

Top Female Trial Attorney: Latham's Peggy Zwisler

By **Megan Stride**

Law360, Chicago (May 29, 2012, 8:02 PM ET) -- Since entering the legal world as a secretary, Latham & Watkins LLP's Peggy Zwisler has excelled for more than 35 years as an antitrust trial lawyer known for dismantling opponents' expert witness testimony and bringing a firm grasp of economic complexities to her courtroom narratives. Those strengths have landed her a slew of legal victories, as well as a spot on Law360's list of top female trial attorneys.

Zwisler has led 14 complex trials, all but one from the first chair, ending in 10 wins, two losses, a favorable settlement and a hung jury her client considered a win as a defendant — an impressive count given the rarity of trials in the antitrust arena. She's represented clients like Johnson & Johnson, wall covering maker F. Schumacher & Co. and home insulation contractor Masco Corp., which she is currently preparing to defend against conspiracy allegations in a trial set for July.

The track record she built up first during her 29 years at Howrey LLP and then over roughly the last seven years at Latham has landed her glowing reviews from colleagues and clients in addition to her place as one of 15 lawyers featured in Law360's top female trial attorneys series.

Gregory Wittrock, Masco's general counsel, vice president and secretary, who has known Zwisler for many years, told Law360 that the company had engaged the Latham partner on case after case thanks to her depth of experience on high-value suits and her penchant for cinching wins.

"In other words, she's proven herself," Wittrock said.

Zwisler turned in one such top-notch performance when she led the trial team for Acuvue disposable contact lens maker J&J in a case brought by 32 state attorneys general and a national class of consumers alleging the company conspired with its retail optical chain and national optometrist association clients to boycott online and mail-order sellers of disposable contact lenses.

The plaintiffs in the case, dubbed *In re: Disposable Contact Lens Antitrust Litigation*, were after more than \$1 billion in damages as well as an injunction that would sink J&J's policy of only selling its products to businesses employing licensed eye care practitioners who required prescriptions.

The stakes loomed large, and Zwisler worked to prove that J&J refused to sell the lenses to unlicensed mail and Internet sellers because its products were prescription medical devices regulated by the U.S. Food and Drug Administration, and not because of any customer coercion.

During the trial's seven weeks of testimony before a jury, Zwisler put a former J&J employee on the stand who had negotiated the labeling for Acuvue lenses with the U.S. Food and Drug Administration. Her team had also pulled original copies of Acuvue boxes from the company's archives, which said that federal law prohibits dispensing the lenses without a prescription from a licensed eye care professional, and she passed the boxes around for the jury to hold and read.

Zwisler called that witness' testimony a turning point in the case, and the judge went on to facilitate a settlement under which all the attorneys general plaintiffs agreed that J&J could hold onto its policy of selling only to eye care professionals. The company also doled out what Latham says were minimal coupons to the alleged class members.

Zwisler, who until recently served as co-chair of Latham's global antitrust and competition practice and previously chaired Howrey's antitrust litigation section, worked as a secretary in a law firm and then as a paralegal before heading to law school at George Washington University, where she graduated in 1976. She then went to work at Howrey, where she met Ralph J. Savarese, a former chairman of that firm and now the founder of legal consulting firm McMorroughSavarese.

As a young associate, Zwisler second-chaired Savarese in the trial of the U.S. Federal Trade Commission's case against General Mills Inc. and other cereal makers that the agency accused of sharing a monopoly and price-fixing. The judge ruled in the defendants' favor.

Savarese told Law360 that in that and other cases, Zwisler remained unshaken by the stress of changing deadlines and tight schedules and was always a person he could count on.

"She would remain focused and disciplined, and never became unnerved as a result of what was going on," he said.

Al Pfeiffer Jr., a Latham partner and co-chair of the firm's antitrust and competition practice, said that Zwisler's "outstanding strategic vision" and understanding of intricate economic issues were vital in a later case against food distributor Michael Foods Inc., which Zwisler helped defend against wholesale distributor Feesers Inc.'s claims of unlawful price discrimination.

