

Litigation Powerhouse: Kirkland & Ellis LLP

From its top trial lawyer to its impressive group of associates, Kirkland & Ellis LLP has one of the deepest of benches in the business, which has carried it to victory in billion-dollar cases for blue-chip clients like General Motors, Samsung and Nike, and a berth among *Law360*'s Litigation Powerhouses.

Bolstered by a litigation group of 623 attorneys, more than half of them partners, Kirkland & Ellis is renowned for a dogged approach that always keeps trial preparation in the forefront and often leads to big wins for its clients.

"We always prepare the case to get it ready for trial, and in the course of that preparation, we become so fluent in the facts it puts us in a position so that every phase of the case can be more successful," said partner Leslie M. Smith. "In all situations, we work to identify off-ramps along the road for the client to get out before trial in terms of a dispositive ruling or settlement if that's what the client wants."

That reputation pays big dividends even at the start of the case, and opponents know that if Kirkland & Ellis is retained, the firm is more than willing to battle it out at trial, and that affects how negotiations go from there.

"Kirkland has the ability to move forward in a steely-eyed way no matter the stakes," said partner James F. Hurst. "We marshal our resources and give our client the very best chance of winning, whereas a lot of firms might fold when the stakes get too high, and try to convince their clients to settle."

On the actual trial front, the Kirkland & Ellis way has translated into some major victories in a number of practice areas.

In the first bellwether trial in the General Motors Co. ignition switch litigation, Kirkland & Ellis secured an abrupt but significant win in January when the plaintiff suddenly withdrew amid accusations he lied on the witness stand.

Partner Mark Filip said that turning point moment grew out of an anonymous tip and the Kirkland & Ellis team's quick work to develop facts to show the plaintiff had fabricated portions of his case.

"GM is a good example of where just hard work paid off to allow people to develop facts that painted a credible picture of the case," Filip said. "It was real concrete work that wasn't sexy to show there was overreaching."

Experts have said that GM prevailing in that first case would likely prove costly to plaintiffs' credibility going forward.

In a major intellectual property win for Samsung Electronics Co., Kirkland & Ellis twice beat back infringement claims from nonpracticing entity Cascades Computer Ventures, even after its primary strategy for the trial had already been on display when the case was ordered for a retrial in September.

"What's interesting is how the trial team reacted and changed," said partner Gregory S. Arovas. "The trial team knew that [Cascades] now knows our game plan, and they tried a completely different case.

Big Wins:

DIRECTV v. Imburgia — In a win for DIRECTV, the U.S. Supreme Court overturned the California Court of Appeal and ruled the language of DIRECTV's service contracts was not subject to a state law that bars class action waivers.

Horne v. Department of Agriculture — In a landmark Supreme Court victory on behalf of California raisin farmers who were fined for refusing to comply with a federal program that would divert part of their annual crop, the high court ruled that personal property cannot be taken by the government without just compensation.

Rentmeester v. Nike — Nike Inc. secured the dismissal of trademark infringement claims that the athletic apparel maker nicked its famous "Jumpman" logo, protecting \$2 billion in annual business for the company.

In re: General Motors LLC Ignition Switch Litigation — In the first bellwether trial in the General Motors Co. ignition switch litigation, Kirkland attorneys scored a significant win when the plaintiff abruptly dropped the case amid accusations he lied on the witness stand.

Atlas IP v. Medtronic — Handing a win to Medtronic in a billion-dollar patent fight, the Federal Circuit agreed the medical device maker did not infringe an Atlas IP patent and also reversed the lower court's finding that the Atlas IP patent was not invalid.

Trial Tip:

"Part of being prepared is understanding the facts well enough to be able to explain them in a plainspoken way."
— Mark Filip

It's a great example of how a trial team can adapt and pull together."

Kirkland & Ellis also prevailed in a False Claims Act case when a Texas federal jury cleared Abbott Laboratories in April of accusations it improperly marketed bile duct stents for off-label uses.

Hurst, one of the leaders of the Abbott trial team, said a major turning point came when Kirkland & Ellis turned around the testimony of the plaintiff's key damages witness.

Instead of the common tactic of challenging an expert witness's calculations, the Kirkland & Ellis team showed that the government had continued to pay for the stent prescriptions even after the plaintiff turned into a whistleblower, and that Medicare knew the vast majority of vascular stent procedures were done using stents that had been cleared for use in bile ducts.

