Timeless Trial Strategies and Tactics: Lessons From the Classic Claus von Bülow Case

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In this new Millennium -- an era of increasingly complex cases -- it is critical that lawyers keep a keen eye on trial strategy and tactics. Although scientific evidence today is more sophisticated than ever, the art of effectively engaging people and personalities remains prime. Scientific data must be contextualized and presented in absorbable ways, and attorneys need to ensure not only that they correctly understand jurors, judges, witnesses, and accused persons, but also that they find the means to make their arguments truly resonate if they are to formulate an effective case and ultimately realize justice. A decades-old case is highly relevant here. A man who was found guilty of two counts of assault with intent to murder, was retried three years later and acquitted on both counts. How could this occur? For Claus von Bülow, a European-American socialite whose wealth afforded him access to the most expensive legal representation at every stage, these two dramatically different rulings can be understood as the result of diametrically opposed approaches to litigation strategy and tactics. Though it can be easy, at times, to lose oneself in the myriad factors that impact the outcome of a case, the trials of Claus von Bülow provide an unusually good vehicle for examining some of the first principles of litigation. This article, which takes a fresh look at these trials, therefore seeks to illuminate crucial lessons on trial strategy and tactics, which in this era of confounding complexity, are particularly relevant.

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I. Introduction

One may well have thought that something was, “rotten in the state of Denmark”\(^1\), as Sunny von Bülow lay in an irreversible coma, and her Danish-born husband, Claus von Bülow, stood accused of attempted murder, in a Shakespeare-like drama. More than a quarter century has now elapsed since Mr. von Bülow was acquitted on both counts of assault with intent to murder his then wife; Mrs. von Bülow has since passed away after spending 28 years in a coma\(^2\); and, the mystery about what *exactly* happened on those ominous evenings during which Mrs. von Bülow fell into her unconscious abyss from which she ultimately never awoke, lives on. Indeed, it seems unlikely that we will ever know *precisely* what transpired in Mrs. von Bülow’s bedroom, but fortunately, we can learn much from evaluating what happened in the courtroom. The fact that Claus von Bülow sustained a guilty verdict in his first trial, but then received an acquittal from a jury of his peers in his re-trial, makes this a particularly good vehicle for illuminating both mistakes in and mastery of legal strategy and tactics.

In this new Millennium – an era of increasingly complex cases – it is critical that lawyers keep a keen eye on trial strategy and tactics. Although scientific evidence today is more sophisticated than ever, the art of effectively engaging people and personalities remains prime. Scientific data must be contextualized and presented in absorbable ways, and attorneys need to ensure not only that they correctly understand jurors, judges, witnesses, and accused persons, but also that they find the means to make their arguments truly resonate if they are to formulate an effective case and ultimately realize justice. This article, which takes a fresh look at the Claus

von Bülow trials, seeks to illuminate key lessons on trial strategy and tactics, which in this era of confounding complexity, are particularly relevant. In the process, this article will analyze these trials in order to discern key legal, factual and jury issues, and assess and critique the lawyers’ strategies and tactics, and hence elucidate some of the first principles of litigation.

II. A Tale of Two Trials: Contrasting Strategies

The facts resembled a soap-opera. What begun as a forbidden, torrid love affair between Sunny von Auersperg (who was still married to her first husband at the time) and Claus von Bülow, had withered into a loveless marriage in which the (now) Sunny von Bülow and Claus von Bülow seemed to grow distant and disinterested in each other.\(^3\) In 1978, Mr. von Bülow met a television soap-opera actress named Alexandra Isles, and begun an affair with her.\(^4\) Despite the fact that Mr. von Bülow was still wed to Mrs. von Bülow, Isles insisted that he marry her.\(^5\) This demand, the prosecution alleged, put Mr. von Bülow in a bind. He had brought comparatively little wealth to his marriage with Mrs. von Bülow. The latter, by contrast, was the heiress to a vast fortune.\(^6\) Thanks to Mrs. von Bülow’s fabulous wealth, the couple lived in Clarendon Court, a stunning twenty room estate in Newport, Rhode Island, which had even served as a set for the motion picture *High Society*\(^7\). And as if that was not opulent enough, the couple split their time between their Newport “cottage” and their spectacular Fifth Avenue apartment in New York.

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\(^4\) Id. at xxi.

\(^5\) Id.

\(^6\) Id. at xx.

City, just a few blocks south of the Metropolitan Museum of Art. Add to their assets and activities various museum-quality art pieces, the finest gourmet dining, and all the personal assistance that money could buy; indeed, it was safe to say that the von Bülows enjoyed the so-called finer things in life. Mr. von Bülow, the prosecution alleged, had become so accustomed to this extremely lavish lifestyle, that he could not stand to forgo these luxuries, even though a divorce settlement and an irrevocable trust that Mrs. von Bülow had set up for him could possibly still allow him to live well. At the same time, however, Mr. von Bülow’s heart was ready to move on to Ms. Isles.

