

Trial Pros: Greenberg Glusker's Fred Fenster

Law360, New York (June 9, 2016, 2:53 PM ET) -- Fred A. Fenster at Greenberg Glusker Fields Claman & Machtinger LLP resolves complex business disputes for a diverse cross-section of clients, ranging from multinational corporations to private individuals and such sports luminaries as Pete Rose, Pete Sampras and Lynn Swann. Although litigation has been the cornerstone of Fenster's practice, he also represents clients in arbitration, mediation and other alternative dispute resolution proceedings.



Fred A. Fenster

Fenster has successfully tried over 100 cases involving business contracts, unfair competition, trade disparagement, misappropriation of trade secrets and interference with advantageous business relationships. He also has significant expertise in business torts, fraud, partnership and corporate dissolutions, defamation, injunctive relief and various employment matters such as wrongful termination and noncompetition covenants.

Fenster is an adjunct professor of law at the University of Southern California and a member of the board of editors of California Pretrial Practice and Forms.

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

A: During the summer of 1969, the city of Los Angeles was terrorized by the seemingly random murders of nine people at four different locations during a time span of five weeks. Unbeknownst to the public, the Manson Family, consisting of Charles Manson and his band of followers, embarked on a killing spree to precipitate a race war in which he would be embraced as society's savior. Due to the prominence of the victims, including actress Sharon Tate, hairdresser Jay Sebring, Abigail Folger, the heir to the Folger Coffee fortune and the local reputation of grocery store owners Leno and Rosemary LaBianca, the public's attention was riveted on the trial, the background of the Manson Family, the gruesome details of the crimes and a desire for retribution. Even President Richard Nixon became embroiled in the trial when Charles Manson jumped on top of the defense table and angrily displayed a headline from the LA Times stating "Nixon Says Manson Guilty."

As an associate who was working with Paul Fitzgerald to represent defendant Patricia Krenwinkel, I was in court during the entirety of the trial and became intimately involved with all aspects of the case, including the preparation of defense witnesses, analysis of legal theories, development of cross-examination, public relations and most importantly, trial strategy. The case also established important legal precedents, including the Court of Appeal's decision overturning the trial judge's ruling that Charles Manson's attorney was incompetent and the California Supreme Court's temporary elimination of the state's death penalty which automatically reduced Charles Manson's death sentence to life imprisonment.

Due to the notoriety of the case and the public's insatiable desire to find out "what really happened," I was constantly being asked to speak about the trial, how Charles Manson created the Manson Family and why his followers embraced him as if he were the Second Coming of Jesus Christ. In short, Charles Manson chose society's rejects, persuaded the women that he would give them the love and comfort they craved, induced the men to become family members by promising them unlimited sex and used drugs to help control everyone's behavior. To become initiated into the Manson Family, each convert approached a giant bonfire, threw all of their earthly belongings into the raging flames and Charlie gave them a new name, a new identity and a reason to exist.

From my perspective, this case represented a lifetime experience that covered societal issues, interpersonal relations, brainwashing, hero worship, mental illness and how the legal system worked. In the end, I was persuaded not to become a criminal defense lawyer. After all, my wife would not enjoy socializing with alleged criminals. More importantly, however, is the fact that prosecutors prevail more than 95 percent of the time which helps explain why depression and substance abuse is the bane of criminal defense lawyers.

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

A: Details matter. In one of my trials, a pivotal witness was testifying as to what took place during a breakfast meeting with two other participants. During the direct examination, the judge interrupted and asked the witness what each person had ordered to eat. Later in the trial, an independent witness, who was one of the attendees at the breakfast meeting, took the stand and the judge asked him the same question. When the witness admitted that he could not recall, the judge refreshed his recollection by repeating what my witness had reported. When the person on the stand agreed with my witness' memory, the judge later stated that that testimony clearly established my witness' credibility and ruled in our favor for all the relief that was being sought.

Q: What does your trial prep routine consist of?

A: To be an effective trial lawyer, an attorney must be able to answer yes to each of the following questions: Do I know the strengths and weaknesses of my case; do I know what evidence must be introduced to prevail on each cause of action and/or defense; do I know which witnesses will present the evidence; am I legally certain that the evidence to be submitted is admissible; is there a legal basis to exclude negative evidence; are my witnesses prepared for direct examination as well as cross-examination; have I prepared the cross-examination of the opposing witnesses so that it will yield the desired admissions; have the exhibits been properly allocated for each witness; have I prepared the opening and closing statements; does my trial brief clearly summarize the facts and applicable law; have I written briefs for the court to consider on controversial issues that have not yet been decided; have the appropriate special jury instructions been prepared; have my questions to the jury during voir dire been outlined; have only the most necessary motions in limine been submitted to the court; have verdict forms been prepared; and have I prepared a winning story that will persuade the trier-of-fact to rule in my client's favor. Unless the answer to each of these queries is an unqualified yes, you are not ready for 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: Trials are akin to story telling. Your theory of the case must be interesting, understandable and compelling so that the trier-of-fact will be persuaded to decide in your client's favor. That is why opening statements are so critical: 80 percent of jurors make up their mind after hearing the attorneys' introductory remarks and tend to evaluate the

evidence in a manner consistent with the desired result. To generate interest in the story, the attorney should not memorize a speech or use notes, but instead, should talk to the trier-of-fact in a conversational tone in order to connect with the judge or jury. To test your preparation, tell a friend what the case is about and see what reaction you receive. If you raise more questions than you answer, leave out important information or do not convince the person to whom you are talking that the only just outcome is the one you are advocating, then the likelihood of winning is substantially diminished.

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

A: Thomas Girardi, Girardi Keese, wins big cases in the press and in the courtroom. He has the ability to humanize any witness, he is well prepared, objective and always maintains control. While we have not crossed paths in the courtroom, his reputation is certainly impressive.

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