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Advice to Delay From Scrushy Lawyer: Chin Up
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One of the lead criminal defense lawyers for Richard Scrushy has some advice for Tom DeLay: chin up.

"Based on the evidence that I've seen, Tom DeLay has an excellent chance at total vindication," Atlanta criminal defense attorney Art Leach told *Corporate Crime Reporter.*

When asked whether he had any advice for DeLay, Leach said – "be persistent and hang tough to your convictions – truth will prevail."

Leach was one of a handful of lawyers who successfully defended at trial the founder and former CEO of HealthSouth.

And if Congressman Tom DeLay (R-Texas) is losing hope because he perceives the odds are stacked against him after being criminally charged in Texas, he need only take a peek at what Richard Scrushy faced in Alabama – and then marvel at the way Scrushy's lawyers got him off the hook.

Against all odds, after 16 weeks of trial and four weeks of deliberations, a jury in Birmingham, Alabama found Scrushy not guilty on 36 criminal counts.

That was June 28, 2005.

The press was disbelieving.

The *Washington Post* called the verdict "a miracle."

"God works in mysterious ways, but his or her decision to acquit Richard Scrushy, former CEO of HealthSouth Corp., on all charges of financial fraud is especially inscrutable," the *Post* editorialized. "Five consecutive HealthSouth CFOs admitted to cooking the books and copped a plea. They all fingered Scrushy. But jurors chose to believe that the man on top knew nothing about what was going on directly below him. . .only one word can describe Scrushy's acquittal. It is a miracle."

The *New York Times* put it this way:

"If ever a chief executive seemed destined for prison, it was Richard Scrushy. Mr. Scrushy has always maintained his innocence. But at his trial, no one disputed that

there was a staggering $2.7 billion accounting fraud at HealthSouth, the company he founded in 1984. Federal prosecutors lined up former executives, including five former chief financial officers, to testify that Mr. Scrushy had orchestrated the wrongdoing. In court, they played a secret tape-recording that seemed to incriminate him. Jurors who heard from dozens of witnesses but never the man himself agreed with Mr. Scrushy – to the surprise of many lawyers watching the case. 'It's a stunner, given how strong the government's case seemed to be,' said Gregory J. Wallace, a former prosecutor."

Art Leach was not stunned.

Neither was Jim Jenkins.

Jenkins is a partner at the law firm of Maloy and Jenkins – a white collar criminal defense firm based in Atlanta.

Jenkins ran the back room operation of the Scrushy defense.

While Leach and the other lawyers were in the courtroom, Jenkins was back in Atlanta, reading the daily transcripts – eventually he read the entire transcript of the trial, more than 20,000 pages in all – and preparing the legal challenges.

He knew he had a Judge he could work with.

And he knew she was reading his pleadings.

For the first time, and in great detail, Jenkins last month laid out the inner workings of the Scrushy defense at a white collar crime conference held at Georgetown Law School in Washington, D.C.

The conference was sponsored by the National Association of Criminal Defense Lawyers.

Jenkins' luncheon talk drew a big crowd – and judging by the reaction of the defense attorneys in the room – was the most popular event at the two-day conference featuring heavyweights from big Washington and New York corporate law firms.

Nuts and Bolts

Jenkins gave the following background to the case:

Richard Scrushy was the only individual to go to trial in the HealthSouth case.

HealthSouth Corporation has not been charged with any crime.

The indictment charged Scrushy with 58 criminal counts.

As of March 2003, when the FBI executed search warrants at HealthSouth's corporate headquarters and HealthSouth's stock was de-listed, there was little doubt that a massive fraud had occurred at HealthSouth.

Government officials put the fraud at $2.7 billion.

It was equally clear after the deluge of guilty pleas by corporate officers within weeks, that the fraud had been carried out at the highest corporate levels.

The only real question was whether or not Richard Scrushy was involved in the fraud.

By the time trial started in January, 2005, 15 HealthSouth employees had entered guilty pleas.