In December 1979, Mrs. von Bülow experienced her first coma. Although she recovered fully and quickly from that incident, she suffered another coma less than a year later, in December 1980, leaving her in an irreversible vegetative state. Shortly thereafter, in January 1981, Mr. von Bülow and Ms. Isles began to see each other more frequently, and in February of that year, while Mrs. von Bülow lay in her hospital bed, Mr. von Bülow and Ms. Isles took a trip with Ms. Isles’s young son to Nassau in order to test out how it would be for them to live together “as a family”. Set against all this, in the background, we see Mrs. von Bülow’s highly suspicious maid Maria Schrallhammer, and Mrs. von Bülow’s angry son (Mr. von Bülow’s stepson), Prince Alexander von Auersperg.

III. Trial No. 1: The Failure of the Defense Strategy

On February 1, 1982, Claus von Bülow’s first criminal trial commenced. He was charged with two counts of assault with intent to murder, and the prosecution arrived equipped with an

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9 Supra note 3, at 29.
10 Id. at 30-31.
11 Id. at 31-32.
effective and indeed lethal legal strategy. The prosecution’s approach was relatively simple and direct: tell the maid’s story. It was a brilliant move on a variety of levels. The prosecution had to build a circumstantial case, insofar as no witnesses actually saw Mr. von Bülow induce his wife’s coma. Ms. Schrallhammer, the maid, however, was as close as the prosecution could come to finding an eyewitness of the alleged criminal act.

The prosecution put the pieces together very cleverly. Ms. Schrallhammer testified\(^{12}\) that on the fateful morning of December 27, 1979, she heard Mrs. von Bülow groaning through her bedroom door. She elaborated that she knocked and entered the room to find Mr. von Bülow sitting on the bed and reading next to his wife. Mrs. von Bülow’s arm was hanging out of bed, so Ms. Schrallhammer went to put her arm under the covers, and she noticed that Mrs. von Bülow’s arm was “ice cold”.\(^{13}\) Ms. Schrallhammer therefore tried to wake her up, but got no response. Ms. Schrallhammer immediately pleaded with Mr. von Bülow to phone a doctor, but he maintained that his wife was simply sleeping and that she should be left alone. Ms. Schrallhammer insisted that Mrs. von Bülow was in fact unconscious, but Mr. von Bülow declared that his wife would be fine and just needed to sleep off a little too much alcohol that she had consumed the night before. Ms. Schrallhammer acquiesced for the moment, but continued to check in on Mrs. von Bülow. At around 6:00pm that day, Mrs. von Bülow’s breathing began to “rattle”, and so Mr. von Bülow finally placed what now became an urgent call to the doctor. By the time the physician arrived, Mrs. von Bülow had stopped breathing, and required resuscitation by the doctor, who saved her life in what was a near-death experience.\(^{14}\) Ms. Schrallhammer also testified that, months later, she discovered what became the infamous “black bag” belonging to

\(^{12}\) *Id.* at 6.
\(^{13}\) *Id.*
\(^{14}\) *Id.* at 7.
Mr. von Bülow, in which she claimed to have found insulin, even though neither of the von Bülows were diabetic.\(^{15}\)

It seems that the prosecution was very adept at judging what would be the landscape of the trial. In particular, they proceeded in a manner that appeared to be highly sensitive to the jury, and in so doing, crafted a strategy that would ultimately prove effective. Emphasizing the maid’s story functioned to create a stark contrast in the courtroom.\(^{16}\) On the one side, there was the humble maid. On the other side, there was the ostentatious Claus von Bülow who stood accused of a cold-blooded crime. This is not to suggest that the jurors were or would be incapable of deciphering the critical difference between an unlikable but innocent person, and a guilty man. In a case like this however, the prosecution appeared to appreciate the profound psychological impact that an apparently trustworthy, credible, and likeable star witnesses could have on the minds of jurors. Whereas Mr. von Bülow appeared distant, Ms. Schrallhammer was dedicated. Whereas Mr. von Bülow looked callous, Ms. Schrallhammer was caring. And, whereas Mr. von Bülow was unhusbandly, Ms. Schrallhammer was maternal. The sharp contrast bolstered the credibility of the allegations, for the onlooking jurors could visually compare Ms. Schrallhammer’s sincere, teary-eyed testimony with Mr. von Bülow’s cold demeanor.\(^{17}\)

The prosecution tactically bolstered Ms. Schrallhammer’s testimony with compelling yet comparatively simple scientific evidence. Certainly, the chief prosecuting attorney in this first trial, Stephen Famiglietti\(^{18}\), realized the traction of expert witnesses, and thus brought in an “expert’s expert”, Dr. George Cahill, who authored the portion of the “Boards” that dealt with

\(^{15}\) Id. at 13-15.
\(^{16}\) Video of trial footage (DVD), The Trials of Claus von Bülow, Vintage Productions, 1992.
\(^{17}\) Id.
\(^{18}\) Supra note 3, at xiv.
blood sugar, to testify to the prosecution’s theory that Mrs. von Bülow’s condition must have been caused by an insulin injection.\(^\text{19}\) By using this expert testimony to bolster Ms. Schrallhammer, and by also including a few additional supporting witnesses such as Mr. von Bülow’s outraged step-son, the blunt family banker\(^\text{20}\), and Mr. von Bülow’s mistress, Mr. Famiglietti strategically constructed a tight theory that plausibly presented to the jury that Mr. von Bülow had the motive, the means, and the opportunity to commit the crime.

