Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trial Pros: Robins Kaplan's Roman Silberfeld

Law360, New York (March 14, 2016, 10:18 AM ET) --

Roman Silberfeld

Roman M. Silberfeld, national trial chairman at Robins Kaplan LLP, has trial and appellate experience in business and high technology matters, product liability, professional negligence and mass tort litigation, with particular emphasis on multi-state, multiparty and class action litigation.

Silberfeld was lead trial counsel in litigation brought on behalf of client Celador International, creator of the "Who Wants to be a Millionaire?" game show. The case's $269.4 million jury verdict — plus $50 million in prejudgment interest — is the largest verdict ever obtained in a "Hollywood accounting" lawsuit.

A member of Robins Kaplan's Executive Board, Silberfeld serves as the firm's national trial chairman. In this role, he marshals the firm's proven and effective trial strategies, tactics and techniques to benefit the firm's clients across the country. He also sits on the board of directors of the International Academy of Trial Lawyers.

Silberfeld has used his versatile talents for both plaintiffs and defendants in a variety of litigation in recent years. Among other matters, he has served as plaintiff's counsel in the TFT-LCD (Flat Panel) Antitrust Litigation and the CRT Antitrust Litigation, and has successfully defended Best Buy in multiple purported national class actions.

Q: What's the most interesting trial you've worked on and why?

A: Celador v. The Walt Disney Co. and Buena Vista Television. The case presented a number of daunting challenges and rich opportunities. It was an epic David v. Goliath battle between an individual and a major studio. In all, the case lasted nine years.

The facts were compelling on our side, the contract that formed the relationship of the parties was ambiguous and the "Hollywood custom and practice/way of always doing things" was against us. The contract interpretation issues, having to do with the rights to share in the profits of a fabulously successful television show, were so ambiguous and fact/credibility intensive, that the trial judge, correctly, left the interpretation and meaning of the contract to the jury. As a result, the five-week trial was largely consumed with the meaning of arcane, complex and industry-specific contract terms in a dense entertainment industry contract — and all of this was put before a 10-person lay jury who, if a verdict was to be reached, had to unanimously agree on an 18-question verdict form.

Once the contractual liability determinations were put into evidence, the key damage dispute was whether, as a matter of Hollywood accounting as opposed to normal accounting, the television show "Who Wants to be a Millionaire?" had ever actually made a profit which should then have been shared with our client. Here again, the evidence was dense and numbers-based with multiple spreadsheets and competing economic and accounting explanations provided to the jury. If more complexity was needed, there were even competing experts on Daubert issues with respect to economic modeling.

Finally, key emails, which established that the show was in fact wildly profitably even though the studio accounting appeared to show otherwise, were in jeopardy of not being received in evidence because the author of those emails suddenly failed to appear at trial: the former CEO of The Walt Disney Co. Fortunately, an adequate record of efforts to secure the appearance of that witness had been made and the court, over the strenuous objection of Disney, admitted the emails through another witness — the current CEO of the company who was ordered to appear as a sanction for the shenanigans associated with the nonappearance of the emails' author.

The verdict, $269 million plus an additional $50 million in pre-judgment interest, stands today as the largest verdict in entertainment history. The case also represents an important win for profit participants in general. The verdict was affirmed on appeal and was paid in full in 2013.

Q: What's the most unexpected or amusing thing you've experienced while working on a trial?

A: Two incidents come to mind. The first was actually quite funny and the second pivotal.

I was in trial in a small rural community in south central Oregon. I was there as lead trial counsel in a large and important case with statewide significance. I was accompanied by local counsel who, unlike me, knew everyone involved in the case — the opposing counsel, all the witnesses and the judge. A witness couldn't recall a key fact that was needed to establish an important liability point for the other side. Although opposing counsel made repeated efforts to get the answer, the witness stubbornly wouldn't/couldn't remember the key fact. Suddenly, in an effort to "help out," my local counsel, over my right shoulder, stood up and answered the question for the witness! The judge was not amused, although the lawyers and the jury were all laughing. The judge was forced to instruct my local counsel as follows: "Now, counsel, the way we do things around here is that the lawyers ask questions and, generally speaking, the witnesses answer them!" I've kept a copy of that page of the trial transcript.

In a property damage product defect case, the central issue was the product number of the welding product used to construct a steel frame building decades earlier. All the key records — invoices, architectural plans and specifications — were gone. The only record of the welding product was the handwritten notes of the welding supervisor on the project. Unfortunately, until we were in the middle of trial, we couldn't find any notation in his job journal of which welding product number was involved. Then, suddenly, with the witness on the stand, I removed an ACCO clip from the corner of the original job notes and, to my surprise, there it was — the key product number notation that had been hidden by the fastening clip. We won that case on the strength of that single scribbled corner entry.

Q: What does your trial prep routine consist of?

A: I go about trial preparation in two distinct ways, depending on whether I've been involved in the case from the beginning or whether I'm brought in late as trial counsel.

In the setting where I've lived the case, I go back to my first notes about what the case is about and I

assess my first impressions about our trial story in light of all that I've learned in the intervening years of discovery and witness preparation. If the first impression of our story still fits the broad swath of the evidence, I will generally try the case around it.

In the setting where I'm brought in near the time of trial, I gather together all of the key lawyers who, unlike me, have actually lived with the case. I talk to them intensively and usually do this in a group setting so that I can get a clear sense of the group dynamics and judge not just the opinions of the team, but also the underpinnings of those opinions. Then, I read all the documents myself and see what trial theme and story emerges from that process. Finally, I meet with the key witnesses, whether or not I will actually present their testimony at the time of trial.

Q: If you could give just one piece of advice to a lawyer on the eve of their first trial, what would it be?

A: As important as it is to have a point of view, an approach, and a trial theme, it is just as important to LISTEN to what is going on in the courtroom. Listen to the court, listen to the jurors, listen to the words used by opposing counsel in framing questions, and, perhaps most importantly, listen to the witnesses. By listening, you will find the places where you can make your key points effectively.

Q: Name a trial attorney, outside your own firm, who has impressed you and tell us why.

A: My professional life has been made all the richer and more satisfying through my relationships and, often, friendships with so many great trial lawyers. If I had to choose one person who has it all — command of the facts and law, persuasive power, presence in the courtroom, keen practical sense, credibility across many different types of cases and substantive matters, and, finally, the ability to engender fear and respect in the other side and their counsel — that person would be Brad Brian of Munger Tolles & Olson. I have handled matters where Brad and I have been on the same side and I have opposed him several times as well. He simply never changes — he is always prepared, is full of great ideas and impressive strategies, and is a force to be reckoned with. It's no wonder that judges and juries believe Brad when he speaks and it's no surprise that so many clients flock to him for their most important matters.