

Trial Aces: Akin Gump's Steven Zager

By Jeff Sistrunk

Law360, Los Angeles (July 27, 2015, 10:28 PM ET) --

Steven Zager knows through decades of experience that it can be difficult to keep a jury engaged during a complicated trial. But when the Akin Gump Strauss Hauer & Feld LLP intellectual property partner instructed his client to perform a mock surgery in the courtroom, jurors were on the edge of their seats and ultimately returned a verdict in the physician's favor.

The verdict for Akin Gump client Dr. Sabatino Bianco in a trade secrets suit against Globus Medical Inc. marked another victory in Zager's more than 30-year career, during which he has tried more than 50 cases and won nearly 90 percent of them. Colleagues attributed the Law360 Trial Ace's success to his magnetic presence in court.

"My single biggest takeaway from trying [the Bianco] case with Steve is that he is entertaining in the courtroom to the point of being captivating," Akin Gump partner and former Texas federal magistrate judge Chad Everingham said.

"Steve's approach is figuring out how to best explain complex issues to juries and judges. He is extremely smart and has tried so many cases that he has an uncanny ability to predict how jurors are going to react."

Zager drew on the advice of a slew of lawyers in the Texas bar when he began to hone his craft after graduating from Vanderbilt Law School in 1983. He landed at the Houston office of Fulbright & Jaworski LLP, which he said "had a huge stable of terrific trial lawyers."

The late Blake Tartt, Zager's mentor at Fulbright, "took great pains" to teach him how to command a courtroom, Zager said.

"He had me close my eyes and walk forwards and backwards, until I could do it effortlessly without bumping into anything," he said. "Blake's point was that you should look like you belong there — if you do, that's half the battle."

Zager also drew inspiration from an unlikely source — his many years tending bar to pay his way through his undergraduate program and law school.



Steve Zager

"It's like voir diring a juror — you want your customer to tip you, and you have to know how to engage that person, to try to get them to do what you want them to do," Zager said.

That well-developed understanding of how people think has influenced Zager's trial strategy over the past three decades. He made stops at Weil Gotschal & Manges LLP and now-defunct Brobeck Phleger & Harrison LLP before landing at Akin Gump in 2003.

"Most jurors first make up their minds with their heart, then use their head to find reasons to justify what they're feeling," Zager said.

Winning jurors' hearts was the core of the approach taken by Zager's team in the Bianco case. Bianco, a neurosurgeon, sued Globus in Texas federal court for trade secret misappropriation and other causes of action, alleging that three of the company's top-selling expandable spinal fusion devices were based on his inventions.

Zager and his colleagues knew it would be a challenge to explain the nuances of the case to a jury, so they decided to have Bianco perform a mock spinal fusion procedure to get across how the design and function of Globus' devices was similar to that of Bianco's.

"Lawyers started using demonstratives about 20 years ago," Zager said. "We took that one step further and said we wanted this jury to connect with Dr. Bianco and have them sympathize with him. That way, visual and kinesthetic learners would embrace that and view Dr. Bianco as an able teacher. Most people like a friendly teacher."

In his closing argument, Zager drew parallels between Bianco and German inventor Heinrich Gobel, who developed an electric lightbulb 25 years before Thomas Edison, but whose legacy has been largely lost to history.

"I told them, 'Don't you think Dr. Bianco deserves a different fate?'" Zager said. "I wanted to shock them with something that was familiar to them and make them think, 'How would I feel if someone took something of value from me, and was unwilling to acknowledge that I was the person who invented it?'"

Everingham called Zager's closing a "compelling argument" that "really resonated with the jury in view of the fact that our client's claim was that he had invented a device for which others were taking credit."

The game plan paid off, as the jury rendered a verdict in Bianco's favor in January 2014, determining that Globus had misappropriated the neurosurgeon's trade secrets for the design of adjustable intervertebral spacers used in spinal fusion. The jury awarded Bianco more than \$4 million in past damages, and the court later awarded him ongoing royalties of 5 percent of Globus' net sales for 15 years.

In another high-profile IP case, Zager recently served as lead counsel for online social gaming company Zynga Inc. in a patent infringement suit brought by Personalized Media Communications LLC. PMC claimed that some of Zynga's social networking games, including wildly popular titles such as "Words with Friends," "CityVille," "FarmVille" and "Zynga Poker," infringed four of its patents relating to "personalized communications" technology.

Zynga brought Akin Gump onboard less than two months before trial, but with Zager's guidance, the

team wasted no time in sharpening a strategy.

"Because we took over the case seven or eight weeks before trial, preparing for trial in this case was like drinking from a fire hydrant, and we couldn't have done it without Steve," said Akin Gump partner Fred Williams, who worked with Zager on the Zynga matter. "As usual, he was the rudder and the captain of the ship. Following his leadership, we divided and conquered the fire hydrant and got up to speed on the facts and the patents."

By the time the trial began in November 2013, Zager and the team had succeeded in getting two of the four asserted patents dropped from the case. The team decided to forego arguing a complex position that the patents were invalid and instead put forth a noninfringement defense, focusing on the technical function of Zynga's games when they are played on stationary and mobile devices.

"I thought the decision that Steve made in the Zynga case to focus solely on noninfringement was remarkable because of the short time frame we had to get up to speed," Williams said. "It was a bold decision not to try a complex invalidity defense, but our case on noninfringement was very strong. It was the right decision, but it took the right first-chair lawyer to make it."

Zager credited Zynga's in-house counsel, Rennee Lawson and Rob McHenry, with embracing the noninfringement defense while jettisoning the invalidity arguments.

"You've got to have some courage to say you're not going to try part of your case," Zager said.

Zager put a senior Zynga executive on the stand to describe the process of how the company builds its games from concept to finished product. The Akin Gump team then presented two engineers who "walked farther into the technology, explaining how the games work, in the context of what the patents claimed," Williams explained.

"Steve's approach to trial presentation is refreshingly low-tech," he said. "In Zynga, we used flip charts with the claim language, putting checks or x's where limitations were missing. That was a strong visual created in front of the jury with a red magic marker to help them grasp the differences between the patents and how the games actually work."

Following a weeklong trial, the jury deliberated for two days before issuing a complete defense verdict, finding that Zynga didn't commit direct, contributory or induced infringement of PMC's asserted patents and awarding no damages to the plaintiff.

Regardless of the matter at hand, Zager emphasized that developing and implementing a trial plan is a "team sport."

"I certainly don't have the monopoly on wisdom," he said. "We like to have the type of atmosphere that encourages everyone to participate, and discourage partners from doing anything to chill that."

Typically, Zager's colleagues on a trial team marshal the evidence, assemble ideas for themes and walk through the details of the evidence that they think supports their plan with Zager, according to Williams.

"We present to him what our ideas are and then have a collaborative discussion as to why theory or theme 'X' is a good or bad idea," Williams said. "Steve invites us to challenge his initial reactions on our proposals, but his initial reactions are usually spot-on. And as those issues are settled, we layer them

into trial themes, and then assign them to witnesses and the examining lawyer."

Zager leads the process, "but he gives his team remarkable opportunities to develop and present the trial plan, which is a great learning opportunity for everyone in the room," Williams said.

While there are a lot of factors that can't be controlled at trial, there is one constant, Zager said.

"I always say to my team: We can't control whether we win or lose; we can prepare and hope for the best," Zager said. "One thing we can control is having fun out there. If so, everything falls into place."

--Editing by John Quinn and Chris Yates.

All Content © 2003-2015, Portfolio Media, Inc.