THE INCREDIBLE SHRINKING JURY TRIAL

WHAT IT MEANS FOR THE JUSTICE SYSTEM—
AND THE NEXT GENERATION OF ATTORNEYS

Tackling big pharma and the Bengals
with JANET GILLIGAN ABARAY

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Looking Around Corners

Janet Gilligan Abaray is all about doing the research, learning the science, then visualizing how the pieces of a case will come together.

BY JENNY BURMAN PHOTOGRAPHY BY ROSS VAN PELT

The wall of windows in Janet Gilligan Abaray’s 20th-floor Cincinnati office looks down on the Ohio River. To the left is Great American Ball Park, where the Reds play. A tilt of the head to the right, Paul Brown Stadium—home of the Bengals—sits like a huge candy dish. On practice days, she can watch the team play.

Abaray, managing shareholder at Burg, Simpson, Eldredge, Hersh & Jardine, has some history with the Bengals. In 2000, the plaintiff’s class action and mass torts attorney represented season-ticket holders who were not amused to find their seats light years from where they thought they’d be sitting.

Her work transcends the local scene. An expert in complex pharmaceutical cases, Abaray has handled matters involving fen-phen, Bendectin, Ephedra, Ortho Evra and Albuterol, often as lead counsel for thousands of plaintiffs. Recently, she was named national co-lead counsel for a class action involving Depakote, an anti-epilepsy drug linked to birth defects. And she chairs an Ohio Constitutional Modernization Commission subcommittee—whose members include former Gov. Robert Taft—charged with exploring changes to the state constitution on issues affecting the justice system.

But in her hometown, Abaray may always be known for putting Bengals owner Mike Brown in his place. Over onion soup at D. Burnham’s in the Renaissance Hotel, Abaray tells the story in a soft voice punctuated by an easy, infectious laugh. The team’s ownership, she says, licensed too many premium seats and ignored seniority; then, instead of adjusting pricing or offering other compensation, simply changed the color-coding on the stadium map. Suddenly, a seat near the 32-yard line was in the same section as the 45.

“They just kind of squooshed the seats over,” she says. Seat-holders, she says, “were going ballistic.” To make matters worse, unlike simple season tickets, these seats were licensed for many years, even generations.

“And so it just exploded. You know how sports fans are. I mean, it was to the point where, honestly, you represent people who get injured and lose a leg and they’re not as mad as these sports fans. A friend called me [and] we decided to file a class action ... on behalf of him and a few other people, and then it just became a big thing. At the time, the Bengals were terrible ... so that didn’t help them any.”

Janet Gilligan Abaray
Managing Shareholder, Burg, Simpson, Eldredge, Hersh & Jardine; Cincinnati
Class Action/Mass Torts
At that point in her career, Abaray had recently moved from Waite, Schneider, Bayless & Chesley—where she worked for 13 years with the legendary and controversial Stan Chesley—to California-based firm Lopez Hodes, which tasked her with opening a Cincinnati outpost, because she wanted the role of lead counsel. She got it, with a vengeance. The Bengals seating case was such big news in Cincinnati that she and her staff—working out of a small space in West Chester near her home—had to find larger offices.

It was not her first class action. After graduating Order of the Coif from the University of Cincinnati’s law school in 1982, Abaray first worked for Dinsmore & Shohl, the largest firm in Cincinnati.

“I was very interested in litigation,” she says, “and they were the only big firm in town that even had women in litigation. I interviewed at three other firms that had no history of hiring women for litigation.

“Well, what they said was, ‘Are you sure you want to do litigation? Because you might get sent to a bad neighborhood’—here she adopts a faux-ominous voice—‘and sometimes we have to interview witnesses and it’s in bad neighborhoods.’ It was ridiculous.”

She recalls one skeptical interviewer: “Are you sure you really want to practice law, or is it just for the fun of it?” I was actually asked that. [But] Dinsmore was very open to the success of the women attorneys who were there, and they were very distinct from the places where I had interviewed where those opportunities just didn’t exist.

The sexism hasn’t completely disappeared. “As recently as a month ago, I showed up at a deposition and had people ask if I’m a court reporter,” she says. “There’s an initial acceptability that you have to overcome.”

At Dinsmore, Abaray was part of the team that defended Merrell Dow in a 1984 mass action that claimed the company’s anti-nausea drug Bendectin was responsible for birth defects.

“It was a huge case, huge trial,” says George Vincent, managing partner and chair at Dinsmore. “She was one of the top people on the trial team—an integral part of it. She was one of the hardest-working people at the firm; she saw humor in difficult situations; she handled multiple tasks exceedingly well. And she has done this in every case I’ve ever sent to her. She brings passion, intellect and humor in a way that’s really unparalleled.”

Barry Levy, founding partner at O’Connor, Acciani & Levy, worked with Abaray on the plaintiff’s side in a trial against the company that originally made Depo-Provera. “She is just fearless in her advocacy,” he says. “She’s tenacious in the way she approaches things, and I think she’s a formidable advocate.

“We were in litigation on [Depo-Provera],” he recalls, “and were bombarded with defense motions once we got closer to trial. The defense was very aggressive. It would have been easy to back down from some of the issues, and she just wouldn’t. She dug in her heels and went forward.”