Zwisler came aboard to try the case after discovery had already closed, and after losing the suit at trial in early 2008, she and her team emerged victorious on appeal, with the Third Circuit reversing the original trial verdict and directing that judgment be entered for Michael Foods.

Pfeiffer worked on the case with Zwisler, and said that by thinking several steps ahead, she was able to preserve issues at trial that eventually led to Michael Foods' appellate win and managed to pull crucial testimony from the other side's witnesses about the plaintiff's business process. That testimony helped establish Michael Foods' defense that Feesers could not prove competitive injury, according to Pfeiffer.

Zwisler skewered Feesers' liability expert in particular, poking holes in his analysis of the case and making him completely ineffective for the plaintiff, according to Pfeiffer.

"Because she gets the economics, and because she's also just a very plainspoken person, she was able to talk to the expert and draw out from him what he had and hadn't done," he said.

"By the end, people watching realized, 'Wow, she just basically eliminated him,'" Pfeiffer added.

Many of the trials Zwisler has worked on lasted weeks or even months, a duration she said was typical in the antitrust arena and can amplify the challenge of keeping a jury engaged in the kind of complex economic matters at play.

The case that nine mail-order dealers of wall coverings lodged against leading U.S. wall covering maker F. Schumacher seeking \$450 million in damages yielded a 10-week trial, but Zwisler told Law360 that the jury paid attention the entire time.

F. Schumacher faced allegations that it had conspired with the National Decorating Products Association to require wall covering dealers to sell products only in their local trading areas, and after deliberating for more than a week and sending questions back to the judge for clarification, the jury remained hung without a verdict but revealed in polling that they had been 10-1 in favor of Zwisler's client, according to Latham.

The plaintiffs dropped the case in exchange for what the firm said was small concession from F. Schumacher, and the Third Circuit later affirmed the resolution when one plaintiff appealed it.

The case speaks to a personality strength Wittrock attributed to Zwisler of being able to engage jurors' interest in complex business subjects and command their attention to certain facts that back up her client's position.

The ability to interact with jurors in just the right way is "very intangible, but she's very good at it," Wittrock said.

Zwisler also tried a case brought by a dentistry specialist who owned patents on new orthodontic technology and his company against GAC International Inc., which he accused of conspiring with professional associations of orthodontists to inhibit competition in the market for orthodontic brackets by refusing to distribute its products. The plaintiffs, who targeted other defendants as well, sought more than \$400 million in damages.

Zwisler ended up securing a win at trial for GAC, and the Fifth Circuit later affirmed that result.

Though the victory in that case came from a directed verdict, Zwisler shared a tact she took after speaking with a jury consultant on the case who told her that she needed to find a way to tell the jurors that she was just "a regular woman."

The jurors called for the case had come from far distances in rural areas to sit in the courtroom, and some seemed concerned about being able to show up on time every morning, Zwisler said.

During voir dire, when the judge allowed the lawyers to address potential jurors, Zwisler told them she had four children and that getting them out of the house on time in the morning could be a challenge, and asked whether that was a concern for any of the juror candidates.

The point was not just to get the answer, but to help humanize her in the eyes of the jurors and let them know that though she may be a Washington lawyer, she is also a regular person, she told Law360.

Zwisler said that in the end, juries make decisions on the ability of a lawyer to persuade.

"I think that the ability to persuade a jury is not a gender-specific trait," she said.

Now, as the Latham partner prepares for the Masco trial — in which the class action competitor plaintiffs are seeking \$145 million in damages — later this summer, she explains that, as in any trial, she is focusing in on the narrative she hopes will secure yet another trial victory.

"It's a story that you need to tell in a compelling way so that the jury can understand the complicated facts and come to the conclusion that your client was right in the conduct that it engaged in," Zwisler said.

"I'm putting the story together," she added.

--Editing by Elizabeth Bowen.

All Content © 2003-2012, Portfolio Media, Inc.