Six of these individuals testified at trial against Richard Scrushy, including five former HealthSouth CFOs and one long-term controller.

Eight other HealthSouth employees who had not been charged with any crime also testified, including a former Treasurer by the name of Leif Murphy, who testified that he met with Richard Scrushy in 1999 and provided him with a notebook which laid out the scope of the on-going fraud at HealthSouth and how it was being carried out.

According to Murphy, Richard Scrushy threw a temper tantrum and shortly thereafter Murphy left HealthSouth.

The government had two days of taped conversations with Richard Scrushy which then-CFO William Owens collected at the behest of the FBI immediately after Owens began cooperating.

The taping ended hours before the FBI raided HealthSouth corporate headquarters on March 18, 2003.

During the trial the defense consisted of 19 witnesses.

Richard Scrushy did not testify in his own defense.

Two defense experts were called regarding accounting and money laundering issues.

The remaining witnesses, with one exception, did not shed any substantial light on the singular question of Richard Scrushy's knowledge or lack of knowledge of the seven-year fraud.

For some reason, this evidence eventually resulted in directed verdicts on eight

counts of the indictment, the government dismissing two counts at trial, and a jury acquittal on the remaining 36 counts.

Back Room Operation

Jenkins told the gathering that he was not one of the lawyers in the courtroom at trial.

"I never entered an appearance – never set foot in the courtroom in Birmingham," Jenkins said. "In fact, the only time I ventured into Alabama was for a one-day meeting three months prior to trial."

He says that he organized and ran a somewhat unconventional back-room operation out of his law office in Atlanta that assisted the legal branch of the courtroom defense throughout this case.

Why the not guilty verdict?

Jenkins answered this way:

It was not a product of home-cooking for a favorite son.

Notwithstanding the breadth of Richard Scrushy's financial generosity to the Birmingham community, a review of the mainstream local press and opinion measurements demonstrate that Richard Scrushy was not a much-loved local hero.

The number of people who lost money in HealthSouth stock and blamed Richard Scrushy personally was, and is, substantial. Polling results at the time of trial could very well have demonstrated a negative rating not much different from Eric Rudolph, the Olympic park bomber who was awaiting trial in Birmingham at the same time.

The verdict was not a product of an unsophisticated jury swayed by a religious and racially-based public relations campaign.

The post-trial jury interviews by the press in the courtroom, which were transcribed and are available, make a convincing rebuttal of this widely held theory.

The verdict was not a result of the defense's "playing the race card." The group jury interview rebuts this. The jury that acquitted on all counts had a racial makeup of seven African-Americans and five whites.

Moreover, additional juror interviews by the press and some informed nose-counting

among the jury support the conclusion that the foreperson of the jury, who was white, was an early supporter of the defense verdict and that one of the two hold-outs for conviction was an African-American.

The verdict was not a product of a trial Judge who was biased for the defendant or against the government.

No, it wasn't any of those reasons.

What's the reason?

According to Jenkins, the jury got it right based on the case that was presented to them inside the courtroom.

The government simply did not prove their case because that case began and ended with the uncorroborated testimony of co-operating guilty-pleading HealthSouth executives who were of questionable character and possessed overwhelming motivation to assist the government in bagging the top guy, and the government was unable to corroborate their testimony with a single document.

Verdict not the product of a biased Judge

"If I can communicate only one fact to you all today," Jenkins told the defense lawyers, "it would be that this verdict was not the product of a biased Judge."

Jenkins continued:

The trial Judge was Karon Bowdre.

She had been a federal Judge for four years.

She was appointed by President Bush.

Prior to her appointment, she was a law professor at Cumberland School of law.

This was her first major criminal trial.

"While I was not in the courtroom and therefore was not advantaged by observing body language and facial expressions, I am probably the only person who has read every word of the close to 20,000 pages of transcript in this case," Jenkins said.

From that, he made the following observation:

Judge Bowdre demonstrated a better working knowledge of the federal rules of evidence than any other Judge I have appeared before or read a transcript of in 30 years of work in federal court.

