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ALM



HENRY 'HANK'
ASBILL



EUGENE F.
ASSAF



JERE L.
BEASLEY



JAMES P.
BENNETT



LORI G.
COHEN



JAMES J.
CULLETON

> WINNING <

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



CHRISTOPHER
M. CURRAN



J. MARK
GIDLEY



ERIC R.
HAVIAN



RONALD J.
SCHUTZ



MICHAEL G.
YODER

Editor's note

The lawyers featured in *The National Law Journal's* 2008 Winning special report share a knack for artfully swaying judges and juries and taking risks when they see the opportunity to seize an advantage in the courtroom. We chose the victors of 10 cases from scores of nominations offered from firms of all sizes from just about every state in the union. The basic criteria required that nominees have at least one significant win within the past 18 months, and a history of noteworthy wins during the past several years.

Litigators with a habit of winning have this thing about golden rules: They've developed their own set, which they use to artfully sway judges and juries, or they'll break the established rules if they think it will give them a better shot at coming out on top.

Case in point: Henry "Hank" Asbill, who represented an AOL LLC executive accused of deceiving investors.

Asbill's biggest strength is in direct and cross-examination—and in taking the somewhat unusual approach of, in many instances, putting his client on the stand. He did so in the AOL case, for more than 40 hours, against the advice of co-defendants' counsel.

"In white-collar cases it's exceptionally important to get across to the jury the clients' character," Asbill explained.

Eugene F. Assaf employs a strategy of giving witnesses greater rein to speak, and extends it to the unorthodox practice of occasionally lobbing an open-ended question at a witness.

"If you're asking the jurors to figure out a person and whether they are truth-tellers, then every once in a while you have to ask an open-ended question and let them show themselves to the jury," Assaf said. "It's a sort of calculated risk."

James J. Culleton—who represented one of the New York City police officers charged in the Sean Bell shooting case—took a different tack. He went against one of his own golden rules: Try the case before a jury.

"We didn't think that in New York City, based on the publicity, that we could get a fair trial because of the sympathy factor. It would just overwhelm jurors."

He went with a bench trial, with good results for his client.

The ability to determine when to follow golden rules, and when to break them, is one good reason why these

litigators, and eight more, are featured in *The National Law Journal's* 2008 Winning section.

The 10 cases featured here were chosen from scores of nominations offered from firms of all sizes from just about every state in the union. The basic criteria required that nominees have at least one significant win within the past 18 months, and a history of noteworthy wins during the past several years.

For the purposes of this section, "significant wins" includes large monetary awards or, from the defense side, winning a decision in which there is the risk of substantial damages. Just as importantly, unique courtroom strategies and actions that scored with judges and juries also swayed our decisions.

Jere L. Beasley did plenty of swaying of his own, winning a multimillion-dollar verdict against AstraZeneca Pharmaceuticals L.P. in a Medicaid drug case.

His secret?

"I learned that lawyers better be straight with that jury. Don't mislead 'em, don't con 'em. Don't be too slick. Don't be slick at all."

James P. Bennett successfully defended JDS Uniphase Corp. in the largest securities class action to go before a jury. He used a blowup of the complex 17-page jury form that he filled out for the jury in his closing arguments.

"It was a little presumptuous, but it was a good idea," he said.

Defense counsel Lori G. Cohen had to work hard at convincing the jury that

her client, pacemaker manufacturer Medtronic Inc., was not the "bad guy" in a case involving a young woman in a vegetative state for the past nine years.

"You have to have genuine empathy in the plaintiff's plight," she noted.

Litigators Christopher M. Curran and J. Mark Gidley's client, Stolt-Nielsen S.A., faced a possible \$250 million criminal fine for price-fixing.

The government revoked an amnesty agreement, leaving Curran and Gidley with the overwhelming task of taking on the federal government. They took the offensive, suing the government to obtain an injunction against prosecution.

Eric R. Havian had to overcome his own skepticism about a whistleblower's claim that the Los Angeles Department of Water and Power had overcharged customers millions of dollars. He neutralized that skepticism with two years of intense discovery, which included painstaking reviews of dozens of boxes of memos and correspondence from the department's warehouse.

Sometimes, you've just got to go with mom.

That's what Ronald J. Schutz did when he capped his closing argument and cinched a \$66 million verdict in a patent infringement trial by telling the jury of his mother's advice to compare words with actions.

The veteran litigator also used his deep knowledge of juries. "If you don't step back and put yourself in the jury's position, you end up drinking your own bathwater," he said.

Michael G. Yoder, in two bet-the-company infringement cases, maintained a delicate balancing act of not asking for too much.

"[W]e needed to keep the jury on our side and not lose them by being overly aggressive, yet we knew the judge would decide exactly what relief would be issued." **NLJ**

—STEVE FROMM

>>WINNING<<

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

>>EUGENE F. ASSAF<<

Drama via video clips

Using 'video flashes' to show witness contradictions scores with jurors.



