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Litigation Department of the Year

Intellectual Property

Winner

ROBINS, KAPLAN, MILLER & CIRESI

THIS HAS BEEN THE YEAR OF LITIGATION. FOR the firms of The Am Law 200, the only litigation crisis they have faced has been the fear that they may not have enough associates to handle the torrent of new matters. All of which made our effort to pick a Litigation Department of the Year, now a biannual contest, especially difficult.

This time we conducted four competitions. We invited every firm on the 2002 Am Law 200 to vie for Litigation Department of the Year. In addition, each could choose to compete in one litigation specialty—Intellectual Property, Labor and Employment, or Product Liability. In all, we received about 120 submissions. To make a baseball analogy, we weren't selecting members for the Hall of Fame, we were choosing the season's most valuable players. (We plan a similar contest for smaller firms in December.)

We asked the firms to report on their litigation records between January 1, 2002, and June 30, 2003. (Lawyer numbers listed throughout are as of August 1, 2003.) Specifically, we asked for no more than five examples of "significant achievements" in six categories: pretrial, at trial, on appeal, before the U.S. Supreme Court, pro bono, and a catchall that included arbitrations and settlements. In addition, we asked firms for client references, names of opposing counsel, and a list of firm partners who tried cases to verdict during those months—which for some firms proved to be a very short list, indeed.

Teams of our reporters and editors read each application. On the basis of those filings we winnowed the candidates and then supplemented the submissions with reporting. We developed a shortlist of finalists and then visited each of them, offering these master advocates the chance to explain why they should win.

Each contest was very close. Over the next 40 pages we present the four winners, the 11 runners-up, and, in the case of the Department of the Year contest, nine more who merited special attention. Congratulations! And let the appeals begin.

PHOTOGRAPH BY NICHOLAS EVELEIGH

Happiness is a Jumbo Verdict

ROBINS, KAPLAN HAILS FROM THE HEARTLAND BUT GOES FOR THE JUGULAR.

By Paul Braverman

ABOUT TWO weeks into the trial that resulted in the second-biggest patent verdict in history, Microsoft Corporation's key defense witness took the stand. Pei-Yuan Wei had invented a technology in the early 1990s, according to Microsoft, that allowed developers to embed interactive programs, called "plug-ins," in Web pages. These plug-ins are what help present stock quotes, games, streaming video, and other interactive content on the Web. The Web would be a far less inviting place without them.

Microsoft's lawyers from Sidley Austin Brown & Wood and Leydig, Voit & Mayer, both of Chicago, were claiming that Wei had demonstrated the technology for Sun Microsystems, Inc., in 1993, and they wanted him to re-create the demonstration. If Microsoft could show that Wei ran a working model of the technology in 1993, it would be a fatal blow to plaintiff Eolas Technologies Inc., which was claiming that Microsoft was infringing a patent it filed in 1994.

Eolas's lawyers, Martin Lueck, Jan Conlin, and Richard Martinez of Minnesota's Robins, Kaplan, Miller & Ciresi, were confident that Wei hadn't figured out how to make plug-ins work in 1993. They were sure that his demonstration, if it duplicated what was doable in 1993, would fail. They suspected Microsoft's lawyers might tinker with the technology before playing it for the jury in order to "conceal technical deficiencies," as Lueck puts it. ("Nonsense," says H. Michael Hartmann of Leydig, who did the direct examination of Wei.) So a few days before Wei was expected to testify, they asked their experts to "ping" the server belonging to Microsoft's expert. (Pinging is a way of diagnosing a remote computer by sending electronic signals, or pings.) Sure enough, they found that the server software had been changed since the 1993 demonstration.

One day last July, Wei took the stand, along with a vintage computer. Could he download a Web page using the early 1990s technology, asked a Microsoft lawyer? "Well, I'd have to make an adjustment, and I'm not actually sure, positive, that it would work," said Wei, who proceeded to tinker with the server's code from the courtroom in Chicago. After a few minutes, he said, "Okay. Now it works. Hey, it works. Great."

