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Tigar's Jury Skills on Exhibit in Bomb Trial

"*Bi societas ibi ius.*" (Where there is society, there is justice.) — Cicero

By Charles Ashby

Special to the Daily Journal

DENVER — Quoting Roman philosopher Cicero — in Latin — isn't something commonly heard in a court of law.

But there it was.

And, yes, it came from Michael Tigar's lips.

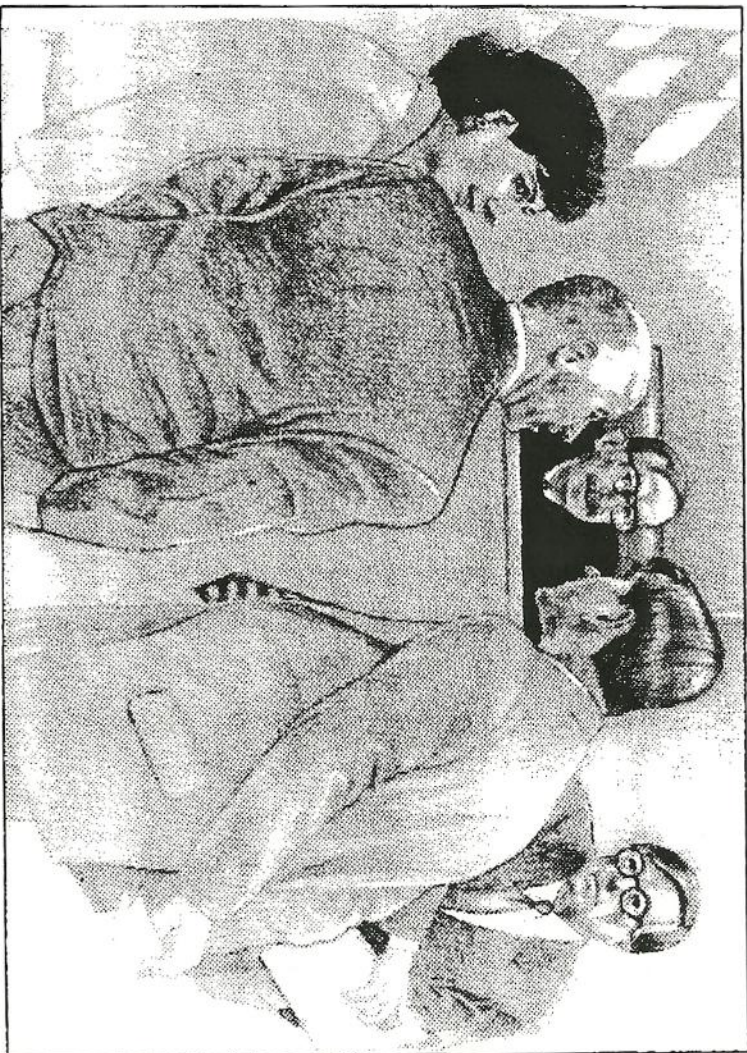
In saying it, though, the lead defense attorney in the second Oklahoma City bombing trial wasn't trying to show off his trivia knowledge. Tigar was proving, yet again, just how good a defense attorney he can be, said Howard Varnitsky, a California psychologist who operates a jury consultant firm in Oakland.

"Tigar walks in and has command of the jury [because] he's very sharp," said Varnitsky, jury consultant for the prosecution in the bombing trial of Timothy McVeigh. "Tigar is a master at voir dire."

As jury selection drags into its fourth week — with three more possible before opening statements can begin — the defense and prosecution in *United States v. Nichols*, 96-CR-68-M, are doing more than looking for a dozen impartial men and women to decide whether Terry Lynn Nichols helped bomb the Alfred P. Murrah Federal Building in April 1995.

They're trying to make a connection with the 12 jurors and six alternates who finally will be chosen.

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APPROACHING THE BENCH — U.S. prosecutors Beth Wilkinson, left, and Larry Mackey and defense attorneys Michael Tigar and

Ronald Woods, far right, have a conference with Judge Richard Matsch during jury selection in the trial of Terry Lynn Nichols.

Associated Press

Of the 80 prospective jurors interviewed as of last week, only 41 have withstood challenge. At the end of three weeks in the trial against McVeigh, the court had gone through 93 people. A total of 99 were interviewed.

In the Nichols jury selection, each side has clearly done its homework in finding things to say to prospective jurors that are designed either to put them at ease, thus drawing out their true feelings, or to show that the lawyers in the case are not the bad guys, particularly the defense.

Tigar, for instance, makes a point of connecting with jurors, even if it's in a small way. He'll discuss dry wall installation in construction jargon to a carpenter, show his familiarity with someone's hometown or talk about France to anyone who's been near that country.

And he'll even speak Latin to a Latin teacher.

"There's two reasons for jury selection," Varinsky said. "One is to get information to know what you're doing with that juror; the other is to establish a rapport and that rapport means a lot. Tigar leaves them with a, 'That was fun' feeling, 'I like that guy.' That makes you much more prone to listen to his arguments."

The five-member prosecution team, for its part, is attempting to show that the government is not only trying to right a terrible wrong in the bombing death of 168 people but to demonstrate that it will do so in a fair manner. Four of the prosecutors — Beth Wilkinson, Patrick Ryan, Geoffrey Mearns and Jamie Orenstein — have tried to make it clear to potential jurors that they truly believe Nichols is innocent, until, of course, they prove him guilty.

"Can you keep an open mind and listen to all the evidence in the case?" Wilkinson has asked jurors on several occasions.

But it's been Tigar who has made the best use of the questionnaires jurors filled out when they first met with U.S. District Judge Richard Matsch at the Jefferson County Fairgrounds on Sept. 17.