In contrast to how overpowering Mr. Famiglietti’s strategy proved to be in this first trial, Mr. von Bülow’s chief defense attorney, Herald Price Fahringer, made some critical strategic and tactical errors. As the prosecution appeared to proceed with a “one-two punch” – hit with the maid’s testimony and then follow up with supporting scientific evidence – the defense also seemed to try out a combination of its own. Whereas the former, however, executed crisp, hard, successive strikes, the latter’s defense was more comparable to flailing fists. The defense strategy, it appears, was uncoordinated and indecisive. And, despite Mr. von Bülow’s persistent insistence that he was innocent, the defense decided not to put him on the witness stand.\(^\text{21}\) Perhaps Mr. von Bülow’s off-putting personality factored into this decision, but irrespective of this choice to keep him off the stand, Mr. Fahringer did opt to call a witness. This seemed to have been a questionable move. For, as Alan Dershowitz has written, “Some defense attorneys believe that if the defendant himself does not take the witness stand, no other defense witness should be put on… [reasoning that a defense case where defense witnesses are called but the defendant himself does not take the stand] serves to underline to the jury the fact that the

\(^{19}\) *Id.* at 25-26.  
\(^{20}\) *Id.* at 33.  
\(^{21}\) *Id.* at 36.
defendant must have something to hide”.

Mr. Dershowitz though, also strongly cautioned that this is not a bright line rule of any sort, and there have been occasions where defense attorneys have succeeded in putting on a strong defense case even without the defendant. The defense must, however, have planned its strategy carefully and thoroughly. In this case though, Mr. Fahringer’s strategy backfired terribly.

Unlike the maid for the prosecution, who held up well under tough cross-examination, the defense witness’s testimony fell apart like a paper bag in the rain. The defense’s “star” witness was Joy O’Neill, who was Mrs. von Bülow’s former exercise instructor. Ms. O’Neill essentially made two claims: first, she testified that she had given Mrs. von Bülow private personal training sessions for four years “on average of five days a week”; and second, that she and Mrs. von Bülow became “like sisters”, and that the latter told to her during a class in 1978 that, by injecting insulin, “[you] could eat anything you want…” and not gain weight, because it “eats up” sugar and metabolizes it. At first, the defense thought that this provided the perfect rebuttal. Although Dr. Cahill had insisted that Mrs. von Bülow’s condition must have resulted from an insulin injection, he could not explain who gave her that injection. Ms. O’Neill’s testimony, therefore, suggested that it could have been Mrs. von Bülow who injected herself, and that this raised a reasonable doubt about Mr. von Bülow’s conduct.

The problem here, however, was that the defense had failed to do its due diligence, so to speak, prior to putting Ms. O’Neill on the stand. The prosecution obtained records from Ms. O’Neill’s employer, which clearly indicated that she had not given private instruction to Mrs.

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22 Id.
23 Id.
24 Id.
25 Id.
von Bülow five times per week for years. On the contrary, in fact, Ms. O’Neill’s employment records showed that she had only taught Mrs. von Bülow on a handful of occasions, and never during 1978.\textsuperscript{26} Needless to say, Ms. O’Neill lost all credibility. Worse, however, is that it seems hard to imagine how such a blunder could not compromise the defense’s entire case. Since, again, Mr. von Bülow himself did not take the stand, it is certainly within the realm of possibility that Ms. O’Neill’s false testimony gravely tainted the defendant’s credibility. After all, if Mr. von Bülow was not guilty, then why could his defense team not put on a better case? Certainly, the contrast in quality of star witnesses must not have been lost on the jury: the prosecution’s unshakable Ms. Schrallhammer, juxtaposed against the defense’s deceitful Ms. O’Neill.

The defense’s tactical errors seemed to bleed through to its closing arguments. Following some opening niceties, Mr. Fahringer began his closing with, “Is Mr. von Bülow the type of man… who would, on two separate occasions, assault his wife with an intent to murder her by injecting her with insulin?”\textsuperscript{27} This was an unfortunate way for Mr. Fahringer to commence his closing arguments, because this was hardly a rhetorical question. The prosecution had strategically painted Mr. von Bülow as so greedy and unhusbandly, that he may well be capable of committing heinous acts out of self-interest. The fact that he did not take the stand to refute this, in a sense, could have fueled the jury’s suspicions. And, the fact that the defense’s star witness, whose testimony was very much the only aspect of the defense case that raised a reasonable doubt, was so entirely discredited, seemed to leave Mr. von Bülow without a leg to stand on. Compounding the problem, Mr. Fahringer then proceeded in a somewhat discombobulated fashion, to provide about a dozen different, “how do you explain” questions,

\begin{itemize}
  \item \textsuperscript{26} Id. at 37.
  \item \textsuperscript{27} Id. at 39.
\end{itemize}
inviting the jury to take its pick of which reasonable doubt answer to choose from, in order to acquit.  

