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Trial Pros: Rusty Hardin

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Rusty Hardin

Rusty Hardin, founder of Houston's Rusty Hardin & Associates LLP, has experience in both complex civil matters and criminal cases. He was named by The National Law Journal to the 2013 edition of The 100 Most Influential Lawyers in America. Hardin's experience has run the gamut, from helping pitcher Roger Clemens get a jury acquittal on perjury charges, to securing a favorable settlement for ExxonMobil in a lawsuit over plant construction, to a case where he helped Dow Jones overturn the largest libel verdict of its time. He has represented former Houston Mayor Bob Lanier and the city of Houston, professional sports figures Wade Boggs, Warren Moon, Rudy Tomjanovich, Calvin Murphy and Adrian Peterson, and a number of public officials in Texas. Hardin has also been selected as a fellow of the Litigation Counsel of America. Before entering private practice, Hardin was an assistant district attorney in Houston for over 15 years.

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

A: The defense of pitcher Roger Clemens because I so deeply felt that he was the victim of a congressional witch hunt that observed no rules and in which they were mindless about how they were ruining a man's reputation in a totally meaningless exercise.

He was called before Congress when it was investigating the Mitchell Report's allegations of performance-enhancing substances used in major league baseball. A criminal case was brought by the U.S. Department of Justice alleging Roger Clemens committed perjury before Congress when he consistently denied he did anything wrong.

The only reason Roger Clemens ever testified before Congress, and allowed them to conduct their politically-motivated circus, was because he was unwilling to invoke his Fifth Amendment rights. He knew if he took the Fifth he would be legally safe from any and all future charges. But he also believed everyone would believe he did it and was hiding behind his constitutional rights. Though we begged Congress not to call him as a witness, he was called to testify, and he was unwilling to refuse because he believed so strongly that he had done nothing wrong.

As a result, for the five years after that, in certain quarters I was called the "worst lawyer in America" for allowing him to testify. And he was perceived as an aggressive, in-your-face ballplayer with no common sense who insisted on testifying.

His first trial ended in a mistrial because of government trial mistakes. But when we got the not guilty at the end of the second perjury trial, it was an incredibly satisfying moment for both Roger and our legal team. One of the most satisfying aspects of all was being told by several jurors that the jury believed that Roger was prosecuted because he refused to take the Fifth, and that he was a model for young people to look up to rather than someone the government should have been trying to bring down.

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

A: During litigation over the hundreds of millions of dollars in the estate of the late J. Howard Marshall II, the questioning of the one-time Playboy centerfold Anna Nicole Smith took on a life of its own. She was on the stand about four days in response to a counterclaim from the defense.

It was interesting to watch a witness say and do whatever outrageous things comes to their mind in a totally unstructured way that made cross-examination a wonderfully extemporaneous experience. And it had a way of reinforcing an aspect of the case I expected to come out if I could keep her on the stand long enough showing her true colors as an incredibly self-absorbed person who thought only of herself.

I asked Anna Nicole how she spent $100,000 a week, she responded with "Rusty, It's very expensive being me," I smilingly said we could both agree on that. I never expected that experience to take on a life of its own so much so that now, 17 years later, total strangers still come up to me and say what she said from the stand: "Screw you, Rusty."

But most satisfying of all, the jury validated our view that our client and heir Pierce Marshall was the true victim of all of this hullabaloo and not a man just trying to secure his father's millions.

Q: What does your trial prep routine consist of?

A: First and foremost, develop a theme for your side of the case as early as possible so that as you talk to witnesses and review the documents, you can look at the facts with an evolving point of view that supports your theory.

You have to be careful, though, and not develop a myopic theme before you are deep enough into the facts to be sure your view of the case can be satisfied. You need this so that at the beginning and the middle of the trial you can do what the jury has to do at the end of the trial — fit the facts into the law. It's a three-pronged approach. You absorb the facts gathered from witnesses and documents, you mold them into the theme of your case and you fit that into the controlling law that will be given to the jury.

If your preparation is thorough enough, then the presentation in trial can become a free form exercise in telling the story to a jury. You can then listen with the ear of a juror rather than adhering to a rigid outline that ignores the dynamics of what's happening in the courtroom.

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: The biggest mistake that trial lawyers make is to not listen — to not listen in jury selection, in direct examination and in cross examination. I would advise them to listen and to not be so bound up in your trial preparation that you fail to constantly be listening to witnesses in a way that is unencumbered by your expectations.

Too often trial lawyers are so determined to get out of a witness what their preparation indicated was

available, that they miss incredible nuggets that both the jury and the facts scream out to be further examined. I've never seen a trial where we were not able to elicit favorable information that we never expected and didn't see coming. If I were bound by a rigid outline, I would have missed it.

Total preparation can free you up from a mechanistic performance and enable you to focus in trial on the dynamics of the moment thereby allowing you to be able to pounce on the unexpected.

One of the unfortunate aspects of the current extensive discovery in civil trials is that all too often it results in lawyers being thrown when they learn something new in trial that they were unprepared for. Lawyers who started to practice decades ago when there was less extensive discovery had to learn how to deal with the unexpected because there were always things that came up in trial that they had not foreseen, no matter how well they were prepared. The fact that lawyers of today have far fewer jury trials under their belt, results in less experience in dealing with the unknown, and that, combined with the false security of massive discovery, can lead to today's trial lawyer being more frequently thrown by the unexpected.

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

A: I can name two — Chip Babcock of Jackson Walker in Houston and Michael Attanasio of Cooley in San Diego. Both are close friends and I've had the opportunity to work on significant cases with both of them.

Though they are very different personalities, they share a penchant for meticulous preparation and unlike me, they are very organized. Each of them recognizes the tremendous significance of being prepared on the law as you discover and prepare the facts. And each has an excellent courtroom demeanor that jurors can relate to. And besides all that, they are both a hell of a lot of fun to work with.

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