

**SUCCESSFUL STRATEGIES
FROM TEN OF AMERICA'S
TOP LITIGATORS**

David Boies

Karen Gievers

Judson Graves

Thomas Kline

Richard Mithoff

Donald Ré

William Slusser

Dennis Sweet

Robert Weber

Kathleen Zellner



Following his nose: Richard Mithoff tunneled for leads to prove his suspicions about the defendant doctor, who had maimed before.

RICHARD WARREN MITHOFF

Attorney who turned sleuth

ATTORNEY: Richard Warren Mithoff, 54
FIRM: Houston's Mithoff & Jacks L.L.P.
CASE: Romero v. Columbia/HCA
Healthcare Corp., No. 98-48856 (Dist.
Ct., Harris Co., Texas)

THE TIMING OF witnesses in a trial can be crucial, says plaintiffs' attorney Richard Warren Mithoff. In any trial, for instance, "I almost always try to call my client last," he says. "I want the case proved by the time the plaintiff is on." The plaintiff then humanizes the case and establishes the loss, he says. This placement at the end also lends drama to the presentation, he believes.

In the medical malpractice trial profiled here, Dolores Romero, the wife of a man who sustained severe brain damage during routine back surgery, was in the courtroom the entire time. But Mr. Mithoff waited before calling her to the stand. All through the trial, he says, "the jury was anticipating, waiting to hear from her, ready to hear from her."

This ability to create dramatic moments has served Mr. Mithoff well in a career representing plaintiffs in personal injury, products liability, medical malpractice and other such litigation. He has won more than 30 verdicts and more than 50 settlements of \$1 million or more. He has won more than 90% of the cases that have gone to jury.

Botched routine operation

Mr. Mithoff was called in to handle the Romero case shortly after the surgical injury occurred. Mr. Romero, a 40-year-old dockworker, had gone to Columbia Kingwood Medical Center, north of Houston, for a routine repair of a herniated disk. During the operation, says Mr. Mithoff, "Mr. Romero began losing a profound amount of blood." The high range of nor-

mal for blood loss would be 1,000 to 1,500 cubic centimeters of blood, the attorney notes. "He lost 6,800 ccs."

Despite the bleeding, he adds, the surgeon "didn't stop the surgery or communicate with the anesthesia team to replenish the blood." Mr. Romero went into cardiac arrest and sustained severe, permanent brain damage.

Ms. Romero, on her own, her husband's and their children's behalf, sued the surgeon, Dr. Merrimon Baker, as well as the anesthesiologist, Dr. William Huie, the nurse anesthetist, Linda Fincher, and the hospital, charging negligence. The charge against the anesthesia team was that it, too, had failed to respond properly to Mr. Romero's bleeding.

Mr. Mithoff began preparing the case by investigating Dr. Baker. "I want to find out everything I can about people involved. I wanted to know what problems he had before this, what other doctors would say about him....We did a computer search of prior lawsuits, filings, pleadings, depositions." He also checked whether Dr. Baker had licenses in other states and any prior adjudications.

Checked past

What he learned, he says, was that Dr. Baker had been placed on staff by Kingwood in 1996 even though he had been sued for malpractice 11 times before, Mr. Mithoff says. The suits included one over an incident in which he removed and replaced the wrong hip. In another suit, filed in 1998, he was accused of operating on the wrong leg, says Mr. Mithoff.

In investigating further, Mr. Mithoff says, "I found that his license had been denied in one state for forging an application." The investigators also discovered that the doctor had been fired from a practice "for patient safety problems."

Early on in this research, Mr. Mithoff took Dr. Baker's deposition. At this time, Mr. Mithoff knew about the other litigation, but he was looking to use Dr. Baker to provide additional leads. "I suspected drug usage," he says, "but Dr. Baker looked me right in the eye and denied drug involvement."

Tracking drug use information is difficult, he says. "You have to talk to ex-wives and ex-girlfriends. He had plenty of both....[W]e sent out investigators to track these women down." People started calling him with tips. One of these calls "led me to the chief of staff at Kingwood, Dr. Ron Kerr. He had tried to keep Baker off the staff," Mr. Mithoff says.

This investigation altered the case considerably. The plaintiffs added another charge against the hospital. The first charge was simple negligence. The new charge was less common. The plaintiffs charged the hospital with malice in allowing Dr. Baker to operate in the first place.

The hospital should have known about the previous malpractice lawsuits and about the reasons he had been denied a license elsewhere, the attorney says. The hospital should also have been aware, he says, that two months before the Romero operation, "Dr. Baker had been suspended from another hospital."

