THE NATIONAL LAW JOURNAL
ALM
MONDAY, JUNE 18, 2007


LEORA BEN-AMI


DAVID J. CHIZEWER


FREDERICK H. COHEN


JOHN M. DESMARAIS


KENNETH A. GALLO


DANIEL J. GERBER

>WINNING<

Successful strategies from some of the nation's top litigators.


DIANE P. SULLIVAN


DAN K. WEBB


REID H. WEINGARTEN


MARK S. WERBNER


STEVEN M. ZAGER

>>WINNING<<

Talk about focus.

When attorney John M. Desmarais is in the middle of a trial, he moves into a hotel to concentrate on the case.

"You can't go home every night or on weekends or you're going to get burned," he said.

He didn't get burned in a recent infringement case, winning a $1.53 billion verdict.

Reid H. Weingarten said with a laugh that when he's trying a case, "I don't eat, sleep or make love. I drink coffee and bourbon." His drive helped him win a defense verdict in an explosive rape case.

Dan K. Webb doesn't sling the colorful anecdotes like Weingarten—but he's every bit as determined. "When I get up in front of a jury, I want nothing to happen that I ever appear to be bewildered by," Webb said. The jurors rewarded his preparation with a $58 million verdict in an infringement case.

Attorneys with that type of drive tend to win more cases than they lose.

That's why these three are among the 10 top litigators featured in *The National Law Journal*'s 2007 Winning section.

The 10 finalists were culled from scores of nominations sent from around the United States. Our basic criteria included nominees having at least one significant win—either a bench or jury verdict—within the last 18 months, and a track record of significant wins over the last several years.

"Significant wins" is an expansive and subjective term. For our purposes, it includes large monetary awards, or, from the other side of the aisle, winning a defense verdict when there is the risk of substantial damages. Other factors that caught our attention included unique courtroom maneuvers and effective techniques for swaying judges and juries.

Kenneth A. Gallo had his work cut out for him. His client, Genentech Inc., is the world's second largest biotechnology company. It was being sued by an ophthalmologist who accused the company of using his research to develop Lucentis, a breakthrough medication for age-related blindness. Gallo had to find a way to prevent the jury from sympathizing with a single man taking on a global colossus. He humanized the company by concentrating on the Genentech researcher who the company said was the true developer of the drug. It worked. The jury found for Genentech.

Daniel J. Gerber faced equally daunting odds when he defended Orkin Inc. The laundry list of "bad facts" included allegations of racketeering and the disappearance of documents.

But Gerber took a gamble and presented the bad facts to the jury up front. By following that strategy, he thought he would be able to get a commitment from jurors to remain neutral. He got the defense verdict.

Diane P. Sullivan faced a situation similar to Gallo's when she represented Merck & Co. Inc., the producer of Vioxx, against a sympathetic grandmother who claimed her heart ailments were triggered by the drug. Sullivan combined humor with effective graphics, and concentrated on the grandmother's previous heart ailments to drive home her point. She won the case.

When David Chizewer and Fred Cohen agreed to represent a whistleblower against an Illinois health maintenance organization, they needed more than a clever strategy. They needed speed. They were brought into the case at the last minute, and the first trial judge cut them no slack on time. That meant a last-minute plane trip to interview a key witness and a grueling discovery process.

As it turns out, they were fast enough. The verdict totaled $334 million.

Mark Werbner found himself smack in the middle of a bitter fight between two brothers and former partners, one of whom owned a company that discovered one of the largest nickel deposits in the world. The fortunate brother sold his business for $4 billion, and the other brother sued him for $200 million, claiming the nickel discovery had relied on their prior projects.

Werbner concentrated on diffusing potential resentment against his client and uncorked one dramatic courtroom surprise to sway the jury.

Steven M. Zager's main philosophy is to engage the jurors emotionally before anything else. He did just that in a high-stakes trade secrets misappropriation case.

The litigation involved a formula for epoxy resins. Zager presented the case as a morality play with a simple message: It's wrong to take something that doesn't belong to you. The jury agreed to the tune of a $152.7 million verdict.

Leora Ben-Ami's philosophy is just as effective: keep it simple. Her patent infringement case involved a method of treating disease by regulating a protein that influences cell-signal activity. Not exactly high school biology.

Ben-Ami broke down the technical data into simple phrase, such as "good sugars," "bad sugars" and "blobs." The jurors must have understood. They returned a verdict of $65.2 million. NLJ

—STEVE FROMM

>>WINNING<<

Successful strategies from some of the nation's top litigators.

>>DANIEL J. GERBER<<

Talking up 'bad facts'

A lawyer uses voir dire to expose jurors to some unsavory allegations.