Under different circumstances, perhaps Mr. Fahringer’s “take your pick” strategy might have been successful. A layered defense, under the right conditions, could indeed function well. The circumstances in this trial, however, did not seem to be conducive to such an approach. Here, the jurors had endured what was, at least at the time, the longest trial in Rhode Island’s history. Any person sitting on the jury for such a trial would likely be exhausted, and possibly even be overwhelmed by the amount of evidence, scientific and other, that accumulated through the course of the proceedings. Unlike Mr. Fahringer, Mr. Famiglietti seemed to recognize the need to provide a more palatable set of options to the jury. Consequently, the latter proceeded to create another sharp contrast in the courtroom. Mr. Famiglietti characterized Mr. Fahringer’s strategy as a “multiple-choice defense”, making it appear desperate, complicated, and contrived in comparison to his straight-forward and commonsensical “true or false” question: “Now, the State’s position in this case is just a little bit… more direct. True or false, Clause von Bülow administered exogenous insulin to his wife in an attempt to kill her on two separate occasions; that’s the ultimate issue, true or false”. Notably, since the defense “stipulated to the fact that there was insulin on the needle” that had allegedly been found in Mr. von Bülow’s mysterious black bag, Mr. Famiglietti seemed to be in a far better position to anticipate the answer to this true or false question, than Mr. Fahringer had been in to anticipate the response to the “Is Mr. von Bülow the type of man intent to murder” question that he posed to the jury in his closing.

28 Id.
29 Id. at 42.
30 Id. at 41.
31 Id.
Surely enough, the jury answered “true” to Mr. Famiglietti’s question, and convicted Claus von Bülow.32

IV. Trial No. 2: The Fundamental Rethinking of the Strategy

Following his conviction, Claus von Bülow retained Alan Dershowitz as his chief counsel for his appeal and new-trial motion. On April 27, 1984, the Rhode Island Supreme Court reversed both counts on legal grounds and expressly held that there could be a new trial.33 On January 5, 1985, the state announced that it would retry Mr. von Bülow. At that point, Mr. von Bülow retained Thomas Puccio as his chief trial lawyer for the second trial, while keeping Mr. Dershowitz on board as a strategist and consultant for this second trial.34 It should be noted here, that the focus of this article is trial strategies, tactics and techniques, rather than appeals. Mr. Dershowitz and Mr. Puccio, however, worked closely together in this case, and the strategy in the second trial flowed directly from the appeal. Admittedly, appeals attorneys enjoy certain advantages that trial attorneys lack, such as a certain benefit of hindsight. Yet, there are nevertheless some valuable trial practice principles that can be discerned from the way in which Mr. Dershowitz formulated his appeal strategy – which ultimately led to a successful strategy in the retrial. The first thing to note is the value of reading one’s client. In this case, for instance, Mr. Dershowitz observed that Mr. von Bülow not only insisted that he was innocent, but that he welcomed further investigation. A guilty client, Mr. Dershowitz observed, tends to be averse to investigations. Therefore, while Mr. Dershowitz could not be sure about his client’s guilt, he did

34 Supra note 3, at xiv.
perceive what he regarded as a certain hallmark of veracity, leading him to search for an “innocent-man issue” to win the appeal.35

Prior to the first trial, Mrs. von Bülow’s two biological children retained Richard Kuh, the former District Attorney of Manhattan, to conduct a discreet private investigation into the circumstances surrounding Mrs. von Bülow’s comas.36 In the process, Mr. Kuh interviewed several witnesses, including the maid and Mrs. von Bülow’s son. Mr. Dershowitz wanted to have those notes produced, and he found a solution. He noted that although the trial court had refused Mr. Fahringer’s request for those notes via a pretrial subpoena, Mr. Fahringer had failed to explicitly seek those notes for use at the trial itself as an aid in cross-examining the trial witnesses.37 Herein lay the source of Mr. Dershowitz’s “innocent-man issue”. As Mr. Dershowitz wrote, “an innocent defendant wants evidence in, not evidence out”.38 Cleverly, Mr. Dershowitz made “openness” a theme in a case investigating an alleged crime that occurred behind the closed doors of the von Bülow’s bedroom. This move to include more evidence, Mr. Dershowitz correctly predicted, would yield key results not just on appeal, but beyond.

Following Mr. von Bülow’s successful appeal, Mr. Puccio in cooperation with Mr. Dershowitz, constructed a strategy for the new trial that built upon the newly available Kuh notes. In the first trial, the defense seemed to lack a clearly focused strategy. Mr. Fahringer decided to keep Mr. von Bülow off the stand, but as noted, opted to put on a case with what turned out to be a deeply problematic star witness. And, Mr. Fahringer tried to raise a large number of different questions about the prosecution’s theory, but never really challenged the

35 Id. at 66.
36 Id. at xiv.
37 Id. at 68-9.
38 Id. at 66.
prosecution head-on, again, even stipulating that there was insulin on the needle and thus eliminating the need for the prosecution to prove that critical point, for example. Mr. Puccio and Mr. Dershowitz’s strategy for the second trial was markedly different. Where Mr. Fahringer was passive, Mr. Puccio would be active. Where Mr. Fahringer was reticent, Mr. Puccio would be vocal. Where Mr. Fahringer was comparatively directionless with the jury, Mr. Puccio would be direct. And where Mr. Fahringer failed to do his due diligence, Mr. Puccio would show extra care.

