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used photos of a family
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This Old Armoire

John D. O'Connor achieved a \$1.36 million jury verdict for the defendants in a counter claim for breach of employment agreement.

BY LEONARD NOVARRO

This case had everything: internecine rivalry, disparate corporate cultures, lack of communication in a business whose heart is communication, deceit, drama and, in the end, an armoire that turned a claim by one of the nation's largest marketing promotion agencies against itself.

It all came down to a credibility contest, according to John D. O'Connor, the attorney representing the three defendants sued by Flair Communications Agency Inc. of Chicago for breach of employee agreement, breach of fiduciary duty and misappropriation of trade secrets.

O'Connor's clients countersued, winning a unanimous jury verdict on Feb. 1 in *Flair Communications Agency Inc. v. David Flaherty, C001061* (N.D. Cal., ver-



Attorney John D. O'Connor holds up suspect photos of a family armoire used to store documents. The photos were crucial in convincing the jury to find for the defendants.

SIDEBAR

Case: *Flair Communications Agency Inc. v. Davide Flaherty, C001061* (N.D. Cal., Feb 1, 2001)

Types: Breach of employment agreement and counterclaim of breach of employment agreement

Result: Jury verdict in favor of the defendants for \$1.36 million

Attorneys: Plaintiffs — George Grumley, Piper, Marbury, Rudnick & Wolfe, Chicago; Arthur B. Sternberg, Pedersen & Houpt, Chicago; C. Griffith Towle, Bartko, Zankel, Tarrant & Miller, San Francisco
Defendants— John D. O'Connor & O'Neill, San Francisco

Experts: Plaintiffs— Marianne Ellis, vice president, DDB Worldwide, Los Angeles, trade secrets
Defendants — Philip Rowley, Peterson Consulting, San Francisco, damages

Judge: Samuel Conti

dict Feb. 1, 2001).

The jury, after a 13-day trial, and deliberating 4 1/2 hours, rebuffed Flair's claims and awarded the defendants \$1.36 million after granting them four of their five claims.

Flair is appealing the verdict. Both sides sought compensatory and punitive damages in the trial before U.S. District Judge Samuel Conti, in which O'Connor claimed wrongful termination, breach of implied contract to pay bonuses, defamation, interference with prospective advantage and intentional infliction of emotional distress.

To prove wrongful interference, however, a breach of legal duty must be explicit, and the defendants couldn't demonstrate that, Conti ruled during the trial. The jury did agree 8-0 in favor of the defendants' other counterclaims.

The three — David Flaherty, 39; Kathleen Mitchell, 40; and Douglas Litwin, 46 — were senior officers in the company's San Francisco office.

Flaherty is also the nephew of Lee Flaherty of Chicago, the 70-year-old founder of the firm and a promotions pioneer.

Lee Flaherty moved from Richmond to Chicago in 1964 to found Flair, one of the

first promotion agencies in the country, and over the years built a roster of high-profile clients that included, among others, Dole Foods, Standard Brands, tobacco company Brown and Williamson and Microsoft.

David Flaherty headed the San Francisco office, which, in recent years, had become an important outpost for the company and helped secure Microsoft as a client.

Once Microsoft came on board, David Flaherty saw the advisability of taking the West Coast office in another direction, a direction that would corral all the opportunities of the Internet but at the same time produce a clash of incompatible corporate cultures, according to O'Connor.

On one hand, the loosely organized West Coast version of the company was bent on capitalizing on the new technology. On the other hand, headquarters, stodgy and old-fashioned, was ruled by Lee Flaherty's iron hand and steeped in what O'Connor calls "palace intrigue."

David Flaherty's idea was to produce a spinoff of the company to take advantage of the Internet, using sophisticated games and contests to promote various products.

In March 2000, David Flaherty and Mitchell took the proposal to a meeting in

Chicago, where they were roundly turned down. Ironically, O'Connor contends, it boiled down to a lack of communication.

While David Flaherty and the others proposed a separate company to focus on the Internet, they intended to remain part of the Flair family.

"It was no doubt a misunderstanding" that led to Lee Flaherty's firing the three on the spot and storming out of the meeting, O'Connor says.

Top officials of the company, including founder Lee Flaherty and president Allyn Miller, completely disagree.

According to their attorney, George Grumley, a partner in the Chicago firm of Piper, Marbury, Rudnick & Wolfe, the three remained silent until the end of the meeting, when they were told they would have nothing to do with the new company. That's when they walked out.

