

THE
AMERICAN LAWYERDavid Boies: Elite Trial Lawyer By Design,
Firm Founder 'By Accident and Necessity'

By Ross Todd

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Rarely, if ever, does the departure of a partner from a law firm warrant front-page treatment from the New York Times.

Then again, not every lawyer is David Boies. And not every law firm is Cravath, Swaine & Moore.

"To Avoid Conflict Over Yankees Suit, Lawyer Quits Firm," read the headline on the front page of the Times on May 15, 1997, the week that Boies set out to found the firm that would eventually become Boies Schiller Flexner.

By this time, Boies had already served as one of the lead lawyers under Cravath legend Thomas Barr in IBM's sprawling decade-plus antitrust fight against the government and competitors—including leading the company's successful trial defense in Los Angeles federal court in a \$300 million case brought by Calcomp. Boies raised his national stature even further by successfully defending CBS and reporter Mike Wallace from a \$120 million libel claim brought by former U.S. Army Chief of Staff General William Westmoreland.

But when Cravath client Time Warner Inc., the parent company of the Atlanta Braves, raised concerns about Boies representing the New York Yankees in a lawsuit against Major League Baseball, something had to give. Boies, not one to leave the notoriously feisty George Steinbrenner in a lurch, mutually agreed with Cravath leadership that it would be best to part ways.



Photo: Clark Hodgkin

David Boies, chairman of Boies Schiller Flexner.

Retelling the story more than a quarter century later, Boies notes his former colleagues loaded him up with the latest technology as he moved into temporary space in his wife Mary's law office. Given the activity Boies brought with him, he said his wife soon nudged him to look for his own office space.

"You've got to have a high tolerance for chaos," said Boies, an American Lawyer Lifetime Achievement honoree, of his chosen line of work. "I'm definitely a trial lawyer, first, a firm administrator by accident and necessity."

Within four months of Boies' departure from Cravath, name partner Jonathan Schiller joined

from Kaye Scholer in Washington, D.C., giving the firm about eight lawyers in two offices—one in the nation's capital and one in Armonk, New York, a unique footprint for a firm aiming to compete with the profession's elite.

About three months later, Joel Klein, then the head of the Antitrust Division in the U.S. Department of Justice, brought Boies on to spearhead the government's investigation of Microsoft Corp. Klein turned to Boies because of his rare combination of trial skills and antitrust expertise.

"What David has is a remarkable steel trap mind and memory. And so there's nobody I've ever seen who is better at cross-examining a witness," Klein said.

In the Microsoft case, that skill was put to use during a marathon three-day examination of Bill Gates—a session so bruising for the CEO that when portions of the video were shown during the trial's opening, there were audible laughs from the gallery.

Years later, Klein still marvels at Boies' level of preparation.

"David knew every document. I don't know what Bill knew, but I'm sure he probably hadn't been prepared in the same way that David was prepared," Klein said. "I think that's the hard work of David's genius."

Boies himself compares the work of trial lawyers to what Olympic athletes do, saying the ratio of preparation to performance is higher than in any other profession. "You cannot intuit the facts. You have to just spend the time investigating, learning, probing, refining," he said. "It's both spending the time to learn the facts, but also it is understanding which of those facts are important and how they are important."

Thankfully for the fledgling firm, the Microsoft assignment didn't pull Boies away completely. He continued to work for the Yankees, existing client Florida Power & Light Co. and some new clients. But he credits Schiller with holding the firm together during his "frolic and detour" with the government. By mid-2000, with Boies back full-time, the firm had tripled in size. That November, Boies found himself in the public spotlight again taking the lead for Vice President

Al Gore in litigation over the Florida vote count in the 2000 presidential election—leading to one of Boies' five oral arguments before the U.S. Supreme Court, a 5-4 loss that sealed the election for President George W. Bush.

"I've won five-four and I've lost five-four. I've won nine-zero and I've lost nine-zero, and I like it better when I win," Boies said. *Bush v. Gore*, he added, "didn't start the politicization of the Supreme Court, but it was still a major step down that path."

Boies added that losing lawsuits didn't teach him anything he hadn't already learned in high school in Fullerton, California. "No matter how hard you try and how much you want to achieve something, if you fail, the sun comes up tomorrow," he said.

"The tough cases are those that you really think you should win, and that involve things that are important to the justice system, to individuals, to the country," he said.