Clearly, he's examined responses to the questionnaires, picking out items of a juror's work experience, places they've been or people they know. He finds tidbits he can use, even if some require a little research, such as finding the name of the county a juror grew up in but didn't mention during questioning, Varinsky said.

"Tigar is an intelligent man," he said. "He probably knows that stuff without research anyway. That's what you should be doing to make that personal connection."

Consider the following dialogue with prospective juror No. 618 last Wednesday:

Juror: "I can understand it, that there cannot be an automatic death penalty."

Tigar: "OK. And can you in good faith and in good conscience put aside, you know, whatever you might think and do it based on a full consideration of everything about this individual as well as about whatever he or she may have been proven to have done?"

Juror: "Before I would make a decision on another human's life, I would want to hear all of the facts and evidence or, as you

Tigar: "In addition to hearing, could you give consideration to it? That is, do you think you'd be really open in a case in which somebody — killed a lot of people, premeditatedly."

Juror: "No, if you say it, killed an awful lot of people premeditatedly, no, I would probably not be as open as I probably should. If you use those words."

In that exchange, Tigar used the connection he had established with the juror to uncover the man's true feelings, that despite earlier promises to consider mitigating factors, the juror could not consider alternate punishments for Nichols should he be found guilty. Matsch later excused him because of those feelings.

While Tigar probes into the minds of prospective jurors and gets results, lead prosecutor Larry Mackey has been noticeably absent in asking questions. The reason?

"Of the four people doing voir dire the last time, Larry was the worst," Varinsky said. "Larry's a really nice man ... but he's not a good interviewer."

During the McVeigh trial, which led to a guilty verdict on the same 11 counts that Nichols faces, Varinsky was adamant about not letting Mackey do any of the voir dire. Of course, he couldn't tell Mackey that, but "maybe that's the reason I'm not there at the [Nichols] trial now," he said.

Mostly, he pushed for Ryan to talk to the jurors because "he can talk water from a stone."

Pleased that Mackey wasn't doing voir dire, Varinsky was surprised to learn that Orenstein was questioning jurors in the Nichols case.

"Jamie doing voir dire? God help us," Varinsky said. "Jamie isn't an on-your-feet kind of guy. Had I been there I'd be screaming against that. He's more of a back-room kind of lawyer, good for writing briefs and that sort of thing. He doesn't seem to be one of those super communicators and be at ease with people."

Not having Mackey in the jury selection stage is a good move, but using Orenstein is a mistake because he isn't capable of picking up on not only what prospective jurors say, but how they say it, Varinsky said.

A successful voir dire is one that draws out information behind an answer, he said. A skilled lawyer can hear that inflection in people's voices indicating there's more to an answer.

A juror might say he "won't consider the death penalty, but ..." Only the good lawyer hears that unspoken "but," indicating the juror could do so under certain circumstances, Varinsky said. That expanded answer could spell the difference between having cause to excuse an unwanted juror or blocking a motion to rid a favorable one.

"That's the key to voir dire, engaging in that kind of dialogue and being able to interview on that level of connectedness," Varinsky said. "Jamie doesn't have a lot of experience in that."

In the McVeigh trial, Wilkinson's unique talent, in Varinsky's opinion, was the somewhat personal connection she made not with jurors, but the judge

anybody wanted to get anything from the judge, let Beth argue it because obviously he liked her and she flirted with him," Varinsky said. "The defense last time never picked that up. She'd get up there and bat her eyes. Every little bit helps."

Tigar would have none of that. Early in jury selection in the Nichols trial, Wilkinson teased Matsch during juror questioning about the judge's legendary lack of knowledge about things technological, particularly computers and the Internet.

She got away with it repeatedly in the McVeigh trial, but the first time she tried it in the Nichols case, Tigar objected. Matsch agreed and told her to stop.

Tigar wins again not only on a simple motion, but by showing that he isn't afraid of Matsch as attorneys on both sides in the Nichols and McVeigh trials seemed to be, Varinsky said.

"Clearly in dealing with the judge, Tigar is the alpha in the courtroom," he said. "That means a lot because jurors pick up who the alpha is and give the alpha much more credibility and power. Again, every little bit helps."

Both sides, however, may find themselves with less time to make connections with jurors. Matsch made it clear last Friday that he's quickly getting fed up with the slow pace of jury selection.

"I think it could go much faster if you didn't duplicate everything I've already done," Matsch told the lawyers.

From here on out, expect to see the judge clamp down on the lawyers, particularly since Matsch doesn't have to let them ask questions at all, Varinsky said.

"Federal prosecutors don't ever get to ask questions of jurors — ever, but this is an exception to the rule because in the federal system the judge asks the questions," he said. "You have to have a really liberal judge. In this case, because of the magnitude of the case and the issues involved, Matsch wasn't going to take any chances."

Matsch is allowing the lawyers to voir dire jurors in hopes of averting any appeal that claims he allowed a biased jury to be seated, Varinsky said. The lawyers had their chance. To help prevent such appeals, Matsch, long before the McVeigh trial began in April, increased the number of peremptory challenges each side can use to excuse jurors without cause to 23.

The thing to watch during jury selection, and later the trial itself, is not how Tigar and co-defense attorney Ron Woods argue Nichols' innocence, but the small role he played in the scheme.

"There's a possibility that [Nichols] could beat guilt, but if you really watch, all the eyes are on the death penalty. In other words, on a certain level they're conceding guilt. Guilt isn't the issue. The issue is saving his life," Varinsky said. "Society got its needs met with the McVeigh verdict. It was the McVeigh name that everybody recognized, so society has gotten catharsis with McVeigh and Nichols has just gone under the radar. You never want your trial to be the focal point of societal rage because then you have that to contend with in a jury's reasoning — that unmet pressure from society to have it