

THE NATIONAL LAW JOURNAL

MONDAY, NOVEMBER 23, 1998

W I N N I N G
THOMAS V. GIRARDI

He Believes a Case Is Won on the Cross

ATTORNEY: Thomas V. Girardi, 59

FIRM: *Los Angeles' Girardi and Keese*

CASE: *Lockheed Litigation Cases, Judicial Council Coordination Proceeding, 2967 (Super. Ct., Los Angeles)*

IN ANY civil action, plaintiffs win on cross-examination, says Thomas V. Girardi. "The opening statement and the closing, anyone can do," he says. "Cross-examination is the money pitch."

Nearly all cases that go to trial, he says, "are close, or they wouldn't be going to trial at all." If there's no liability, a matter doesn't go to trial, he says, and if the liability is overwhelming, the defense will settle.

This leaves most big cases as 50-50 propositions, he believes. "But the plaintiff has the burden of proof," he says, "so unless you can destroy the other side by cross-examination, you will lose."

Mr. Girardi's ability as a cross-examiner has helped him create a superior record in winning plaintiffs' cases. He has won more than 30 verdicts of \$1 million or more and has handled more than 100 settlements of \$1 million or more. He has tried more than 100 jury cases, winning the first California medical malpractice verdict of \$1 million or more, back in the 1970's.

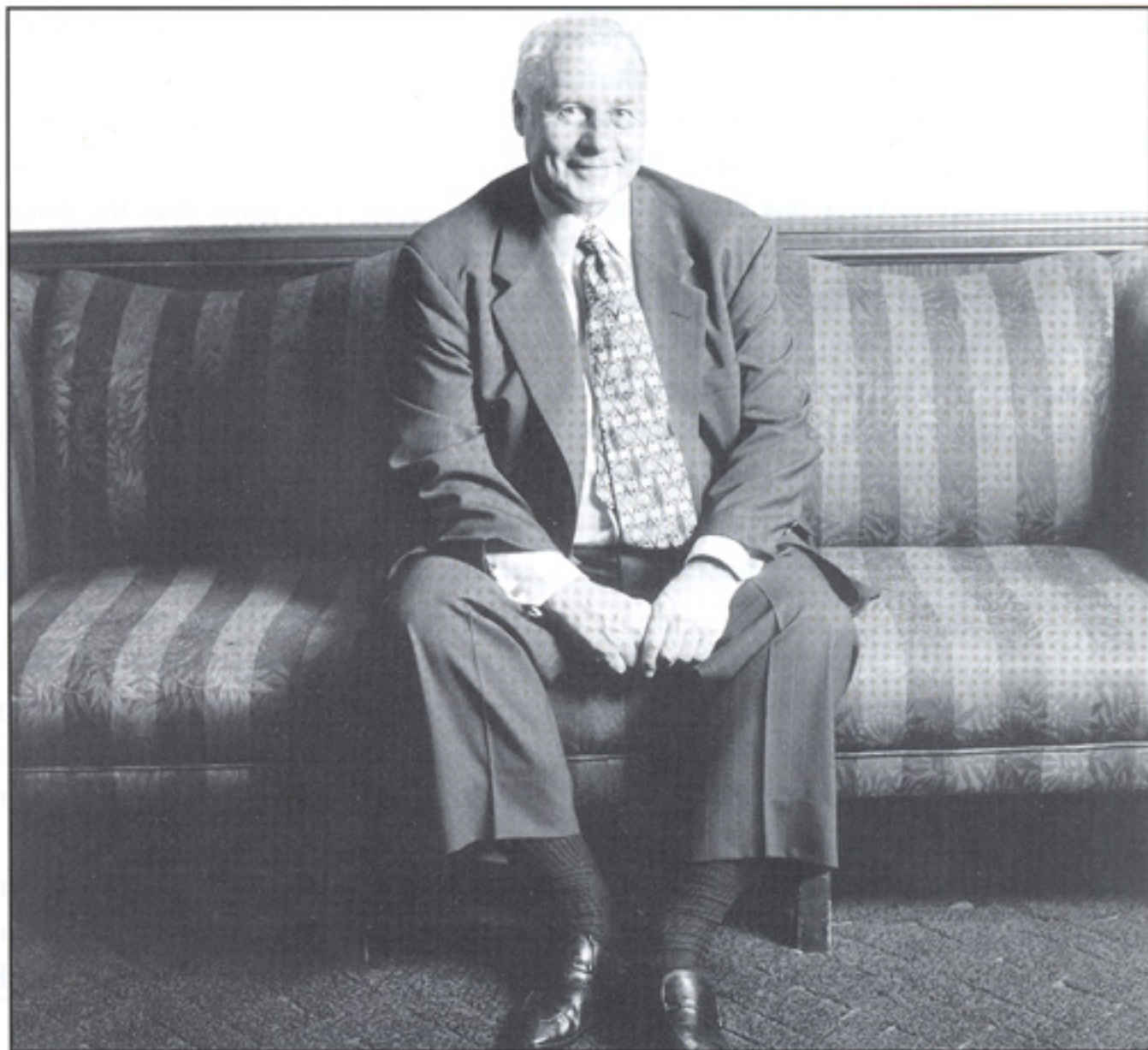
This summer he won a \$785 million ver-

dict against five chemical companies over worker exposure to toxic chemicals while building stealth airplanes. He has won several other trials arising out of the construction of stealth and other aircraft, and a \$131 million arbitration award in 1996 against Pacific Gas & Electric Co. over toxic contamination; this judgment led to a \$333 million settlement.

