

THE NATIONAL LAW JOURNAL

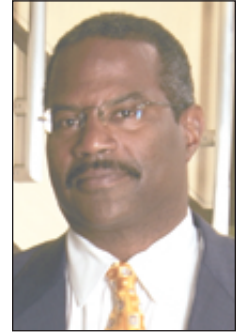
© ALM PROPERTIES INC.

WWW.NLJ.COM

MONDAY, JUNE 21, 2004

WINNING

SUCCESSFUL TRIAL STRATEGIES FROM 10 OF THE NATION'S TOP LITIGATORS



Edward F. Fernandes

Four represented defendants, six represented plaintiffs. One lawyer dusted off a 1916 statute that had never been used before. Another won a billion-dollar verdict in a fen-phen case. A third defended IBM against former employees' claims that they'd been poisoned by workplace chemicals.

What the lawyers have in common, in addition to at least one big trial win within the past 18 months, is a track record of success over many years.

Two quick caveats: We do not suggest that these are the 10 best litigators, only the 10 we chose after a necessarily subjective process. And some of the verdicts they won have been—or may yet be—modified by judges or appeals courts.

Keeping it simple

Despite the diversity of cases, the lawyers' strategies also had a good deal in common. They told simple stories, paid attention to the way they were perceived and treated jurors with respect.

On the way to winning a \$416.9 million verdict for Exxon Mobil from a state-owned Saudi Arabian company, Jim Quinn kept it short. He called 10 witnesses, but none testified for longer than an hour.

Defense lawyer Edward F. Fernandes said he learned the importance of simplifying a complex case early in his career from plaintiffs' lawyers who peppered him with sound bites. A key to his success, said Fernandes, who defended Bank of America against a Mexican pharmaceutical company that claimed the bank misappropriated \$24 million, was learning to bite back.

He also looks for opportunities to show jurors he's a regular guy. If an electrical cord is unplugged, he doesn't hesitate to crawl on the floor and plug it in. "Then the

jury thinks, 'He's not a suit like the rest of these lawyers,' " he said.

Bill Price also pays attention to such details. Normally a defense lawyer, Price switched for the first time to represent plaintiffs who did work for Bertelsmann A.G., the German media giant, in a joint venture that created AOL Europe.

He, too, wants to avoid the perception that he's "a suit like the rest of these lawyers"—only he means that literally, Price said. He studiously avoids stylish clothing, preferring the look of a family's trusted accountant.

Paul Yetter said his entire legal team was on display—and not just in court. Yetter represented a Nevada mining company that won a \$137 million verdict from a consulting company it claimed fed it bad information. He and his colleagues moved into Tonopah, Nev., population 1,500, for the duration of the trial.

"I made certain we behaved as good guests," he said. "How the community sees your team is how they see your client."

The word is 'authenticity'

The most important way to be real with the jury, several of the winning lawyers said, is to be honest. Especially if your case has problems.

William G. Schopf represented a manufacturer of newspaper printing presses that won a \$32 million verdict against a Japanese company that "dumped" its competing product in the U.S. market at artificially low prices.

Though it didn't come up in this case, Schopf described others in which clients made mistakes. One of his core strategies, he said, is admitting wrongdoing. Fortunately, he added, his adversaries had even more to explain. And weren't as effective doing it.

Robert C. Weber, who defended IBM against its former employees, seconded this

approach. "I think it comes down to the word 'authenticity,'" he said, adding that it's important to speak honestly about weaknesses in cases.

Several lawyers spoke of respecting jurors, and giving them what they need.

"People say to keep it simple," said Martin R. Lueck, who represented the plaintiff in the Web-browser case, "but you have to give the jury enough detail and evidence, even if it's highly technical...to understand why you are right."

It also helps, said John M. O'Quinn, who won the big fen-phen case, if you speak their language.

"Most lawyers would say, 'I want to talk to you about punitive damages,'" he said. "Right then they are starting to lose the jury...I say, 'I want to talk to you about punishment.' That's a word people can understand."

Dick DeGuerin, defense lawyer in the Robert Durst murder trial, used a consultant to help pick jurors "smart enough to intellectualize the case," he said. Durst testified that he and a friend struggled for a gun and it accidentally discharged. He acknowledged that he panicked and dismembered the body before dumping it. The case hinged on the jury's willingness to ignore everything but the moments before the shooting, said DeGuerin.

Daniel J. Callahan took respect for a jury to a whole new level. His client manufactured blood analyzers used to diagnose illnesses, and it claimed it was defrauded by a firm that supplied its circuit boards. The jury returned a verdict of \$934 million. After it was over, he invited jurors to a party at his home. And sent limousines to pick them up.

"Oh my God," some of his friends said. "You did that?"