Fortunately for Boies and his clients, those sorts of "tough" cases have been infrequent for him. His presence tends to make things tough for the other side. Boies has recovered more than \$1 billion on the plaintiffs' side of cases nine times, including securing record settlements totaling more than \$4 billion for client American Express Co. in antitrust litigation against Visa and Mastercard in 2007 and 2008. Having contingency and success fee arrangements on such assignments helped Boies Schiller offer above-market compensation to associates and invite them to bet on themselves by taking a portion of their pay on contingency. "If we were going to compete for the very best associates coming off of clerkships and law reviews, we had to have something to distinguish ourselves," Boies said.

On the defense side, Boies helped Hank Greenberg's Starr International fend off \$4.3 billion in claims from American International Group over disputed stock in a 2009 trial showdown with fellow trial legend Theodore Wells Jr. of Paul, Weiss, Rifkind, Wharton & Garrison. (Wells would get a better result the next year in a rematch, with Boies representing Terra Firma against

Wells' client Citigroup in a suit centering on Terra Firma's ill-fated purchase of EMI Group.)

Wells, who counts Boies as a friend, calls him "one of the great lawyers of his generation."

"He's somebody who has a complete command of the facts of his case, is totally prepared with respect to every detail of the case, and who has a low-key courtroom demeanor that is very attractive to jurors who want to know the facts without a lot of histrionics," Wells said. "Both jurors and judges respect him, because one thing you know about David, he knows all of the facts."

Few lawyers make it through such a high-profile career without taking controversial clients. Indeed, Boies' public reputation took a dual hit in the past decade due to his association with failed blood testing company Theranos, where he sat on the board, and longtime client Harvey Weinstein.

Boies noted that his fellow board members at Theranos included healthcare experts such as the former head of the CDC. "I think everybody who was connected with it would have liked [to be] able to see in the future and to see and understand what the nature of the problems were," Boies said. "That's not one of the gifts that I've been given."

As to Weinstein, Boies said his involvement is often boiled down to a paragraph or sentence in a story written by people who have little knowledge of the case or his involvement in it. "You've just got to have a high tolerance for negative things that people—who don't know you and don't know what the facts are—say," he said.

Opponents often tend to develop respect—and even affinity—for Boies. Like Wells, Charles Cooper of Cooper & Kirk knows what it's like to oppose Boies. Cooper represented proponents of Proposition 8, the 2008 California ballot initiative banning same-sex marriage, in the trial where Boies and his *Bush v. Gore* counterpart Theodore Olson of Gibson, Dunn & Crutcher teamed to successfully challenge the law. More recently Cooper, who has since become friends with Boies, was among the co-counsel for

policyholders in an antitrust case led by Boies and Michael Hausfeld of Hausfeld against the Blue Cross Blue Shield health insurance network. The BCBS case yielded significant market changes and a \$2.67 billion settlement for plaintiffs—and this in a case that lacked a companion government investigation.

"I've seen David from both sides of the podium," Cooper said. "Believe me, I'd much rather have him on my side than on the other side."

Cooper said Boies is "extraordinarily skilled" at exposing the flaws in a witness's testimony—particularly expert witnesses. (In the Prop 8 case, Boies got the proponents' expert to agree that "we would be more American on the day we permitted same-sex marriage than we were on the day before.")

"I think that's just a tribute not only to his extraordinary intellect, but the logical nature of his mind and his real grasp of voluminous, complicated material," Cooper said.

Even before the marriage case, Cooper defended a school desegregation case in Wilmington, Delaware, against Boies and Tom Barr during Boies' Cravath days. Cooper said despite handling cases with "emotion-laden" issues, Boies always treated him with respect and collegiality.

"I began very much to like David Boies, again, in light of his personal qualities as man: from his integrity, to his civility, to the ease with which he deals with others and his native friendly character," Cooper said. "I attempt, in a way, to approach my professional responsibilities in the same way."

Boies, for his part, continues to practice full bore at age 83. Although he will step aside as chair of the firm at the end of the year, he said that 2021 and 2023 rank among the busiest years of his career. "I wouldn't do what I do if I didn't like it," Boies said. "I like the challenge. I like the process of putting the case together. I like dealing with people."

"I like having an opportunity to sometimes actually move the law and make a small dent in the universe," he said.