Mr. Fahringer’s and Mr. Puccio’s personal styles were even starkly different. Mr. Fahringer appeared posh. The nickname for Herald Price Fahringer was in fact “Hy Price” Fahringer, and his appearance and mannerisms even resembled those of the haughty Mr. von Bülow.39 Mr. Puccio, by contrast, was regarded as a “street-fighter”, and unlike Mr. Fahringer, the former came from the same background as many of the jurors and judges in Rhode Island.40 The jury in the second trial, moreover, would come to be made up of a social worker, a retired letter carrier, a maintenance administrator, a stitcher, a factory supervisor, a Head Start counselor, a bank teller, a health administrator, a lab technician, a housewife, an accounting student, and a city finance director.41 Mr. Puccio appreciated the importance of a sound and forceful commonsense approach.42

Consequently, Mr. Puccio (with Mr. Dershowitz’s input) formulated a re-trial strategy in which the defense would directly attack the prosecution’s insulin theory. The plan was to use the Kuh notes to uproot the foundations of the insulin theory on which the prosecution based its

39 Id. at 38.
41 Supra note 3, at 228.
42 Serrill & Loughran, supra note 40.
case. That theory had four independent premises, and so Mr. Puccio would tactically use the Kuh notes to discredit each by showing: (1) Mrs. von Bülow’s maid and son provided false testimony about seeing insulin in Mr. von Bülow’s black bag; (2) that Mrs. von Bülow’s blood did not in fact have high levels of insulin; (3) that despite the defense’s stipulation in the first trial, there actually was not any insulin found on the needle in question; and, (4) the doctors who testified as expert witnesses for the prosecution were wrong to conclude that exogenous insulin must have caused Mrs. von Bülow’s comas. 43 In sum, the strategy had a kind of funnel shape to it, in that Mr. Puccio would take a certain mass of scientific data and channel it into a singular point: there was no insulin, thus proving that the prosecution’s entire theory was wrong. Hence, Mr. Puccio would ultimately proceed with a sharp and simple bottom-line – “no more multiple-choice defense” as Mr. Dershowitz put it 44 – in order to confront the state’s case clearly and directly.

Of course, however, the re-trial strategy of proving Mr. von Bülow, as Mr. Dershowitz put it, “not guilty by reason of innocence” 45, required Mr. Puccio to use a variety of trial tactics, always with a keen awareness of the overarching context of the case, in order to prevail on the key issues of fact. To begin with, Mr. Puccio needed to undo some of the damage done in the first trial. As noted, Mr. Fahringer had not only failed to dispute whether or not there truly was any insulin on the used needle allegedly found in Mr. von Bülow’s black bag; he had even stipulated that the presence of insulin was a “fact”. 46 This was, in effect, a fatal concession because, when it was interpreted in combination with Mrs. von Bülow’s supposed insulin levels, it was in some ways comparable to admitting to finding a bullet and agreeing that it was traceable back to the attempted murder weapon. Indeed, it was on that insulin theory that the

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43 Supra note 3, at 172.
44 Id.
45 Id. at 128.
46 Id. at 173.
prosecution prevailed in the first trial. Therefore, from the outset, Mr. Puccio confronted certain hurdles. Yet, he was able to convince the judge that the defense should be allowed to “unstipulate” this key point, thereby enabling them to introduce new evidence to call into question the earlier laboratory results that had appeared to indicate that there was insulin on the needle.\footnote{Id.}

\textbf{a) Tactical use of the Kuh notes.} In the beginning, the Kuh notes were somewhat of a non-issue. Mr. Fahringer had never attempted to obtain them for the sort of use that Mr. Dershowitz and Mr. Puccio envisioned in the second trial. When Mr. Dershowitz undertook Mr. von Bülow’s appeal and initially asked Mr. Kuh for a copy of his notes, however, Mr. Kuh refused, writing, “I am satisfied that there is not a scrap of paper in my files that might even arguably be viewed as exculpatory”.\footnote{Id. at 70.} Mr. Dershowitz, however, suspected that a defense attorney might have a different reading of the notes, and doggedly pursued them via a motion before the Rhode Island Supreme Court. He succeeded, the notes turned out to be critical and revelatory, and Mr. Puccio used them tactically to impeach the credibility of the prosecution’s key witnesses in the second trial. These tactics are worth examining here in more detail.

Mr. Puccio and Mr. Dershowitz were keenly aware of how witness’ “trial memories” tended to work. The latter, for instance, wrote, “While the theory [of the case] begins to emerge, the memory begins to fit to it... In the end, what is remembered is not even the event. It is the \textit{memory} of repeating and clarifying the event... Whether consciously or unconsciously, these witnesses mold their stories to fit the result that they seek.”\footnote{Id. at 68.} Mr. Dershowitz therefore hypothesized that the Kuh notes, which had been created contemporaneously – approximately a
mere two weeks after the final coma – might well reveal the more raw and accurate accounts of
the prosecution’s star witnesses before their memories, even perhaps unwittingly, conformed to
the subsequently proposed insulin theory.50

Surely enough, Mr. Kuh’s notes revealed a subtle but critical problem in Ms. Schrallhammer’s trial testimony. She had sworn that she discovered insulin in Mr. von Bülow’s black bag, but in the notes that Mr. Kuh took from his interview with her soon after Mrs. von Bülow’s final coma, Ms. Schrallhammer had made no mention of insulin. On the contrary, Ms. Schrallhammer listed the items she found in that black back on the first occasion (again, no insulin), and stated that she found the same items on the second occasion except that all the labels had been scratched off.51 This account, provided before there was an insulin theory, directly contradicted the testimony that Ms. Schrallhammer provided in the first trial, which had been part of the centerpiece of the prosecution’s case.