By Emily Heller
SPECIAL TO THE NATIONAL LAW JOURNAL

SAYING THAT DEFENDER Daniel J. Gerber had a jury trial with bad facts seems an understatement: allegations of racketeering, a parade of former employees testifying about widespread document fraud, mysterious disappearance of documents and, to top it off, a possible $100 million punitive damages award following millions in compensatory damages.

Gerber's case involved the owner of Lighthouse Bay apartment complex in Tampa, Fla., suing Orkin Inc. over a termite-treatment contract. Looming over the outcome was a 2000 Alabama fraud case against Orkin that resulted in an $80.8 million verdict, most of which consisted of punitive damages, which were reduced on appeal to $2.3 million. The Florida case contained some of the same documents presented in Alabama.

But the Florida circuit court jury in Tampa had a different take: The case ended in a defense verdict. After three weeks of testimony about termite behavior, contract language and alleged forgery of customer signatures, the jury issued its September 2006 verdict in about an hour. *Lighthouse Bay Holdings Ltd. v. Orkin Exterminating Co. Inc.*, No. 02-1963.

Bad facts early

Gerber, partner in the Orlando, Fla., office of Rumberger, Kirk & Caldwell, said he wouldn't have won if he hadn't started talking to the jury about the bad facts as early as jury selection.

"From the defense side, one of the disadvantages is that the plaintiff goes first and they get to spin the case aggressively," Gerber said. Opening statements were three hours. "We used jury selection as a way to prepare the jury for the bad facts before the plaintiff got to expose them."

Acknowledging the bad facts right off the bat, the defense can get a commitment from jurors to remain neutral "in light of what otherwise would be devastating facts," Gerber said. "I think too often attorneys try to emphasize the good parts of the case during jury selection in order to find favorable jurors."

Another reason to be forthcoming?

DANIEL J. GERBER

Juries like it. "If they get to know you as a trustworthy person early on, so much the better," he said. Gerber said the turning point in the case was his cross-examination of the plaintiff's star witness, former employee Jack Cox, who testified that Orkin instructed him to forge customer signatures on hundreds of reinspection documents, including 17 for Lighthouse Bay. The 17 documents were never found, and the plaintiff alleged that Orkin had "lost" the file, Gerber said.

Cox had testified in a dozen depositions in cases against Orkin—during and after his employment, Gerber said. Gerber examined transcripts and challenged Cox over how his testimony about the alleged forgery became "more emboldened over time as he got more involved in litigation." Under cross-examination at trial, Cox conceded the differences: "That was when I was on your side. Now I'm on their side," Gerber said recalling Cox's reply.

As for the missing 17 reinspection documents Cox insisted that he forged, Gerber said he planted a "land mine" in Cox's cross that caused the witness to become "unraveled." Because of the way it was structured, the Lighthouse Bay contract would have required only one reinspection document for the entire property, not separate tickets for each building, Gerber said.

When challenged, Cox bristled, he said. "What does it matter?" Gerber said the witness's final words were.

Though the Cox cross-examination may have provided courtroom drama benefiting the defense, the jury believed that Orkin cheated Lighthouse Bay, according to plaintiff's attorney Peter M. Cardillo of the Cardillo Law Firm in Tampa.

Cardillo said a juror who contacted him said the jury would have awarded damages to Lighthouse Bay if its Orkin contract had not contained disclaimer language precluding the plaintiff from recovering damages. If not for that contract provision, the jury would have awarded the plaintiff $10 million in compensatory damages and $30 million to $50 million in punitive damages, Cardillo said. The verdict is on appeal.

TRIAL TIPS

- **Expose jurors to your bad facts as early as jury selection.**
- **Meet with the entire trial team to evaluate each trial day.**
- **For visuals, use low-tech tools.**

The defense effectively neutralized the bad-fact evidence, Cardillo said, but that wasn't the reason for the verdict. Gerber did a good job "confusing the jury" over the contract, Cardillo said. "He should take credit for that."

The plaintiff sought a new trial based on comments from the juror, who refused to sign an affidavit, countered Gerber. "This is part of an overall effort to discredit the verdict, which failed," he said. "The fact is, if I was a 'master of deception' as Cardillo said in rebuttal in closings, the jury could have penalized Orkin," Gerber said.

Lead defender on *Lighthouse Bay*, Gerber has obtained other big defense wins against the odds. In April 1997, a Florida state court jury in Manatee County rendered a defense verdict in a case against Sears Roebuck and Co. alleging that a pesticide caused Susan and Don Maxwell's neurological damage. *Maxwell v. Sears Roebuck and Co.*, No. CA 94-0156 (Manatee Co. Cir. Ct.). NLJ