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Litigation Leaders: Fish & Richardson's Kurt Glitzenstein on Being the Busiest Patent Litigation Firm in the Land and Keeping it That Way

“When you are number one, you want to stay number one, and that means constantly improving how we service clients and how we help them meet their business objectives.”

By Ross Todd
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Welcome to another edition of our *Litigation Leaders* series, featuring the litigation practice leaders of the biggest firms in the country.

Meet **Kurt Glitzenstein**, litigation practice group leader at **Fish & Richardson**, the intellectual property-focused firm that handles the highest volume of patent cases in U.S. federal courts, the International Trade Commission, and at the Federal Circuit. Based in Boston, Glitzenstein, like many of his Fish colleagues, has a background in engineering. He's also taken a lead role in the firm's push to offer alternative fee arrangements to clients.

Lit Daily: Tell us a little about yourself—beyond what's in your law firm bio.

Kurt Glitzenstein: I grew up in Connecticut and planned to be a mechanical engineer like my father, who worked at Pratt & Whitney. I received my B.S. from the Massachusetts Institute of Technology and was pursuing a Ph.D. in mechanical engineering from the University of California at Berkeley in the late '80s when I realized that obtaining my doctorate would require me to become extremely technically focused, in a way that didn't seem quite right for me. I have always had very broad technical interests, and I also like to teach, like my mother, who was an English teacher in the high school I attended. Being a patent trial lawyer seemed like a good combination of the two, since you teach how technology functions in court while at the same time working through the legal issues.

I finished my master's degree at UC Berkeley before heading to Harvard Law School and joined Fish as a part-time clerk before I graduated in 1993. During my early years at Fish, I worked with colleagues who challenged me, sharpened my thinking, and gave me opportunities that few young litigators receive. Now, one of the most gratifying parts of

my job is nurturing our firm's next generation of litigation leaders.

When I'm not working and spending time with my family, you will most likely find me outside. I build my own mountain bikes and love the freedom of going off the beaten path when I ride. My son and I both love scuba diving, and we have traveled the world in search of interesting diving locales. I'm also a pretty intense skier. My dad was a volunteer ski patrolman in Vermont, so I learned to ski when I was four years old. Now, I'm that guy who goes hiking with his skis to find untrammeled snow.

How big is your litigation department and where are most of your litigators concentrated geographically?

Fish is an elite intellectual property firm that operates at the top of the market. Our litigation practice includes over 200 IP trial lawyers in 14 worldwide offices. We serve clients by forming customized, collaborative teams that intimately understand our clients' industries and technologies, so our focus is on fielding the most skilled team for the client rather than on where the attorneys are geographically located. This means there is no one office with a higher concentration of litigators than others.

That said, our offices do line up strategically in key regions where there are large concentrations of technology and life sciences companies, like Atlanta, Boston, New York, Twin Cities, Southern California, Silicon Valley, and Shenzhen,



Kurt Glitzenstein of Fish & Richardson.

Courtesy photo

China. Other offices like D.C., Wilmington, Dallas, Houston, and Austin are near the busiest patent jurisdictions and venues. Our Munich, Germany, office is important because the European and German Patent Offices and the German Federal Patent Court are located there, so it's a pivotal base of operations for our European clients.

In what three areas of litigation do you have the deepest bench?

Technology: There is no firm with a deeper bench of technology lawyers than Fish. We have over 100 attorneys with electrical engineering or mechanical engineering degrees. We speak our clients' language. This vast technical knowledge combined with our trial prowess is why the largest technology companies in the world, including Microsoft, Samsung and LG Electronics among many others, trust us with their most important global IP litigation. Of the so-called Patent Elite companies, which own the 100 largest portfolios of granted, in-force U.S. patents, we represent five of the top 10 companies (all technology companies) that filed the most patent litigation over the past 10 years (2009-2019). Overall, we represented 59 of the 100 Patent Elite companies—more than any other firm—and handled more patent litigation in U.S. district courts than our competitors by a large margin.

Life sciences: We represent branded pharmaceutical clients, such as Gilead Sciences and GlaxoSmithKline, in their highest-stakes, global life sciences and Hatch-Waxman litigation. We also have a strong biosimilars litigation practice that has grown significantly over the past several years. Our bench includes more than 115 attorneys and technical specialists holding biology, chemistry, or genetic engineering degrees, including over 50 with Ph.D.s. We are scientists who understand the unique challenges that life sciences companies face, and we are trial lawyers who are in court nearly every day, which is a powerful combination for our clients.

