Lethal weapons
Stars of US litigation
“Suing people is part of the ethic of this country,” says a top US antitrust lawyer. And when antitrust cases go to trial, multi-million dollar lawsuits turn on the courtroom the skills of a few individuals. Policy, economic theory and complex antitrust issues reduce down to persuading a non-specialist judge or 12 ordinary Americans to make a favourable decision. This is where some of the antitrust community’s most colourful characters thrive. GCR found out who they are.

Our selection of the best US antitrust defence litigators was developed through conversations with in-house counsel and by a survey of the top antitrust lawyers that work with them. When drawing up the list, we asked who defence counsel would use ‘if the case was definitely going to trial – and their life depended on the result’. All but one of those litigators selected to appear responded – Daniel Webb of Winston & Strawn in Chicago was busy on trial. Advocacy appears to be an alpha male sport at the moment – women are seriously under-represented in the following pages.

As well as the 14 names that this research gave us, we also spoke to the highly-recommended Roy Englert, an antitrust appellate specialist. As Englert says, appeal work is less dramatic than a trial lawyer’s brief. It’s also the level at which most antitrust law is made.

First steps
A defence team should have an antitrust litigator in their ranks from the start. When you have a serious problem, one of your first priorities is to present the threat of serious litigation. “You want a trial lawyer as part of the team early on, who can get their hands dirty, help to construct a strategy – and show the other side that you’re serious,” says William Baer, antitrust partner at Arnold & Porter LLP in Washington, DC.

To begin with, they are only there as back-up. Plans depend on knowing what will work in court and how to convince a dozen jurors of your case. “The trial lawyer’s great ability is to spot a story that is going to appeal to the judge and jury,” says R Hewitt Pate, antitrust partner at Hunton & Williams LLP and former head of the Justice Department’s antitrust division. “The litigator needs to figure out whether that story is sustainable. Although they’ll get more involved later, they have to engage at the start.”

Choosing who to hire is easy. You want the person who will win your case. According to Douglas Melamed of WilmerHale, the first thing to check is a litigator’s win–loss record. “I want a prediction that we’re going to win,” he says.

Among antitrust litigators, these tallies appear small. The spectre of colossal damages in an antitrust case means that defendants usually prefer settlements to risking everything at trial. Treble damages have made an antitrust trial too much of a risk. Fewer cases mean that each one becomes more important to a litigator’s record. “Dan Wall will be able to trade on the fact that he won that single Oracle case for years,” says Pate.

We asked the advocates profiled later in this feature to tell us how many times they had been to trial with an antitrust case, how many times they’d won and how often they had made the opening and closing arguments in these cases. One other indicator of quality was to ask them whether they had been elected to the institutionally elite American College of Trial Lawyers. Says Janet McDavid, antitrust partner at Hogan & Hartson LLP in Washington, DC: “It’s the gold standard.”

Hustle and graft
Litigators love telling war stories, so we asked about memorable things that have happened to them. Fred Bartlit describes hurling himself across a courtroom to catch a falling US flag. Chevron’s lawyers never forgave Stephen Bomse for making the closing argument of a motion to dismiss in verse. And big name clients that lawyers profiled here have represented include George W Bush, George Foreman and Al Gore.

We also discovered the best way to forge a career as an antitrust litigator. Experience. “You need two skill sets rarely present in the same individual. As well as the advocacy skill set, someone who can sit down calmly as one of the team and work out a strategy,” says Baer. The way to acquire these is through relentless graft, taking every opportunity to handle cases in court.
“The best trial lawyers outwork their adversary,” says Melamed. “Like a chess player, they think three steps ahead. It’s not the answer to the immediate question, it’s where that answer leads further down the line. Against Gates, Boies was using his first and second questions to set up his fifth.”

Boies says that the most important skill is making a jury believe you. “Credibility is particularly important in an antitrust case because the less the jurors understand about complicated issues, the more they rely on the lawyers who are presenting the case,” he says.

But the sacrifices required to get to this stage are extreme. Nearly all those questioned slated long absences from family life as the trial lawyer’s worst burden. “Trial litigation is all-consuming,” says George Cary, antitrust litigator at Cleary Gottlieb Steen & Hamilton LLP in Washington, DC. “It takes its toll on family life, particularly on the children.”

If it’s not your personal life that is suffering, then the strain may come from constant travelling, indigestible food and the sheer pressure of having millions of dollars riding on your every word.

The question of whether extensive antitrust knowledge is indispensable polarised the litigators. One group says that advocacy skills are more important to the lawyer standing on the courtroom floor than substantive antitrust knowledge.

“I think of a trial lawyer not as someone who is not necessarily a really good thinker but someone who can explain and convince a judge and jury,” says Pate. “The judges in the US are not experts on economics or antitrust. And if you get to a jury, multiply that by a hundred.” A number of the antitrust litigators profiled in the following pages agree.

