

THE BEST IN THE WORLD



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David Samuels looks at the trends behind the results of the first International Commercial Litigation World Survey

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International Commercial Litigation

Prepare for a surprise. For the last six months our World Litigation Survey has been simmering along. Its aim: to isolate the people and firms most envied by their colleagues and peers.

Boy—were we unpopular! "There are many excellent firms in this area (including ours) and singling out a few is inappropriate," replied one lawyer. "I do not believe it would make sense to rank any firm or individual as being the first or second-best in general or within a certain field," said another. Those typified the response that met our questionnaires.

An impossible task then? Not quite. **BEST IN THE WORLD—US FIRMS** *Position* Law Firm 1 Susman Godfrey, Houston 2 Arkin Schafer & Supino, New York 3 Paul Weiss Rifkind Wharton & Garrison, New York 4 Wachtell, Lipton, Rosen & Katz, New York 5 Sullivan & Cromwell, New York 6 Bartlit, Beck, Herman, Palenchar & Scott, Chicago 7 Williams & Connolly, Washington DC 8 Fulbright & Jaworski LLP, Houston 9 Vinson & Elkins LLP, Houston 10 Gibbs & Bruns, Houston 11 Munger Tolles & Olson, Los Angeles 12 Skadden, Arps, Meagher & Flom, New York 13 Davis Polk & Wardell, New York 14 Debevoise & Plimpton, New York 15 Baker & Botts, Houston

The reluctant were wooed. Even Mr. Inappropriate faxed across his candidates for this roll-call of the finest—eventually. And his returned copy suggested reluctance had flown: neat and typed, with shaky little hand-drawn arrows dropping a third-place to fourth.

Others were more forthcoming. "These guys that I've given you are all good—but none of them are as good as me," stressed one. Over 350 questionnaires were faxed to law firms and companies, using an electronic system. The questionnaires asked a lot of contributors: declare four litigation firms and three individuals, as the best

available in their location. Yet in follow-up interviews with contributors several noted the clarity of their own views.

"It's not hard to do. It's perfectly natural that people should have a view about who else is good. And it is certainly not inappropriate to give it, provided that you are being given some confidentiality," says one US contributor.

A UK head of litigation who polled his whole department before returning the form, supports that view: "I thought overall that it was pretty easy. The more specialist areas are always the easiest. But even on the more general area of who's best overall we didn't have to ponder too long."

The long lists of candidates generated by the fax survey were honed in telephone interviews. The final league tables appear opposite this page.

The US and UK tables, the countries that gave us the best response, disclose the biggest surprises. For a start, in the US lists the famous Wall Street firms fail to dominate. The overall best US firm, Susman Godfrey, is based in Houston, Texas. In comparative terms it is small for the US. It has just 36 lawyers. **BEST IN THE WORLD—US INDIVIDUALS** *Position* Lawyer and Firm 1 Stephen Susman; Susman Godfrey 2 Stanley Arkin; Arkin Schafer & Supino 3 John Warden; Sullivan & Cromwell 4 Bernard Nussbaum; Wachtell, Lipton, Rosen & Katz 5 Arthur Liman; Paul Weiss Rifkind Wharton & Garrison 6 H Lee Godfrey; Susman Godfrey 7 Fred Bartlit; Bartlit, Beck, Herman, Palenchar & Scott 8 Robert Fiske; Paul Weiss Rifkind Wharton & Garrison 9 John O'Quinn; O'Quinn, Kerensky, McAninch & Laminack 10 Greg Joseph; Fried Frank Harris Shriver 11 Barry McNeil; Haynes and Boon 12 George McMaster; Thompkins and McMaster 13 Roy Reardon; Simpson Thacher Bartlett 14 Robin Gibbs; Gibbs & Bruns; Finis Cowan; Baker & Botts 15 Patricia Hynes; Milberg Weiss Bershad Hynes & Lerach

In total, in the US top 15, four firms with fewer than 40 lawyers appear. Arkin Shafer & Suppino, which came second, is an 11-lawyer firm. Bartlit, Beck, Herman, Palenchar & Scott in sixth-place is a firm founded by nine partners who chose to leave Chicago's 400-lawyer Kirkland & Ellis in 1993. Gibbs & Bruns, in eleventh place, has 18-lawyers.

"I think it's surprising that the survey actually got that result," says US trial lawyer Fred Bartlit, founder of Bartlit Beck and number six in our list of merited individuals. "But, in my opinion it's accurate," he adds. Bartlit believes that: "The best law in the US right now is being done in 20 to 40 lawyer firms."

