

THE
AM LAW LITIGATION DAILYLitigation Leaders: Wilmer's Ronald Machen
on the Value of a Strategic Approach

By Ross Todd

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Welcome to another edition of our *Litigation Leaders* series, featuring the litigation practice leaders at some of the biggest and most innovative law firms in the country.

Meet **Ronald Machen**, the chair of the litigation/controversy department at **Wilmer Cutler Pickering Hale and Dorr**, who is based in Washington, D.C. Machen served as U.S. Attorney for the District of Columbia for more than five years during the Obama administration and his practice focuses on government enforcement actions, internal and congressional investigations, as well as civil business disputes. Upon taking on the role of litigation chair earlier this year, Machen succeeded **Howard Shapiro**, who led the department for 22 years, including during the integration of the litigation groups of Wilmer Cutler Pickering and Hale and Dorr after the firms' 2004 merger.

Litigation Daily: Tell us a little about yourself—perhaps even a thing or two your partners would be surprised to learn about you.

Ron Machen: I love working with kids. I tutored D.C. elementary school students when I was a young assistant U.S. attorney in the 1990s, and some of my best days as U.S. Attorney were



Photo: Diego M. Radzinski/ALM

Ronald Machen, with Wilmer Cutler Pickering Hale and Dorr in Washington, D.C.

spent in schools inspiring students to stay on the right path.

I'll never forget coaching youth football for my sons' teams from when they were seven up to 14. The thrill of helping my sons and their teammates reach their full potential was exhilarating. I would obviously miss some practices here and there because of work, but I made it a priority to be at practice from 5 to 7:30 even though it meant working into the night to be ready for the next day.

My youngest son's team was actually very good during this time—we won a couple of state championships, and our team won our league championship most years that he played—so it

was a lot of fun and everyone in our household was very engaged on those Saturday mornings. The feeling I got from winning those state championships with those boys was certainly on par with any feeling of accomplishment I've had from winning a big case. I loved watching the kids become more confident after each win to the point that—by late in the season, before the game had even started—they knew they would prevail if they stuck to the game plan. As coaches, we stressed that all the preparation that went into our practices was the key to their success. We told them that “you get out what you put into any endeavor.” I hope they learned that lesson applied to everything in life, from school to business to their relationships with family and friends.

We had 16 kids on that team throughout the years and I believe all are in college now, and at least eight of those kids are playing Division 1 sports. It has been heartwarming to follow them in high school and see how they have matured into successful young men.

You come into this role as chair of the department after Howard Shapiro previously served more than two decades in the position. What sort of advice did he have for you?

Howard Shapiro has been my good friend and mentor for over 20 years. He did an extraordinary job leading our department from the time of the 2004 merger of the two predecessor firms that formed WilmerHale until he stepped down at the start of this year. His efforts at recruiting, supporting, and retaining so many talented and diverse lawyers made our department an industry leader. He set a high bar.

As for advice Howard gave me, he is still just across the hall, so I can still go to him for advice. However, there are a few pearls

of wisdom I received from him over the years that stand out. First, he always stressed what an honor it is to be a partner at our firm, and how we should carefully scrutinize prospective lawyers—not only with respect to their legal acumen but with respect to their personalities and whether they will fit into our firm's culture—when deciding whether to bring them into our partnership. Our partners not only have to be outstanding attorneys, but also outstanding people who will treat others with respect, especially in high-stress situations.

Howard also has repeatedly emphasized to me the need to be flexible and fluid in this business. The legal industry has changed dramatically from 20, 15, or even five years ago, and there are many new challenges. The pandemic led to the rise of remote and hybrid work not just for firms but for courts and our clients as well. Clients are more concerned than ever about costs and the efficiency of outside counsel. Competition for work is as fierce as ever. Lawyers' expectations for greater work-life balance, especially more junior attorneys, wasn't as big a factor when I first joined the firm 30 years ago and it was a given that everyone would work and come into the office every day. In addition, we have been fortunate to have a robust civil trial practice at WilmerHale, during a time when trial opportunities in the industry have been on the decline, but it is still very challenging to get our younger attorneys valuable courtroom experience because clients want partners to handle those responsibilities. And finally, there is an added layer of uncertainty as to the impact of new technologies, such as generative AI, on the way we staff and manage our litigation matters.