JAY MALLIN

EUGENE F. ASSAF: *"The jury wants to trust you as the lawyer and see you're giving people a fair shake on the stand," he said.*

By Lynne Marek
STAFF REPORTER

KIRKLAND & ELLIS attorney Eugene F. Assaf isn't one of those hard-edged litigators who cuts off witnesses in mid-sentence to end rambling explanations. When a witness says, "Let me explain," Assaf says, "Please do."

"The jury wants to trust you as the lawyer and see that you're giving people a fair shake on the stand," Assaf said. "My experience is that the person often will say something in their explanation that is demonstratively false or ridiculous."

Assaf's gentler approach is about psychologically winning over the jury by be-

ing fair and polite throughout a trial's proceedings, but it's also about taking a "calculated risk" that additional information will play to his advantage, he said. He thanks all juries for respecting their oaths and tells them that the U.S. justice system depends on them expecting the same of witnesses.

"The oath matters and credibility

counts," Assaf said he tells jurors at the start, middle and end of the trial.

Assaf, 46, led a team of lawyers from Chicago-based Kirkland to two seven-week trial victories in as many years, winning one in New Jersey state court last year and another in Florida state court the previous year. In the New Jersey case, his client, BASF Corp., won \$170 million in compensatory damages, which was the eighth-largest jury verdict last year, according to VerdictSearch, an affiliate of *The National Law Journal*. *BASF v. Lyondell*, No. MRS-L-001069-05 (Morris Co., N.J., Super. Ct.).

Contractual dispute

Assaf's team represented BASF, the U.S. arm of a German chemical producer, in a lawsuit it brought against Lyondell Chemical Co. over a 1998 sales contract for propylene oxide, a chemical that BASF bought from Lyondell and uses in many of its products. BASF argued that Lyondell had overcharged for the chemical by as much as \$287 million and later tried to cover up contract violations.

During the trial in Morristown, N.J., Assaf showed that every single Lyondell witness, except one, in courtroom testimony contradicted earlier statements made during depositions, chalking up 34 instances of impeachment from the stand, Assaf said. During his cross-examination, he flashed video clips of witnesses' earlier statements from depositions up on a large screen in the courtroom every time a witness on the stand contradicted a previous statement.

"That becomes a very dramatic moment in the trial," Assaf said.

In one instance, a Lyondell witness answered "yes" when he was asked whether he understood the phrase, "the duty of fair-dealing," although he had answered "no" in his deposition. When Assaf asked if he could explain the discrepancy, the witness said it was because of certain preceding questions during the deposition about how to treat customers. But then Assaf showed that there had been no such prior questions.

H. Lee Godfrey, name partner at



TRIAL TIPS

- >> **Treat witnesses fairly, and let them have their say.**
- >> **Be willing to allow witnesses to provide additional information.**
- >> **Always remind jurors that witnesses must respect their oaths.**

Houston's Susman Godfrey and leader of the defense team for Lyondell, did not return calls seeking comment.

In addition to the jury finding that BASF was owed the \$170 million in compensatory damages, the court added \$36.5 million for prejudgment interest.

A juror's letter

Assaf learned the power of treating witnesses well when he co-led a Kirkland team in defending client Honeywell International Inc. against a civil fraud complaint brought by Breed Technolo-

gies Inc. The lawsuit alleged that Breed's purchase of an airbag and seat belt business from a Honeywell predecessor, AlliedSignal Inc., had caused it financial troubles that eventually led to bankruptcy. *Breed Technologies Inc. v. AlliedSignal, Inc.*, No. 99-2478 (Polk Co., Fla. Circuit Ct., Tenth Circuit).

After Breed lost the 2006 trial in Polk County, Fla., the jury foreperson sent an e-mail to the company's attorneys at Jones Day saying that they didn't like how that legal team had cut off witnesses' testimony, Assaf said. The e-mail became public later when it was attached to a request for a new trial.

Jones Day attorney Gregory Shumaker declined to comment.

"It was really a life lesson in seeing how jurors think and the importance, in front of a juror, of being fair to the witness," Assaf said.

A 'calculated risk'

Assaf's principle of giving witnesses greater rein to speak even extends to the unorthodox practice of occasionally lobbing an open-ended question at a witness.

"If you're asking the jurors to figure out a person and whether they are truth-tellers, then every once in a while you have to ask an open-ended question and let them show themselves to the jury," Assaf said. "It's a sort of calculated risk."

Assaf said he tells his own witnesses to be themselves on the stand and provide additional information that the jury may need. When he called an economic damages expert in the BASF case, the expert was pleased to take time during breaks and overnight to come up with additional information requested by opposing counsel.

"Your expert has to be well-prepared and seem to have done everything they can do to help the jury," Assaf said. **NLJ**

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