He says the preponderance of such firms is no surprise. In recent years in the US, the number of senior litigators leaving big firms to set up trial-shops of their own has jumped.

"It's a huge movement right now, because the financial rewards when you're out on your own are so much bigger," confirms Stephen Susman.

Big-firm politics is given as one explanation for the exodus. This means more than just passing-up work because a client has connections to another area of the firm that raises conflicts of interest.

Litigator qualities 1

"To be a good litigator you need a prodigious memory, the ability to mentally cross-reference huge amounts of material, and an understanding of what motivates people—what they want, what they fear, what they need and what they can forego."

Stanley Arkin, 2nd in US survey

Muzzled

Litigators at big firms often find themselves asked to take a less aggressive stance on a dispute. Usually it is because the firm's executive lawyers consider that the alternative places client-relationships at risk. "You get told, Look, please don't do this—it'll upset Merrill Lynch, don't do that it'll make Bank of America mad, please don't pursue MCA too hard, we have a relationship there," says Stanley Arkin, who left Chadbourne & Parke two years ago. Now, Arkin says he can do the kinds of cases he had to forego while he was there.

When the top litigator at a big firm decides to leave, business often goes with him. General Motors and NL Industries moved much of their work to Bartlit's new firm in 1993, when he departed from Kirkland & Ellis. The conglomerate Tenneco use Susman & Godfrey our double winner whenever it has an important enough case.

The lists clearly show that having fewer lawyers is no barrier to doing large cases. One of Texas's most famous trial lawyers, Joseph Jamail (who surprisingly failed to make our US list), is known to hire big local firms like Baker & Botts to do the heavy paperwork on his largest cases. Now others are following his lead. "We're in a big case right now, huge, doing four to five depositions a day no problem," says Bartlit. When the work demands it, he says, he can co-opt in lawyers he knows at other firms. "We just attach them using e-mail," Bartlit explains.

Fred Bartlit believes his career is a perfect example of why litigation practice in the US is changing. He left Kirkland & Ellis aged 61, dissatisfied. He calls it his bid for freedom: "To really innovate you have to start from scratch, with a clean sheet of paper."

Primarily, he wanted to find new ways of charging-out his services. But he also felt that in a new format efficiencies were possible that meant his clients could have the same product but at vastly less cost. In other industries, he points out, managers have already recognized the links between a team's performance and its size.

Small and mighty

Few would contest the wisdom in that view. Virgin's Richard Branson is on record with his belief that more than 60 people in an organization is unwise. Percy Barnavik, the chief executive at the mighty engineering group ABB, is restructuring its 200,000-person business into groups of 40. Bill Gates, of Microsoft, is also a known fan

of small teams.

The new small firms can work better because of their size. "We're just applying a principle that's already widely known, which is that unless the leaders of a group personally know all members of that group, there is no way they can manage them effectively," says Bartlit. He adds: "We don't have factories, we don't own patents, or other assets, all we have is people—their strengths and weaknesses. Management in our business means simply how we put our people into teams."

Small firms operate in more efficient ways. For instance, right from the start, experienced pair of eyes get to read a new case. At a Wall Street firm, teams of junior lawyers may do the early work. In contrast, at Arkin Shapiro & Suppino Stanley Arkin himself vets the brief. "This is more efficient, because of the way I process it: I get to the guts of the thing, I'm not afraid to make decisions at that time. I go quicker and I get it right," he says.

Litigator Qualities 2

"It requires a combination that is rare in people. You have to have attention to detail. But you also have to have flair and the ability to simplify and tell a story. Also, you have to be a very secure person, able to take your losses without falling apart. You have to have a great deal of physical and mental endurance, an ability to, if necessary, get up at 3 am to prepare for the day's case. And deep down you have to love the challenge and what it feels like to wake and daily be faced by that"

Fred Bartlit, 6th in US survey.

Off to Southwark

In contrast, the UK tables show that there the big firms still reign. Although many acknowledge that the situation could change. One UK head of litigation admits big firms face forces similar to those altering the US market: "Centrifugal forces have always been there but recently they've begun picking up speed."

Most City litigation departments have kept pace with other parts of their firm, growing equally fast. That means within the firm litigators have not lost prestige. Nor has leaving looked rosier for them financially. The lock-step method of calculating rewards has worked well in recent years. "There's always been enough money to satisfy everyone," says the head of litigation at one City firm.