But the others value knowledge of the antitrust law. “The lawyer must understand what the critical point is going to be. It could be one or two of 100 points at stake,” says Melamed. Knowing antitrust inside out helps a litigator to frame good questions on the spot.

“It is like choosing as one’s interpreter a native speaker or a bright language student raised in a different language,” says Daniel Wall of Latham & Watkins LLP in San Francisco. “The native speaker will always appreciate more. Likewise, the expert can look at the same set of facts and understand more than the general litigator dabbling in antitrust.”

To be the best, the combination of skills and knowledge are indispensable. “Every antitrust case comes down to the facts,” says Boies. “What the facts are perceived to be depends on the lawyer.”

### States and juries

Social observation pays large dividends when selecting a jury. “Trying an antitrust case to a jury is more difficult than appearing before a judge,” says Bradford Reynolds, antitrust litigator at Howrey LLP in Washington, DC. “The learning curve for the former is steeper, their attention span is shorter, there is less appreciation for the true nature of the controversy, and the amount of money in dispute is less comprehensible.” Finding a connection with the jurors becomes essential in these circumstances. Teft Smith, antitrust litigator at Kirkland & Ellis LLP, says that the best approach is to make an emotional appeal to them: “the ‘right’ thing to do would be to rule for my client”.

GCR also heard of less obvious (but more outrageous) ploys. One trial lawyer instructs his male team members to remove their wedding rings if many of the jurors are middle-aged females. But they are to keep them on if the female jurors are young or good-looking.

Richard Parker of O’Melveny & Myers has found having a guide to regional habits helpful. “The local counsel I was with said, ‘Whatever you do when you come to court tomorrow, wear brown shoes.’ So I did even though I ordinarily wear black. Then I noticed that the judge, the jury and every man in that courtroom, was wearing brown shoes. Anyway, we won.”

There are more prosaic concerns. Experience shows that juries favour plaintiffs, because it’s easy to associate with the little person stamped on by big business. State court juries are more difficult than federal court juries. Defence teams angle for trials with judges. Equally, different circuits offer different advantages, and some states – such as California – have historically awarded greater damages to plaintiffs than others.

Should European lawyers be reading the advice in the following pages with care? It may be that the introduction of treble damages, contingent fees, jury trials and class actions may be needed before the antitrust defence litigator becomes a common sight in Europe. Despite their careers relying on the honey-pot of US antitrust litigation, these lawyers aren’t keen to see the trend in extended across the Atlantic.

“Antitrust litigation in America has turned into a multi-billion dollar speed trap,” says Robert Cooper of Gibson Dunn & Crutcher LLP. Adds Stephen Bomse of Heller Ehrman: “Wash your mouth out with soap! Don’t even suggest encouraging more private antitrust actions. Of course, if it does come to pass, we’re going to be there to defend our clients.”

### JONATHAN JACOBSON

Wilson Sonsini Goodrich & Rosati
Age: 54

How many times have you been to trial on an antitrust case?
Five.

What is your win-loss record?
Won three, lost one, settled one.

How many times have you made the opening and closing arguments?
Two.

Member of the American College of Trial Lawyers?
No.

Why did you become an antitrust litigator?
Great cases, great clients and a great mentor – Gordon Spivack.

What does it take to be a successful antitrust litigator?
Preparation, confidence, knowledge of the facts, law and economics.

What is the best thing about being a litigator?
Winning the case.

What is the biggest drawback?
Long, unpredictable hours.

What is the best route to being successful?
Take the initiative on cases you are assigned to; pro bono and ABA work.

What is the most memorable moment of your career?
In Sewell Plastics v Coca-Cola, the judge dismissed the plaintiff’s case following my opening statement for the defence. It was a huge courtroom, filled to capacity.

What effect does a litigator have on an antitrust team?
It provides a reality check to non-litigator’s musings about what might happen.
How much antitrust law does a trial lawyer need to know?
If the case is simply a ‘did they do it’ price-fixing case, then not much. If a vertical or monopoly case, then lots.

What is the most effective way to present a complex antitrust case to a non-specialist judge or jury?
Develop key themes. Simplify everything. Break everything down so that most events take 20 minutes or less.

What is the most important ingredient of a successful antitrust case?
The opening statement.

How much improvisation goes into a trial performance?
You always need some, or you become boring. But you must be prepared.

Which are the best places to take a case to trial?
Varies too much to answer sensibly.

What percentage of your work is for plaintiffs?
Twenty per cent.

How does this compare with previous years?
Over a long period, roughly the same.

What could Europe do to encourage more private antitrust actions?
Develop consistent and clear rules about the availability of a private action, legal standing, damages, and attorneys’ fees.

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