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MAGAZINE

BARRY M. KAPLAN

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the Overdog

Barry Kaplan is a defense
lawyer to the bone

BY HARRIS MEYER PHOTOGRAPHY BY REDSTONE PICTURES

IN AN APRIL 2010 *NEW YORK TIMES* PHOTO, Barry Kaplan stands at the side of his best-known client, former Washington Mutual CEO Kerry Killinger, as U.S. senators grill the exec on how the nation's largest bank failure came about.

"It was challenging and fascinating to work on a case that got so much attention," says Kaplan, who succeeded in settling shareholder class action and Federal Deposit Insurance Corp. civil suits against Killinger, and winning dismissal of derivative cases. The federal criminal investigation was closed without any charges being filed.

Representing Killinger, Kaplan says, "stretched" him, requiring skills like dealing with hostile Senate interrogators and handling intense media attention without the help of a corporate press office.

Kaplan says he became known to the media as "Mr. No-Comment."

"I'm a defense lawyer to the bone," says Kaplan, 62, a veteran securities litigator at Wilson Sonsini Goodrich & Rosati in Seattle. In his younger days, representing the Federal Savings & Loan Insurance Corp., he once had to make a case against a financial executive. "I thought that something was probably wrong in the way he acted, but it took me weeks to get comfortable with the idea that he had committed an improper action. ... I kept on going over and over [it] again, saying to myself, 'What am I missing, am I missing

anything, am I unfairly about to accuse somebody of fraud?' And that's when it dawned on me that I guess I'm really a defense lawyer."

ON A RECENT DAY, KAPLAN SHARES HIS

corporate-defense view of the law with his shareholder-litigation class at the University of Washington School of Law. The topic is derivative lawsuits, in which corporate boards are accused of failing to take appropriate action against executives to protect the company and shareholders.

"I was going to wait until the end of the class to say this, but I can't help expressing my skepticism about derivative lawsuits," says Kaplan, a bespectacled man dressed in a dark gray suit, white shirt and red-checked tie, lecturing to a small group of third-year students wearing jeans, T-shirts and flip-flops.

"It's wonderful," he tells them, "explaining to judges that these suits challenge the fundamental power of a company to decide who to sue. I'm happy to say most judges agree with me."

Kaplan tells his students that plaintiffs now have "mountains to climb" to prevent derivative lawsuits from being dismissed and to reach the crucial discovery phase. He draws a laugh when he describes how he defends these cases. "It's like a movie chase scene," he says with a grin. "We keep throwing garbage

barrels in their path as they run after us, and hope to trip them up."

The 1995 Private Securities Litigation Reform Act, for which Kaplan advised one of its congressional drafters, made it much harder for plaintiffs to win securities class action suits. He treasures a copy of the act (passed over President Bill Clinton's veto) given to him by one of the lead sponsors, former Washington U.S. Rep. Rick White, with the inscription: "To Barry Kaplan who was an inspiration for this law."

Kaplan loves being the teacher. That includes educating state court judges—who often have little experience with derivative suits—when he goes before them seeking dismissal of these unusual cases. Derivative cases are typically filed by shareholders in state courts and often accompany federal shareholder class-action suits that allege fraud or lack of proper disclosure on the part of executives.

Over the past 30 years, Kaplan has compiled an enviable record of success at defending companies against both securities class action and derivative suits. Many say he's become the attorney to go to in the Northwest—and, more recently, North Carolina—for firms facing this potentially ruinous litigation. He's been lead counsel in various suits for a long list of major public companies, including Boeing, Immunex,



Alaska Airlines, OfficeMax and Micron Technology.

"Barry is on the short list of top securities litigators nationally," says Patrick J. Schultheis, managing partner of Wilson Sonsini's Seattle office, where Kaplan moved in 2005 after 27 years at Perkins Coie. "He's helped us become more dominant in the Northwest and expand beyond technology and biotech. Barry helps attract top-notch litigators to our firm."

Though he helped tilt the playing field against them, leading plaintiffs' lawyers also regard Kaplan with respect. "From a personal perspective, I'm happy to have him on the other side because I like him and trust him," says John K. Grant, a partner at Robbins Geller Rudman & Dowd who often faces off against Kaplan in securities cases. "But in terms of my odds of winning a case, he would not be my first choice—and that's a compliment."

Grant ruefully acknowledges the impact of the 1995 Private Securities Litigation Reform Act. "It completely reset the ground rules for securities litigation," he says. "It did a 180 on plaintiffs' right to discovery."

GROWING UP IN THE BRONX AND THEN Long Island, Kaplan says he knew he wanted to be an attorney by the time he was 5. He remembers reading his uncle's law books and trying to explain contract law to his boyhood friends. "They were bored out of their minds," he says with a laugh.

He started with an underdog perspective. His father ran a struggling business supplying coin laundry machines to large apartment buildings. Working with him, Kaplan saw that building owners often treated his father unfairly. He recalls the time when he and his father arrived at a building to find that the owner had moved his father's laundry machines onto the street. His father looked crestfallen.

"It was a sad moment," Kaplan says. He still remembers his father's reaction, which came in the form of a poignant piece of advice. "You have to stand up for your rights," his father told him.

Years later, after graduating cum laude from University of Michigan Law School and while doing a federal court clerkship, Kaplan, on a lark, traveled to Seattle by train for a vacation in the winter of 1977. He'd never been west of Ann Arbor. Enchanted by the mountain silence along the way, and by views of Puget Sound and the snow-capped Olympic Mountains once he got to Seattle, he decided he wanted to move West. After completing his clerkship, he accepted an offer from the firm that is now Seattle-based Perkins Coie.