"Yeah," he told them. "It's legal."

—DAVID HECHLER

EDWARD F. FERNANDES

A complex litigation expert likes it simple

By Emily Heller

SPECIAL TO THE NATIONAL LAW JOURNAL

ATTORNEY: Edward F. Fernandes

FIRM: Akin Gump Strauss Hauer & Feld, Austin, Texas, office.

CASE: Nitla S.A. de C.V. v. NationsBank of Texas/Bank of America, No. 96-44152, Harris Co., Texas, Dist. Ct.

DEFENSE ATTORNEY Edward F. Fernandes is a maven of complex business litigation, but simplicity is his hallmark.

Where did he learn that? From, among others, successful plaintiffs' lawyers who, early in his career, ate his lunch.

"I'd see the plaintiffs' lawyer just beating us to death by keeping it simple and having a nice little populist theme," said Fernandes, Austin practice manager for the litigation group at Akin Gump Strauss Hauer & Feld. "We were always the fancy schools, the intellects and just couldn't break it down to a jury."

Having learned those lessons well, Fernandes gave the plaintiffs' bar a serious dose of its own medicine last year.

In 2003, during his first year with Akin Gump, Fernandes had a hat trick:

■ Brought in just before trial, Fernandes won a 12-0 defense verdict in February representing Citicorp in a California state court against allegations of breach of agreement over a Spanish television station

deal. The plaintiff had alleged \$300 million in damages. *Azteca America Stations Group LLC v. Citicorp Venture Capital Ltd.*, No. BC-247113 (Los Angeles Co., Calif., Super. Ct.).

■ Also just before trial, Fernandes was brought into an antitrust case involving the retail sale of tortillas. Representing defendant Gruma Corp., against which 17 plaintiffs alleged \$84 million in damages, Fernandes won a directed defense verdict in November after a four-week trial in Houston federal court. *El Aguila Food Products v. Gruma Corp.*, No. H03-0427 (S.D. Texas).

■ In a case Fernandes brought with him—he has handled it from its start in 1996 as lead defense counsel—Fernandes represented Bank of America against fraud and other claims by Nitla S.A., a Mexican pharmaceutical company. Nitla alleged that the bank misappropriated \$24 million of its funds on deposit and sought more than \$400 million in damages. The jury found that the bank was not liable. *Nitla S.A. de C.V. v. NationsBank of Texas/Bank of America*, No. 96-44152 (Harris Co., Texas, Dist. Ct.).

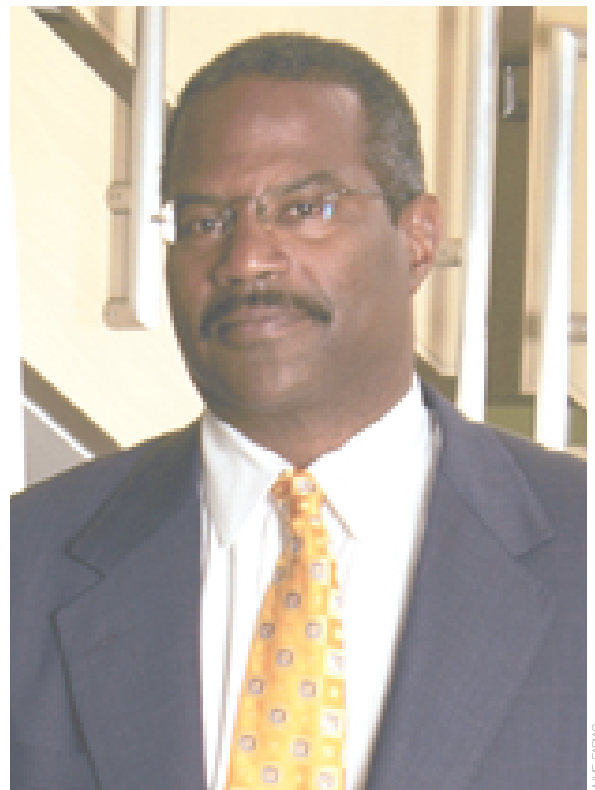
Sound bites strategy

The successful outcomes in *Bank of America* and other cases stem primarily from giving the jury easily grasped concepts, Fernandes says.

"I always use simple language. To me, plaintiffs' lawyers do a wonderful job of basically using sound bites. It takes the other side 20 minutes to respond," he said. "Plaintiffs' lawyers, it drives them crazy when someone on the defense side can actually throw some sound bites back."

In the *Bank of America* case, the defense kept the jury focused on its argument that the bank was not liable because a third party involved in the transaction had violated the law. Using simple charts, the defense described the transaction as merely one in a series of family loans.

"It's advocacy when you use sound bites



EDWARD F. FERNANDES: "I've spent the last 18 years practicing law just going from my gut. And basically doing things unorthodox from time to time."

