5 Credibility Lessons Trial Attys Can Learn From Harris' Run

By **Ken Broda-Bahm** (September 18, 2024)

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Persuaders of all stripes, including courtroom persuaders, can learn many lessons from political communication.

The dialogue over the leadership and direction of the country can be a gold mine: It's national; it provides a wealth of examples, good and bad; and, particularly recently, it is frequently changing.

In one of the biggest recent twists, President Joe Biden agreed to step down from his reelection effort and pass the torch to Vice President Kamala Harris. That sudden shift just in late July created a critical opportunity for Harris to define, or to redefine, who she is to the American people.

Toiling in the relative obscurity of the secondary role, she had mostly absorbed Biden's polling numbers — for better or for worse. With the switch, however, a wave of enthusiasm from some, and curiosity from others, means Harris is getting a fresh look from voters. Her first big decision, the selection of Minnesota Gov. Tim Walz as her running mate, sharpens that attention.

Her challenge is to use this moment of novelty and rebooted attention in order to establish, or reestablish, some credibility.

That imperative to define oneself parallels the challenges of credibility generally. In legal cases, advocates routinely face audiences that know little about them beyond perhaps some baseline impressions or stereotypes. The need is to say, "This is who I am, this is who I represent, and this is what I aim to tell you" in a way that is believable and compelling.

This article draws from the current example of the challenge faced by Harris, as well as her new running mate, in order to emphasize some lessons for legal persuaders.

1. Perceptions are thin until the attention is significant.

As the HBO show "Veep" mercilessly pointed out, the U.S. vice president is probably the most powerful office where the officeholder still needs to scrap for small bits of attention and relevance.

The fact that Harris had, up until this point, been consigned to absorbing Biden's relatively low public approval rates means she started with an uphill battle, despite running against a historically polarizing former president, Donald Trump. The large number of voters who, until recently, were reportedly dissatisfied with both options are now paying attention.

The situation has some comparison to what happens in a trial: Jurors might arrive with some preconceptions, but those perceptions can be thin, without a great deal of thought or commitment behind them. Jurors might feel that lawsuits and plaintiffs are frivolous when they're thinking about the issue generally, but then those views are refined when they start to hear some of the evidence and the specific story that led to the particular lawsuit in front of them.

Jurors might think that big corporations are heartless and dishonest while the defendant company is still an abstraction, but they may start to revise their views once they begin to hear more about the company and meet some of the witnesses.

Particularly during the heightened attention given in a trial's early phases, these are preconceptions that can change.

2. Justify the fresh look.

Prior to Biden bowing out, the Trump campaign may have been guilty of assuming that Biden would never back out, or assuming that it wouldn't matter if he did because Harris wasn't polling much differently.

What changed on July 21, however, wasn't just the presumptive name at the top of Democratic ticket, but also the motivation of the party's base and the undecided voters. Harris has benefited, at least temporarily, from a surge of attention.

Of course, that attention can be positive or negative, depending on what you do with it. But so far at least, the message has been that the election is now on a different footing, and that has justified some fresh appraisals and better polling for Harris.

There's a parallel moment of attention in a trial. For the jurors, once the surprise of having been selected wears off, they settle into hearing about the case. As the attorneys stand to give openings, it is safe to assume that juror attention is never going to be greater. Attorneys should use those precious moments of fresh attention in order to deliver a simple and compelling theme for the case.

A witness in trial can also make use of the fresh attention given at the start of their testimony. They may need to dig out of a prior bad assessment that was cultivated by your adversary.

Once they're armed with first impressions, fact-finders might reasonably be wondering, "Why should we take another look?" In your own presentations and testimony, and in your demeanor and substance, give them an answer.

3. Associations matter.

It is true in every context that you're probably going to be judged by the company you keep. The Trump campaign strategy so far seems to reflect this tack in painting Harris with the same brush it most recently used on Biden.

She will predictably hear the same attacks — focused on inflation, immigration and crime — and it won't matter whether and to what degree Harris participated in any of the relevant policies, because the point is association more than causal blame.

In litigation, associations are also a key part of credibility. It pays to ask the question, "What is my client associated with?" Accurately or inaccurately, explicitly or implicitly, are jurors likely to associate your party with other parties — including co-defendants? Are they likely to associate your client with any current social issues or public figures?

It pays to bear in mind that whenever a big company story dominates the headlines — like Enron Corp., Apple Inc. or Tesla Inc. — then the images of similar companies might take a hit based on that association.

The company will also, however, be personified by the story you are able to tell, the person sitting at counsel table, and by the company witnesses who take the stand. The character of a plaintiff will be enmeshed with jurors' view of the character of their lawyer and their experts.

4. Everything is now.

Past positions matter as much as if they were uttered today. No one is perfectly consistent; our views and statements change over time. That variability is normal, human and understandable — until it is put under the microscope by someone who wants to make a point that you're waffling.

Harris has a long history in high-profile elected office. As the attorney general in the most populous state, a U.S. senator and now as vice president, her positions on a variety of issues are a matter of record.

Some have pointed to a seeming evolution of her views on criminal prosecution, law enforcement, recreational drugs, Israel and other issues. The campaign undoubtedly expects this will all need to be defended.

The same goes for a witness in trial. One of the first imperatives for a trial witness is to be consistent with what you said in deposition, or to justify the difference. This is why fact witnesses should be thoroughly familiar with their deposition testimony — not just the topics covered, but the general phrasing and consistency of their answers as well.

For the expert witness, that consistency imperative is even broader, since adversaries won't be just looking at this case, but at all the cases the expert witness was involved in.

5. It doesn't pay to take the bait.

There are certainly reasonable criticisms being levied against the substance of some of Harris' policies. But there are also some lower attacks emerging, including several surrogates calling Harris "a [diversity, equity and inclusion] hire" because of her race and ethnicity. In addition, Trump himself falsely claimed that Harris had previously identified only with her mother's Indian ethnicity, and only recently "happened to turn Black" for political purposes, and that she also "has a very low IQ."

These attacks, echoed by some of Trump's supporters, reframe the conversation in a disappointing direction. These kinds of attacks are dangerous because they can often elicit a response in kind.

Both counsel and witnesses should make a firm commitment to take the higher road, particularly when in front of a judge or jury. When opposing counsel baits a witness with an express or implied insult, that witness needs to have the discipline to answer without defensiveness, complaint or a desire to return fire.

Michelle Obama's maxim can seem a little Pollyannaish these days, but it is still a good principle. "When they go low, we go high" is effective guidance for the witness as well: Stick to the facts and stick to what is most relevant. Don't be baited by express or implied personal attacks.

Conclusion

Already in the final months before the election, much can still change. It is certainly high stakes, but for those who are persuasion and communication junkies, it will also be fascinating to see how the players navigate this constantly changing field.

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