International Trade Commission (ITC): We've been active in the ITC since long before the rush to appear in its chambers and have the deepest bench and most winning track record in the industry. Over the past 20 years, we have been involved in more than 135 ITC investigations and have played a role in nearly every hot-button ITC issue, from changing the law regarding "downstream products" to advancing the standards for when non-practicing entities can litigate in the ITC to participating in unprecedented hearings before the full Commission regarding public interest

issues. The ITC is a specialized venue with its own rules and procedures, and we know the process, the judges, and the law better than anyone else.

As head of the department, what are some of your goals or priorities? What do you see as hallmarks of your firm's litigators? What makes you different?

Fish handles more patent cases in district court, at the ITC, and at the Court of Appeals for the Federal Circuit than any other firm. We have also been the most active firm at the Patent Trial and Appeal Board (PTAB) for the past four consecutive years. PTAB trials have become an essential strategic tool to help our clients achieve defensive and offensive patent litigation success. We obviously want to maintain and build on our leadership position in all these areas. When you are number one, you want to stay number one, and that means constantly improving how we service clients and how we help them meet their business objectives.

We are a firm with a very specific focus and expertise, and a loyal client base who hire us when the stakes are high and they need the most experienced legal counsel on their side. One of our greatest strengths is handling large-scale, competitor-to-competitor patent disputes requiring extensive global litigation coordination. One priority is to continue to be the go-to firm for companies that need sophisticated counsel to develop and execute holistic, coherent, and cohesive worldwide enforcement and defense strategies.

We excel at handling these massive, complicated disputes for a number of reasons. First and foremost, we value collaboration and client service above all else. Our lawyers trust one another and teamwork is one of our firm's core values. From our clients' perspective, that means that our lawyers welcome other Fish lawyers into their client relationships. We can put the best team on the field to solve our clients' business problems and bring in specialty teams when needed. Fish is unique in that we have seasoned trial lawyers, prosecutors, and post-grant practitioners all under the same roof, working together to solve clients' problems from every possible angle. Our technical expertise is so diverse that attorneys can "crowdsource" within the firm answers to virtually any technical question. This is an important differentiator for us.

Our trial lawyers are laser-focused on setting up cases for success from day one, and we keep our eyes on the prize no matter how far the horizon might be. To be successful, we have to remain consistent across all matters, which requires strategic front-end thinking about the implications in all the

parallel proceedings. It is all about winning the ultimate war, not necessarily doing what is most expedient for the particular skirmish we are confronted with in any given matter.

It's why our trial lawyers typically handle their own appeals, in contrast to other firms where one or two "specialists" argue all appeals. Our philosophy is that the attorney who handles the appeal should have the deepest command of the law and the record, which uniquely positions them to spot novel legal issues and frame those and other issues for appeal from the beginning. It is a broad-based approach that maximizes our chances of success.

Last, but certainly not least, we are a pioneer in alternative fee arrangements (AFAs). In 2019, AFAs represented 38% of our litigation business. I was one of the architects of Fish's AFA program well over a decade ago, which we developed to find better ways to partner with clients on pricing that was more tailored to their specific business needs. Microsoft became our first large-scale AFA client in 2009, and together we came up with an innovative fixed fee approach to pricing patent cases that created a better client-firm partnership, value and outcomes. By showing that it was possible to successfully price complex patent litigation cases using a fixed fee, we were able to demonstrate the viability of Microsoft moving most of its remaining legal work to AFAs, which it did over a two-year period starting in 2017.

We prefer to price on an AFA basis because we believe AFAs improve many aspects of the lawyer-client relationship. Fixed fees allow lawyers and clients to focus on the merits of the case from the outset, so that we can reach the ideal result, without the level of concern that occurs in a traditional hourly fee arrangement where changes in the case strategy, or unexpected developments, can significantly increase the client's cost.

Clients know that when Fish proposes a fixed fee, it has been vetted by a team with immense experience, with every foreseeable detail discussed. By asking the right questions, we can predict which cases will be more challenging and then educate clients about the likely direction of the case. By strategizing before a fee is negotiated, principals have the ability to enter into an AFA quickly, without layers of approvals, which also makes clients happy.

How many lateral litigation partners have you hired in the last 12 months? What do you look for in lateral hires?

This is an easy question—zero. Although we do bring litigation laterals on board every year, we rarely hire them at

the principal level. Fish has a unique litigation culture that is quite different from other firms, and we prefer to nurture our litigators up through the ranks. That way we know their talents, we know they fit into our culture, and we know they have learned from the top practitioners in the field. This has been a successful model for us.

What were some of your firm's biggest in-court wins in the past year, and can you cite tactics that exemplify your firm's approach to success?

Fish is the firm that clients hire for the long haul. Our ability to strategically manage and win the most complex, global disputes across multiple venues and through all levels of appeal is what we are best known for.

