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Barney Smolens: A Reminiscence

BY GERARD J. ST. JOHN

In the 1960s, most law schools did not teach trial advocacy. Accordingly, one of the first challenges facing a recent law school graduate was to find an experienced lawyer who would not mind having a youngster tag along through the course of a trial. It occurred to me that Barney Smolens might be that kind of experienced lawyer.

Bernard J. Smolens was then in his mid-fifties. A short, slender, gray-haired man with a pixie-ish sense of humor, he had a strong background in personal injury defense and general commercial trial practice. In the Schnader law firm, Barney was one of the lawyers who handled the defense of cases brought against Yellow Cab Company of Philadelphia. He was also a fun-loving man who welcomed the company of young lawyers at the regular Monday night dinners at T'arellos and lunches at the Vesper Club. I knew that Barney was getting ready for the trial of a Yellow Cab case. His reaction was exactly what I had hoped it would be. He said that he would be delighted to have me sit in with him during the trial. The case was Lacey v. Yellow Cab Company.

Gus Lacey was a familiar name in Philadelphia in the 1960s.

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An African American, Gus was a handsome man. His pencil-thin moustache fit in perfectly with his square jaw and trim figure. As a young man, he sold lingerie door-to-door in the rowhouse neighborhoods. The good-looking, smooth-talking Lacey was very successful at what he did. And in the process, he became known as "Mr. Silk." Later, he bought the spacious bar at the corner of 52nd and Spruce Streets and named the business "Mr. Silk's Third Base." Gus' motto was, "You have to touch Third Base before you go home."

The accident happened shortly before midnight. Gus Lacey was a passenger in a Yellow Cab. He was returning to Mr. Silk's to supervise the closing of the bar and the preparation for the following day's activities. At the intersection of 52nd and Chestnut streets, the cab was hit by a car that was traveling east on Chestnut. Gus suffered what people usually call a "whiplash" injury. Suit was filed against the driver of the other car and against the cab company. The cab driver was one of the company's old-timers, an excellent driver who wore a uniform and considered himself to be a professional. Deposition testimony was taken and Gus Lacey supported the cab driver, saying that the traffic light

was green for traffic moving on 52nd Street. After the deposition was taken, it was determined that the other car had no insurance. If Lacey was to collect any money from his lawsuit,

it would have to be paid by Yellow Cab and that would require a finding that the cab driver was negligent. Yellow Cab's claims people were convinced that Gus Lacey could not credibly attack the cab driver in light of his deposition testimony. Yellow Cab expected Barney Smolens to use Lacey's own deposition testimony to destroy him on cross-examination.

Barney's background as a defense lawyer was evident from the mementos that cluttered his office. His favorite was the old-fashioned cab meter on the windowsill behind his desk. When one of the firm's associates wanted his opinion, Barney would ceremoniously put his feet up on the edge of the desk, lean back in his chair and, with an exaggerated sweep of his left hand, bang the meter flag to the "down" position. As the loud tick-tock filled the room, Barney would say, "Well, go ahead m'boy. Ask your question; the meter's running." He loved posturing, striking dramatic poses and delivering his comments with theatrical timing. When speaking, he delighted in the use of grammatically incorrect words and malapropism. He would begin a sentence with the word "irre-

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Barney Smolens, who served as editor of *The Shingle* in 1963, died May 20, 1997 at the age of 81.

gardless" and then pause as if hanging the word out to dry before continuing with his thought. In place of "rappart" he would say "rappaport," the surname of the well-known real estate speculator, Samuel Rappaport. And he was always ready with a funny story or the very latest joke.

During World War II, Barney was the side gunner on a B-17 bomber based in England. The plane was shot down while on a bombing run over the Baltic. The crew bailed out. Barney was taken prisoner. He spent the next year-and-a-half in a German prison camp. To hear Barney talk about this experience, you almost began to think that he did it deliberately to gather background material for humorous stories. He said that he was the most literary-minded of the

prisoners in his stalag. Pretty soon, the other POWs sought out Barney to write letters for them to girlfriends, wives and family members. He was paid with cigarettes, which were highly valued in the prison camp. Often he found himself orchestrating long-distance romances, the stockade's version of *Cyrano de Bergerac*. And then there was the time that the men in his barracks collected whatever chocolate they could get, whether it be

from Red Cross packages of cocoa or packages from home. After months of collecting, they pooled their resources and baked a chocolate cake in a C-ration tin can on the pot-bellied coal stove. He described something that looked like three hockey pucks stacked one on top of the other. They cut it into sixteen pieces. Barney said it was the best cake he ever tasted.

The case of *Lacey v. Yellow Cab Company* was called for trial in City Hall before Judge Theodore Gutowicz, sitting without a jury. During recesses in the trial, Gus Lacey would invariably walk over to our table and trade jokes with Barney.

Finally, the time came for Gus Lacey to testify about the accident. As we expected, Gus now said that he "thought that the light was red for the Yellow Cab." A witness who contradicts his own deposition testimony is a sitting duck for cross-examination. There is a tendency on the part of that witness to try to explain away the inconsistency. But it is almost impossible to wiggle out of the contradiction. The inevitable result is the repetition and re-repetition of the deposition testimony, to the point where the attempted explanation makes no sense at all.

Standing at the counsel table, Barney picked up the deposition transcript with his left hand, and with his right hand flicked open his reading glasses. He quickly found the page that he wanted. Leaning forward over the table, he said, "Now, Mr. Lacey, do you recall what you said about the traffic light when you testified under oath just six months after the accident?" When Gus answered in the negative, Barney held up the transcript, pointed to the page and said, "Right

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here at page 79, line 14, you testified that, Quote, 'The light on 52nd Street was green,' Unquote." Dramatically whipping the reading glasses from the bridge of his nose, Barney demanded, "What do you say about that?" Gus looked Barney straight in the eye; his expression showing only amused curiosity. Slowly, his smile became wider, almost as though Barney had just told a joke, and in a cool, clear voice Gus said, "Well, how about that?" In a twinkling, Barney's fish slipped off the hook. Later that afternoon, the case was settled.

A few weeks after the trial, I stopped by Barney's office to ask him a question. Before I could say a word, he flashed a big smile and said, "Guess who I just talked to on the telephone?" Answering his own question, he added, "Gus Lacey!" Barney said that Gus chatted for a while and then invited Barney to come out and have a martini on the house at Mr. Silk's Third Base. When Barney declined, Gus sensed the reason. Gus told him that he had nothing to worry about; that Gus would have one of "his boys" pick up Barney at the office and would drive him back to the office after they finished their drink. Barney was obviously delighted by the offer but still he declined. Perhaps he was worried about how he would explain it to the people at Yellow Cab Company.

Over the years, I learned a lot from Barney Smolens. We tried several cases together and collaborated on a number of others. To a great extent, trial lawyering is an exercise in decision-making; and Barney and I sometimes advocated divergent courses of action. It wasn't often that I disagreed with Barney. Reasonable men do differ on occasion, however, and one such disagreement dates back to the days of Mr. Silk. Contrary to the best judgment of my friend Barney, I would have been inclined to touch Third Base before going home. ■

Gerard J. St. John is a retired partner of Schnader Harrison Segal & Lewis LLP. He concentrates his practice in general civil litigation. His e-mail address is Sinjin@Schnader.com.