The problem? His college girlfriend, Erica, wanted to stay in her native Massachusetts. So Kaplan volunteered to work on a major lawsuit representing a New Jersey nuclear power plant operator against Exxon in a contract dispute, requiring lots of commuting back East. That allowed him to visit his girlfriend regularly for several years. But when discovery ended in that case, Erica had to make a choice. In 1981, they married after a 10-year courtship, and settled in Seattle.

"I'm a very deliberate guy," Kaplan explains.

KAPLAN BELIEVES THAT "WITH VERY FEW exceptions," he's "fighting the good fight" in defending corporations, their executives and their directors. The executives and directors, he argues, almost always are honest and committed to the best interests of their companies, and face unjust allegations of fraud and other misconduct.

And in those few cases in which he has doubts about his clients' conduct—he's particularly wary when executives have unloaded their company stock—"we help the clients settle quickly and resolve the matter," Kaplan says.

He still represents Killinger, whom he believes was unfairly maligned by the media and Senate investigators, on potential claims arising from the WaMu bankruptcy case.

"I have come to know Kerry as an incredibly hardworking, ethical and honest person," Kaplan says. "He worked hard to protect the bank from the housing downturn. He did not succeed, but that was not for lack of real effort on his part."

He declines to comment on Michigan Sen. Carl Levin's tough questioning of Killinger, other than to say with a grimace that "the questions we got weren't responsive to the information we provided."

Kaplan also declines comment on the general conduct of financial industry leaders leading up to the 2007 financial crash. But the stack of nonfiction books in his office offers a strong clue about his views on business and government. They include Whole Foods co-founder John Mackey's Ayn Rand-inspired book, *Conscious Capitalism: Liberating the Heroic Spirit of Business*, and Amity Shlaes' glowing biography of anti-regulatory President Calvin Coolidge.

A Republican Party activist and contributor, Kaplan served on the finance committee of unsuccessful Republican gubernatorial candidate Rob McKenna. He declines to talk more about his political views. "Here in Seattle, I'll just say I'm a Republican," he says with a smile.

AT THIS POINT IN HIS CAREER, CORPORATE leaders fully trust Kaplan with bet-the-company cases. He likes to learn as much as he can about his clients' businesses, whether they're in aviation or pharmaceuticals, so he can effectively defend the company's executives.

"He loves learning," says Wilson Sonsini partner Gregory L. Watts, who's working with Kaplan on a pending securities class action. Watts recalls with a laugh that when Kaplan represented Zumiez, a national retailer targeting skateboarders and surfers, "he learned everything he could about marketing clothes for surfer dudes. That was something for a guy his age."

That's part of what Watts calls Kaplan's "great bedside manner" with clients. Christy Shaffer, former CEO of a North Carolina pharmaceutical firm that Kaplan successfully represented in a shareholder class action, seconds that. "Barry has a very nice style working with scientists, CEOs, board members and other attorneys," she says. "He really tries to understand science and the whole picture.

He really cares, and that matters a lot to the executives he's working with."

Kaplan enjoys meeting with clients at his favorite table at Il Terrazzo Carmine, in Seattle's Pioneer Square, to get acquainted and discuss their cases. He calls it his conference room. His regular waiter doesn't need to ask what he wants for lunch. It's always salmon.

He's been zealous about eating healthy—and working out three mornings a week with a personal trainer—since suffering a heart attack in 2000 in the middle of representing Boeing in a huge securities class action case. Even before the health scare, he was passionate about representing biotech companies that are working on developing new medical therapies.

"It's one of the best things that happened to me," he says. "I survived and changed my ways. I didn't used to handle stress well. But it just doesn't get to me anymore. I got through the heart attack, and there's not much else to worry about."

Unlike some securities defense attorneys, Kaplan has always been known for being nice to plaintiffs' attorneys. "I like Barry because he's reasonable, he's personable, and you don't have to waste time with him on silly arguments," says Steve Berman, a leading securities class action plaintiffs' attorney with Seattle-based Hagens Berman who has litigated numerous cases against Kaplan over the past 25 years. "Some defense lawyers look at plaintiffs' lawyers and say they're jerks. With Barry, we talk about our families and vacations. It's not personal with him."

Not too personal, anyway. Kaplan is still a tough competitor who hates to lose. When he invites Berman to speak to his UW securities law class in February to present the plaintiff's point of view over lunch, he tells his students about the special guest coming the following week.

"Berman is one of the best in the country, though it hurts me to say it," Kaplan jokes.

With the Killinger case winding down, Kaplan looks forward to continuing to teach the shareholder litigation course, attending more operas, and traveling again to Israel, where his son now lives. Kaplan works with a trade group whose mission is to strengthen trade relationships between Washington state and Israel.

Kaplan also hopes to see more of beautiful, water-bound Seattle from his new speedboat, which he's still learning to pilot. "I take my kids by boat to their favorite seafood restaurant at Fishermen's Terminal," he says with a smile. "But my wife drives there by herself because she doesn't trust my piloting skills."

Meanwhile, he's expanding his securities and corporate-governance defense work with biotech companies in North Carolina's Research Triangle area, to which he feels especially committed emotionally. And when he retires, he'd like to serve on some corporate boards, to advise companies on liability issues.

"It just gets better every year," he says. "I represent very good people doing wonderful things. Boy, I love this practice." ■