Judge Bowdre was curious about the nuances of case law and the applicable rules and open-minded enough to know that she did not already know it all.

What she did not know, she took the time to find out.

She took the time to read and understand the parties' briefs and arguments.

Judge Bowdre wanted to get this trial done right and do it only once.

She demonstrated an uncanny sense of fundamental fairness and an ability to discern when she was being led astray by either side.

Judge Bowdre did not believe that a speedy trial or verdict was more important than a fair trial that reached an accurate verdict.

Judge Bowdre was far more than patient with the advocates of both sides while they made their first, second, and third arguments on any particular objection or point of law.

She, like all Judges, had her limits of patience and meted out appropriate sanctions when clearly defined lines were crossed.

Judge Bowdre understood the personal sacrifices of a jury in a 20-week trial.

She showed her consideration in many thoughtful ways, and by doing this avoided a hung jury.

"This is my personal opinion," Jenkins said. "I realize that there are some who disagree with it. I submit that those who blame this verdict on the trial Judge are seeking a simple answer to a complex question, and in doing so are doing a disservice to bright, fair, and unusually hard-working Judge while at the same time ignoring some important and interesting lessons that this unusual case can offer to advocates in complex white collar prosecutions."

A tale of two trials

Jenkins says that the defense of Richard Scrushy was really "a tale of two trials."

Jenkins put it this way:

There was the trial that the media covered and that apparently ultimately won over the jury on a gut level.

That was the defense presented by lawyers Jim Parkman and orchestrated by Donald

Watkins.

The second trial was the trial which focused on the legal issues and provided a legal framework for the Parkman-Watkins operation.

On a big picture basis, this schizophrenic defense had the very powerful effect of forcing the government to fight on two very different fronts at the same time.

On the one hand, the government had to deal with a shifting, unconventional attack on their case that was not what usually shows up in federal court, let alone in a trial of this size and profile.

At the same time, the government had to face an aggressive legal attack by what appeared to be a lone lawyer – Art Leach – who objected – usually successfully – to what seemed like two out of every three questions the government asked – and that was only on direct.

At the same time, Art Leach attacked the government's case at its very foundations, leading to lengthy hearings out of the jury's presence, making it very difficult for the government to gain any traction or momentum in the courtroom.

Jenkins said that while the Parkman-Watkins branch of the Richard Scrushy defense may have appeared to have been unconventional, it succeeded because it adhered to the very simple and fundamental rules of Trial Practice 101.

Jenkins said there was a very straightforward, easy to grasp theory of the case:

Yes, there was a gigantic fraud at HealthSouth.

But it was carried out by a rogue group called "the family" under the leadership of top corporate officers who completely hid it from Richard Scrushy.

This theory was communicated and repeatedly reinforced through a number of complimentary themes:

* Out of the millions of documents and e-mails in the government's possession, not a single piece of paper established Richard Scrushy's knowledge of the fraud.

* The five CFOs who led the conspiracy were really and truly neither honest nor admirable human beings, most especially the omnipresent lead conspirator Bill Owens, who somehow neglected to file tax returns for nine years and conveniently transferred most of his assets just before coming in to help the government.

* These men, and the family of accountants that booked the fraud every quarter, successfully fooled the board of directors, internal auditors, regulators, and Wall

Street analysts for nearly seven years.

* Richard Scrushy started HealthSouth from nothing and built it into a Fortune 500 company virtually single-handedly, so why would he want to destroy his life's work?

* Richard Scrushy was worth over $175 million before the fraud began in 1996, so why would he need to steal to get more money?

The defense played up a dominant emotion: betrayal

The five CFOs and the family betrayed the stockholders of HealthSouth, and the board of directors, and the regulators, and the analysts.

Most of all they betrayed the man who made it all possible, the founding father of HealthSouth, Richard Scrushy.

What Jim Parkman and the rest of the defense did was straight out of Trial Practice 101: they identified and communicated a theory of innocence that did not contradict the facts and that appealed to the jury on an emotional, if not entirely cerebral, level.

