

Of Counsel Interview . . .

Houston Attorney Sees New Litigation Trend, Discusses Media Appearances

In 2000, the specialty materials company Rohm & Haas faced a potentially devastating case, which, if it lost, would cost it millions of dollars. The coating that it manufactured was flaking off a pipe that had been buried in the ground for water transfer in Chile, which was polluting the water. It looked like either the pipe company or Rohm & Haas would have to pay some \$200 million for the dig-out of this pipe.

Michael McLaughlin, then the counsel for Rohm & Haas and now counsel for Dell Computers, needed to hire outside attorneys to help win the mediation. He held a beauty contest for the job, with lawyers from such large prestigious firms as Baker Botts and Fulbright & Jaworski. He invited a former partner of his (when both were at Baker Botts), Thomas Ajamie, an attorney at a Houston-based boutique.

“We interviewed Tom, and I actually didn’t think that he’d get the job,” McLaughlin recalls. “Then in the middle of the interview, I said something like, ‘If we lose, what will happen?’ Tom looked at me and said, ‘We’re not going to lose.’ I said, ‘Yeah, yeah, I know but what if?’ He said, ‘We won’t lose. I don’t lose. I don’t believe in it.’”

Ajamie got the job. He also got the victory.

“In that mediation, I thought that it was an absolute certainty that we’d pay \$5 million or 6 million just as a start,” McLaughlin says. He handled the expert testimony and thought that he had impressed both the mediator and the other side when he presented his well-prepped, scholarly expert witness. That wasn’t the deciding factor, as the lawyers for pipe manufacturer had equally sound expert testimony.

“I thought that I had wow-ed them with the science,” McLaughlin says. “But the case was won because Tom had painstakingly gone through records of this pipe manufacturer and put together a calendar of every single day that there was a mistake or a problem on the production line, and there were a lot of them.”

The president of the pipe company and the plant manager watched nervously as Ajamie outlined the factory’s poor performance record. “At the end of Tom’s presentation, they were huddling around this chart that he’d made, and the plant manager was essentially begging for his job. Tom’s very smart and creative, but he normally wins because he outworks the other side. That’s what happened here; he saved us millions of dollars.”

Ajamie wins often, and he and his Houston boutique are gaining quite a reputation for litigation victories, for both plaintiffs and defendants. *Of Counsel* recently talked to Ajamie about his career, the profession, an emerging litigation trend, and his many appearances on and quotes in a wide variety of media outlets from CNN to NPR to some of the nation’s finest newspapers. The following is that excerpted interview.

Enron Verdict Analysis

Of Counsel: Before we get into your career and practice, could you talk about the interview you did with National Public Radio about the Enron verdict that forced you to push this interview back an hour? What is your take on the decision, and what chance do Jeff Skilling and Ken Lay have to successfully appeal their convictions?

Thomas Ajamie: The verdict was expected, but I was surprised at how quickly the verdict came back, as most people were. What that tells me is that not only did the government prove its case beyond a reasonable doubt but also that the evidence was absolutely overwhelming. There were mountains of evidence.

I did a lot of commentary over the course of the trial for some of the networks, so I was monitoring it. Boy, it was devastating. There was witness after witness after witness who basically said, “I told Ken Lay on Monday that the company was having financial problems, that we weren’t going to make numbers. On Tuesday, he told the shareholders that we were doing very well.” Other witnesses came in to say that they had told Lay about crimes and cooking the books and that he didn’t do anything.

Others came in and said, “I committed a crime. I already plead guilty, and Ken Lay and Jeff Skilling were involved in the conversations.” The prosecutors just kept pounding away. The reason that the two had a fighting chance is because of our system, which of course, requires proof beyond reasonable doubt. They just had to poke holes in the prosecution’s case.

OC: They were not able to do that.

TA: Exactly, and the jury came back very quickly with its verdict. As far as I could tell, it was a very highly educated jury.

OC: No one fell asleep like some did a few years ago in a related matter.

TA: You’re absolutely right. It was one of a few times that I’ve seen in a three-and-a-half-month trial where no one dozed off.

OC: So the second part of the question: What are their chances on appeal?

