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SPECIAL ISSUE





LITIGATION DEPARTMENT of the YEAR


LITIGATION DEPARTMENT OF THE YEAR WINNER

KIRKLAND & ELLIS LLP

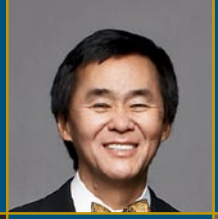






SPECIAL REPORT

LITIGATION DEPARTMENT of the YEAR
















GROOMING AND MAKEUP BY MARTHA FRIEDLANDER

THIS IS THE FOURTH TIME we've chosen a Litigation Department of the Year, a now biennial undertaking that has acquired a life of its own. We invited the Am Law 200 firms to compete for the overall title as well as laurels in one of three specialties: Intellectual Property, Labor and Employment, and Product Liability.

We asked the firms to report on their litigation records between January 1, 2006, and June 30, 2007. Specifically, we asked for no more than five examples of "significant achievements" in six categories, ranging from pretrial work to appellate to pro bono. The responses filled two dozen crates and have occupied most of our waking hours since the August 1 deadline.

We read them all, the clear and the confusing, the witty and the turgid. We whittled down the entries to a short list of finalists and then invited each to come to New York to plead their case. Oral argument, as it were, helped some firms. Others should have stayed home. Also, once again, we asked for client references. Note to law firms: Next time, check to make sure these folks actually think as highly of your work as you believe they do.

In the end, our four panels of judges concluded that we were most akin to admissions committees at very select colleges: At a certain point, you get used to rejecting high school valedictorians. This was a remarkably close competition. In our special report we present the four winners, the runners-up, and, in the Department of the Year contest, 18 more who merited special attention. Congratulations! And let the appeals begin.

PHOTOGRAPHS BY MIKE McGREGOR

LITIGATION DEPARTMENT OF THE YEAR WINNER

KIRKLAND & ELLIS

Top Guns

A kinder, gentler Kirkland & Ellis? Young partners say the firm's chest-pounding litigation culture is a thing of the past—but when they go to trial, Kirkland lawyers are still locked and loaded. In the courtroom, nobody does it better.

By Susan Beck

DO YOU HAVE AN HOUR? Or two or three? Because a Kirkland & Ellis lawyer would like to tell you the story of a trial. Michael Jones will detail how he convinced a jury in Milwaukee state court last year that NL Industries, Inc., was not liable for the cognitive problems of a boy exposed to lead-based paint. Steven McCormick will walk you through his strategy to prove to a state court jury in Florida in 2006 that AlliedSignal, Inc., was not responsible for the failure of a revered local business. Garrett Johnson will explain how last year, after a 50-day bench trial, he convinced a New York federal bankruptcy judge that Motorola, Inc., should not have to forfeit $3 billion in payments it had received from Iridium LLC before the satellite maker's spectacular failure. Even David Bernick, smacked with a $554 million jury verdict in his 2006 defense of Rockwell International Corporation and The Dow Chemical Company against homeowners who lived near a nuclear weapons plant in Colorado, still relishes the chance to delve into the nuances of the case.

Most litigators love to relive their trials. But what sets Kirkland apart—and the reason the firm is this year's winner—is the number of high-stakes, high-impact trials its lawyers have won since the start of 2006. Kirkland tried 30 cases to verdict, winning more significant trials than any other firm in our contest. "The whole culture in the litigation group is, 'We're trial lawyers. We try cases,' " says partner John Desmarais. Last year Desmarais won the biggest patent infringement verdict ever, $1.53 billion, for Lucent Technologies Inc. against Microsoft Corporation. The judge later invalidated the verdict, but Desmarais still considers it a "huge accomplishment."