Most importantly, throughout the trial, the defense communicated this theory of the case:

Simply.

Clearly.

Consistently.

Repeatedly.

The type of litigation is as complex as it gets.

But when we fail to remember that our first goal is to overcome those complexities and paint a clear and acceptable picture for the jury by failing to remember the basic tenets of trial work, we lose contact with the only audience that matters in every criminal case: the jury.

That's what the defense did right in this case.

And that's where I believe the government missed the boat.

Sometimes It's Better to Look Good than Be Good

Jenkins said that throughout the four weeks of jury deliberations, Art Leach recognized the importance and the rightness of maintaining your integrity with the court.

He did this at all times and regardless of the cost.

He always tried to tell the truth, even when it hurt in the short run to do so.

Jenkins went on:

A corollary component of this is in the defense's paperwork.

We made every effort to accurately represent the legal principles in our arguments, and especially in our representation of the holding in every case.

And, since our Judge was most recently a law professor, we worshiped at the shrine of the 17th edition of the Bluebook (Uniform System of Legal Citation).

As one of my role models says, "sometimes it's better to look good than to be good."

But the lesson is that accurate case parentheticals and arguments build trust and credibility.

Inaccurate cites or parenteticals undercut everything a party does or days before that Judge.

A second corollary is listening to what the trial Judge wants and trying to meet those expectations while zealously advocating your client's case.
It is surprising how many high-powered, experienced, high-quality trial lawyers miss this stop – even, maybe even especially, in the biggest cases.

Art Leach: Objection, Your Honor

One lesson that this case offers is that, in the right circumstances, and when executed strategically and with discipline, basic evidentiary objections can be a surprisingly potent weapon.

One hundred percent of the credit for this tactic goes to Art Leach.

In reading the transcript of this trial day in and day out, I never ceased to marvel at the number, aggressiveness, and efficacy of his objections.

Over the course of the next 16 trial weeks, Art Leach made more objections than any lawyer I have ever seen.

I'm not talking about quite a few objections.

I'm talking about a whole helluva lot of objections.

Perhaps his most effective, and confounding objection was to leading questions.

I don't believe that Art let a single leading question go by without an objection.

First, this flies in the face of conventional wisdom to avoid objecting if possible so as not to make the jury think you are hiding something.

But if the objections are well-taken, and the vast majority are sustained, not only does the jury become desensitized to the process, it eventually adopts a belief that this is, in fact, the way things should be done.

The second necessary ingredient is opposing counsel that have apparently rarely had their feet held to the fire and learned how to ask non-leading questions when put to the test.

Once it becomes clear what the rules of engagement are on this issue, it is crucial to comply rather than try to subvert.

Wayward Prosecutor

Jenkins said that one of the prosecutors in this case repeatedly ran afoul of the Judge on the issue of asking leading questions.

Jenkins did not reveal the name of the prosecutor, although he did say it was not U. S. Attorney Alice Martin.

Jenkins related this story:

After day after day of sustaining objections to leading questions by this particular prosecutor, Judge Bowdre, one of the most patient Judges I have read 20,000 pages of transcript of, lost her patience, and the following colloquy ensued at the bench:

Q: And do you know if the government has agreed to, under certain conditions, make a motion for downward departure?
Mr. Leach: Your Honor, every one of these questions suggest the answer. He's leading. We object.
The Court: Sustained. May I see counsel again?
The Court: Mr. ------, where did you did to law school?
Mr. ------ : Georgetown, Your Honor.
The Court: Did they teach you how to ask questions in law school without leading?

Mr. ------: They did, Your Honor.
The Court: Okay. Did anybody ever teach you not to talk while somebody else is talking?
Mr. ------: My mother, Your Honor.
The Court: I would like to let your mother know what a poor job you're doing in that regard. And I want to let your law school know what a poor job you're doing in trying to ask questions that are not leading. I don't even think you're trying not to ask leading questions.
Mr. ------: I will try, Your Honor. Thank you.