TA: Very slim. The judge is too careful. He gave the defense a lot of what they wanted. He didn’t make any errors as far as I can see. The jury just did not go down each charge and rubber-stamp guilty, guilty, guilty. They found not guilty on certain charges [against Skilling], which also reflects to an appellate court that they were thoughtful.

OC: Let’s back up now and talk about your career. Why did you choose law? What attracted you to the profession?

TA: That’s actually easy for me to answer. When I was five years old, I decided to become a lawyer. I’m serious.

My uncle was a lawyer in Phoenix. He is deceased now, but his name was Amil Ajamie. Amil Ajamie was the kind of person I wanted to be. When I spoke to Uncle Amil about anything—sports, politics, controversial issues like abortion—he was articulate, thoughtful, and able to present all sides of a debate. I decided at five that I wanted to be like Uncle Amil. He was the type of person that I still think some lawyers are: a Renaissance man, someone who reads, who thinks, analyzes, and has a wide range of interests.

OC: You found your way into litigation. Was that always your plan?

TA: Yes. When I started at [Houston-based] Baker Botts (I was recruited out of Notre Dame) I didn’t know anything about Texas or about Baker Botts except what I had read. But they seemed like a very progressive law firm, and they were. What was progressive at the time is not today. Then, they had word processing, which was considered high-tech. Back then you mostly just had secretaries typing on typewriters. Baker Botts had computer banks, which literally took up half of a floor.

I was going to go back to Arizona where I’m from [to practice], but I was so impressed with Baker Botts that I decided to go to Texas and got into litigation. I’ve been very happy with that decision.

Odd Couple

OC: You left Baker Botts to join a small firm with Houston lawyer Andrew Schirrmeister.

TA: Yes, at the time Andrew had another lawyer [as a founding attorney of the firm], but that guy wanted to represent Paula Jones in her case against Bill Clinton. This guy also supported a politician named Tom DeLay, who was a rising star in the Republican Party. The purpose of the firm wasn’t to be a political interest law firm. It was to be a very good litigation firm. I certainly don’t have respect for people like Paula Jones or Tom DeLay. So, Andrew and I split with this attorney.

OC: *Of Counsel* recently interviewed Andrew Schirrmeister. When you compare his resume and your resume, it sure seems like opposites, like salt and pepper, considering who each of you have represented. He’s primarily a corporate defense attorney and has defended some clients who have been charged with some horrible crimes that have caused birth defects in Mexican indigents and have appalling track records of polluting the environment. You just seem different. How did that relatively short-lived partnership work?

Litigation Trend: Insurance Scammers

TA: You're absolutely right. I agree. Well, you probably don't know people too well until you partner up with them. Over time, I just realized that I had an ideal that I wanted to strive toward. He would come in and talk about taking on more clients who had [been charged with] asbestos [poisoning]. Lawyers can do those things and many times you do them, but we had a philosophical difference in how we viewed the world.

OC: You split with Schirrmeister at the end of 2003, and now you're the managing partner of Ajamie. By the way, is that your title?

TA: Yes, I guess so, or Founding Guy.

OC: [laughs] Let's talk about one of your latest victories in a case that involved the collapse of the Queen Isabella Causeway that killed several people. What was important about winning that verdict?

TA: It's a good story about how I got the case. Here I am in Texas and this is a major accident that killed all these people. Barges aren't supposed to be running into bridges and collapsing them. It almost never occurs. It happened in the Rio Grande Valley, where I've done a lot of plaintiff and defense work and where many people speak Spanish. I speak Spanish. I wanted to get into the case; it was a big case, high-profile, there were people who had to be gone after.

Out of left field I got a call from a partner of Latham & Watkins in New York. He told me that one of the families whose son died needed representation; the surviving son lives in San Diego. He does work for a corporation, and Latham is the corporate counsel for this company. The family was being inundated with lawyers showing up at their house. This Latham partner said to me, "I told the family not to do anything with any other lawyers, that I want them to interview you." So I got a case in Texas from a guy in New York.

OC: Out of San Diego. From an LA-based law firm.