Adding the charge of malice brought significant obstacles, says Mr. Mithoff. Under a previous U.S. Supreme Court decision, he says, before the jury could find a hospital responsible for improper credentialing, "we had to prove actual

awareness," he says. "We had to show what any reasonable hospital should have done and that the hospital had to be aware of the risk."

Before jury selection, Drs. Baker and Huie settled, for a total of \$2.2 million. But Dr. Baker remained the focus of the trial. Mr. Mithoff started the presentation with the video deposition of Dr. Baker.

"I never started a trial with a videotape before," says Mr. Mithoff. "But in this case, Dr. Baker was Exhibit A." The plaintiff contended that Dr. Baker was an accident waiting to happen and that the hospital should have known this. Presenting the videotape, Mr. Mithoff says, "was like marking him with a sticker and entering him in evidence."

Using the deposition was better than bringing Dr. Baker on live, he adds. "We didn't want him to have the opportunity to explain it away." In addition, in a deposition, "it's entirely my cross. The other side doesn't do a direct examination. You see no one else, just me."

He continued to establish Dr. Baker as exhibit A with Dr. Kerr. Dr. Kerr testified that he had investigated Dr. Baker in 1990 in an unrelated matter and had discovered that a South Carolina practice had fired him over patient care issues.

Mr. Mithoff then moved to questions on Dr. Kerr's ongoing opinions about Dr. Baker. He could not ask Dr. Kerr directly if he had recommended against accepting Dr. Baker at Kingwood. Because the peer review committee was privileged, he had to skip around the subject.

Under indirect questioning, Dr. Kerr admitted that, at the time of his 1990 investigation, he felt that Dr. Baker presented a risk to patient safety and that his opinion had never changed. The clear inference, Mr. Mithoff says, "was that he had recommended against him."

Mr. Mithoff then turned to the lay witnesses, including two former office managers for Dr. Baker and one of his ex-wives, to establish that Dr. Baker had a long-term problem with pain killers. One office manager testified that she had discovered sample packages in Dr. Baker's office with the drugs removed. The ex-wife testified that she had gone to drug counseling sessions with Dr. Baker before the Romero surgery.

The cross of the hospital's credentialing witness, Gary R. Binder, provided the final blow to the hospital's defense, however. Mr. Mithoff had Dr. Binder reiterate

his deposition statement that many doctors took the prescription pain medicine called Vicodin and were not necessarily impaired. "I confronted him with the *Physician's Desk Reference* and took him through the warnings for Vicodin. 'Do not operate vehicles. Do not operate heavy machinery.' I asked him, 'Are you telling the jury it's not all right to operate a vehicle but it's all right to do surgery?' He started backing off. I've never seen a witness crumble that quickly."

On April 7, a Houston jury awarded the Romeros \$40.6 million, including \$12 million in punitive damages against the hospital on the malice charge. The jury, however, found that the nurse anesthetist was not responsible for the injury. On the finding of liability at 40% for Dr. Baker, 20% for Dr. Huie and 40% for the hospital, the compensatory award against the hospital was reduced, leaving the total judgment, including prejudgment interest, at \$26 million. The hospital has paid \$4 million but is appealing. ■

TRIAL TIPS

- Create drama in the presentation.
- Do thorough research on the defendants.
- Use depositions at trial to skewer your opponents.

10 wins shaped by pretrial hard work

WATCH ANY television or movie depiction of a trial, and the tide always turns after some dramatic moment in court. An attorney tears apart an opposing witness. New evidence becomes available at the last moment. An opening or closing leaves a juror in tears. The outcome of the trial often seems more a matter of luck than of talent or technique or effort.

But in reality, luck has little to do with the results. Serendipitous events do happen, but the attorneys who win most consistently create their own opportunities and are so prepared that they can seize on the slightest miscue by the other side. As legendary Brooklyn Dodger baseball executive Branch Rickey once put it, "Luck is the residue of design."

Trials are won or lost in pretrial preparation. The battle goes not to the attorney who is most theatrical or fortunate, but to the one who has best marshalled the evidence, created a coherent theme and made an engaging, credible presentation. And the telling moments are usually crafted long before they're sprung on witnesses or jurors.

NLJ's annual selection

Every year, *The National Law Journal* selects and profiles 10 trial attorneys who for years have exhibited the ability to outprepare opponents, create those telling moments and persuade jurors to their viewpoint. The NLJ profiles concentrate on how each attorney handles a suit, from the moment he or she is hired, through discovery and each step of the trial, citing a recent win as an example.