Government botches examination of Goodreau

Jenkins said one witness at trial proved critical in the final equation of guilt-innocence.

The witness was Jim Goodreau, the former head of HealthSouth's security department.

Jenkins filled in the details:

The security department was, shall we say, somewhat robust – they are the folks that purchased the weapons with the sniper scopes.

There were also allegations of surveillance and other hanky-panky by the security department that the government was salivating to put before the jury.

So Jim Goodreau was a potentially dicey witness to call for the defense.

On the other hand, he had knowledge of a conversation which was the single most potent affirmative evidence in support of the fact that Richard Scrushy did not know about the fraud, and that William Owens had led a conspiracy to hide the fraud from Richard Scrushy.

The conversation occurred between Owens and Goodreau during the period a few months before the fraud came unraveled.

At that time, Owens was the CEO, and Richard Scrushy was Chairman of the Board and living in Florida as part of a planned leadership transition.

Here's how the testimony came in on direct:

Q. Can you tell the jury what your relationship was with Bill Owens as of August 2002?
A. He was the CEO.
Q. And what was your personal relationship with him?

A. I was in somewhat of a transition period between Mr. Scrushy and Mr. Owens and trying to determine, you know, kind of where I was going to wind up in the mix.
Q. Did you consider Mr. Owens to be your friend?
A. I certainly did.
Q. Did you have discussions that evening with Mr. Owens about HealthSouth?
A. I did.
Q. And what was discussed in that part of the conversation?
A. Mr. Owens told me that there was some accounting problems at HealthSouth. And I said, well, how bad is it? And he said, well, it's not another Enron, but the number is significant.
Q. Significant?
A. Significant. And I said, does Richard know? And he said, no. I said, well, you need to tell him, Bill. And he said, I will.
Q. When you said does Richard know, who were you referring to?
A. Mr. Scrushy.

Jenkins said that "fortune shined on the defense when, early on in his cross-examination, the prosecutor made one of those mistakes that happen in the heat of battle, but reverberate long after the moment they occurred."

Jenkins emphasized again that the prosecutor who made the mistake was not U.S. Attorney Alice Martin.

He did not name the prosecutor, but said – "you might guess that he was the same guy who had trouble with the leading questions."

Jenkins said that on a couple occasions prior to this, Judge Bowdre made it plain that the words "Enron" or "Worldcom" should not, under any circumstances, be uttered by any lawyer in the presence of the jury.

Unfortunately, the cross-examination of Jim Goodreau very early on stumbled over that critical trip-wire:

Q. Now, Mr. Goodreau, you know what Enron is, don't you?
A. I don't know what Enron is. I know that Enron is a company that had a bunch of problems.
Q. Yeah. A bunch of really big accounting problems, correct, sir?
A. Yes, sir.
Q. And the company collapsed, correct?
A. Yes, sir.
Q. And millions of people lost money, correct, sir?
Mr. Leach: Objection, Your Honor. That's irrelevant.
The Court: Sustained.
Q. A lot of people lost their jobs; isn't that right, sir?

Mr. Leach: Object to the whole line, Judge.
The Court: Sustained.
Q. Mr. Goodreau, people went to jail at Enron, correct?
Mr. Leach: Judge --
The Court: Mr. --------
Mr. Leach: Ask to approach, Your Honor?
The Court: Yes. Ladies and gentlemen, would you excuse us a minute, please?

Jenkins said that the ensuing sidebar was not a pretty sight for the government.

Jenkins went on:

After much back-and-forth in which the “custody” word was uttered several times, along with a serious discussion of banishing the offending lawyer from the rest of the case, the government suggested a compromise: as a sanction, the cross-examination of Jim Goodreau would be terminated at that point and the jury advised of the reason for the sanction.

Aside from the loss of face before the jury, the real windfall for the defense was the incredibly valuable nugget of testimony regarding the Owens statement that Richard Scrushy did not know about the fraud, which resonated in front of the jury untested by cross-examination or impeachment of any kind.

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