

Winning the Acquittal: Tips from a High-Profile Trial

*Below is an excerpt from "Winning the Acquittal: Tips from a High-Profile Trial," based on the intriguing diary by Carlton Fields shareholder **Michael Pasano** documenting the day-to-day developments of the high-profile 2009 trial of Luisa Inclán Bird, an advisor to Puerto Rico's former governor. Told in "real time," Pasano provides his own unique observations and comments on how criminal defense work is done; what succeeds and does not succeed; how criminal defense attorneys perform their work; and what well-planned steps they take toward winning a judgment for their clients. The book was published through the ABA Criminal Justice Section and can be purchased at http://www.americanbar.org/groups/criminal_justice/publications.html.*

LESSON ELEVEN – THE CLIENT

This piece about clients may be the most important thing I advise here. Too often trial lawyers think little about their clients as human beings. Prosecutors, for sure, ignore this. Ignore the real impact criminal investigations and charges have on people's lives. I sometimes call my clients "the fragile" and "the fractured". These are businessmen and businesswomen, professionals, who have never been in trouble before in their lives. Who have never been involved before in the criminal justice system. Whose lives have been turned upside down by the government's investigation. And if as trial lawyers we begin to think we can understand what these people are going through, we need to stop and shake our heads and accept that we cannot. We may get it intellectually. We may empathize. But we will never fully appreciate how our clients feel. We see that sometimes in our clients' expressions as we try to explain the charges and the law. And the process. And the choices. They stare back at us looking like deer in headlights. We try to tell them there is order in the universe and all they see are colliding atoms. Alice in Wonderland stuff. And it's not just the client. It's the family. The spouse and children. It's the business partners. The best friends. It's the clubs and associations they belong to. It's the whispers as they walk by people

they've known for years. It's the false assurances that people will stand by them and it will be all right. It's the sleepless nights. And nightmares. And the games their minds play. They hear prison cell doors being slammed behind them. They see the darkness while we try to sell them the light.

We will never truly know how they feel and how they cope. They tell us they are ok and are holding up. They are not. Years ago I had a client. Let's call him Mickey. Well educated. Very smart. Very intelligent. Beautiful wife and two grade school aged children. Mickey became CFO at a company that ended up cooking its books. The government found out and people got indicted. Including Mickey. The prosecutors weren't offering much of a deal. They wanted complete surrender. And Mickey's nature was to fight. So I met with Mickey regularly. Met his family. Filed motions. Made noise. One day I get a call that Mickey left South Florida without permission and had been arrested in New York City. Seems he went up there trying to meet with a former business partner who owed him money. This man had turned out well. He even had ex FBI agents working security for him. And his ex FBI agents called their pals at the FBI when Mickey surprised his old friend and Mickey got arrested. The prosecutors, the judge and I were all enough concerned about Mickey's state of mind and what this incident meant that we had Mickey screened by psychologists. Mickey said he was fine. The doctors said he was fine. Mickey was released back on bond. And a few weeks later Mickey committed suicide. I won't ever stop thinking about Mickey. I'll second guess everything I did in that case for the rest of my life. And I use that horrible experience and the memory of the call I had to make to Mickey's wife after the police discovered his body and notified me, to remind me that we can never as criminal defense lawyers underestimate the pain and panic and despair our clients feel.

So we take on special obligations to try to guide our clients through this alien and unfriendly process. To tell it to them straight and give them choices. But that does not mean telling our clients to

plead guilty. In many ways, that's a cop out for the lawyer. And totally wrong for the client. A plea bargain may be smart and right. As the lawyer it's our job to explore what the best possible resolution of the case is. The best plea. And to present it to the client. The challenge is to neither understate the risks or overstate them. The challenge is to not forget that we go home at night and too often clients go to jail. The challenge is to intelligently analyze the pros and cons of a deal versus the risks of conviction at trial. Sometimes a deal is offered that's too good to say no to – the "horse's head" of the Godfather movie. Even then, it's up to the client. And our job is to aggressively and tirelessly fight for the client, whatever choice the client makes. We tell our clients what their choices are. We believe in our clients. We are Atticus Finch fighting against the odds. And if we can't do that, we shouldn't be handling the case.

In the Governor's case, I was blessed to have Luisa Inclan Bird as a client. A good woman who didn't deserve to go through what she had to endure. Luisa was brave and tough and absolutely terrified at the prospect of going to trial. Not because she felt she had done anything wrong. But out of concern for her husband and children. There was extraordinary pressure on Luisa to plead guilty. Co-defendants made deals and urged her to do so. Lawyer friends and judges urged her to do so. The newspapers urged her to do so. It was an incredibly difficult decision she made to say no to the government and put her trust in me and in the jury. During the trial, I did my utmost to keep her positive-minded. And the support Luisa received from her family and close friends was incredible. Trials see ebb and flow. This case had its dark moments. Luisa stayed resolute and the jury verdicts vindicated her and her judgment.

As the Governor's trial showed, being a criminal defense lawyer is operating a high wire act. With no net below. It's not for the meek or the uncommitted. But for me, it's the best job around.