Moreover, the Kuh notes revealed that Mrs. von Bülow’s son, Alexander von Auersperg (Mr. von Bülow’s step-son) had, a few days after his mother’s final coma, told the family banker: first, that he was “ready to start a fight with Claus”; second, that he was “eager not to lose [Clarendon Court] which was willed to Claus – under any circumstances”; third, that his sister (Mr. von Bülow’s step-daughter), “has never gotten along with Claus”; and finally, that Mr. von Auersperg and the family considered “buying him off and getting him to renounce all interests in his wife’s will” before determining whether to prosecute him.52 Mr. Kuh’s deeply revealing notes also indicated that, despite subsequent claims to the contrary, Mr. von Bülow had actually stated to Mrs. von Bülow’s grown children that it was they who must decide whether to

50 Id. at 168.
51 Id. at 169-70.
52 Id. at 171.
terminate their mother’s life-support, not him. And notably, all of these facts emerged unrehearsed, prior to the prosecution’s theory, making them unbiased and reliable. Mr. Puccio, consequently, was able to tactically employ the Kuh notes as a weapon against the prosecution’s witnesses on cross examination in Mr. von Bülow’s second trial. Still, the task was not so simple, and this is where Mr. Puccio’s trial techniques were very effective. Let us begin with Mr. Puccio’s cross examination of the maid, who the prosecution selected as their first witness in the second trial.

b) Finding the right balance. Certainly, every attorney has idiosyncrasies, making each lawyer’s individual style somewhat unique. Mr. Puccio, at least in this trial, decided to frontload his attack. Following a few standard preliminary questions and still very early into his cross-examination, Mr. Puccio opted to ask Ms. Schrallhammer this very pointed question up front: “The first time you spoke to Mr. Kuh, you didn’t tell him about the insulin. Is that correct?”54 This was a well-calculated move because Ms. Schrallhammer was a star witness for the prosecution for an important reason – she appeared to be an extremely composed (under the circumstances) and credible witness. The idea here, then, was to rattle this key witness along with the jury’s confidence in her, and indeed, Mr. Puccio succeeded. Ms. Schrallhammer could only offer the evasive response, “That could be…”55 – a reply that raised questions about the reliability of her testimony since she had stated during direct examination just a few moments earlier that she had made that profound discovery of insulin in Mr. von Bülow’s black bag, and if she had indeed made such a profound discovery, then logically, she would have told this to Mr.

53 Id. at 172.
54 Id. at 184.
55 Id.
Kuh. Pressed further, she stated, “...I was not concerned so much about the insulin”\(^{56}\) – a rather bewildering declaration in light of the fact that she had placed so much emphasis on insulin earlier, and the fact that insulin was the key ingredient in the prosecution’s case.

Mr. Puccio, however, seemed to have a good sense of when to attack, and when to refrain.\(^{57}\) Interestingly, Mr. Dershowitz has written that he was frustrated with Mr. Puccio’s cross-examination, because the latter was not aggressive enough with Ms. Schrallhammer, in Mr. Dershowitz’s opinion.\(^{58}\) Mr. Dershowitz has stated that his own style is to “zero in on the inconsistencies repeatedly and to focus the jury’s attention on the impossibility that they could have been inadvertent”, and that Mr. Puccio by contrast, would merely highlight an inconsistency and move on, creating the risk that the point might go unnoticed by the jury.\(^{59}\) Mr. Dershowitz raises an important consideration here, and under certain circumstances, he may be correct that an inconsistency in a witness’s testimony ought to be pursued very aggressively. In the present situation, however, it seems that Mr. Puccio struck the optimal balance. The maid was an older woman with delicate features, a petite frame, and an accent. While it was crucial to effectively impeach her testimony, it had to be done carefully in front of the jury. An overly aggressive cross-examination by a powerful, quick-witted attorney against a seemingly humble, somewhat frail-looking, hard-working immigrant, could be off-putting to the jurors. That is, the optics could potentially undermine the force of the attorney’s worthy arguments. Ideally, a juror should be able to distinguish what might in her opinion be a distasteful but effective cross-examination, from an ineffective one. But, jurors are only human and imperfect. And, off-put jurors could theoretically even search for ways to, at least in their own minds, rationalize a

\(^{56}\) Id.
\(^{57}\) Serrill & Loughran, supra note 40.
\(^{58}\) Supra note 3, at 185.
\(^{59}\) Id.
witness’s poor performance, perhaps by regarding any perceived inconsistencies as resulting from excessive pressure and bullying by the attorney, rather than genuine lapses or a lack of reliability by the witness. Given the maid’s physical appearance and likeability, such an aggressive approach as the one that Mr. Dershowitz would have preferred, may well have backfired here. Mr. Puccio’s tactic of highlighting inconsistencies without appearing to humiliate this witness, seemed to work well, as evidenced by the reporters (whose lay opinions could arguably reflect impressions similar to those of the lay individuals on the jury) who wrote the following morning that Mr. Puccio managed to “score points” in some “big areas”\textsuperscript{60}, and by Mr. von Bülow’s eventual acquittal.