But City firms wonder if the old arrangements have taken litigation as far as they can. Recently clients have begun to howl about the size of their bills. "Even the Goldman Sachs of this world are demanding efficiencies on a scale we've never seen before," says one senior litigator. But the finances of big firms are already finely-balanced and there is no simple remedy. Cutting the rates that they charge for their time is not an option. The rates already include only the barest of profit margins. "It is amazing how quickly we find ourselves operating at a loss if we lop bits off our hourly rate, what we have to do—and fast—is re-engineer," says a City firm's head of litigation.

Otherwise, he thinks, litigation departments will see their biggest names start to go: "The heavy-hitters will realize that if they left and set up on their own just outside the city—across the river in Southwark say—they could offer their clients exactly the same product at about half the current price."

The US and UK tables share another surprising characteristic—almost no female names. In the whole survey, only three women appear: Patricia Hynes, who appears at number 16 in the US list, and Michelle Carr and Julie Ward, four and five in the Australian report. "I think the explanation is that it's probably a matter of time," says Fred Bartlit. "You can't be a good trial lawyer without spending 20 years down at the court and there aren't yet many women who have chosen to do that." But it may also be that, when a questionnaire like ours arrives, women suffer from a lack of the right image.

One litigation counsel at a major US chemical company suspects that is the case: "I think that a lot of people filling out your questionnaire may have approached it as, Okay, who do I think is the fastest gun in the west, and maybe people don't really think of women like that. Which is a pity. I certainly know some very able litigators who are women to whom we give a lot of work."

Litigator Qualities 3

"What sets apart the really good younger ones right now, the one who are really going somewhere, is that they regard themselves as having an absolute proprietary interest in the client's dispute.

"It's more than just commitment—it's as if they own it. It's not the client's case it's theirs. Funnily enough that doesn't make them aggressive as people necessarily. It's just that their commitment is total. And if it means staying up three nights in a row, or canceling family holidays at the last minute, they do it and it's not even a question."—The head of litigation at a City firm.

Plaintiff knights

On the subject of best individual, the US and UK individual tables each feature an unusual name. John O'Quinn (number nine in the US), and Martyn Day (number 10 in the UK) are generally renowned for their skill at suing companies, not for representing them. O'Quinn is famous for bringing cases on behalf of women with silicon breast implants. Last year, that work is reported to have earned him \$40 million. Clearly, his courtroom skills have earned him a high regard. The same is true of Martyn Day. "The closest thing the UK has to a US-style plaintiff lawyer," comments one head of litigation.

Whether Martyn Day would act for a company is unclear. Many think it is unlikely he would ever be asked. "I don't think a big company would be able to make itself hire Martyn. They'd instinctively not trust him," comments one senior litigator.

Yet in the US such link-ups are becoming commonplace. "Some members of the US plaintiff bar have acquired unique experience as trial lawyers and often they are simply the most effective and aggressive advocates you can have," says Theodore Tezloff, general counsel to the conglomerate Tenneco.

The result is a new kind of US litigator, best exemplified by Stephen Susman, our US winner. Susman worked on the plaintiff side of law for most of his early career.

But these days he does defense work for big companies as well. "I'm just a trial lawyer. I work both sides of the docket, pretty much evenly—a real 50/50 split," says Susman, who last year won a \$14.2 million verdict against RJ Nabisco in a dispute about back pay and a \$21.7 million settlement from Xerox for a breach of contract. His firm's winnings last year totaled more than \$140 million.

Success breeds success

It is said that when, in December 1987, the king of the Texan trial lawyers, Joseph Jamail, won a remarkable \$10 billion verdict against Pennzoil, his phone rang non-stop for three days.

His secretaries logged 500 calls a day. Soon afterwards, Jamail found that Kirk Douglas, the actor, had arrived on his books.

For litigators, there is little doubt that success attracts new work. A big win or a recent court record unmarked by defeat is a valuable asset.

Yet few firms make a habit of publishing their litigation departments' performance figures, or will seek attention after noteworthy success.

"You don't build a reputation by acting like a ball team," says Stanley Arkin, of New York's Arkin Schafer & Suppino. He believes that reputation gravitates naturally to where it is deserved: "The best way to build it is to be an effective advocate. Just do a good job. Don't hide, and afterwards you'll start to hear your name mentioned around town."