"We took the other side's damages witness, and without quibbling with her math, turned her into one of our best witnesses through a cross the other side never expected." Hurst said. "She wasn't even our witness."

Kirkland & Ellis has notched other significant trial and pretrial wins over the past year, including dismissal of trademark infringement claims that Nike Inc. nicked its famous "Jumpman" logo, protecting \$2 billion in annual business for the company. It also scored a \$93.8 million jury award to AbbVie Inc. in a royalty dispute with MedImmune LLC, as well as a summary judgment ruling in favor of BP PLC that it had no duty to report the 2010 Deepwater Horizon oil spill under the U.S. Emergency Planning and Community Right-to-Know Act, and a \$73.6 million trade secrets misappropriation jury award against Caterpillar Inc. in favor of supplier Miller UK Ltd. believed to be the largest verdict of its kind in Illinois.

And at the appellate level, Kirkland & Ellis' wins included two victories in the bankruptcy space: the Seventh Circuit's reversal of a

decision in the Caesars Entertainment Operating Co. Chapter 11 that allowed third-party litigation to go forward in other venues, and a Third Circuit decision in the Jevic Transportation case that permitted a so-called structured dismissal of the case that was favorable to client Sun Capital Partners Inc. It also won a landmark U.S. Supreme Court ruling in June that decided California raisin farmers who were fined for refusing to comply with a federal program that would divert part of their annual crop to a reserve are entitled to just compensation by the government.

"If you're a fan of the underdog or have any libertarian leanings at all, that's the case where you are waving the flag," Filip said. "It will be a case people still read about in law schools many years from now."

Kirkland & Ellis' formidable trial record is born not just out of the prowess of its top litigators but what Filip calls "extraordinary depth" that extends down even to the associates working a case.

The firm runs something called the Kirkland Institute for Trial Advocacy, or KITA, for its associates. It's an in-house training program that covers the entire range of litigation, from the pretrial stage down to a two-day mock trial where professional actors play witnesses, lay people act as jury, and a senior trial partner dons the role of the judge.

"It's crazy intense," Hurst said. "But our young lawyers already have the basics taught to them before getting on their feet for the first time."

The program is a high priority of the firm and associates go through it annually, learning the ins and outs of trial at a level of rigor several Kirkland & Ellis partners said was rare at other firms.

"This is a big part of what it means to be at Kirkland," Arovos said. "Associates develop a comfort level and an intimate understanding of what we're trying to accomplish."

Associates hone not just tactics but skills and approaches to trial work that might not be obvious just from reading briefs and watching videos.

"To tell a story in a way that's interesting is critical," Smith said. "In most cases the allegations are baseless, but you've got to work piece by piece to dismantle them."

Smith said another crucial element to a trial attorney's skill set at Kirkland & Ellis is empathy, which is important not only for understanding witnesses but also for connecting with juries and reinforcing a lawyer's genuine credibility.

Filip agreed and added that convincing juries should not be some act of hucksterism but an appeal to a panel's sense of truth and fairness.

"There's a reality to a case that you can't manufacture," Filip said. "You have to convince people who learn the facts that they should trust the truth."

The ability to listen is also a key skill taught to Kirkland & Ellis attorneys. That allows them to digest information and explain it in the same concise and matter-of-fact way that a high school chemistry teacher might, Filip said.

"Life is complicated, but it can be explained," he said. "It's often not a theatrical process. Juries don't make decisions because you're glib or they like your clothes or hairstyle. We can take comfort that they consider more than that."

Kirkland & Ellis' calendar over the next year is just as well-stocked, with high-profile clients continuing to retain the firm for some of their most precarious cases.

The firm is set to represent Volkswagen AG in multidistrict litigation claiming the company violated the Clean Air Act by equipping its vehicles with software designed to evade emissions testing.

Kirkland & Ellis will also be on board to represent IMA SpA in a high-profile patent infringement and trade secret misappropriation case brought by INDAG GmbH and Wild Parma SRL that includes accusations that IMA unit FillShape improperly took proprietary technology

provided by a former engineer of the plaintiff companies.

“Our reputation as a top trial firm is almost a self-fulfilling prophecy,” Hurst said. “Clients know we can and will try the toughest cases, so they come to us for more and

more trials. Our opponents know we won’t hesitate to take a big case to verdict.”



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