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Q&A With Crowell & Moring's Cliff Zatz

Law360, New York (February 15, 2013, 5:09 PM ET) -- Cliff Zatz is a partner in Crowell & Moring LLP's Washington, D.C., office. A senior trial lawyer, Zatz has defended personal injury and property damage cases involving consumer, occupational and environmental exposure to chemicals and other products. He has represented clients in individual, class action and community-wide exposure cases. He has tried cases arising out of environmental exposure to trichloroethylene, vinyl chloride, polychlorinated biphenyls, and dioxins; formaldehyde in home insulation; and occupational exposure to benzene and isocyanates.

Q: What is the most challenging case you have worked on and what made it challenging?

A: It was a month-long toxic tort trial in federal district court in Kentucky. The facts were unusual: The plaintiffs, three coal mining companies, alleged that they couldn't profitably mine their most lucrative coal seam because of its proximity to our client's Superfund site. They had three different theories: opening the mine would divert the groundwater contamination plume into the coal seam; exposure to the chlorinated solvents in the groundwater would pose an unreasonable health risk to the miners; and the coal would be stigmatized in the marketplace, reducing its value as compared to coal mined elsewhere. They claimed $140 million in lost profits, plus punitive damages.

It wasn't my longest trial. Nor was it even the most complex — although Louisville co-counsel and I had to teach the jury toxicology, hydrology, environmental remediation technology and coal mining economics. What made it especially challenging was that our defense never seemed to gain traction.

In a settlement conference during one recess, the judge insisted that we would never persuade the jury as we were trying to do, that the plaintiffs weren't capable of mining the coal and, indeed, had never really intended to do so. Every night, our jury consultant reported that our shadow jury didn't understand and wasn't buying our defense.

So we walked into court each day fearing that we were losing and that the verdict might approach nine figures. Standing up to give closing argument on a tight time limit, I felt like the quarterback who, with the clock running out, knows that he has to throw a "Hail Mary" pass into the end zone to win the game. And I knew that our shadow jury had already deliberated to a $45 million verdict for the plaintiffs.

All's well that ends well, though. We won and were recognized in a list of the year's top 15 defense verdicts in the country.

Q: What aspects of your practice area are in need of reform and why?

A: We need to limit the proliferation of "no injury" lawsuits, especially the class actions. So many tort cases today are based on harm that hasn't yet occurred — fear, increased risk, emotional distress, the need for medical monitoring and so on.

The traditional product liability case is being replaced by lawsuits alleging false advertising, consumer fraud and mislabeling. As I write this, for example, several class actions have recently been filed alleging that a national sandwich chain's "foot-long" sandwich actually measures only eleven inches. These may be legitimate causes of action, but too often, it's only the lawyers, not the plaintiffs themselves, who benefit from the outcome. And, more importantly, plaintiffs with serious injuries must compete with these cases for the courthouse door.

Q: What is an important issue or case relevant to your practice area and why?

A: Endocrine disruption: The notion that very low levels of some chemicals in consumer products, pharmaceuticals and in the environment, can mimic or otherwise alter the activity of hormones in the body. Some scientists now contend that endocrine-disrupting chemicals are causing diabetes, thyroid disease, endometriosis and early onset puberty, among other medical problems.

They suggest that in utero and perinatal, exposure to some chemicals increases the risk of obesity later in life and even in later generations. These chemicals are in the regulatory spotlight right now. The universe of potential tort plaintiffs is enormous, and the focus on prenatal and childhood exposures will likely make for sympathetic jurors. It remains to be seen how these theories will stand up to Daubert scrutiny.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Mark Fitzsimmons at Steptoe & Johnson. We tried a case together for more than 10 weeks. He's well prepared, full of creative ideas and skilled at making expert testimony understandable to judges and juries. He endears himself to jurors with his regular-guy demeanor and his self-deprecating humor; just when things start getting too serious, he'll "accidentally" knock over an easel. And speaking of easels, with today's courtroom graphics and PowerPoints, he can now hide his tragic flaw: his indecipherable handwriting.

Q: What is a mistake you made early in your career and what did you learn from it?

A: In my first cross-examination of an expert witness in a jury trial, I not only broke all of Irving Younger's "Ten Commandments of Cross-Examination" but also invented a couple of new ones. I needed the expert to admit only one thing, and I fought with him and badgered him until, in exasperation, he halfway conceded the point.

I followed up by announcing to the jury — I'm not sure my next "question" even had a question mark at the end — what a dramatic admission I thought I'd just elicited. When I returned to the counsel table, feeling triumphant, the lead trial counsel leaned over and whispered to me, "the jury hates your guts now."

I learned that jurors' natural sympathy is with the witness, not with the cross-examiner. I learned that cross-examination is about preparation and control, not about beating up the witness. And I learned to save the punch line for closing argument.

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