Indeed, there does not seem to be a “one size fits all” approach to cross-examining witnesses, and a great deal of finesse must be used to tailor one’s tactic to the circumstances. Therefore, while Mr. Puccio was relatively reticent with Ms. Schrallhammer, he came out against Mr. von Bülow’s step-son visibly gripping the Kuh notes in his one hand and pointing at Mr. von Auersperg with his other\textsuperscript{61}. Mr. von Auersperg was a young, wealthy, resilient-looking man, whose physical appearance and demeanor created the impression that he was not easily pushed around. Here, Mr. Puccio could afford to lean his weight on the witness, looking tough and dutiful in front of the jury rather than overbearing, as he might have appeared had he proceeded in this way with the maid. During cross, Mr. Puccio pressed Mr. von Auersperg on the statements that he made to Mr. Kuh, which the latter had memorialized in his notes. Mr. Puccio even approached him, and physically showed him the Kuh notes to refresh his recollection. By the end, Mr. von Auersperg admitted his desire to keep Clarendon Court and pay his stepfather to renounce any interest in Mrs. von Bülow’s estate, revealing the reasonable possibility that some

\textsuperscript{60} Id. at 186.
\textsuperscript{61} Id. at 186-190.
of Mr. von Bülow’s key accusers may have had dark motives and biases: to cut him out of his wife’s will at any cost.\textsuperscript{62} This tactic also cleverly steered attention away from the accused and focus it on the accuser.

Mr. Puccio’s cross-examination of Mr. von Auersperg, moreover, raised a pivotal factual issue: was there \textit{really} insulin in the infamous black bag? Mr. von Auersperg had accompanied the private detective that his family had hired, to retrieve the mysterious black bag from a locked closet in Clarendon Court.\textsuperscript{63} It turned out that during the search and upon obtaining the black bag, no inventory was made, no photographs were taken, no fingerprints were preserved, and critically, all evidence found during this search from inside \textit{and} outside the black bag and from different rooms, was put by the detective into the black bag “for convenience”, with no record of which items had originally been in the black bag and which had not.\textsuperscript{64} Mr. Puccio’s cross had even managed to get Mr. von Auersperg to admit that, in the course of that search of Clarendon Court, he (Mr. von Auersperg) had disposed of some of the drugs he had gathered. Yet, Mr. Puccio, once again, exhibited here a sharp sense of how to limit his cross-examination of witnesses. Mr. Dershowitz has written that Mr. von Bülow told them that Mr. von Auersperg himself had used drugs, and indeed, this could perhaps be used to show that at least some of the alleged contents of the black bag actually belonged to the latter. Yet, Mr. Puccio realized that it was more prudent to raise a serious doubt about the contents of the black bag, than to go further and attribute any ownership to Mr. von Auersperg. The main reason, as Mr. Dershowitz correctly pointed out afterwards, was that such a sharp accusation against a young man could ultimately

\textsuperscript{62} Id. at 188.  
\textsuperscript{63} Id. at 107.  
\textsuperscript{64} Id. at 108.
generate sympathy for him and thus backfire on the defense.\textsuperscript{65} Hence, here, Mr. Puccio skillfully drew the line at aggressive cross-examination, and prudently refrained from accusing the witness.

Mr. Puccio and Mr. Dershowitz astutely perceived that this case had a kind of naturally bifurcated story-line: the soap opera account and the medical account. Since Mr. Puccio had exposed deep flaws in the prosecution’s two star soap opera-like witnesses, the next phase of the defense strategy was to dismantle the prosecution’s medical account. As Mr. Dershowitz observed, the prosecution’s insulin case had “three basic building blocks”: (1) leading experts who had opined that Mrs. von Bülow’s comas had been induced by insulin; (2) that insulin was found on the needle in the black bag; and (3) that Mrs. von Bülow had a high level of insulin in her blood after her coma. Mr. Puccio adhered to the defense strategy, and attacked the state’s medical case head-on. Whereas defense counsel Fahringer cross-examined the prosecution’s star medical witness, Dr. Cahill, for a mere twenty minutes without doing any damage to his testimony, Mr. Puccio, here, questioned him for three hours. During this time, Mr. Puccio was able to get Dr. Cahill to concede that, in actuality, there could have been different factors than insulin that might explain Mrs. von Bülow’s irreversible coma.\textsuperscript{66}

Building on this, Mr. Puccio went on to construct the defense case, based entirely on medical and forensic evidence. Therefore, as it is now clear, Mr. Dershowitz’s and Mr. Puccio’s strategy was to rehabilitate Mr. von Bülow’s image into that of an innocent man, by impeaching the “soap-opera testimony”\textsuperscript{67} of the maid and step-son. The next step was to undermine the medical opinions of the prosecution’s top experts. And now, finally, the defense planned to raise