Wei's enthusiasm didn't last long. Lueck was easily able to show that the file on display was not traveling across the Internet but was simply stored on the computer in the courtroom. "Doesn't that show 'local file' down at the bottom?" asked Lueck on cross-examination.

Then Lueck delivered the coup de grace—he forced Wei to admit that the server software had been changed since 1993, thus destroying both the premise underlying the demonstration and Microsoft's credibility. Two weeks later, the jury returned a $521 million verdict for Eolas. "I never doubted it for a minute. I thought the verdict would come in right where it did," says Lueck, although he admits that his partner Conlin was probably the only person to share that view.

The Microsoft verdict came two months after Lueck and Conlin won a $30 million jury award for Honeywell Inc. in a patent infringement suit against U.S. JVC Corp., a verdict that came two months after the firm hammered out a $50 million settlement for Tulip Computers International B.V. in an infringement case against Dell Inc., which was the same month the firm won a $25 million jury award for St. Clair Intellectual Property Consultants, Inc., in a suit against Sony Corporation. "We're long-ball hitters," says partner Ronald Schutz.

On the strength of these victories, the firm is also *The American Lawyer*'s Intellectual Property Department of the Year. Other firms have more Ph.D.s on staff (Robins, Kaplan has five) and IP lawyers with technical degrees (Robins has 11)—two measures of a firm's depth in technology. Several have had more impressive IP defense victories. But none of them can match Robins, Kaplan's ability to "ring the bell," in the words of one client.

The Microsoft war is far from over: As of November, the court was considering post-trial

PRACTICE GROUP	Partners: 42 Associates: 38
GROUP AS PERCENT OF FIRM	Partners: 47% Associates: 37%
ESTIMATED PERCENT OF FIRM REVENUE 2003	40%

ON THE DOCKET Robins, Kaplan hounds Microsoft, this time on behalf of TVI Corporation. The firm is also suing Amgen on behalf of the Israel Bio-Engineering Project.

motions, and the U.S. Patent and Trademark Office had decided to reexamine the patent at the urging of the World Wide Web Consortium, a standard-setting body. The consortium argues that two public 1993 e-mail postings describing early Internet development work would have prevented Eolas's patent from issuing if the patent examiner had known about them. But Lueck points out that the author of those e-mails testified at trial, as did an expert for Microsoft, and that Robins, Kaplan had been able to show that the e-mails did not contain new information.

Robins, Kaplan entered IP almost by accident. Michael Ciresi, the firm's most prominent litigator, is best known for mass tort litigations. He won more than $6 billion in damages and $560 million in attorneys' fees from the tobacco companies for the state of Minnesota. In the early 1990s, Honeywell, then based in Minneapolis, sued Minolta Camera Co. Ltd. in a dispute about auto-focus lens technology. Merchant & Gould, also of Minneapolis, had been handling the case for years, but as the trial neared, the company looked around for trial counsel. Ciresi didn't have any IP experience, but he knew how to win cases, so he got the job.

After a five-month trial, Honeywell's gamble paid off. Ciresi won a $96 million jury award. Honeywell eventually settled with more than a dozen Japanese camera manufacturers for more than $500 million. The firm has been rolling up IP wins ever since.

In an era when many companies find themselves on both sides of the "v," it's essential to know how to play both offense and defense. Robins, Kaplan lawyers say that they can defend companies as well as they can attack them. Just before last Thanksgiving, partner David Beehler (working with Gibson, Dunn & Crutcher) won an unusual decision—he convinced a Federal Trade Commission administrative law judge to dismiss the FTC's own complaint against Unocal Corporation, which alleged that patents owned by the company gave it a monopoly over the production of gasoline in California. Beehler argued that it wasn't the FTC's job to interpret the patents. That decision came about a month after Beehler beat Harvard Law School professor Arthur Miller and Melvyn Weiss of Milberg Weiss Bershad Hynes & Lerach before the U.S. Court of Appeals for the Federal Circuit in a case defending the validity of a Unocal gasoline patent. At about the same time, Schutz successfully opposed a petition to the U.S. Supreme Court, thus locking in his winning defense of a $500 million trade secrets case for IBP, Inc. (now Tyson Fresh Meats, Inc.).