A year ago, we obtained a \$175 million settlement for our client Power Integrations (PI) after 15 long years of competitor-to-competitor litigation against Fairchild Semiconductor and ON Semiconductor. The litigation has spanned multiple venues including district courts, appellate courts, the PTAB, and the ITC in the U.S., as well as courts in China and Taiwan. We won multiple patent infringement verdicts, several multimillion-dollar damages awards, and permanent injunctions against hundreds of infringing Fairchild products. The settlement came within a year of our winning two jury verdicts and a precedential appeal at the Federal Circuit affirming an earlier PTAB win. The Federal Circuit decision made new law regarding the relationships that govern the time bar in inter partes review proceedings—effectively ending Fairchild/ON's strategy to defeat PI's relevant patents through IPRs. With this final "nail in the coffin," PI's competitor had no place to go but the negotiating table.

We also recently closed the latest chapter in client Gilead's ongoing patent infringement battle with Idenix Pharmaceuticals over Gilead's blockbuster hepatitis C drugs. In October 2019 (*en banc* denied April 2020), the Federal Circuit denied, in a precedential decision, Idenix's bid to reinstate a \$2.5 billion verdict that we reversed on JMOL 18 months earlier. At the time, it was the largest patent damages award in history, but we were confident in our ability to ultimately prevail. This global dispute included trials and proceedings in eight different countries including Norway, the U.K., Canada, Germany, Australia, Japan, South America, and the U.S. We maintained a consistent strategy and vision throughout all the cases so that no position was taken in the international litigation that would jeopardize Gilead's final U.S. case, which represented the biggest market. It was five

years of hard-fought litigation, but we were able to obtain favorable outcomes for Gilead in every case.

In February 2020, Fish won a \$31.2 million jury verdict in the District of Delaware for Swiss clients Wasica Finance GmbH and BlueArc Finance AG in their long-running patent battle against Schrader International Inc. and three other Schrader companies over technology related to tire pressure monitoring systems. The case was the latest chapter of an international patent dispute that started nearly 20 years ago between the parties. Wasica and BlueArc sued Schrader in the U.S. in 2013 after years of alleged infringement, and the case spanned the district court, PTAB, and Federal Circuit. In July 2020, the court refused Schrader's request for JMOL or a new trial and awarded our client \$12.1 million in prejudgment and post-judgment interest, for a total of \$43.3 million in damages.

Where are you looking to build or expand in the next year?

We are continuing to grow our U.S.-based litigation work for clients who are outside the U.S. We handle work for a significant number of clients in Europe, and we have been enormously successful developing work from leading technology companies in Asia, including South Korea, Taiwan, Japan, and China. We opened an office in Shenzhen, China, in the beginning of 2019 to help us meet the needs of clients in this region, and to support our continued expansion efforts in this region.

One specific practice area we are particularly focused on expanding is trade secret litigation. I recently (in July) led and secured a favorable Initial Determination in a rare trade secret case at the ITC for three China-based clients (Rebenet) who were sued in the ITC for alleged misappropriation of trade secrets and tortious interference with contractual relationships. The complainants had sought a limited exclusion order to bar the importation of Rebenet's products into the U.S., which would have put them out of business in this critical market. Early on, we identified and took an aggressive stance on domestic industry—a strategy we pursued persistently before and throughout discovery and pre-hearings. Our deep experience in complex trade secret cases

and vast understanding of litigating at the ITC were key to securing this favorable Initial Determination for our clients.

How are you coping with the current economic downturn?

I feel fortunate to work at a firm that has prioritized the right things since the start of the pandemic. Unlike many firms, we have not had layoffs, furloughs, or pay cuts. By keeping our teams intact, we've been able to provide clients with the exemplary service that they've come to expect from our firm.

Like everyone, we've adjusted to new ways of working and advocating remotely while delivering high levels of client service. But much of it has been seamless because remote work has long been a core element of our culture. Our cases are regularly staffed with team members from across the country, so we already had the tools and technology in place to keep people connected when attorneys and staff are not in the same office. If anything, this crisis has strengthened our culture and solidified our collaborative focus and commitment to each other and to our clients.

Before COVID-19, our trial lawyers were in court leading trials every three weeks, so the biggest adjustment has been moving to remote hearings and advocacy. One of the things I'm most proud of is how flexible and nimble our litigators have been in adapting to this new virtual reality. We quickly established ourselves as a leader in remote advocacy. Now, our litigators are busy doing remote depositions and Markman hearings, remote Federal Circuit appeals, as well as preparing for remote, and possibly a new kind of in-person, trials. One of our seventh-year associates, **Nitika Gupta Fiorella**, argued and won the first-ever pandemic-forced telephonic oral argument at the Federal Circuit in April. It was also the first appellate argument of her career, so that was pretty exciting.

I feel honored every day to lead this impressive team of trial lawyers.

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