The Metropolitan
Corporate Counsel®

www.metrocorpcounsel.com

Volume 20, No. 6 June 2012

Winning Big Trials With A Science Focus

The Editor interviews ***Barbara Harding****, Partner, Jones Day. Located in Jones Day's Washington, DC office, Ms. Harding handles complex litigation-related cases and investigations.*

Editor: Please describe your background as a litigation attorney at Jones Day. Where did you practice before joining Jones Day?

Harding: Prior to joining Jones Day, I practiced at Kirkland & Ellis for over 15 years. I managed complex litigation for clients facing assaults from the plaintffs' bar and state and local government agencies. I also gained valuable experience as a prosecutor at the Department of Justice in the Criminal Section of the Civil Rights Division from approximately 1990 to 1993. And I served under Secretary Lloyd Bentsen as the deputy director of the White House Security Review from 1994 to 1995.

Editor: One of your clients prior to your joining Jones Day was W.R. Grace, whom you represented in what the Justice Department called one of the "largest criminal cases in history." You and your colleagues obtained an acquittal on all charges for the company and the executives charged. To what do you attribute your success in that matter?

Harding: In all litigation, whether in front of a jury or a judge, it is critical to present evidence, data and arguments that are credible and grounded in accurate facts and data. Juries and judges do not like to be gamed – both want lawyers appearing before them to be advocates whom they can trust. The jury in the W.R. Grace criminal trial understood that

Barbara Harding

Grace and its lawyers presented evidence that was credible and based on accurate facts and data.

Editor: In 2008, you represented W.R. Grace at trial in the bankruptcy court where you conducted examinations of experts leading to the first asbestos bankruptcy settlement allowing a debtor to retain equity. What scientific testimony was presented by experts that contributed to this benefit for your client?

Harding: We presented an analysis of asbestos claims data that we believed demonstrated that thousands of the asbestos claims that had been filed against the company were not based on sound medical data and diagnosis. We sought out and retained leading scientists in pulmonary medicine, epidemiology and radiology who each applied rigorous scientific methods to analyses of claims and medical data – contributing ultimately to the resolution of the matter. The rigor of the science and the scientists played a large part in how the case was resolved.

Editor: I assume the *Daubert* precedent had a lot do with the acceptance of your argument.

Harding: It did. We utilized the federal rules of evidence and the particular rulings regarding *Daubert* in a novel way in Federal Bankruptcy Court, which permitted the court to look at the claims and hear evidence about the claims in a way that had not previously been done. That had a significant impact on the outcome of the litigation.

Editor: You also led the pretrial effort for Grace that resulted in discovery wins against major asbestos plaintiffs in the U.S., laying down markers that have been used by other trial counsel in asbestos suits. What are some of those markers?

Harding: The most important discovery rulings we received in the W.R. Grace case involved orders requiring disclosure of underlying medical records, x-rays and screening data that had not been part of previous bankruptcy proceedings. Some of those rulings occurred in the actual bankruptcy court, and some of them occurred outside the bankruptcy court in district courts around the country where we were pursuing data from plaintiff firms.

Editor: What are some specific courtroom presentation strategies that work best in ensuring that a jury understands the true scientific implications of a given situation?

Please email the interviewee at bharding@jonesday.com with questions about this interview.

Harding: The most important aspect of any presentation involving litigation or in any circumstance where you are trying to persuade others about a particular issue is accuracy. Any litigator in high-profile, high-stakes litigation understands that it is his or her job to ensure that the data being presented is accurate. The only strategy I know for being effective is to be right.

Editor: Do you normally use visuals that are media-generated?

Harding: Absolutely. In any type of presentation, you must engage the audience. Occasionally, you will see an overuse of visuals and props that can be distracting. It is critical that you streamline your use of media so that it is targeted to help explain difficult conceptual issues or to help organize massive amounts of data in a way that effectively communicates your main points to your audience. Visuals obviously are one of the tools you use. But at the end of the day, they are just a tool. You – the speaker – must be able to capture and keep the attention of your audience.

Editor: Do you work closely with the support team in putting this together in your argument?

Harding: Yes, it is vital. I work closely with everyone assisting me in any presentation. In a litigation setting, it is important that the person who is presenting the data has a very in-depth understanding of the underlying analysis that provides the foundation for any argument, exhibit, visual or demonstration of a concept. The attorney in the courtroom ultimately is responsible for any supporting evidence and needs to know for certain that it is based on accurate data and rigorous analysis.

Editor: Do you often invoke testimony from scientific experts to bolster your position on a scientific issue?

Harding: Absolutely. The most important aspect of any technical case is again to ensure that the data or arguments you present are based on sound scientific data. I insist on rigorous data analysis from our experts. I insist on understanding how the analysis is conducted at the most basic technical level – what data is included in an analysis, why, and what data is not included in analysis and why it is not included – so that I can assure myself and the court or jury that the analysis I am presenting is unassailable.

Editor: Do you work closely with experts in determining how to refute any claims to scientific authenticity by the opposing side?

Harding: Rather than trying to undermine any arguments put forth by the other side, I will work with experts to understand analysis, arguments or data presented by an opponent. Oftentimes an expert on the other side will do an analysis or present an argument that is perfectly sound and reasonable. It is important to understand the foundation for that argument and the implications it has for your case, just as it is important to understand when the other side has presented an analysis that is unsound.

Editor: The decisions in *Daubert v. Merrill Dow Pharmaceuticals, Inc*. and *General Electric v. Joiner* have set the bar for many product liability cases. Recently, the case of *Milward v. Acuity Specialty Products Group, Inc* (1st Cir. 2011) seemed to undermine the earlier cases in that it was decided on the basis of "weight of the evidence." Do you think the *Milward* case, owing to its unique subject matter, will have any lasting impact on *Daubert* (based on clear and convincing evidence) as a future defense?

Harding: It is too early to tell what the implications of that decision will be at this time. I am hopeful that it will be limited to the unique facts of the case. The decision is significant though, and we will watch how other courts interpret it. Most judges are sophisticated in their understanding of the *Daubert* requirements and most trial judges, whether in federal or state court, attempt to admit only evidence that has a sound basis in science. For that reason, the *Milward* case is not likely to dramatically alter the way that most courts around the country determine admissibility of scientific evidence – or at least – that is my hope.

Editor: What resources are of greatest value to you as a defense attorney?

Harding: My clients. Often the most knowledgeable person is the in-house attorney from our client's organization. Generally, the in-house lawyer will have been dealing with the strategic and factual issues in the matter for months, if not years. It is vital for any successful defense to get an in-depth understanding of the documents, the witnesses, history and concerns of the in-house attorney before making any major strategic decisions or arguments in a case. In the fast-paced nature of high-stakes litigation, it is sometimes difficult. But it is imperative that you do it.

Editor: One of the secrets of your success is your experience as an athlete. How do you think your background as an NCAA All-American gymnast has contributed to your success?

Harding: As an athlete, you welcome competition. As a litigator, it is important not to fear competition – but to welcome it. I am never afraid to go to court to battle for my clients. Clients need a team of highly capable lawyers and a leader. Sometimes your clients need you to lead and sometimes they need you to put your ego aside and be a good team member – regardless of who you are or what you have done. As many know, good coaches and mentors prepare you for both. I've had the privilege both as an athlete and a litigator to be coached and mentored by extraordinary individuals who still have a large presence in my life. That is probably the most lasting imprint of athletics on me – the knowledge of how big an impact you can have on those you are asked to lead.