Not every Kirkland success story of the last two years revolves around a trial. The firm achieved important results for clients at every stage of litigation. Michael Foradas, for instance, won the pretrial dismissal of a case against Union Carbide Corporation, in which famed plaintiffs lawyer Gerry Spence represented 225 residents of Uravan, Colorado, who claimed that they were poisoned by a uranium mining site. Richard Godfrey convinced a federal court judge to approve a settlement between client General Motors Corporation and the United Auto Workers that is expected to reduce GM's retirement health care costs by more than $15 billion. Christopher Landau won a U.S. Supreme Court ruling in *Buckeye Check Cashing Company* v. *Cardegna* that strengthens the enforcement of arbitration clauses. "I think we're in the dispute resolution business, not the trial business," says partner Emily Nicklin, who nonetheless in 2006 tried a breach of contract case for UbiquiTel Inc., a former Sprint Nextel Corporation affiliate, that settled near the end of trial. "Trials are fascinating and cathartic events... but most clients are not looking for a shoot-out at the O.K. Corral."

Nicklin's sensible words belie Kirkland's reputation as a firm of choice for clients with itchy trigger fingers. In years past, Kirkland litigators were known for being hard-nosed warriors—aggressive and then some. But partner Eugene Assaf says the firm's culture has evolved. "I see people who are much more nuanced in terms of their approach to client problems," he says. Assaf, 45, and some of Kirkland's other young litigation leaders, like the understated intellectual Jay Lefkowitz, 48, would never be mistaken for former Kirkland partners Fred Bartlit, Jr., or Donald Kempf, Jr., who approached cases as if they were George Patton heading off to war.

Client D. Cameron Findlay, the executive vice president and general counsel of insurer Aon Corporation, says his perception of Kirkland changed when he switched from being a rival to a client. (Kirkland represents Aon in matters arising from the bid-rigging scandal in the insurance industry.) "Frankly, I was not a big fan of Kirkland until I came to Aon," says Findlay, a former Sidley Austin partner. "I used to view Kirkland as aggressive, chest-pounding, grind-you-into-the-dust litigators." But once he started working with Kirkland lawyers at Aon, Findlay says, he saw a different attitude: "They're very thorough, very professional, and very responsive."

The evolution of Kirkland's litigation practice goes beyond its lawyers' attitudes. To bolster key practice areas, the firm has brought in prominent laterals, such as white-collar specialist Mark Holscher from O'Melveny & Myers. It has also attracted new clients to complement an established roster that includes General Motors, Motorola, and Dow. In the last five years, BASF Corporation, Calpine Corporation, Tenet Healthcare Corporation, and Teva Pharmaceuticals USA have all become clients. "That's an indication of the dynamism within this practice," says Lefkowitz, who sits on Kirkland's management committee.

Lefkowitz also points out the younger partners heading up cases, such as Desmarais, 44, Andrew Clubok, 39, Craig Primis, 37, and Leslie Smith, 45. "We are rejuvenating ourselves with clients and new attorneys," he says.

Still, some things haven't changed. Why tinker too much with a formula that is one of the key reasons for Kirkland's financial success? Kirkland's revenue per lawyer in 2006 was $1.035 million, placing it eleventh nationwide. Litigators generate half of the firm's revenues.

From left: Leslie Smith, Emily Nicklin, Jay Lefkowitz, Eugene Assaf

DEPARTMENT SIZE	Partners:	**302**
	Associates:	**393**
	Of Counsel:	**15**
DEPARTMENT AS PERCENT OF FIRM		**50%**
ESTIMATED PERCENT OF FIRM REVENUE 2007		**50%**

ON THE DOCKET Defending W.R. Grace & Co. against a Justice Department Clean Air Act prosecution in Libby, Montana; serving as trial counsel for GlaxoSmithKline plc in litigation involving diabetes drug Avandia; representing Navistar International Corporation in a multimillion-dollar dispute with Ford Motor Company involving the supply of diesel engines for Ford Trucks.

The foundation of Kirkland's litigation practice remains a dedication to the art of taking a case to trial. "There's a lot of trade craft passed down from generation to generation," says McCormick, 61, who estimates that he's handled 25 jury trials and 25 bench trials. "We do things to the nth degree. Dig down to the bedrock." The firm runs a rigorous in-house trial advocacy program that costs an estimated $10 million in expenses and attorney time each year. "The Kirkland philosophy is, you prepare a case as if you're going to trial from day one," says partner Jennifer Levy, 35.

