

## How Great Lawyers Win Bad Cases

By **Vidya Kauri**

*Law360, New York (December 22, 2015, 6:58 PM ET)* -- Lawyers who can take seemingly impossible cases and turn them around for high-profile wins may be the envy of those who shy away from such cases, but they say their skills are not necessarily innate character traits and can be learned.

Law360 spoke with some of the toughest litigators in both civil and criminal areas and at the trial and appellate levels who won notoriously bad cases that looked like a lost cause to their colleagues. Their wins surged through the legal community and they enjoy a reputation as hardy negotiators who don't cave in to unreasonable demands from opposing counsel.

Here, Law360 shares the secrets that helped them emerge victorious in arduous and highly problematic cases.

### **They Master Storytelling**

Most lawyers will agree that what sways a judge or jury is how you present your facts and meld them with your understanding of the law. But there is a real art that requires more than a knowledge of relevant statutes when it comes to convincing decision-makers that you are right, according to tax attorney Duane Webber of Baker & McKenzie LLP.

"Lawyers who have the ability to think imaginatively about how the facts might be presented and how the story might be told are more likely to be able to influence how the decision-maker hears or reads and, therefore, perceives the objective facts which then helps in arriving at the oftentimes more subjective factual conclusions that are necessary in order for a party to prevail," Webber said.

Webber, who was part of a team that successfully waded into uncharted territory in July by challenging the widely accepted notion that the U.S. Department of the Treasury is not bound by the same legal standards as other federal agencies in promulgating new regulations, said that even in cases that are fully stipulated, a lawyer can still lose if the objective facts in a story do not line up with what the law is.

Akerman LLP's partner and appellate attorney Katherine Giddings said it is a common mistake for lawyers to include unnecessary and extraneous information in their briefs and pointed out several ways for a lawyer to strengthen the story presented to judges and juries.

"You have to be able to write succinctly, clearly and with brevity," Giddings said. "It is much, much harder to write a short brief than a long one, but shorter briefs are going to get read, they're going to be more

persuasive and you've got to be able to grab the court's attention."

Judges could be looking at upwards of 200 pages of documents for each oral argument scheduled in a day, so it is unrealistic to think that every one of them will have the time to digest every single line in a brief, Giddings said.

In addition to being concise, Giddings said it helps to draft a brief, walk away from it and then return to create another draft because "you are always going to be able to improve it after you've digested it and let it sit awhile."

Briefs can also be strengthened by eliciting feedback from colleagues before they are filed, Giddings said.

### **They Question Their Own Beliefs**

Webber cited a case from the mid-1990s when he was part of a team that defied predictions from the tax bar that his client Bausch & Lomb could not defer tax on income from the sale of sunglasses earned by foreign controlled corporations.

Bausch & Lomb's affiliates in Hong Kong and Ireland assembled all the different parts of a pair of sunglasses into the final product, and the company had to prove that the parts it bought were different in essence from the final products — the sunglasses — that were being sold to qualify for the tax treatment it sought, according to Webber.

Part of the reason Webber's team was able to convince the judge that putting together all the parts of a pair of sunglasses constituted a manufacturing operation rather than minor assembly is because the team questioned the existence of a widely accepted exception to the tax laws known as the manufacturing exception. Yet, there is no such exception in the statutes, Webber said, explaining that the term may have been invented decades earlier by people trying to understand the statute, after which it stuck around as common knowledge.

"Don't assume the law actually says what others have told you what it says or even what you have read in books that it says, but go back and read the provision and actually understand it and deconstruct it," Webber said. "If you get back to the same place you've always been told or that you read about in the books, you're still better off because you'll understand it better than just reading the superficial conclusion that tells you what it means."

One way for lawyers to test their knowledge is by asking themselves if they can prove what they believe is true, Webber said.

"If you don't know how to prove it, then automatically, by definition, you don't really know if it's true. You think it's true because you've been told that," he said.

### **They Make Their Clients Look Good**

Bill Geraghty, a managing partner at Shook Hardy & Bacon LLP, is regarded as a heavyweight within the tobacco industry for having helped cigarette companies escape extremely damaging allegations such as manipulating nicotine levels to make cigarettes more addictive and targeting teenagers in marketing. When plaintiffs tried to use the companies' own internal documents against them, Geraghty convinced

jurors on multiple occasions that his clients cannot be held liable for the personal health choices of their customers.

Geraghty said he knows that he becomes the face of his client companies from the day the jury gets picked to the last day of trial, and a compelling way to put the best face on the companies is by presenting himself as a credible attorney who is respectful and sensitive to the opposing counsel and their clients who have suffered serious medical ailments, but also proves during the course of the trial that the evidence shows what he promised during opening remarks.

“You have to treat the opposing lawyers and plaintiffs and the court with tremendous respect in order to have a jury maybe see through all of the things that we think might obscure the jury from understanding what we think are the real issues that should ultimately drive their decision-making,” Geraghty said.

### **They Know Their Cases Inside and Out**

Knowing the record, including relevant laws and case history, backwards and forwards is critical for being able to answer unexpected questions during oral arguments and knowing how to recognize the key issues that will persuade judges and juries to rule a particular way.

Giddings said that by the time a trial winds its way into the appellate courts, it is possible for the lower courts to have made about 20 or 30 minor mistakes, but most judges want briefs to be restricted to no more than three issues, if possible.

“One of the biggest attributes of a great appellate lawyer is being able to spot key issues and know the issues that are going to get a reversal for you,” Giddings said.

Perkins Coie LLP partner Shannon Bloodworth, who won two big pharmaceutical patent victories this year, said that the most successful attorneys are those who understand both the strengths and weaknesses of their cases.

“The lawyer who is as comfortable handling the imperfections in their case as readily as they handle the stronger aspects of their case is the one that is going to succeed,” Bloodworth said in an email. “The most successful lawyers are able to use the strength of a case as a shield to protect its weaker points.”

--Editing by John Quinn and Kelly Duncan.

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