

>>WINNING<<

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

>>STEVEN M. ZAGER<<

A trial's morality play

A simple message connects with jurors, producing a \$152.7M verdict.



TIM JOHNSON

ON THE JURY: *Voir dire* is "the only time in a trial where jurors get to talk with me—except for the verdict," said Steven M. Zager.

By Emily Heller

SPECIAL TO THE NATIONAL LAW JOURNAL

GIVING A JURY the factual basis for deciding a case your way is not the first step a lawyer should take, said Steven M. Zager, partner in the Houston office of Akin Gump Strauss Hauer & Feld.

First, "make the jury want to decide the case for you," he said. "Engage the jurors emotionally before you engage them cognitively." Zager learned that principle tending bar for 10 years in college and law school. "You learn people make decisions with their heart, and then seek ways to reinforce it with their head," he said.

As a business litigator, that's especially important because the issues are often complex and the facts convoluted. "I think where a lot of fine lawyers go wrong is they forget all about step one. They are so anxious to talk to them about the reasons and the evidence, that they never enable the jurors to want to find for them."

In June 2006, Zager enabled a Texas jury to award his client \$152.7 million in damages against its rival for trade secrets misappropriation. The case was then settled for a confidential amount.

His client, Hexion Specialty Chemicals Inc., and its competitor, Formosa Plastics Corp. of Taiwan, manufacture chemicals used in the manufacture of epoxy resins. *Hexion Specialty Chemicals Inc. v. Formosa Plastics Corp.* (Harris Co., Texas, Dist. Ct.).

A morality play

At issue was a formula developed by Hexion for optimizing the manufacturing process. Hexion accused Formosa of paying a Hexion employee \$40,000 for the formula.

Zager wouldn't have won by skipping the scientific processes that were the subject of the trial, but he made those complexities secondary. He made the case about a morality play with a simple message: "It's wrong to take something that belongs to someone else."

He introduced the theme in jury selection. "You've got to be willing to toss out concepts and then stand back and hear what members of the jury pool have to say about those concepts without trying to dominate the conversation," he said. *Voir dire* is "the only time in a trial where jurors get to talk to me—except for the verdict. And you don't want to wait for the verdict to have that conversation."

The trial had several golden moments. Some defense witnesses were from Taiwan and testified in Chinese, though they spoke perfect English, Zager said. In depositions, all said they spoke, read and wrote in English, and Zager introduced their English-speaking abilities as part of his case in chief.

When the defense called them, defender Rusty Hardin used an interpreter to translate his questions into Chinese, then to translate the testimony into English for the jury. When one of the witnesses mistakenly answered a question in English, the defense lawyer admonished the witness to wait for the translation from the interpreter and to give his answer in Chinese, Zager said.

"It would be absolutely impossible for you to testify at a trial like this in English, wouldn't it?" Hardin asked the witness, Zager recalled. "In perfect English, the witness goes: 'Yes, that would be impossible.' That was one of those moments you can't purchase."

Taking gambles

Zager said he took some gambles in litigating the case that he had never taken before and probably wouldn't take again, though they

paid off. He called all his experts first when he ordinarily would call "the face" of a company first to personalize your client, he said. But he decided that the biggest asset of the defense was defender Hardin, a high profile trial lawyer. In battle, you neutralize the opponent's best asset, he said. He correctly predicted that Hardin would not be cross-examining the plaintiff's expert witnesses.

"That would keep Rusty in his chair for the entire first week of the trial and not give him a chance to make a connection with the jury," Zager said. "It's like pitching around somebody in baseball. We pitched around Rusty. That I think was the key to the case."

By the time Hardin was participating, "most jurors had already made up their minds about who was good and who was not," said Zager, who spoke to members of the jury after the trial.

Hardin, of Rusty Hardin & Associates in Houston, laughed when told of Zager's strategy. "I think he's being too kind." What "made the difference" in the trial outcome was credibility of defense witnesses, he said. Several Chinese defense witnesses didn't understand the role of depositions and had conflicts between their depositions and trial testimony, he said. From the jury's standpoint, it looked like they were lying, Hardin said. "It was a good reminder to me of the difficulties of cross-cultural witnesses."

Zager took a similar big risk in another trial successfully defending Bank of America against a \$400 million claim over international monetary transactions. Zager said he convinced the bank not to put on a defense. "I said, 'This jury is tired. They have heard everything they need to hear. We've won the case on cross,'" he said.

The jury rendered a defense verdict. *S.A. de C.V. v. Nationsbank of Texas/Bank of America*, No. 96-441152 (5th Jud. Dist., Harris Co., Texas). **NLJ**

Each year *The National Law Journal* profiles 10 top litigators.

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.

Reprinted with permission from the June 18, 2007 edition of THE NATIONAL LAW JOURNAL. © 2007 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6226 or visit www.almreprints.com. #005-06-07-0024