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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<<

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>>DAVID J. CHIZEWER AND FREDERICK H. COHEN<<

Beating the clock

Two attorneys take over a case at the last minute, and win $334 million.

WM. FRANKLIN MCMAHON

By Peter Page
SPECIAL TO THE NATIONAL LAW JOURNAL

DAVID J. CHIZEWER AND Frederick H. Cohen were the litigation equivalent of firemen when they agreed to represent a whistleblower against an Illinois health maintenance organization (HMO) he alleged had defrauded the state Medicaid program. His case was going up in flames quickly and they had to decide if they could salvage it.

Amerigroup Corp.'s Illinois HMO was under contract with the Illinois Department of Public Aid (IDPA) to enroll anyone eligible for Medicaid without regard to medical condition in exchange for a set amount based on the recipients' age and gender.

The "capitation rate" paid the same regardless of the amount of services received. The whistleblower, Cleveland Tyson, formerly vice president of government relations for the Illinois subsidiary of Amerigroup, alleged Amerigroup defrauded the

READING REVIEWS: *David Chizewer and Fred Cohen with the* Chicago Sun-Times *announcing their big win.*

state by training its representatives to avoid people who were ill and women in the third trimester of pregnancy.

In January 2005, Tyson's case was set for trial, but his legal team—a tiny local firm and a sole practitioner—faced lopsided odds. Amerigroup was represented by Freeborn and Peters, which was later bolstered by Houston's Baker Botts. *U.S. ex rel. Tyson v. Amerigroup Illinois Inc.*, No. 02 C 6074 (N.D. Ill., March 13, 2007).

A 'moving train'

With the April 2005 trial date looming, Tyson's attorneys asked Chizewer and Cohen, both principals at the Chicago's Goldberg Kohn Bell Black Rosenbloom & Moritz,, to take over the case.

Only months earlier Cohen and Chizewer, both well-known corporate litigators in Illinois, had won a widely publicized class action against the IDPA and the Illinois Department of Human Services for failing to provide preventive medical care to more than 600,000 low-income children on Medicaid in Illinois. *Memisovski v. Maram*, No 92 C 1982 (N.D. Ill., Aug. 23, 2004).

"They didn't have the resources to take the case to trial and do everything that needed to be done over the course of the four months before the trial was scheduled to begin," Cohen said. "They needed somebody who knew the Medicaid system, was good at trying cases, got good results and could basically take over the case and present it in a very short time."

There was less time than either Cohen or Chizewer realized when they first stepped into court in January 2005. Judge David Coar, as both Cohen and Chizewer knew, believed firmly in sticking to the trial calendar.

TRIAL TIPS

- **Trial preparation starts with discovery.**
- **Narrow the number of witnesses.**
- **Examine your case from your opponents' point of view.**

"When we came into the case we appeared in court on a Tuesday and there was a summary judgment response due that Friday," Chizewer said. "We asked Judge Coar [who eventually recused himself] for one extra week to respond. He said no. We asked him for the weekend, until Monday. He said no. He told us that if we wanted to take over the case, fine, but we were getting on a moving train. We looked at each other and went for it."

That night Cohen flew to California to interview Paul Hardwick, Amerigroup's former marketing manager in Illinois, and returned with an affidavit that supported Tyson's allegation.

"Amerigroup claimed they weren't discriminating against pregnant women and people who were ill," Cohen said. "The marketing manager said that was exactly what they were doing. Now we have conflicting evidence and that gets us past summary judgment."

The case that Chizewer and Cohen would present to the jury was formulated as they moved through a grueling discovery process. Amerigroup fought Cohen and Chizewer's efforts to obtain e-mails relevant to the case, which showed company executives to be training representatives not to enroll women who were plainly at a late stage of pregnancy.

The e-mail evidence, and Amerigroup's reluctance to yield it, caused Coar to strike the calendar and restart the discovery process. After three weeks of trial in October 2006 the jury found that Amerigroup had submitted 18,130 false claims to the federal and state governments, and awarded $48 million in damages.

In March, Judge Harry Leinenweber entered judgment on the verdict, amending it for treble damages and penalties of $5,500 per claim under the federal False Claims Act and $5,000 per claim under the Illinois Whistleblower Reward and Protection Act—bringing the total judgment to $334 million.

Tyson stands to collect up to 25% of the award.

Amerigroup was represented by Daniel J. Riley of Baker Botts and Daniel J. Voelker of Freeborn & Peters. Neither attorney responded to requests for comment. NLJ