Flair's suit contended that the three San Francisco employees quit on their own, taking company secrets and a client base with them.

Immediately after the incident, company officials flew to the San Francisco office to protect their files. When they arrived, the files were gone, they contended.

The trial's key issue was this: Was anything, particularly client lists and trade secrets, taken? Flair's attorneys produced photos of what they claimed were a ransacked and stripped-down office, including pictures of the Flaherty family's favorite piece of furniture, and armoire used to store files. David Flaherty's father, Dennis, 73, the brother of Flair's founder, had donated it.

"What we faced was diametrically opposed stories," O'Connor says, which led him to attack the credibility of Flair's witnesses.

Flair contended that the photos were taken on March 11, the day after the defendants were fired. In the photos, the door to the armoire is open. Flair officials said they pried it open themselves to see what was taken.

At the trial, however, O'Connor had David Flaherty's father, Dennis Flaherty, testify that opening the cabinet is impossible without a key, and his son had that key.

The jury concluded that the photos were taken later, not on March 11.

"We got them in deposition," O'Connor says of the eye-witness testimony. "We came into the court, and the first witness said he took the picture on March 11. We confronted them with the notion that David had locked it and the key was not returned until Monday. It proved the picture was staged and cast great doubt for the jury."

According to O'Connor, the case also largely boiled down to a clash of corporate cultures: the upstart West Coast versus the Midwest establishment.

Grumley says, "Our clients are not much for long lunches in posh restaurants and sports clubs after work. They're pretty basic and fundamental business people, even though the business they're in is slightly glitzy.

"But one thing they are, unfailingly, is courteous, which is why it's surprising to me that a jury could think they were anything less than they are."

But the jurors did, by Grumley's own admission.

"We interviewed jury members afterwards," he says, "and some of them got a David and Goliath take-away.

"That hurt."

The Paper Chaser

John D. O'Connor has a talent for taking a group of documents that at first glance don't seem particularly pertinent and stringing them together to show a pattern.

BY LEONARD NOVARRO

John D. O'Connor shied away from a career as a doctor because he thought he'd be bored.

So what does he do out of the starting gate as a young attorney? Try a medical malpractice case with the "king of torts," Melvin Belli.

In 1972, O'Connor was working as an associate with Belli, Choulos, Ellison & Lieff of San Francisco. O'Connor was responsible for assisting Belli in several trials, including a claim against the city and county

of San Francisco over inadequate medical care at the San Francisco County Jail. Belli represented an inmate whose leg had to be amputated because of improper medical treatment.

O'Connor went straight from being sworn in as attorney to questioning witnesses. He subsequently assisted in the malpractice trial, which ended in a large settlement for the plaintiff before the jury was to render a verdict.

However, O'Connor cut his teeth even earlier, with another famous name.

In 1970, while attending the University of Michigan Law School, he interned for William Ruckelhaus, then an attorney in private practice in Washington, D.C..

Ruckelhaus went on to become the first director of the Environmental Protection Agency and the deputy attorney general. He was fired in 1974 by President Richard Nixon for failing to get rid of special prosecutor Archibald Cox.

O'Connor left the Belli firm in 1974 to become an assistant U.S. attorney in the Northern District's San Francisco office. The reason was Ruckelhaus.

"When I came out of law school, I always intended to work for the U.S. attorney's office. I just loved working for justice under Ruckelhaus," he says.

SNAPSHOT

John D. O'Connor

Law School: University of Michigan Law School, 1972

Career highlights: Partner, San Francisco's Tarkington, O'Connor & O'Neill, 1982-present; associate, San Francisco's Brobeck, Phleger & Harrison, 1980-81; assistant U.S. Attorney, San Francisco, 1974-1979

Case types: Business, Commercial and insurance coverage litigation

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The Paper Chaser

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"I was taken with the idea of starting a public-interest law firm, and it struck me that the finest public-interest law firm in the country was the Justice Department."

At the Department of Justice, O'Connor worked in both the civil and criminal divisions, finding himself at the center of several high-profile cases, among them the United States' prosecution of Patricia Hearst.

He was pitted against F. Lee Bailey and Alan Dershowitz in that case. Hearst's attorneys were able to secure a pretrial motion preventing any testimony about the so-called "missing year," the period after the newspaper heiress's kidnapping, when she was accused of cooperating with her captors, the Symbionese Liberation Army.