That approach makes Kirkland less likely to settle cases than many other firms. In fact, when the firm described its successful settlements to *The American Lawyer*, they tended to be cases that settled in the midst of trial. One lawyer for a defendant in the Lucent patent litigation (which involves claims against three companies) says he was surprised the Microsoft case didn't settle before reaching a jury. "John [Desmarais] and his group are trial lawyers rather than counselors," he asserts, adding that the Kirkland lawyers took unreasonable positions in negotiations. "Some lawyers at any cost want to settle a case," Desmarais responds. "If you don't settle, some people will say you're being really aggressive."

In the last two years, aggressiveness worked for Kirkland & Ellis. Stanley Bernstein of Bernstein Liebhard & Lifshitz—one of the lead plaintiffs lawyers in the litigation arising from failed initial public offerings of the dot-com boom—has admired Kirkland's tenacity from the other side. Kirkland partner Clubok, he says, has pursued a maverick strategy for Morgan Stanley. "They never shy away from a fight," says Bernstein. "A lot of firms [in this case] are trying to hide in the weeds. They're not hiding."

SOME LAWYERS MIGHT TAKE a gentle approach when defending a big company against personal injury claims brought by a mentally retarded youngster from an urban housing project. Not Kirkland's Michael Jones in the case of 17-year-old Steven Thomas. Exposed to lead-based paint in Milwaukee's public housing, Thomas had an extremely high lead level in his body. Blood tests showed 49 milligrams of lead per decaliter; 10 is considered a level of concern. Thomas had never tested higher than 74 on IQ tests and attended special education classes only sporadically. In 1999 his family sued Kirkland client NL Industries and four other paint makers, claiming that Thomas would never be able to hold a job.

Jones, who started honing his oratory skills at a young age by making speeches in his Baptist church, acknowledges that the case presented "very, very sensitive issues." At front and center was the question of whether genetic or environmental factors were responsible for Thomas's cognitive deficiencies. Roughly 40 cases, most filed in Wisconsin, have attempted to link brain damage to lead paint exposure. Thomas's case was closely watched because it was the first test of Wisconsin's new risk contribution law, which doesn't require plaintiffs to show that they were exposed to the defendant's product, only that they could have been. (Jones won one of the previous lead paint trials, a 14-plaintiff case in Mississippi state court.)

In Milwaukee, Jones, 47, took the lead for NL and the four other defendants. And despite Thomas's woeful situation, he went on the attack. Jones didn't dispute Thomas's high lead levels, but he challenged the assumption that lead exposure had caused Thomas's problems. Decades ago, when gas was leaded, doctors considered a lead level of 60 normal, he pointed out. "America's greatest generation had high lead levels," Jones told the jury.

He also accused Thomas, his family, and plaintiffs lawyer Peter Earle of deceiving the jury with a "ginned up" case that exaggerated the boy's problems. (Earle did not return calls.) Jones argued that Thomas was far more capable than he claimed in court, and introduced evidence that the boy could play video games and chess. Jones also told jurors that Thomas's problems were exacerbated by his tumultuous life—he was the ninth child of a single mother and had attended 25 schools. The Kirkland lawyer even chided Thomas's family for failing to get the boy remedial help.

"By the closing, I did not have to be gentle," says Jones, who says his kid-glove cross-examinations of Thomas and his sister showed that "it was obvious they were not telling the truth." At the end of the trial, Jones exhorted the boy, who was not in the courtroom that day, to take responsibility for his life: "I would say to Mr. Thomas, you can and you must change your attitude."

After a day of deliberations, the jury returned a unanimous verdict for NL and the other defendants, finding that the paint had not caused any brain damage. "Mike is a very good communicator and very engaging," says NL's general counsel, Robert Graham. He says Jones methodically built a case that showed the jury a more complete picture of Thomas's life. Jones says he didn't view his strategy as an attack on a troubled teenager. "I've always believed," he says, "there's a difference between attacking a notion or a lawsuit, and attacking a person."