TA: Right. It was an important case and a terrible story. The son was a 20-year-old young man who was coming back to work and driving across the bridge at the wrong time. It was important to represent that family and visit with them. They speak only Spanish, are very poor, and very nice people. It was the right thing to do, to represent them, and I reduced our contingency fee of what we normally charge.

The settlement was just under \$10 million. We were successful against the tug boat company, but we tried to pull in the barge company, a long shot, and we couldn't.

OC: Still you served the family well. Now, to move onto another recent case. Could you briefly describe the case involving a little old lady who had Berkshire Hathaway Company stock and was swindled into trading it in for life insurance? Could you also explain why the award that you got for her family is significant in the body of case law in this area and, perhaps more broadly, to our nation as a whole?

TA: Good question. I'm actually about to send out a newsletter to lots of people, not to talk about the victory but about a problem in society that this case addresses. Insurance companies have been looking for new ways to develop business in the past five to 10 years. They recognize that people don't want to get a call from an insurance agent selling insurance.

In a new marketing technique, insurance agents hold themselves out as estate planners. Consequently, the title of my newsletter about this is: "Beware of Insurance Agents Posing As Estate Planners." This is a very developed area within the companies. It's also a growing field of law, and in 10 years we'll have seen many lawsuits against insurance companies for what they're doing. They are diversifying their businesses into areas that they're not qualified to be in. It reminds me of the good old days of the accounting firms trying to get into every business known to man.

OC: Look what happened to them.

TA: Exactly. Congress came in and legislated it, so they can't get into consulting and other businesses. Insurance companies are diversifying, too, and now they've hired estate planners and lawyers. They have whole departments that churn out information about estate planning—developing your estate, drawing up your will, and how insurance is a very important part of your estate planning. In general terms, insurance can be a part of your estate; there's no question about it. But they are taking estates and putting them into 100 percent insurance.

That's what we had in the case that you asked about. We had a lady [who lived in Texas] whose husband bought Berkshire stock in 1946, before it was even Berkshire when it was just called The Hathaway, before Warren Buffet took it over, for \$6,600. By 1997 when he died, it had grown to be \$25 million, which he left to his 90-year-old widow.

After he died, two insurance agents pounced on her, saying, “You need estate planning. This is very risky. You have stock. When you die, you’ll be giving 50 percent to the government. You don’t want that. You want money for your grandkids. Let us plan your estate.”

They did some things that were, frankly, appropriate estate planning. But the fraud, and I mean fraud, was saying to her, “You have to sell all your stock and buy life insurance and annuities.”

Now, anyone with \$25 million doesn’t need life insurance. Nor does a 90-year-old need annuities, which pay out in 10 or 20 years; they are for people who need a stream of income. She lived out in the country in a Depression-era home. She had no credit card debt, and \$3 million in cash. She had two used cars and lived like a Depression-era lady lives. She didn’t need a stream of earnings from annuities.

When she passed away, one of the family members who had inherited the money, one of her grandsons, went to see a woman who is very good at financial planning. This planner said, “Wow why in the world did these estate planners tell your grandmother to sell Berkshire Hathaway stock and buy all this junk that she didn’t need? You’ve been ripped off.”

I was recommended by a lawyer who I’d beaten in two other investment cases to handle the case. Now, why was this important? Because insurance agents are still doing this.

OC: The insurance agents want people to liquefy their assets and then buy insurance.

TA: Right. In this case, the two agents generated for themselves a \$2 million commission, and it took them about six months worth of work. We had to fight them for three years. They kept saying that the case was frivolous, that it had no merit. But we finished the trial in January of this year. Going into the trial, there was a settlement on the table of \$200,000. But I picked a jury over two days, started opening arguments, and by then the defendants were settling one by one, and we settled for a total of \$7.3 million.

OC: That’s a fascinating case, and it’s important that people become aware of this.

TA: Yes it is. It’s very important. These insurance guys are preying on elderly people.

OC: So for both plaintiff and defense attorneys this will be big over the next five to 10 years. This is a trend that you are predicting will emerge.

TA: Yes, we already seeing a lot of it.