O'Connor wrote the brief that challenged the ruling. It was overturned, allowing prosecutors to cross-examine Hearst on her activity as a fugitive.

During his tenure with the Department of Justice, which ended in 1979, O'Connor also defended complex civil actions against the federal government over regulations during the gas crisis in 1978, prosecuted illegal activity regarding energy regulation and defended a number of employment-related actions against the government.

In 1980, now focusing on business issues, he joined the San Francisco firm of Brobeck, Phleger & Harrison, where he honed his skills in discovery and pleading. A good deal of his work involved unfair competition, trade secrets and intellectual property rights, among other complex business litigation.

But O'Connor longed for something he felt he didn't have with the large firm — freedom. In 1981, he left Brobeck to start his own firm, which has since grown to 10 attorneys.

A small firm "gives you the freedom to do what you want to do," O'Connor says. "In a small firm, you have the freedom to go with your gut and take a case. You don't have to take it to a committee."

The disadvantage of the small firm is that it is not a known commodity, such as a large firm with institutionalized clients would be.

"With a small firm, you're always in a position of having to prove yourself," O'Connor says.

Which he has had little trouble doing.

After receiving a small assignment from the Federal Deposit Insurance Corp. in 1983, his firm gained enough client confidence to become one of the larger law firms the federal government turned to during the savings and loan crisis.

O'Connor's expertise over the years has extended to a variety of well-known cases.

In one of these, he successfully defended the drug manufacturer in some 150 cases in which women claimed to have developed cancer through their mothers' use of the drug diethylstilbestro, known as DES. The case ended with a range of settlements favorable to his client.

Few cases have baffled him, according to those who know him.

One case in particular stands out for Bob Mehaffey, a sole practitioner in Lafayette.

In 1996, he and O'Connor both represented Samsung Heavy Industries In, of South Korea, which was being sued by the German firm Vulcan Kocks Bremen over delays in a crane construction project in Oakland.

The plaintiff was awarded \$1.5 million, but Samsung got \$2.8 million on cross claims for fraud and negligence.

"John was the trial attorney who did the vast majority of examinations," Mehaffey says. "It was a fascinating case because there were thousands of documents — a third in German, a third in Korean and a third in fractured English. He did a great job of stringing events together in a logical way to create a picture for the jury.

"In a case like this, some documents everybody knows are the big ones. But he's able to take the ones that at first blush don't appear to be pertinent and string them together to show a pattern."

William DelHagen of Belcher, Henzie & Biegenzahn of Los Angeles, who represented Kocks in the case, says O'Connor was "very clever and resourceful. We probably had 5,000 exhibits between the two of us. Keeping track wasn't easy. A massive amount of paperwork was involved."

But through it all, O'Connor knew how to make the best use of his paralegal team

to keep every document in order and ready for use.

While such preparation may exhaust some attorneys, for O'Connor, it's exhilarating.

"I like the stress," he says. "The more stressful it gets, the better I like it. It's a matter of passion."

That passion comes from growing up in an Irish family that thrived on a good argument.

"I grew up in a big family, with many cousins, uncles and aunts. And when we got together, we argued for fun and to provoke arguments with each other. What we often ended up doing was cross-examining each other," O'Connor says.

It was good practice, for when O'Connor, as an undergraduate of Notre Dame, got bored with the idea of becoming a doctor — "I didn't want to fix elbows as a living; I wanted to fix social problems" — the natural course seemed to be law. "My whole family was my mentor," he says.

That included his father, John, himself and attorney and onetime partner with Ruckelhaus. His sister, Carolyn, also a lawyer, is one of the leading health care advocates in Chicago.

In his spare time, O'Connor, who with wife Janet, 45, has three grown children, reads a lot of nonfiction and enjoys playing racquetball, tennis and golf. His passion, however, is basketball.

"It's a hot game," he says. "Golf is not a hot game. Basketball is. It's a matter of passion."

And, perhaps, that's what sticks out most about the man in court, according to William Morrisroe, and attorney with the California Department of Transportation's legal division.

"He enjoys life," Morrisroe says. "He's extremely likable and not afraid to be himself in the courtroom. That's what comes through."

"I never try to be haughty," O'Connor says. "I try to be respectful of everything and everybody. I think the kiss of death for a trial attorney is to appear arrogant. I never try to talk down to anybody."

"For some people, being yourself is not good advice," Morrisroe says. "For John, that's an asset."