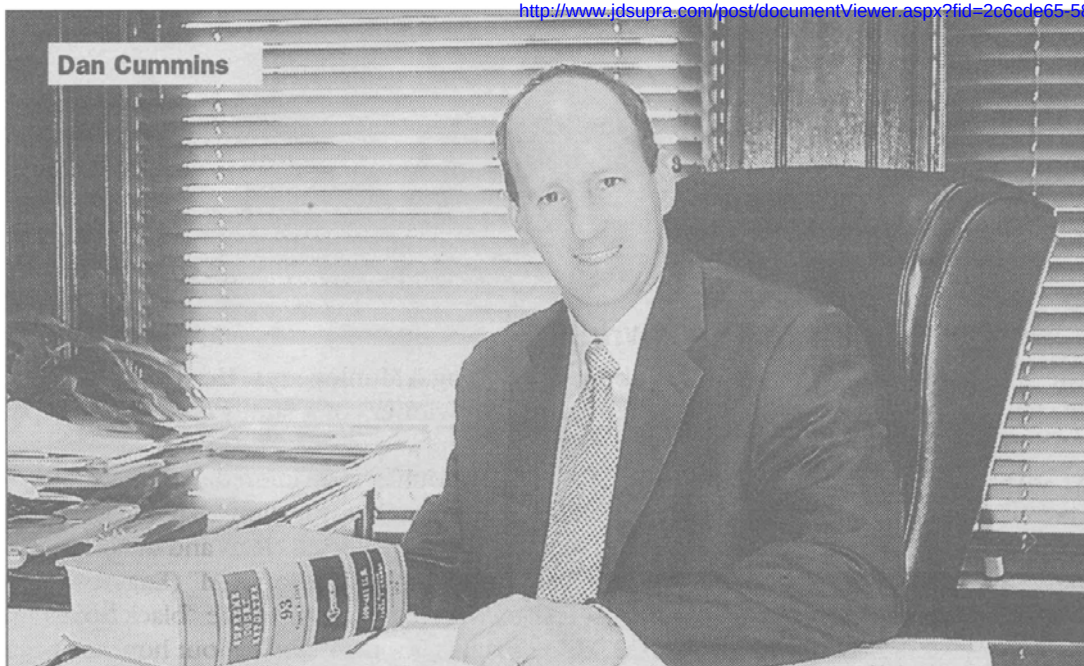


Witness for the Defense

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By Elizabeth Zygunt

Atty. Dan Cummins isn't afraid to employ theatrics to win a case — just don't ask him to bend the rules. An arched eyebrow, an incredulous look and a nifty PowerPoint presentation are all fair game. But he dislikes when the opposing counsel tries to open doors they shouldn't, throwing hints sure to raise an objection.

"A judge can tell the jury to disregard a statement, but no one ever forgets about it. Once that door is open, the damage is done. But most lawyers are willing to follow the rules," he says.

Cummins does strictly defense work for the Scranton firm, Foley, Cognito, Comerford, Cimini & Cummins, a boutique law firm located in Scranton that handles general civil litigation matters.

Cummins says he believes the civil justice system is fair once two parties are before a jury. However, "it's all uphill" for defendants as to what evidence they can get before that jury.

He believes the plaintiff is at an advantage because he or she is in control of the medical records. While it's true that the plaintiff must disclose all records, the defendant is still limited to one independent medical exam.

"This one visit, against all of those other visits, it's tough," he says.

However, there are tools — both old and new — in the defense arsenal to combat the medical advantage. Old tools include the interrogatories (written questions), requests for production

of documents and depositions that have been staples of legal life for years. New to the tool box are Google searches and social networking sites like My Space and FaceBook. Woe to the plaintiff caught posting pictures of his ski vacation while complaining of pain and disability.

Cummins says a defense lawyer spends a lot of time on the damages side of a case because, in Pennsylvania, if a person is 51 percent or more liable for an accident, no recovery is possible. "If it's totally the plaintiff's fault, we won't even see the case," he says.

However, under Pennsylvania's joint and several liability rule, plaintiffs who are 50 percent liable or less can collect, with their percentage of fault deducted from the overall award.

Although expert testimony is often the subject of tort reform conversations, Cummins says dueling experts often "cancel each other out." He believes a polished and engaging lawyer is often more decisive in a case — and credible, sympathetic, believable witnesses don't hurt.

Cummins recalls being stunned by a jury decision just once, when a jury awarded six figures to a plaintiff he was convinced was a malingerer.

"After careful evaluation, I realized my judgment may have been clouded by my dislike for the other attorney. I found him rude and that biased me against the plaintiff. The lesson I learned is to never let my feelings get in the way. It's like that line

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‘Never hate your enemies. It affects your judgment.’

from the Godfather II, ‘Never hate your enemies. It affects your judgment.’”

Despite this one shock, Cummins says he’s proud he’s never been “whacked” with a big award. He believes his pristine track record is helped, in part, by familiarity with local judges, lawyers and their rules and customs.

“I’m dismayed when either plaintiffs or defendants feel they have to go out of town to get a lawyer,” he says. “There are so many excellent lawyers here. It’s an advantage to be a local lawyer. Judges and juries dislike being talked down to.”

Of course, should an out-of-town lawyer speak condescendingly, Cummins can look at the jury incredulously, telegraphing a “can you believe this guy?” expression — and win the case. It’s been known to happen. ■