\footnotesize{\textsuperscript{\textsuperscript{65}} Id. at 190. \textsuperscript{66} Id. at 196. \textsuperscript{67} Id. at 211.}
a reasonable doubt through the use of scientific evidence. Indeed, Mr. Fahringer had erred in the first trial by “stipulating” to the insulin, because a major part of the defense’s job is to make the state prove its case. Mr. Puccio and Mr. Dershowitz had an effective plan precisely because they required the state to prove each and every aspect of their theory – a task that ultimately proved to be impossible for the prosecution. To begin with, Mr. Puccio raised an irrefutable reasonable doubt in two different ways about the existence of insulin on the needle. First, Mr. Puccio’s expert witness demonstrated that the chemicals in the black bag could, in combination and under testing, produce a false positive result, indicating insulin where there in fact was none. And second, Mr. Puccio’s expert witness demonstrated that a used syringe could not have insulin on the outside of the needle because any residue on the outside of the needle would be swabbed clean as it is extracted from the skin. Then, Mr. Puccio raised a reasonable doubt about the high levels of insulin in Mrs. von Bülow’s blood. Through the testimony of the chairman of University of Chicago’s medical department, Mr. Puccio demonstrated that the insulin readings that the prosecution had relied upon were, in actuality, scientifically invalid given the huge discrepancies in those readings and the fact that the abnormal readings could not be duplicated in subsequent testing.

Mr. Puccio’s and Mr. Dershowitz’s various tactics all worked in symphony to support a winning trial strategy, and it is worthwhile here to look at how the different strands of their plan tied together to accomplish this. The best angle from which to view this, it seems, is the way in which the team handled the person at the center: Mr. von Bülow. The ongoing question that Mr. Puccio and Mr. Dershowitz asked themselves, was whether to have Mr. von Bülow himself take

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68 Id. at 112.
69 Id. at 111.
70 Id. at 202.
the witness stand. Indeed, Mr. Dershowitz wrote, “I became convinced that substantively Claus would make an excellent witness…”71 Yet, the defense, here, clearly seemed to appreciate a critical point. That is, as Mr. Dershowitz wrote after the retrial, “in a close battle of equally persuasive experts, the side that has the burden of proof generally loses”.72 The Puccio-Dershowitz team had truly turned everything around: the defense had gone from “stipulating” the insulin in the first trial, to casting a real doubt about it in the second. Having accomplished this, what would be the value-added of having Mr. von Bülow himself testify? Despite the fact that he might make a good “substantive” witness, the defense team realized that his “haughty manner” could generate a negative reaction from the jury.73 Even worse than that, however, Mr. von Bülow’s testimony – whatever he might say – threatened to merely draw the jury’s attention away from the defense’s key message: “No insulin on the needle. No insulin in the blood. No insulin in the bag. No insulin, period”.74 Unlike Mr. Fahringer, who seems to have failed to think like a juror, Mr. Puccio and Mr. Dershowitz crafted a defense that was successful because, among other reasons, it was highly cognizant of what a juror might think. Mr. Puccio and Mr. Dershowitz foresaw that, if Mr. von Bülow testified, he would unavoidably play into the soap opera-like portion of the story line, and therefore, come jury deliberations, the individual jurors would likely gravitate to those juicier “he-said-she-said” aspects of the case, as opposed to the dryer but more telling scientific ones. Hence, by limiting their story to scientific facts with a clear simple message, Mr. Puccio and Mr. Dershowitz were able to intelligently manage the risks and play to their strengths. Everything tied together in the end, in Mr. Puccio’s closing arguments, when he put to the jury not a multiple-choice set of options, but a true or false

71 Id. at 207.
72 Id. at 203.
73 Id. at 207.
74 Id. at 211.
question of his own: was there an insulin injection? “You, ladies and gentlemen”, Mr. Puccio stated to the jury, “have to find that there was an insulin injection to find the defendant guilty”. Indeed, the jury determined that they could not make any such finding, and Claus von Bülow was again a free man.

V. Closing Observations

The Claus von Bülow trials provide rich grounds for discerning key principles in formulating and executing trial strategies and tactics. An investigation of each of Mr. von Bülow’s two trials, both independently of one another and in comparison with each other, reveals the centrality of sound, thoughtful, and creative legal representation. He was found guilty in his first trial because his attorney failed to adequately vet his key witness, did not force the state to prove every aspect of its case, did not foresee the potential in what turned out to be a critical piece of evidence, neglected to think like a juror, and erroneously submitted to the jury a forceless and disjointed set of possibilities and questions that gave them no reason to doubt the prosecution’s case. Mr. Dershowitz and Mr. Puccio’s strategy, by contrast, was effective because it met the state’s case head-on, and raised a clear and simple question for the jury to answer. Mr. Puccio, then, executed this strategy very well because he accurately judged how to cross examine the state’s witnesses, made good decisions about which of his own witnesses to call, effectively directed the jury’s attention to the most relevant issues in his case, and framed the key questions for the jury in a simple, manageable, and cogent way. This is not to suggest that Mr. Puccio and Mr. Dershowitz’s performances were perfect, or that Mr. Fahringer’s representation was completely deficient. Rather, the successes and mistakes within these two trials, and the contrast

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75 id. at 220.
in their respective rulings, serves to illuminate certain principles in trial technique and practice, which if followed, can help to better ensure that justice is realized.