With all that change, Howard's advice is helpful—stay nimble and attentive to what our

clients and our younger colleagues are prioritizing so we can quickly shift strategies to thrive regardless of what the future holds.

You spearheaded the firm's effort to develop a toolkit for companies that wish to boost diversity while complying with the law, which included a section on mitigating the risks of potential lawsuits alleging reverse discrimination. Did you foresee the amount of political blowback we're currently seeing against corporate DEI efforts when you put that toolkit together back in 2021?

There has never been a time in our nation's history when efforts designed to open the doors of opportunity to those previously excluded weren't met by political backlash from those who were intent on preserving the status quo. What's happening now is sadly not new or surprising in the least.

We created the toolkit because we knew that corporate efforts to create more diverse workplaces would be challenged by those who prefer the status quo. The toolkit was the byproduct of a conversation I had with a good friend, Spencer Overton, who at the time was president of the Joint Center for Political and Economic Studies—America's premier black thinktank—after he learned that many of their corporate members were concerned about lawsuits challenging their efforts to increase diversity shortly after the murder of George Floyd. The goal in creating the toolkit was to provide companies practical guidance for increasing diversity in all facets of the workplace—from the copy room to the board room and all points in between—while simultaneously minimizing the likelihood that reverse discrimination suits challenging their efforts would succeed. We've received so much positive feedback on the

toolkit from companies that want to do the right thing but worry about backlash.

By the way, the legal industry is not immune from the need for increased diversity in the workforce, especially among partners. While we've made some strides at the biggest law firms in the number of women partners in recent decades, there is more progress to be made, and we continue to fall woefully short when it comes to promoting and sustaining Black, Latino and other attorneys of color at our country's largest law firms. I and many others have tried to mentor and provide opportunities for underrepresented groups at our individual firms, but this is a long, uphill battle that requires sustained effort across the industry.

How big is the firm's litigation and controversy department and where are most of your litigators concentrated geographically?

Litigation is our firm's largest department with more than 500 lawyers. DC, Boston, and New York each have about 120 lawyers apiece. We have nearly 100 more litigators spread across our other US offices in Los Angeles, Palo Alto, Denver and San Francisco. In Europe, we have about 50 litigators in London and 10 more in Germany.

What do you see as hallmarks of Wilmer litigators? What makes you different?

When you hire WilmerHale litigators, you're hiring lawyers who are hard workers, brilliant problem solvers, and impassioned advocates. Our litigators love to collaborate with each other, with our clients, and even with lawyers at other firms to get positive results. We thrive in building multidisciplinary teams with diverse experiences to be prepared for any challenge that might come up during litigation.

One difference we notice when our lawyers go up against other firms is that we are very strategic in our approach. We try to anticipate the next two or three or four moves on the chessboard. We're always thinking of the long game, of creating the strongest record possible on appeal, whether to overturn or to defend the judgment. That means we typically embed at least one member of our appellate practice within our trial teams. They're there to observe and advise. When procedural or legal issues arise during trial that give us a strong basis for appeal, our appellate lawyers have deep, first-hand knowledge of those issues from the trial and that gives our clients an edge.

Mark Fleming, co-chair of our appellate practice, recently played that role during our representation of Cisco Systems in a patent infringement trial against Centripetal Networks. Even though we didn't prevail at trial, we won in the end. Mark took the lead on appeal with a strong record because of some tactical decisions we made during trial. The appellate court agreed with us and reversed the judgment in full.

In what three areas of litigation do you have the deepest bench? (I know it's hard, but please name just three.)