The Kirkland craft of careful preparation was also on display in the Lucent-Microsoft patent trial. Lucent had sued Microsoft, Dell Inc., and Gateway, Inc., seeking billions of dollars for the alleged infringement of 15 patents for the computer audio compression technology known as MP3. San Diego federal district court judge Rudi Brewster had segmented the case so that the first trial involved just three of the patents and one defendant: Microsoft.

Kirkland partner Desmarais raised doubts about the claims of one of Microsoft's key experts, Dr. Karlheinz Brandenburg. Brandenburg testified that he, not Lucent, had invented MP3 technology. But Desmarais's check of the scientist's background reached back to Brandenburg's student days. During cross-examination, the Kirkland partner pointed out that Brandenburg had learned the underpinnings of MP3 technology as an intern at Bell Laboratories—Lucent's predecessor. "We had some fun with him," Desmarais recalls. "We took this great expert they had and turned it around on them." (Lawyers at Fish & Richardson, which represents Microsoft, did not return calls.) Barbara Landmann, vice president of intellectual property for Alcatel-Lucent, says she was impressed with Desmarais's disciplined trial preparation. "John's cross-examinations are systematic, extraordinarily interesting, and quietly dramatic," she says. "His jury presence is remarkable."

In February 2007 the jury gave Lucent the entire $1.53 billion Desmarais had asked for, but in August, Judge Brewster threw out the verdict. He concluded that Lucent hadn't proved Microsoft's infringement. (The judge retired shortly thereafter.) Despite Brewster's ruling, which Kirkland is appealing, Desmarais believes the trial has given his client a much stronger negotiating position. "Microsoft never believed we could get a big verdict against them. Now they're looking at four to five more trials coming up," he says. "I think our leverage is pretty high." A trial against all of the defendants on five other disputed patents is scheduled for early this year.

Some of Kirkland's recent trial victories involved much smaller dollar amounts than the Lucent case but still had far-reaching consequences. Kirkland is national counsel for Nationwide Mutual Insurance Company in Katrina-related litigation, which included hundreds of homeowner suits brought by Mississippi plaintiffs lawyer Richard Scruggs. The majority of these cases involved the interpretation of insurance policies that cover wind damage but not most types of water damage. A bad precedent for Nationwide in one case could put the company, and possibly the industry, at a huge disadvantage.

In the first case to go to trial in Mississippi, Scruggs wanted Nationwide to pay $130,253 for damage caused by the wind-blown storm surge that flooded his client's home. The insurer countered that it was liable only for $1,661—the damage Nationwide said was caused solely by wind. After a bench trial handled by Kirkland partner Daniel Attridge, senior district court judge L.T. Senter, Jr., ruled that Nationwide's policy did not cover damages caused by the surge. He allowed the plaintiff an additional recovery of only $1,228.

Despite the victory, Kirkland saw a problem. Judge Senter had written that Nationwide's policy language about concurrent damage from wind and water was ambiguous and unenforceable, which would hurt the insurance company in subsequent cases. Kirkland, led by appellate specialist Landau, appealed Senter's ruling. Scruggs objected, arguing that Nationwide couldn't appeal a case it won. Landau unearthed a Supreme Court case from 1939 in which the Court held that the prevailing party in a patent case could appeal collateral issues that might hurt it in future cases. In August, the U.S. Court of Appeals for the Fifth Circuit agreed with Kirkland that Nationwide had the right to appeal, and that the policy language was not ambiguous. Scruggs then settled all his cases against Nationwide. "This case was significant for Nationwide and the industry," says Randolph Wiseman, senior vice president and chief litigation counsel for Nationwide. "This policy language had implications for many companies."

