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MCC INTERVIEW: Kurt Glitzenstein / Fish & Richardson

Patently Powerful

When complicated tech, facts and law intersect, clients call Fish

In the high-stakes world of patent litigation, ***Fish & Richardson*** *has established itself as the industry leader.* Corporate Counsel *magazine has named the firm the top patent litigation firm for 13 years in a row. Not content to rest on its laurels, however, Fish continues to innovate with new services like the eFISHency™ suite, which helps the firm deliver exceptional value without sacrificing client objectives. We spoke to* ***Kurt Glitzenstein*** *about his role as Fish & Richardson's Litigation Practice Group leader, how the firm became so good at what it does, and what's in store for the future. His remarks have been edited for length and style.*

MCC: You became the head of all litigation for Fish & Richardson earlier this year after your predecessor went to GM. Tell us about your background and how you came to your current position as Litigation Practice Group leader.

Glitzenstein: I joined Fish after graduating from Harvard Law School in 1993, and my litigation practice has grown to include virtually all aspects of litigation, from lead counsel in high-stakes competitor cases in district court to investigations in the International Trade Commission to appellate work on novel issues of law. I've also participated in cases that have gone to trial in many countries around the world. Given both our international footprint and the global nature of many intellectual property disputes these days, these experiences have given me a breadth of perspective on the opportunities and challenges of running a premier patent and commercial litigation practice at the top firm in the industry.

I oversee more than 220 litigators in 12 worldwide offices, and none of us ever take for granted the trust our clients put in us with their highest-stakes litigation. Fish has handled more patent litigation than any of our competitors for 13 years running (oftentimes 100 percent more) and we are serious about our leadership role. When I took on the practice group leader position at Fish in the beginning of the year, it was a natural extension of the management responsibilities I've assumed over the years, from being a group leader to serving on our five-person principal compensation committee to chairing our alternative fee program since 2011.

> ***There are many commercial litigation cases that are natural extensions of the firm's core competencies in IP litigation.***

MCC: Our readers will be especially interested in your role as chair of the firm's alternative fee program overseeing pricing and budget management. Give us your perspective on alternatives to the billable hour and how Fish approaches alternative fee arrangements (AFAs) both concerning patent litigation and litigation generally, which led to your inclusion by BTI Consulting in an elite group of corporate clients singled out as especially adept at AFAs.

Glitzenstein: We have been a pioneer in the area of alternative fee pricing for a long time. Fish started its AFA program in early 2009, and we have been partnering with clients to come up with fee arrangements that are tailored to their business needs and objectives before AFAs and fixed fees became industry buzzwords. Right now, AFAs (primarily fixed fees) represent 27 percent of our litigation business.

Kurt Glitzenstein *is Fish & Richardson's Litigation Practice Group leader and is responsible for the firm's largest practice, which spans 12 offices. He can be reached at glitzenstein@fr.com.*

One of the many salutary benefits of having these conversations with our clients at the outset of a case is that it ensures that everyone is on the same page. We discuss schedule. We talk about when the case will be busy, and when it might slow down, so clients know when their scientists, engineers and businesspeople will need to engage. We explain how the case is likely to unfold on the merits. Importantly, we make sure we know their commercial objectives. We then come up with a proposal that takes into account all of these considerations. I've got a terrific team assisting with this, and we take great pride in both our flexibility and our creativity.

While we price many of our matters with a set monthly fee schedule, we also craft collared-fee deals and blended-rate arrangements. In addition, we're very willing to explore bonus payments for achieving specified objectives or milestones. We understand that clients are generally very open to paying for success, and we are confident enough in our diligence and our abilities in the courtroom to make that option available.

One of the things I find very interesting is the number of times we go through this exercise and the client opts instead to retain us on a traditional hourly billing structure. This shows me that we are doing things right. We are presenting an array of options alongside a detailed discussion of how the case is likely to unfold, allowing our clients to make a well-informed business decision about what works best for them.

MCC: On a related note, tell us about the firm's eFISHency™ suite of services, which is billed as enabling you to deliver exceptional value without sacrificing client objectives. What are the key elements of your approach?

Glitzenstein: Our ever-expanding suite of eFISHency™ legal services includes a wide range of cutting-edge yet practical tools and practices that help us deliver exceptional value. We have created very sophisticated Legal Project Management tools that allow us to quickly create a litigation budget, monitor actuals compared to budget, and allocate hours to our litigation teams to ensure we run the case to budget. To ensure we're not recreating the wheel, we have customized best practices resources for use by litigation teams, including templates, checklists and guides to complete a variety of patent litigation tasks most efficiently, while maintaining our high standards. We also have an internal, custom-developed repository of tens of thousands of pleadings and memos as well as an extensive database of trial transcripts, outlines and demonstratives, with tailored searching by claim construction term, jurisdiction, judge or full text.

Fish has handled more patent litigation than any of its competitors for 13 years running.

MCC: You've handled many important patent matters individually and have cited* Uniloc v. Microsoft *as especially challenging and gratifying, particularly for its impact on damage demands in patent cases. What impact has* Uniloc *had? What other cases stand out in a career marked by major matters?