All the litigators profiled this year have long been recognized by colleagues and clients as among the nation's best. The cases they describe include some of the biggest trials of the past 18 months.

David Boies, of Armonk, N.Y.'s Boies, Schiller & Flexner L.L.P., for example, was lead counsel for the U.S. Department of Justice in the federal antitrust action against Microsoft Corp. He won a resounding victory that could lead to a breakup of the company.

Thomas R. Kline, of Philadelphia's Kline & Specter P.C., won a \$51 million jury verdict for a boy whose foot was severed by a Philadelphia subway station escalator. The case led to the dismissals of numerous subway system executives and promises to fix all broken escalators.

Karen Gievers, of Tallahassee, Fla., won a \$4.4 million verdict against the Florida state foster care system on behalf of two girls who had been bounced around and abused in foster care for more than 13 years. The verdict may be a precursor to judgments in other states, where attorneys are increasingly filing litigation against foster care agencies.

In several cases, the losers were also among the nation's most successful trial attorneys. Judson Graves, of Atlanta's Alston & Bird L.L.P., for instance, won a medical malpractice verdict against famed plaintiffs' lawyers Don C. Keenan, of that city's Keenan Law Firm, and Jim M. Perdue Sr. and Jim M. Perdue Jr., of Houston's The Perdue Law Firm L.L.P.

William C. Slusser, of Houston's Slusser & Frost L.L.P., won a patent defense judgment against noted intellectual property specialist Harry Roper, of Chicago's Roper & Quigg.

The cases vary—from plaintiffs' wins in personal injury, medical malpractice and agency negligence to defense wins in white-collar crime, medical malpractice, products liability and patent infringement. The size of the law firms varies as well—from Ms. Gievers, who works in a one-lawyer shop, to Robert C. Weber, defense attorney for R.J. Reynolds Tobacco Co. in the tobacco litigation, who practices at the 1,300-plus-lawyer firm of Jones, Day, Reavis & Pogue.

Some of the winning attorneys are specialists. Mr. Graves, for instance, represents only defendants, primarily in medical malpractice. Mr. Kline represents only plaintiffs, and Donald M. Ré, of Los Angeles' Law Offices of Donald M. Ré P.L.C., represents only defendants, in criminal matters.

Others have tried a wide variety of cases. Dennis C. Sweet III, of Jackson, Miss.' Langston, Sweet & Freese P.A., started as a public defender in Washington, D.C., and still handles some criminal defense work, along with his thriving civil practice. Kathleen T. Zellner, of Naperville, Ill.'s Zellner & Associates, was one of the top criminal defense lawyers in Illinois before recently switching to civil litigation, representing plaintiffs.

Whatever the specialty, the type of case or the size of the law firm, however, each of the attorneys profiled this year is devoted to thorough pretrial preparation—even when called in at the last minute to try a case. Mr. Boies, for instance, read more than 3,000 documents in the days before trial—working day and night—to master the material before giving his opening statement. Richard Warren Mithoff, of Houston's Mithoff & Jacks L.L.P., left no stone unturned or lead unfollowed when developing a medical malpractice action arising out of botched back surgery. He and his investigators did a computer search of prior lawsuits against the surgeon involved, and even tracked down the doctor's former girlfriends and wives to find relevant information. Mr. Graves spent weeks learning the medicine involved in his case, so he could translate it for jurors.

Each of the profiles covers only one attorney, but few worked alone. Mr. Mithoff's co-counsel was his partner Tommy Jacks. Mr. Weber, in his defense of R.J. Reynolds, was accompanied by numerous other attorneys for the tobacco industry. Mr. Sweet, who won a \$150 million products liability verdict in a fentanyl case, was co-lead trial counsel with Michael Gallagher, of Houston's Gallagher, Lewis, Downey & Kim P.C.

It should be noted that these are the views of the trials by the winning attorneys. And for five of the cases, which are on appeal or in post-trial motions, the final outcome has not yet been determined. But for now, here are war stories as told by the victors. **NLJ**

PREVIOUS WINNERS

One hundred and twenty four lawyers have appeared in previous special reports by The National Law Journal that featured top trial lawyers and their winning strategies. Listed below are their names and the year or years in which they appeared.