Several companies that Robins, Kaplan have defeated at trial have subsequently hired the firm for defense work. In 1997, for example, the firm won a $110.5 million patent infringement verdict against General Electric Company. The company turned around and retained the firm as defense counsel (along with cocounsel Parsons Behle & Latimer of Salt Lake City and Plunkett & Cooney of Bloomfield Hills, Michigan) to defend it in an infringement suit brought by General Motors Corporation.

Robins, Kaplan lost two cases for Medtronic, but the client still loves the firm: "They were very difficult cases. Was it painful? Yes. Was it a lot of money? Yes. Were we unhappy with Robins? No. They did an outstanding job."

BUT IT'S PLAINTIFFS WORK that make the hearts of Robins, Kaplan lawyers beat faster, especially when it lands them in front of a jury, and especially when it's done on a contingency-fee basis. Schutz estimates that 50 percent of the firm's IP work is done on contingency, and he says, "I wish it were more." What about the Eolas case? Neither Lueck nor Eolas president Michael Doyle would say.

The firm also has a good record for protecting its trial work in front of the Federal Circuit. Richard Taranto of Washington, D.C.'s Farr & Taranto, a leading appellate specialist, worked with the firm at the claim construction phase of the Microsoft case, and on multiple appeals in the Federal Circuit. Most recently, he worked with Lueck on an appeal in the recent Honeywell case. The district court granted JVC summary judgment; Lueck and Taranto had the decision reversed, which allowed Lueck to show at trial that Honeywell essentially invented auto-focus technology for cameras, and that JVC was the only manufacturer in the industry that didn't have a licensing agreement with Honeywell. "Wonderful," is how Taranto describes Lueck's appellate skills.

Robins, Kaplan is different from the other finalists in this survey. First, at about 250 lawyers, it's less than half their size. Second, because its plaintiffs work can produce conflicts, some clients are off-limits. It won't represent Big Pharma, for example. "We're not trying to be all things to all people," says Schutz. Third, while Robins, Kaplan has Ph.D.s on staff and retains world-class experts when needed (such as Princeton University computer scientist Edward Felten, who worked on the Microsoft case), the firm is selling its trial skills, not its technology expertise. "If I can learn it, I can teach it to someone else," says Ciresi, who has no formal tech training.

That, of course, is what all trial lawyers say. But it may come a little more naturally to Robins, Kaplan lawyers than others. Schutz grew up on a farm in Adrian, Minnesota, and attended college on a ROTC scholarship. Lueck, the son of a state trooper in Roseville, Minnesota, tried a career in music (trumpet; mostly big band jazz) and taught grammar school before going to law school. Beehler is also a farmboy from rural Minnesota (St. Cloud, to be exact) who taught English before deciding that he "needed to earn more than $11,500 per year." Conlin, the youngest of ten children, is from Williston, North Dakota. Ciresi has a farm in the area, and Conlin babysat for his kids before he convinced her to go to law school.

The firm has been on such a roll that even defeats look like victories. The firm's biggest losses in recent years have been as defense counsel to Medtronic, Inc., a manufacturer of medical devices. Medical devices is the rugby field of intellectual property; there are lots of players and lots of IP scrums. Medtronic has taken its share of hits: It paid $158 million to Guidant Corporation in April 2002, and $175 million to Boston Scientific Corporation in September 2002 to settle patent infringement arbitrations involving vascular products.

But Robins, Kaplan has a big fan in Medtronic general counsel David Scott. "These were very difficult cases," he says. "Was it painful? Yes. Was it a lot of money? Yes. Were we unhappy with Robins? No. They did an outstanding job." His biggest vote of confidence? The firm is representing Medtronic in ten to 12 cases. "They're good at figuring out what's important and they don't spend a lot of time worrying about what's not," Scott says. "They're very well organized, very efficient. The staffing is lean. They don't play games with discovery. And they're always ready to go to trial, which makes other firms think they're dangerous."

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