JULIE PARRAS

and it takes the other side 15 minutes to explain,” he said. “The jury sometimes falls asleep in those 15 minutes.”

But a robot using Fernandes’ words might not be so winning. Fernandes’ easygoing style scores big points with jurors because he looks for ways to relate naturally to them.

“I try to do little things in every case to try to connect and look normal,” he said.

For example, during trial he doesn’t hesitate to crawl around on the floor to plug an electrical cord back in. “Then the jury thinks, ‘He’s not a suit like the rest of these lawyers,’” Fernandes said.

He’s also not afraid to poke fun at himself. For example, in the *Bank of America* case, Fernandes was reading from a document displayed on a screen, but wasn’t “terribly articulate that day so I kind of messed up the sentence.” He said to the jury, “You all read better than me so you know what it says.” He said the jurors laughed.

“I believe at the end of a long trial, the jurors—if everything is even—go with who they like,” he said.

He also is open about his unusual heritage and plays it to his advantage. His family came from Cape Verde off the coast of Africa and settled in cranberry-farm country in Massachusetts. He and his seven siblings grew up working in the cranberry bogs.

In closing arguments in a case in Brownsville, Texas, with mostly Mexican-Americans on the jury, he said, “I can tell there is a question you want answered....You are trying to figure out where am I from and where did I get a last name like Fernandes.” The jury started

laughing. “Now you’ve got them open and you just feed them what you need to feed them to get to where you need to be.”

Teaching a trial advocacy course at the University of Houston Law Center, he urged his students: “Do not try a case based on what you learned from law school and college,” he said. Rather, think back to the skills you learned at home—what it takes to convince people you are right, he said. “You didn’t use these big words. You didn’t talk on and on for 20 minutes.”

The key to winning credibility with a jury is to do what you promise, Fernandes said.

Trial lawyers talk about respecting jurors’ time, “but nobody does it,” he said. “Jurors have said over and over again that they don’t like it when lawyers are repetitive.”

No defense presentation

In *Bank of America*, Fernandes had told the jury he would not waste their time. Indeed, he rested the defense after the plaintiff’s case. He said it was the first time in his 21-year practice he did not put on a case. “I’ll never forget when I ran the decision by the client,” he said. “It looked like she saw a ghost. ‘We’re going to do what?’”

Fernandes said the plaintiff had called two defense witnesses and its expert. “My gut is that this jury gets it. They are tired of it,” he said.

Plus, during cross-examination, Fernandes had used a magnet board

with photographs and bullet points highlighting key testimony backing the defense arguments.

TRIAL TIPS

■ **Look for natural ways to connect with the jury.**

■ **Develop populist themes that appeal to the jury.**

■ **Respect jurors’ time. Don’t be repetitive.**

“The reason why I did it in this case is because they all had [similar-sounding] surnames,” to avoid confusion, he said. The magnet board helped the jury recall who said what, he said.

Fernandes said the plaintiff’s attorney called the defense “arrogant” for not putting on a case.

Apparently the jury did not agree.

“It didn’t feel risky,” he said. “It would have been more risky for me to put on a case given where I thought we were with that jury.”

When he first began to practice, Fernandes tried to be like everyone else. “And then I spent the last 18 years practicing law just going with my gut. And basically doing things unorthodox from time to time.”

Conventional, Fernandes is not, even when developing themes of a case.

“When I was in Houston, I used to go to this little redneck bar, where nobody looked like me, and buy everybody a couple of drinks and start talking about a fact situation,” he recalls.

He wouldn’t disclose that he’s a lawyer. “Hell no. Go in there with jeans and look like everybody else—to the extent I could—to basically to get people’s perceptions.” **NLD**

This article is reprinted with permission from the June 21, 2004 edition of THE NATIONAL LAW JOURNAL. © 2004 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #005-06-04-0023

Akin Gump Strauss Hauer & Feld LLP

Recognized for its sophisticated clients and capabilities and its outstanding team of professionals, Akin Gump Strauss Hauer & Feld LLP is a leading international law firm dedicated to providing innovative legal services to individuals and institutions. Founded in 1945, the firm has grown to be one of the largest in the United States, with more than 900 lawyers in 13 offices — as well as an affiliate in the Middle East — representing regional, national and international clients in more than 50 practice areas, including antitrust; banking and financial; capital markets; communications; corporate and securities; employee benefits; energy, land use and environment; entertainment; estate planning, wealth transfer and probate; financial restructuring; government contracts; health; insurance; intellectual property; international investment management; labor and employment; litigation; mergers and acquisitions; privatization; project development and finance; public law and policy; real estate and finance; taxation; and technology.



1.866.AKIN LAW akingump.com