Floyd Abrams (1990)
Guy H. Allison (1995)
Thomas T. Anderson (1991)
Stanley Arkin (1989)
Thomas D. Barr (1985)
Fred H. Bartlit Jr. (1985, 1995)
Jere Locke Beasley (1995)
David J. Beck (1998)
Philip S. Beck (1997)
Melvin M. Belli (1985)
David H. Berg (1992)
William O. Bittman (1989)
Roy Black (1992)
Maxwell M. Blecher (1988, 1996)
Brad D. Brian (1995)
Aaron J. Broder (1996)
James J. Brosnahan (1990)
James E. Butler Jr. (1994)
Ronald E. Cabaniss (1999)
Ricardo G. Cedillo (1999)
Helen Davis Chaitman (1995)
Morgan Chu (1995)
Michael V. Ciresi (1989, 1993)
Robert A. Clifford (1993)
Johnnie L. Cochran Jr. (1992)
Vincent H. Cohen (1988)
Roxanne B. Conlin (1989)
Philip H. Corboy (1985)
Joseph W. Cotchett (1992, 1993)
Finis E. Cowan (1994)
Morris Dees (1991)
Thomas A. Demetrio (1990)
Elizabeth J. Du Fresne (1998)
Larry R. Feldman (1999)
James E. Ferguson II (1989)
Geoffrey N. Fieger (1999)
Peter E. Fleming Jr. (1988)
Willie E. Gary (1994, 1996)
Wendell Gauthier (1989)
Susan Getzendanner (1992)
Thomas V. Girardi (1998)
Oscar B. Goodman (1985)
Browne Greene (1990)
Marshall B. Grossman (1989, 1999)
Robert F. Hanley (1985)
David M. Harney (1985)
Richard 'Racehorse' Haynes (1985)
Joseph D. Jamail (1988, 1993)
Alfred S. Julien (1985)
John W. Keker (1996)
William L. Kirk Jr. (1996)
Peter C. Kopff (1997)
Albert J. Krieger (1997)
Ronald D. Krist (1990)
Robert G. Krupka (1998)
W. Mark Lanier (1998)
Scott D. Lassetter (1997)
William F. Lee (1996)
Fredric G. Levin (1999)
Arthur L. Liman (1990)
James Paul Linn (1991)
Jack T. Litman (1989)
Judith A. Livingston (1993)
Susan E. Loggans (1985)
Martin London (1995)
Frederick A. Lorig (1994)
Joan A. Lukey (1999)
Paul N. Luvera (1994)
Pat Maloney Sr. (1991)
Edward F. Mannino (1990)
John S. Martel (1988)
G. Barry Montgomery (1996)
Robert M. Montgomery Jr. (1991)
Thomas A. Moore (1992, 1998)
Robert G. Morvillo (1988)
R. Kenneth Mundy (1991)
William H. Murphy Jr. (1998)
James F. Neal (1985)
Gustave H. Newman (1994)
Raymond P. Niro (1997)
William S. Ohlemeyer (1998)
Jack H. Olender (1990)
Brian B. O'Neill (1995)
Vance K. Opperman (1992)
John M. O'Quinn (1993)
Dennis P. Orr (1997)
Ronald M. Oster (1994)
Henry F. Owens III (1995)
Mary A. Parker (1990)
Eugene G. Partain (1991)
Cornelius Pitts (1993)
Debra E. Pole (1994)
Joseph A. Power Jr. (1996)
Howard J. Privett (1993)
Thomas P. Puccio (1985)
James W. Quinn (1993)
Mary Beth Ramey (1991)
Roy L. Reardon (1991)
Harry M. Reasoner (1992)
Leonard M. Ring (1988)
Larry R. Rogers Sr. (1999)
Robert N. Saylor (1997)
Ivan S. Schneider (1997)
William M. Shernoff (1996)
Harvey M. Silets (1992)
H.T. Smith (1997)
Suzelle M. Smith (1997)
Neal R. Sonnett (1993)
Gerry L. Spence (1985)
Deborah C. Stevens (1996)
Brendan V. Sullivan Jr. (1988, 1992)
Stephen D. Susman (1989)
Robert A. Swift (1995)
Barry Tarlow (1988)
William V. Vaughn (1989)
R. Lawrence Ward (1994)
Dianne Jay Weaver (1988, 1998)
Dan K. Webb (1991)
Harvey Weitz (1994)
Howard L. Weitzman (1985)
Theodore V. Wells Jr. (1990, 1999)
Malcolm E. Wheeler (1998)
Edward Bennett Williams (1985)
Sarah R. Wolff (1999)

ARTICLES BY
MARGARET CRONIN FISK