

Q&A With Robins Kaplan's Bernice Conn

Law360, New York (August 8, 2011) -- Bernice Conn is a partner in the Los Angeles office of Robins Kaplan Miller & Ciresi LLP. Her trial and appellate practice involves complex commercial contractual disputes, business torts and intellectual property issues, including misappropriation of trade secrets, copyright, trademark, unfair competition and antitrust on behalf of both plaintiffs and defendants. Conn has represented both domestic and foreign corporations in a broad spectrum of disputes.

Q: What is the most challenging lawsuit you have worked on and why?

A: I defended a British protection and indemnity club (basically an insurance company in the shipping industry) and Japanese ship owners/charterers in suits filed by both the state of Oregon and the federal government for damages resulting from the beaching of a large commercial freighter off the Oregon coast.

The accident was caused by an incorrect nautical map on which a safe anchor symbol appeared, but it only appeared on the version of the map issued to our ship captain and no one in the federal government could explain how or why that symbol had been inserted into that version of the map. The captain anchored the huge ship overnight, believing it was safe to do so, not knowing that he had anchored in the path of rough weather troughs. Bad weather hit in the morning and in an hour the ship was beached.

The state law aspects of the case overlapped federal environmental and maritime law. The federal case was stayed while we tried the state case, so we had to balance a lot of competing considerations in developing our trial strategy. We ended up having to try the state case in a local courthouse in a small town near where the accident had occurred. The only motel was in a neighboring town, which is where we set up our trial team. We had to fly in witnesses and experts from all over the world to testify, sometimes by helicopter.

The technical aspects of the case — the evolution of nautical maps, the combined dynamics of weather, wind and water, the failed salvage efforts — were very complex. Also, Oregon state law doesn't allow a lot of pretrial discovery or any pretrial expert discovery, so we had to continually adapt our examinations to unexpected evidence and damage claims.

And, since the U.S. Attorney handling the federal case was sitting in the courtroom monitoring the state trial, we were pretty much giving him a dry run of the federal trial, which was both good and bad.

We had to cross-examine local pilots and Coast Guard personnel, which was hard because it was such a small town. The Oregon attorney general's office co-tried the case for the state, and the governor actually came and testified at trial.

Very unfortunately, over the course of the trial, an undercurrent of xenophobia developed which was very difficult to combat head on. Still, we were able to deliver a very satisfying result for our clients in the state trial and that result mandated a quick and also satisfying resolution of the federal case.

Q: Describe your trial preparation routine.

A: I don't actually have a "routine." From day one, we handle each case as if it will be tried, so our team develops and refines the case theme over the course of the litigation. In the months before trial, we transform that theme into a story that we can tell to the jury in a relatively simple, clear and persuasive way.

We identify the key evidence and witnesses we are going to present on each claim, identify and develop strategies to handle problematic evidence and adverse witnesses, and focus on a small number of documents that we consider to be the key documents in the case. We also start formulating our trial graphics and models as early as possible.

We work with our clients and witnesses so that they understand the overall story we intend to tell and their role in the story. Early on, we sequence and re-sequence our witness appearances until we are satisfied that the story will be told in the most persuasive manner.

We decide which attorney will present what aspects of the case, allowing the trial attorneys to concentrate on developing their examinations of the relevant witnesses. Sometimes we use focus groups to help refine our trial presentations and strategy. The last thing we do is develop our opening statement and outline what we think will be our closing arguments.

Q: Name a judge who keeps you on your toes and explain how.

A: Federal District Judge Virginia Phillips [of the Central District of California] is one of the most impressive judges I've ever appeared before. Despite an intimidating caseload, she is able to learn, understand and evaluate the legal and factual complexities of each case she handles and to retain and recall that information month after month. You have to be extremely well prepared every time you appear before her since she becomes almost as familiar with your case and arguments as you are.

I've rarely been before a judge who works as hard as she does. And, she maintains her judicial demeanor and is unfailingly courteous no matter how heated the proceedings sometimes become. She sets schedules and deadlines and absolutely holds you to them. Appearing before her requires the best you've got.

Q: Name a litigator you fear going up against in court and explain why.

A: I don't think I've ever really "feared" an opponent. I don't think you can allow yourself to get into that mindset because it puts you at a terrible disadvantage. And, generally speaking, if your opponent is really being difficult or bordering on being dishonest or unethical, it becomes very apparent to the judge pretty early on.

But there are certainly lawyers who are so good that you know that you're going to be in for a really difficult time of it. A lawyer that I very much like, admire and worry about going up against in court is Nick DeWitt. Nick was a partner at Paul Hastings Janofsky & Walker when I worked with him.

Nick is smart, articulate, easygoing, funny and completely at home in a courtroom. Also, whenever he begins to see that things aren't going his way, he has a knack for persuading the judge to delay making a decision by suggesting that either more briefing or more discovery is necessary before the judge can fairly decide whatever the issue is.

More often than not, when we walked out of the courtroom, all we had was another hearing date. It's very challenging to go up against a lawyer like Nick because he is so effective and because he's just a really nice guy. I wouldn't say I "feared" him, but I sure did worry a lot.

Q: Tell us about a mistake you made early in your career and what you learned from it.

A: I think my biggest mistake as a new lawyer was not having enough confidence in myself. When you start practicing, almost everyone you're dealing with has more experience than you do and some of your opponents will try to intimidate you or psych you out because of that. It took me a while, but I learned that just because my opponent was older or more experienced didn't mean that he or she could always out-think me, out-argue me or best me in the courtroom.

You need to develop your own style and to believe that you are as good as, or better than, any other lawyer you are up against. And always fight as hard as you can for your clients. Nothing is more persuasive to a judge or jury than a passionate lawyer.