That view is widely held. In some parts of the US, references to past victories are even forbidden under the local bar association rules. "Unbelievably, their idea is that if you tell a client about how you've won cases in the past you might mislead them into thinking that you will win this one too," says Fred Bartlit, of Bartlit Beck Herman Palenchar & Scott LLP.

He takes a less staid view: "Win-loss records do count—it's part of communicating who you are, what you've done, who you've represented, who

you've acted against."

Hiring a litigator, he says, should be like selecting a surgeon to do open-heart surgery: "How are you going to feel if the elegant and distinguished looking guy you've booked suddenly tells you that he's never actually done an operation before—but he's thought a lot about it."

Bartlit believes that clients today demand more information about the lawyer they are hiring. Bad past experiences are to blame: "I've had many clients tell me about how they were in court once and they knew as soon as they heard their lawyer's opening statement that they'd made a terrible mistake."

"The truth is you can't tell how good a lawyer is just by meeting him, any more than you can tell how good an actor is just by looking at their photograph," he concludes.

A stellar year

The Minneapolis firm of Dorsey and Witney also takes that view. In a letter that accompanied their employment law newsletter for February 1996, the employment litigation team listed its performance during the past year. With nine wins at trial, 14

summary judgments in their favour, two cases where the other side pulled out completely, and no losses, the team's 25 members had every reason to feel proud. "1995 was a stellar year," says the team's leader Roy Ginsburg, who sees publishing results as serving several ends.

"It makes us proud, it makes our clients

proud, and it shows them that we may have unpublished orders and judgements in our possession that could be of help to them—and we send them copies of those if they ask.

"In addition, it brings new clients in. These usually already have some familiarity with the firm. They use the firm for work already but as yet they don't bring their litigation here," Ginsburg says.

Trail blazing

In the UK, one of last year's biggest winners was City firm DJ Freeman. Its profile could not have been higher following a highly publicized victory over another City firm Clifford Chance, in a long running construction dispute. Not only did Clifford Chance's client abandon the case in mid-trial,

it later apologized, in advertisements taken out in the specialist construction press, for starting the dispute.

Anthony Edwards was the man in charge of DJ Freeman's case. He confirms that clients look at a firm afresh after a big win: "We've benefited enormously from the big win. Clients who use the firm for other things—property work for instance—are very pleased to see the litigation

department trail-blazing."

Two company clients, that had not thought to use the firm for litigation before, have now brought him work Edwards states. "We're picking up litigations that they would previously have taken elsewhere," he says.

In a business where the only product is success, why is anyone surprised if law firms revel in their wins?

Fee deals

In the past, a major obstacle to a company wanting to hire Susman would have been money. For litigators, plaintiff law in the US has traditionally been where the riches lay, working for percentages of the awards that their clients win. The hourly rates paid by companies have seemed unrewarding by comparison.

But lately some companies have initiated change. "You can usually get a fee-deal now that pays you for the result you get, not just for effort," says Susman. Tenneco is one company that is prepared to offer win-bonuses to its lawyers. "We're flexible. We just want to get the right guy for the situation. We're prepared to work at the fee arrangement and come up with one that suits," says Theodore Tezlaff.

General counsel Tezlaff was himself a litigator before he moved to Tenneco. That makes him representative of another trend. More and more companies are choosing litigators to preside over their legal affairs. Tezlaff was recruited by Tenneco in 1992. "And it's legal problems are largely litigation-orientated," he says.

Echoes of his move are evident elsewhere. When Goldman Sachs needed a new general counsel recently it chose Robert Katz. Katz was then one of Sullivan & Cromwell's top litigators. Entertainment group MCA also decided that litigation was the background it would need when they picked their latest general counsel. They chose Howard Weitaman, the chief litigator at Katten Muchin & Zavis, a Chicago-based firm, as their new head man. Barry Schwarz, the current general counsel at McAndrews & Forbes Holdings, the company that owns the cosmetics firm Revlon, is another who has swapped taking instructions for issuing them, by crossing to the client side.

"I think that kind of hiring really shows how in the US, litigation as a cost and a threat—is now lighting up the senior management's radar screens. What we're seeing now is management's response to that threat," says Du Pont's counsel Dan Mahone.

With the best lawyers now making themselves available at less cost, for clients the outlook is good. But a savvy general counsel looking to hire the best still faces one problem he may never overcome. "Representing defendants is much less fun," says Stephen Susman, "all the creativity is on the plaintiff's side—the defense's job is just to react."