I can't narrow it down to just three because we don't tend to silo our litigators in that way. Our strength is putting together multidisciplinary teams that can provide holistic advice. A good example is our recent set of wins for Gilead in trials against the U.S. government. That matter involved patents as well as basic contract law, all against the backdrop of contentious public policy issues. I brought my background in government-facing litigation together with our best-in-class IP litigators, and we were able

to succeed both before a judge in the Court of Federal Claims and a before a jury in Delaware. It's not unusual for our litigators who came out of the Department of Justice to team up with specialists in antitrust or IP or financial regulation. My point is that our litigation group has an extremely deep bench of talented attorneys who have the experience and legal acumen to successfully handle almost any corporate legal conundrum.

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

As I mentioned, our two victories for Gilead in separate federal trials over a span of six months were among our most significant wins this year. It all started when the federal government did something unprecedented—it sued Gilead for patent infringement in Delaware on a treatment that used compounds that Gilead had provided to the government for collaborative research purposes for free. The government filed those patents in secret without disclosing it had done so to Gilead, and then years later accused Gilead of infringing those patents. When the government filed that unprecedented lawsuit, we went on the offense. We helped Gilead respond by suing the government in the Court of Federal Claims for breaching the collaborative agreements it had entered into with Gilead to receive the compounds in the first place.

We put together an amazing team. I was lucky enough to work with **Dave Bassett**, one of our top IP litigators, along with **Vinita Ferrera**, **Mark Fleming**, **George Varghese** and **Tim Cook**. Last December, before the government's suit against Gilead went to trial, the Court of

Federal Claims found the government to have breached its agreements with Gilead, which would have reduced Gilead's exposure by hundreds of millions of dollars even if the government had been able to prevail on its patent lawsuit. But our team also won in Delaware. After a five-day jury trial and just a little over two hours of deliberation, the jury decided completely for Gilead and found the government's patents to be invalid.

The firm had another remarkable victory against the government last year in a criminal antitrust case against DaVita. The charges against DaVita and its former CEO were the first-ever criminal antitrust prosecution for so-called "no-poach" labor agreements. The stakes were huge—if the government had won, DaVita could have lost state licenses to conduct business and faced hundreds of millions in fines. The former CEO could have gone to prison.

Our trial team was led by **John Walsh**, the former U.S. Attorney in Colorado, who worked with great partners from **Morgan Lewis**. Together they convinced the jury to acquit on all charges. John's credibility was foundational to this victory, from pre-trial motions to jury selection through presentation of the evidence, to obtaining the crucial jury instructions that set the stage for the acquittal. **Seth Waxman**, the leader of our appellate practice, was also critical—he argued a motion to dismiss the indictment that led to a court ruling that helped pave the path to victory.

We also recently had a strong outcome in the *Masimo v. Apple* case, which was led by our

partner **Joe Mueller**, one of the most experienced IP litigators in the entire country. That trade secrets trial involved the Apple Watch. Joe and the team secured a judgment as a matter of law for Apple that knocked out over a billion dollars in damages claims. On the remaining claims, we persuaded all but one juror to rule in favor of Apple. We've got a post-trial motion pending that will hopefully knock out those remaining claims as well.

I should also mention what we've done in pro bono matters, which are essential to our mission as a firm. We've invested tremendous resources to defend reproductive rights following *Dobbs*. In Ohio, we sued the attorney general to stop a state abortion ban that was inconsistent with the state constitution and obtained the preliminary injunction our clients were seeking.

What does the firm's coming trial docket look like?

We've had five trials so far in 2023. We have a dozen more set for 2023 and eight more on the calendar for the first half of 2024, not to mention arbitrations. One of our most high-profile trials will be defending JP Morgan against the allegation that it somehow benefitted from Jeffrey Epstein's sex trafficking. While the Jane Doe 1 putative class action was settled recently, the litigation brought by the U.S. Virgin Islands is still scheduled for trial. Later this year we'll be in federal court in Georgia challenging gerrymandered districts that unlawfully diminish the voting power of Black Georgians. So the rest of the year will be very busy, and that's exactly how we like it.