Glitzenstein: The *Uniloc* decision was particularly gratifying for its impact in bringing increased rigor to the calculation of damages in patent infringement litigation. *Uniloc* rejected what was then referred to as the "25 percent rule of thumb," which posited that the starting point for determining the appropriate reasonable royalty rate for a patent damages claim is 25 percent, which would then be adjusted upward or downward depending on a myriad of considerations. Application of this rule generally resulted in royalty rates that far exceeded those seen in real-world licenses.

Another appellate victory that I am proud of is the decision last year in *Williamson v. Citrix et al.* That decision centered on a point of law that might at first blush seem obscure, but actually has broad relevance. We represented Microsoft, Adobe, and Citrix, and were able to prevail on the Federal Circuit, sitting *en banc*, to overrule longstanding precedent regarding the construction and application of functional claim language, holding that the heightened standard it had previously used was "unjustified" and invalidating key claims in the asserted Web conference patent. The win opens up new avenues for defending against allegations of infringement on both infringement and validity grounds.

MCC: Fish is widely known as the gold standard in IP litigation. Less well known are the firm's capabilities in other types of commercial litigation, which the firm positions as going hand in hand with its IP prowess. Tell us about the evolution of the firm's broader litigation practice and what differentiates Fish & Richardson from the many other firms handling that kind of work.

Glitzenstein: There are many categories of commercial litigation cases that are natural extensions of our core competencies in the IP litigation space. The most obvious are trade secret cases, which we have long handled. Product liability cases also present the same types of litigation challenges as patent cases since you need to be able to understand what is very often an exceedingly complex technology. You need to identify experts who can articulate these complexities to lay jurors. You need skilled and accomplished trial lawyers who understand how to package and present both the law and the science. We've got all

of that at the highest levels at Fish with 300 attorneys with technical or science degrees, including 85 with Ph.D.'s. As we like to say, we are "the experts on experts." Our sweet spot is high-stakes cases where complicated technology, complicated facts and complicated law all intersect.

MCC: Fish has carved out a leading position in post-grant proceedings and inter partes review since the advent of the America Invents Act (AIA), which has been a game changer for patent practice in many ways. What is most important for our in-house readers to understand about the impact of the AIA? What, if any, have been some unintended consequences of the Act?

Glitzenstein: The AIA has had a huge impact on patent litigation. Inter partes reviews (IPRs) and Covered Business Method reviews (CBMs) are now filed by defendants in a large number of patent infringement lawsuits, and they provide an expedited and lower-cost option for challenging the validity of a patent in the Patent Office. If the Patent Office agrees to review the patent, many courts will then stay the litigation until the proceeding concludes, and sometimes even into the appeal. That can put the case on hold for a year or two, if not more. Moreover, the thinking behind post-grant proceedings is that they would be a lower-cost way to challenge validity, and from where I sit, they have done just that. From a strategic perspective, it has made validity defenses — which are very difficult to prevail on with a jury — real and viable defenses in patent-infringement litigation.

MCC: Fish is widely regarded for its patent prosecution and related work. These are capabilities many firms either lack altogether or have deemphasized. How does the firm's prosecution work inform its litigation work?

Glitzenstein: You are correct, there is no other firm that has the depth and breadth of our patent prosecution practice. Our Patent Group has deep expertise in patent office practice and procedure, which makes them excellent partners for post-grant disputes, and exceptional technical and analytical skills that make them well suited to assisting our trial teams with infringement and validity issues. Our post-grant practice is one of the best and busiest in the country, and we work closely together on IPRs and CBMs to knock out or defend patents that are part of litigation disputes, and to strengthen clients' patents to enforce against competitors more effectively and efficiently.

MCC: Who are your mentors, and what are the most important lessons you've learned that inform your day-to-day handling of extremely complex, high-stakes IP litigation matters?

Glitzenstein: For the past 20 years, I have been very fortunate to work with my colleague and friend Frank Scherkenbach, who is one of the finest patent trial lawyers in the country. The lessons are too numerous to list, but Frank has given me a true appreciation of the fact that our cases demand painstaking attention to detail by everyone on the team. That's how cases are won. He's also taught me that "dumbing it down" and oversimplifying are not the way to go, contrary to popular belief. Juries will work very hard to understand the technology and the complex issues, and they take great pride in reaching informed decisions. There is a story surrounding every patent, and it is our job as trial lawyers to unlock that and to engage in the material details.

MCC: General Counsel and other corporate executives are intensely focused on the protection of IP, trade secrets and other intangible assets as cybersecurity has emerged as a leading boardroom concern. From your unique perspective, what would you advise a GC who is looking for answers in an area where bad things seem to be happening daily and appear all but unavoidable?

Glitzenstein: It's our view that the cascading bad effects of a cyberattack are only unavoidable in the absence of advance planning. At Fish, we have practice groups focused on helping our clients prepare for the worst – including cyberattacks, insider threats, and other high-tech criminal activity that affects the company – so if it happens, the company can deal with it quickly, correctly, and with a minimum of business disruption. GCs have a key role to play here, because they serve as the corporate hub of all of the folks who need to be thinking about these issues, including finance, HR, IT, the rest of the C-suite, and of course the board of directors. While the attack itself may in some cases be unavoidable, good planning and great legal advice can help the company mitigate or avoid the secondary effects of an attack, including legal liability, governmental investigations and reputational harm.