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THE MILLION- DOLLAR MAN

Mike Kelly is a very funny man. But facing him in court is no laughing matter

by JOE MULLICH

photography by LARRY MARCUS

Michael A. Kelly has tried, arbitrated or mediated more than 100 cases in which his client's recovery exceeded \$1 million, including the largest personal injury verdict in Sonoma County history. So it's not surprising that when asked for his most memorable courtroom moment, Kelly has to lean back in his chair and think for a while.

Finally, he recalls a case he tried nearly two decades ago, when the courthouse was still housed in City Hall. The grandiose room seated 200, but usually, "only two or three people were there, mostly because of boredom or to get out of the rain," he recalls. One of those three people in attendance that day was his mother, an elementary school principal, who wanted to watch her then-40-year-old son in action.

Kelly was aggressively cross-examining a female physician. In the middle of the questioning, the judge suddenly stopped the trial. He privately told the attorneys a bomb threat had been called into City Hall and ordered a brief recess without alerting the jury of the reason. As the court cleared, Kelly's mother bounded down the aisle and demanded of her son: "Did the judge stop the trial because you were being so mean to that woman?"

The dry punch line is as much of a Kelly staple as the million-dollar verdicts. This is, after all, a man who was drawn to the verbal acrobatics of law school "because tons of aunts and uncles patted me on the head when I made a smart-aleck remark." The irony of his mother's question in that long-ago case is that, in a field known for oversized egos and aggressive tactics, "mean" is the last word anyone uses to describe Kelly's demeanor.

"He possesses 101 anecdotes and they're all funny," says Charles Hawkins, a San José mediator. "He has a wonderful, easy-going way with jurors. He can make chicken droppings into chicken pâté. All the truly great trial lawyers have different personalities, but the one thing they have in common is they're all really nice guys. They're the kind of

people who you'll enjoy talking to at a cocktail party and will listen to you and aren't a bunch of phonies."

Moving from his most memorable "moment" to his most memorable "case," Kelly talks about a Modesto woman who suffered 14 rib fractures and a shoulder fracture in a car crash. Her case merited a \$75,000 settlement request—huge to the woman, a cashier, but table scraps for Kelly's firm, Walkup, Melodia, Kelly & Schoenberger.

"No one at the firm was really happy I took the case, but her story resonated with me," Kelly says. "The opposing counsel was loud and gruff and bossy—he probably came in with a good-sized ego that had been inflated by repeated success trying bad cases."

As the trial proceeded, Kelly says, "I'd be lying if I didn't tell you I was concerned that the other lawyer was big, brash and flamboyant. I was constantly wondering, 'Is that style working with the jury?' because I knew I was not going to be that person."

After Kelly presented the Modesto woman's case in his patient, organized style, the jury awarded her \$140,000, nearly twice what she had originally asked for. A little while later, Kelly received three different notes—one from another lawyer who had been watching the case, one from the court reporter, and one from the bailiff.

"In separate notes, they all thanked me, saying they were so pleased someone had come out there and successfully tried a case against that lawyer," Kelly says. "They told me that after losing, he had started to act like a human being again."

WHEN KELLY BEGAN practicing law, San Francisco had five big personal injury firms, including Melvin Belli's whose office was right across the street. "The Belli firm lived and died on the personality and theatrics of Belli," Kelly says. "Bruce Walkup would have been invisible on the sidewalk next to him. But Walkup's gross numbers were higher, because he was more analytical, and intensively and extensively prepared. If you're soft-spoken, you can be every bit



Juries listen to Kelly,
and like him.

as successful as someone who's bombastic and loud—you just need to find an aspect of the case that emotionally connects with jurors.”

Consider, for instance, the bicycle helmet case. Kelly's client had suffered a head injury, falling off his bike while wearing a helmet produced by Bell Helmet Company. It was a popular brand, even used by Olympian Lance Armstrong. The design complied with all the standards from the American Society for Testing and Materials and the American National Standards Institute. The company was in a conservative jurisdiction and had won some 20 cases in a row based on the design of the helmet.

When the Bell lawyers began their standard litany—meticulous standards; memberships in respected organizations; Armstrong, for goodness sake!—you might have wondered why Kelly bothered to take the case.

But during his extensive research, Kelly discovered the company had designed a safer helmet, which was never brought to the market because it wasn't as attractive. “Our theme became, ‘Did the consumer have the right to make a decision about his own protection rather than have the manufacturer make the decision for you and dump it in your lap?’” Kelly says. “If you were buying a life jacket, would you want the company to give you a lavender one that looked great but only kept you afloat for 10 minutes, and not tell you they had an ugly orange one that would keep you safe for a lot longer because they didn't think you would buy it?”

The jury, he says, was filled with a lot of smart people, and they thought they should be allowed to make their own choice of safety versus aesthetics. He believes the jurors also disliked that the company's slogan, “Courage For Your Head,” suggested their helmet was the best protection available, when the company had a blueprint for something safer. By ditching the strategy of challenging the helmet design, and making the case about personal choice, Kelly won a \$17 million verdict.