Kirkland's perseverance and attention to every detail was equally critical in a fraud trial that partner McCormick won for Honeywell International in Florida state court. McCormick, who hails from the old-school generation of Kirkland lawyers, frames the case dramatically: "This case was a direct frontal assault on the senior management of the company." The case was filed in 1999 by Breed Technologies, Inc., which claimed that AlliedSignal defrauded Breed when it sold Breed its troubled auto safety restraint business. Breed, which landed in bankruptcy soon after the purchase, wanted $800 million in compensatory damages from Honeywell, which had bought AlliedSignal. Breed's Jones Day lawyers also asked for a $2 billion punitive award.

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The litigation started badly for Kirkland. "The judge ruled against us in 29 motions in limine," says Kirkland's Assaf, who led the team during most of the pretrial proceedings. Kirkland failed to get the case transferred out of Bartow, Florida, where Breed's founder was a local legend for inventing the airbag. It also tried and failed to get the dispute settled through arbitration.

As the trial approached, Kirkland did an extraordinary amount of jury research. At one point, the firm paid almost 300 people to watch an abbreviated version of the trial in a hotel ballroom near Orlando. The crowd held devices that let people register their immediate impressions—good, bad, or bored. On the basis of that research, the Kirkland trial team decided not to raise many objections during the trial, to avoid looking as if they were trying to hide something.

Jones Day's lawyers did not follow that approach. Halfway through the six-and-a-half-week trial, jurors entered the courtroom and turned their backs to the judge and lawyers. The bailiff explained that they were tired of the objections. In the end, the jury took less than one day to return a verdict for Honeywell. (Jones Day declined to comment.)

Of all his accomplishments at Kirkland, McCormick says he is proudest of teaching young people how to try cases. "I'm planning to ride off into the sunset and have these people support me in the manner I'm accustomed to," he says. McCormick heads the annual Kirkland Institute for Trial Advocacy training program, in which 95 percent of Kirkland's litigation associates—337 lawyers—participated last year. Sixty equity partners and 12 nonequity partners took time away from their cases to be instructors at the four-day program, which costs the firm an estimated $10 million in out-of-pocket costs—including actors for mock trials—and lawyers' time.

Kirkland acknowledges one area where it isn't satisfied with its performance: pro bono. "We've done a good job, but not as good as we need to," says Lefkowitz, who says the firm is now close to meeting the American Bar Association's pro bono target of 3 percent of hours. One of the firm's biggest projects, led by partner Victoria Reznik, is litigation to stop Tennessee from cutting Medicaid benefits to children. (Sonnenschein Nath & Rosenthal is also playing a major role.) "We have not, frankly, done enough big, high-profile cases," says Lefkowitz. "The firm committee has said we need to set a tone at the top."

To reinforce that commitment, the firm last year brought back former partner Thomas Gottschalk, who stressed pro bono work when he was GM's general counsel ["Lifetime Achievers," September 2007]. "I want to get the number of people participating up," Gottschalk says, noting that only 35 percent of Kirkland's lawyers are doing at least 50 hours of pro bono work a year. "I look at other firms and see some at 90 percent," he says. In particular, Gottschalk says he would like senior partners to mentor young lawyers in pro bono cases. He's also working to match transactional lawyers with projects, such as a program to secure benefits for recent war veterans.

The firm does not, however, feel it needs to be contrite about the role it played in the disastrous 2005 Morgan Stanley case in West Palm Beach, Florida, in which the company was severely sanctioned for discovery abuse and ended up with an adverse $1.57 billion jury verdict ["Recipe for Disaster," June 2006]. Morgan Stanley, whose legal department was then led by former Kirkland partner Kempf, fired Kirkland shortly before trial, after a state court judge imposed the crippling sanctions. A Florida appellate court later vacated the verdict and entered judgment for Morgan Stanley, without addressing the sanctions. (Plaintiff Coleman Holdings Inc., owned by Ronald Perelman, has appealed.) "I think we are comfortable we handled the case the right way," says Lefkowitz.

In 2008 Kirkland will continue to handle some of the highest-stakes cases. And, most likely, Kirkland lawyers will be in trial. Desmarais, who is preparing to try another phase of the Lucent patent case, says he never tires of the courtroom: "There's something about the competition that charges me."

E-mail: sbeck@alm.com.