That’s not to say she’s all nose-to-the-grindstone, Levy adds: “She likes to laugh. She takes things with a grain of salt.”

**CASE IN POINT:**

While defending Merrell Dow, Abaray helped develop an approach that evolved into the Daubert standard for expert witness testimony in federal court. Concerned about the quality of testimony from the opposition plaintiffs’ experts, Abaray and colleagues sought to have stricter rules adopted by the court—more in line with federal rules of admissibility.

“We had a couple of district court cases where we...argued] that the court should, under the federal rules, make a preliminary...
review of the expert testimony,” she says. “That was kind of a novel approach.” Abaray adds that it had been used in some of the Agent Orange liability cases, but “it hadn’t really been set forth as a requirement. What they say now is the judge is the gatekeeper of expert testimony.”

It was a significant precedent. She was working on the defense side of the fence in those days. Of course, in 1987, she switched to the plaintiff’s side, joining Waite, Schneider, Bayless & Chesley as she sought an opportunity to grow as a trial lawyer. And there was Daubert waiting for her.

Years later, she laughs at the irony. “A lot of people will say to me, ‘Janet what did you do? We kind of created a monster.’

But she also parses the difference between what she argued for and what’s currently happening.

“Unfortunately, it’s become much more of a burden and really been kind of taken way out of context and overlaid, in my opinion,” she says. “So we are dealing with Daubert issues all the time.”

After moving on to Lopez Hodes, she stayed on after that firm’s Cincinnati office was absorbed in 2006 into Burg Simpson, with whom it had represented plaintiffs on the Ortho Evra birth-control patch multidistrict litigation against Johnson & Johnson.

ONE OF ABARAY’S STRENGTHS LIES IN the care she takes in looking around corners, visualizing the pieces of a case and how they fit together. Learning the science case by case is one of the things she loves most.

Peter Brodhead, partner at Spangenberg Shibley & Liber in Cleveland, worked with Abaray in 1995 on the plaintiff side of the first national products liability class action ever to go to trial.

“It involved a contaminated drug called Albuterol,” he says. “Janet was the leader of our trial team and just did some extraordinary lawyering on so many levels. She knows the science of pharmaceuticals and epidemiology extremely well. She’s a very courageous litigator. Throughout the course of that case, and throughout the trial, she demonstrated to me that she’s a lawyer of uncommon skill. She’s a brilliant strategist.”

THOUGH ABARAY NOW CAN LOOK UP from her work and gaze at the steamboats and barges on the Ohio River, she didn’t always see herself here. At the University of Cincinnati, she majored in English. To this day, she is an avid reader of historical fiction.

But her degree worried her dad, who managed the Cincinnati Court Index, which announces legal proceedings. “My father kept saying, ‘What are you going to do? Hang up a sign that says ‘English spoken here?’” He wasn’t too thrilled with the English degree.

“I took these business courses, and, oh, that was torture. And then they had a certificate for teaching. I didn’t like that, either.” But somewhere between these nonstarters and the pressure to come up with a career, she decided to take the LSATs. She thinks the English degree has served her well, though, by training her to identify themes and trace storylines.

“I think I’ve been pretty good on [knowing] from the beginning of a case where I want to go and how to get there,” she says. She has seen too many lawyers chase their tails in complex cases, to the detriment of the combined effort. One preeve is working with attorneys from other firms who are not careful in their selection of mass tort/class action participants, failing to make sure all of the cases fit the profile of what they’re trying to prove.

“What we see happening a lot is a lot of firms [accepting clients based on,] ‘Oh, yeah, I took that product and now I’m sick.’ And they don’t continue to drill down.

“I can’t tell you how many times I’ve been on an MDL, and we get done and they’ve got this perfect case all put together with all these experts, and I’m over there going, ‘But you know, none of our plaintiffs match [the profile of the argument].’ I’ve had that conversation many a time, where there’s just a breakdown between what people think they’re going to prove and what the clients actually have going on.

“I try to teach the associates working for me [that] when you start the case is the time to do the research, figure what evidence you need, know what elements you have to prove, figure out what defenses [your opponents] have, and plan in advance. ... A lot of people don’t do that. They kind of slap it down and say, ‘Well, you don’t have to have all that detail in a complaint.’ Which you don’t, but if you haven’t really thought it through in detail, then you may not really know what you need to accomplish. Or how to get there.”

‘The Magna Carta of Cheviot Road’

There were early signs that Janet Gilligan Abaray would one day go into law.

For instance, she wrote her first contract when she was 11 years old.

The story goes: As part of their weekly chores, Abaray and her older sister, Sharon, were supposed to bring garbage cans back to the house from the street (Cheviot Road) on pickup days. But Sharon wasn’t bringing them in her turn, and their parents got frustrated when they saw a can down on the street.

Janet investigated. Turned out her sister was embarrassed to be seen taking in trash from Cheviot Road, the street her high school was on, because her classmates might see her. So Janet negotiated a trade-in-services deal and drew up a carefully worded document, which she titled “The Magna Carta of Cheviot Road.”

She notes, laughing: “It was a perfectly enforceable contract.”