“He's like an everyman,” says Linda Ross, past president of the San Francisco Trial Lawyers Association. “Juries can relate to him—he's not stuffy—just a regular guy. But he can take a complicated subject and make it easy and understandable.”

Walnut Creek attorney Pat Galloway, who has tried cases against Kelly, calls his cross-examinations “devastating.” “I had a medical expert make some sophisticated points about the implantation of an intraocular device,” Galloway says. “I thought it would be difficult to refute or attack the medical expert. But even though Mike was hearing about these points for the first time, he was able to quickly distill the information and effectively use it against my expert.”

Those abilities have translated into many milestone cases. In March 2007 Kelly obtained the largest jury verdict for medical negligence in the history of El Dorado County. In the spring of 2006, he obtained a jury verdict that was, at that time, the largest ever reported for the wrongful death of a nondependent adult child in San Francisco Superior Court.

Kelly's record-setting Sonoma County case involved a 26-year-old man named Eric Dahl who suffered paralysis that could have been avoided if his physician had used, as Kelly put it in a newspaper editorial, “basic common sense and standard diagnostic tools to rule out an epidural abscess [an infection to the spine].”

“The doctor noted in the medical records that Dahl had long hair and tattoos,” Kelly says. “He didn't get an optimal evaluation because of his appearance.” As usual, Kelly chose a theme that was simple and personal: “From jury selection right on, we kept making a point of asking the jury, ‘You aren't going to make your decision based on how he looks, are you?’ ‘Do you think the limitations of a handsome person who can't walk are much worse than a not-so-handsome

person?’ We took that arrow out of their quiver right away.”

The Sonoma County jury awarded Dahl \$5.3 million for future medical care costs and lost wages. They also awarded \$3.85 million for physical pain and mental suffering, which the Medical Injury Compensation Reform Act scaled back to \$250,000.

“I have been in practice for 30 years and I have never seen a body of law that so consistently hurt those who have been damaged most,” he says. “Four weeks ago my partner had a case with a 22-year-old who had been permanently blinded in both eyes. If the doctor had run her over in his Mercedes, it would be a \$10 million case.”

Coming from a personal injury lawyer, such comments could easily seem self-serving. But those who know Kelly say his passion is genuine; the first thing people remark on after his humor and nimble mind is his ethics. For nearly 30 years, he has taught for the National Institute for Trial Advocacy, the organization dedicating to imbue lawyers with the ability to provide skilled and ethical advocacy.

“He doesn't make a lot of money for teaching, but he's a great believer in the obligations of lawyers,” says San Francisco mediator Ken Gack. “If you didn't get to know him better, you might never guess this glib and sometimes caustic man, with an always humorous demeanor, was so active in charities.”

Teaching has taken Kelly around the world. In Great Britain, the legal system has historically been divided between barristers, who tried cases, and solicitors, who prepared the paperwork. “The phrase ‘tying everything up with a red ribbon’ comes from the solicitors handing the paperwork to the barristers with a red ribbon,” Kelly says. “When the law was changed, allowing solicitors to go to court, it wasn't in the barrister's economic interest to train them in things like how to examine witnesses.” So Kelly and other American lawyers came in to instruct them.

After the collapse of the Soviet Union, Kelly went to the Republic of Georgia, helping educate lawyers in a new system where a defendant suddenly was entitled to a lawyer. (He still gets e-mail and notes from some of his students there.) His latest travels took him to Japan, where the military-style legal system, installed after World War II, is now being replaced by a new criminal-trial system where three judges will decide cases in deliberation with a panel of six jurors.

In a trial skills boot camp, which was covered in national newspapers and in nightly news broadcasts, Kelly gave primers on direct, cross-examinations, opening statements and final arguments to attorneys chosen from Japan's 52 prefectures.

“The lawyers in Japan have no idea what presentation skills are necessary to persuade a lay jury as opposed to professional judges,” Kelly continues. “I've seen cases where the lawyers will stand at a podium and read the final argument to the judge without making eye contact—I had to tell them if you do that with six people taken out of the community they'll be bored and have terrible memories of high school.”

As Kelly explains all this in his firm's conference room, with its spectacular view of Alcatraz, he jumps to his feet and makes sketches on a blackboard of potential courtroom layouts for the new Japanese legal system. He's in teacher mode now, animated and excited.

Given the many eight-figure cases he has involving physicians, does he have any qualms when he has to go to the doctor?

“Six years ago,” Kelly begins, without missing a beat, “I had to have surgery that required general anesthesia. You know how they make you count backwards from 100? I was going ‘99, 98, 97 ...’ and just as I went under, I heard the scrub nurse say, ‘Is this the lawyer?’”

He booms with laughter and continues: “But it doesn't worry me. I'm not the right person for anyone to try to get even with.” ◀