The stealth cases began as a lawsuit filed against Lockheed Corp. in 1986. Workers

who built the top-secret military aircraft at the Lockheed plant in Burbank, Calif., claimed that they had been exposed to a variety of toxic chemicals, such as toluene and xylene, used in cleaning solvents in the manufacturing process. The Lockheed workers began complaining of a series of illnesses, says Mr. Girardi, "ranging from cancer and brain damaged to relatively minor symptoms, such as irritability or nasal congestion. About one-third were severely harmed or killed. The effects of the chemicals grew with two factors, the type of occupation and the number of years exposed."

About 700 workers filed a toxic torts action against Lockheed. The plaintiffs also had claims against about two dozen makers of the solvents, charging that the companies had provided inadequate warnings



of the dangers of the chemicals. Lockheed settled in 1992 for \$33 million, and a series of trials and settlements have knocked out all but five of the solvent-maker defendants. The trials so far include plaintiffs' verdicts of \$1.6 million in 1993, \$10.6 million in 1995, \$4.5 million in 1996 and \$20 million in 1997.

In the 1998 trial, 42 plaintiffs were seeking damages from five defendants: Exxon Corp., Shell Oil Co., Ashland Chemical Co., E.I. Du Pont de Nemours & Co. and Unocal Corp.

The earlier trials helped to determine much of the strategy in this case, Mr. Girardi says. In the opening statement, for instance, "I didn't lay out my case, but played defense. I made sure the jury was aware there would be bad evidence against Lockheed."

A primary contention of the defense was that Lockheed was responsible for the workers' exposure to these chemicals. Going into the trial, "I knew there was going to be a lot of evidence against Lockheed," says Mr. Girardi. "We saw how they had exploited this in the past trials in their opening statements. But I wanted the jury to know that this was not the whole story.

"The Lockheed carelessness was a major factor," he says, but, during the opening and later on, he stressed the plaintiffs' contention that these defendants "knew the side effects and did nothing to warn the workers." By playing defense, his purpose was to blunt the impact of defense evidence against Lockheed.

When the trial is destined to be long, Mr. Girardi does not believe in laying out the whole case at the opening. In this case there were 42 plaintiffs, so "in effect, you're doing 42 trials," he says. "In a long trial, the challenge is to keep the case interesting throughout.... By the end of trial, no one would remember the opening."

He put on all of the plaintiffs, but he spaced them around his expert witnesses: "I like to start out with someone good and end with someone good and sandwich the bad witnesses in between." Not all the plaintiffs, he says, "gave a good impression. You can't have 42 people without wishing a couple weren't there." But others, he says, told stories of lives that have been devastated by their exposure to toxic chemicals, leaving a strong cumulative impact on the jury.

"When I was younger," he says, "I worried about liability. Now that I'm older I realize that if you give me a

good person, there's a good chance I'll win. You can have the best liability, and if your client is a jerk, you're not going to win. Justice is not blind."

His pretrial preparation of the plaintiffs was limited. They were provided a mock-up of the plant and other information to refresh memories, "but we don't go over and over what they're going to say. I want to make sure it's spontaneous." How the plaintiffs testify, he says, "is fairly irrelevant, unless they start getting impeached." Overall, he says, "I felt the plaintiffs acquitted themselves better than the defendants experts. The defendants looked less candid, ill-prepared."

When his witness does badly or a witness for the other side does well, Mr. Girardi believes in acknowledging it. He says to the jury, straight out, "I thought this witness hurt us"; then he tries to put a better spin on the testimony. "Pretending the elephant isn't in the living room is archaic. Lawyers can't get away with that," he says. "Jurors are as smart as you are. Some may not be as sophisticated, but four or five of them are, and lawyers who talk down to jurors lose cases."

During the plaintiffs' case, he called some midlevel employees of the defendant companies, "primarily to show how much

of the chemicals were at Lockheed." But he did not call any executives. "I have a theory about high-level people," he says. "They're likely to acquit themselves well on the stand, or they wouldn't be high-level.

Instead, he saved his best ammunition for his cross-examination of the defense witnesses. "I react the way they react," he says. "If the witness is soft-spoken and candid, I'm very soft-spoken. If the witness is a lying, cheating scoundrel, I become very aggressive.

"A lawyer can be abrupt with a witness," he says, "as long as it's a limited part of your repertoire. A raving lunatic doesn't save many souls.

"[Y]ou have to choose your spots. Some lawyers are aggressive when they ask witnesses their names," he says. This dilutes any of the effect of being forceful, he believes.

A cross-examination, he says, "has to be very short, very focused. If I have three or four points to make with a defense witness, I make those points and go home."

While the witness is testifying, he says, "I don't take notes. I want to listen and see the effect the witness has on the jurors."

As he listens to the defendants' expert witnesses, he assesses their weak spots. "Some experts," he says, "say anything for money." These are fairly easy to break down, he believes. "They stretch themselves too far, so you attack them in areas outside of their expertise."

The more honest the experts, the less vulnerable they are, but there are ways to lessen their impact. "These are the experts who'll admit there is a little weakness in their theories," says Mr. Girardi.

In this trial, these attacks proved very effective; on July 30, a Los Angeles jury awarded 29 of the plaintiffs a total of \$25.4 million in compensatory damages, while returning defense verdicts on the other 13. A week later the jury ordered the defendants to pay the plaintiffs \$760 million in punitives. Post-trial motions are pending.

TRIAL TIPS

- Destroy the defense on cross-examination.
- Play defense in the opening.
- Acknowledge when a witness hurts you.
- Don't talk down to the jury.