An Educational Talking Head

OC: You have a knack for getting into the media a lot. Do your appearances in the media, either as an expert talking on TV and radio or being quoted in the print media, get you business?

TA: Media has gotten me a little bit of business, but often my appearances don’t. What media does do in a marketing sense, but I want to talk to you later about another reason I like to do media, is remind people who I work for that I’m still out there.

You don’t get invited back [to media outlets] unless you know what you’re talking about and you’re honest. The media has very high standards, I think. I found people in the media to be very honorable. I was on a CNN program a couple of years ago, and a guy looked me straight in the eye and said, “Look, I don’t put people on who don’t tell the truth, and if you ever embarrass me and say something that’s wrong to our viewers, I’m not having you back.”

I’ll have people call me and say “I saw on you television.” But people aren’t going to hire you because you’re on TV. If you’ve done bad legal work, they’re not going to hire you. You don’t want to remind them, “Hey, there’s a guy on TV who screwed up my case.”

Also, for trial lawyers, especially, it’s just an extension of what we do: We explain things to average people.

OC: If you were to give advice to another lawyer who is thinking about being more involved with the media but who thinks that there are just too many risks involved, what would you say to him or her about the risks, how to minimize the risks, and why the risks are worth it?

TA: Yes, a lot of people, lawyers as well as clients, are afraid of the media, but if you have a great story to tell, it’s a great way to get it out. If you’re in crisis management, if a company is undergoing a crisis, you can’t put your head in the sand and ignore the media. That’s dangerous.

It’s worth it because in this day and age you have to get your story out for your client, especially if your client is under attack. Often, it’s a part of the plaintiff’s campaign to use the media to affect the share price and to get the word out that [a company’s product] has detrimental effects. It is shaping congressional opinion, shareholder

opinion, the Wall Street analyst's opinion, and I'm guessing that some of it is seeping down to state court judges or jurors who are reading the newspaper. You may not like the media, but you have to counter the information that's being put out there. You have no choice but to respond. As you suggest, 90 percent of lawyers would rather say "no comment."

How do you minimize the risks? You have to know the facts of your case and have a clear understanding of the other side's position, and you better take it seriously. You better not lie to the reporter. If you do lie on a particular case, you may get a favorable story, but it will bite you in the future.

OC: So what's the other reason, which you referred to, about why you like to appear in the media?

TA: I feel like I'm doing a public service, sometimes, when I appear in the media because I get to express opinions. When I have the chance, I can say, for example, "By the way, there's not a crisis of medial malpractice. Yes, we need to cut out the frivolous cases but don't just universally say that anyone who brings a malpractice case is capped at \$250,000 in damages. That's short-changing the guy who goes in for routine knee surgery and comes out a vegetable. That's not supposed to happen, and his damages should not be capped at \$250,000. Someone else who has a history of heavy smoking and drinking and a bleeding liver and goes into the hospital and the doctor can't help him and he sues, that's probably a frivolous case and you ought to weed that out of the system."

The media offers an opportunity to get a message across. On NPR today, for example, I was asked if Sarbanes-Oxley is good or bad. Certain companies and groups, like the American Chamber of Commerce, complain that it's too expensive, that it makes business too costly. That's what companies have always complained about, and they're supposed to complain about expenses.

I had a chance on NPR to talk about why Sarbanes-Oxley is good. From an American perspective, we want to have clean markets. We want investors to feel safe when they invest, so you want clean financials. You don't want a company hiding debt, like Enron, when stock goes from 90 to zero until the stock collapses. You don't want that. That may happen in Third World countries, but it's not supposed to happen in the United States.

Is it more expensive? Yes, it is, but it's important that we have [the law]. There's a campaign out there to get rid of Sarbanes-Oxley. Someone has to speak out and explain why it's good to spend the money to comply with Sarbanes-Oxley. Do you want people to look at the United States as a Third World country? Or would you like to know as a corporate pension fund that there are some safeguards for your money in the United States?

Frankly, my media appearances first and foremost serve to educate, and the marketing element is a byproduct. If you go into it with a marketing goal, you won't succeed. ■

—Steven T. Taylor

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