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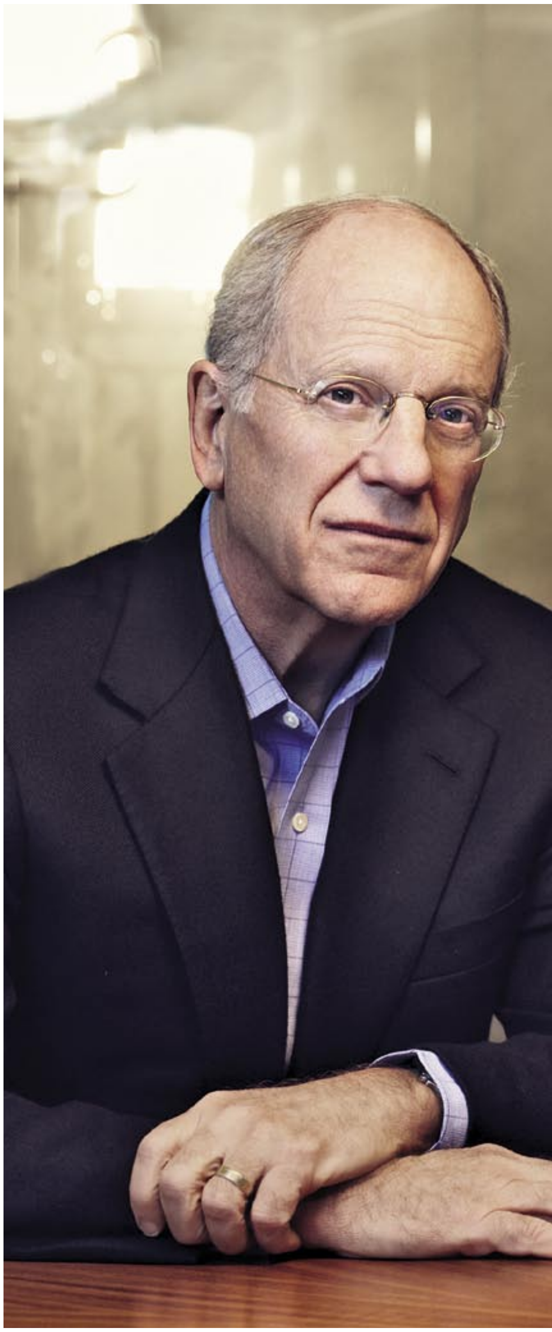
Big wins on contingency cases push **Boies, Schiller** onto The Am Law 100.

DON'T BET AGAINST THE HOUSE

By Andrew Longstreth



Photographs By Steven Laxton

DAVID BOIES MAKES IT OUT TO LAS VEGAS A FEW TIMES A year. In February he checked into the Encore, the newest hotel developed by Steve Wynn (a client) on the Strip. Boies had some legal business in town, but he was mainly there to relax and gamble.

Craps is his game. Boies enjoys the social aspect of chatting up fellow gamblers and cheering on the dice roller. But for the celebrated litigator, who reasons relentlessly about everything, it's also about the odds. Craps offers the only bet—the so-called odds bet—in which the house does not take an edge.

At the craps table, Boies shows off his internal risk calculator. He's never too excited after a winning roll or too distraught after a losing one. "What's critical in a hand is to get at least one pay [or win]," he says. "If you get one pay, it's not going to be a disaster when you lose. You want to have plenty of bets out there, but you want to collect one. You don't want to lose them all. If you lose them all, it gets very expensive."

Expensive, of course, is relative. In the course of a few hours, Boies puts thousands of dollars in play. But he is always acutely aware of how much money is at stake. After a shooter rolls a seven and wipes out hundreds of dollars of his bets, Boies calculates that he actually netted $1,600 since the shooter began rolling.

It quickly becomes clear why Boies gives summer associates a lesson in craps. It's not just to entertain them. The game also teaches risk management, and at Boies, Schiller & Flexner, that's a required way of thinking. The firm takes a big chunk of cases on contingency, and associates—not just partners—can share in its profits.

One of Boies, Schiller's bets—representing American Express Company in an antitrust case on partial contingency—helped the firm crack The Am Law 100 for the first time in its 12-year history. While 27 firms saw zero or negative growth in revenue in 2008, Boies, Schiller's revenues increased 18 percent, to $295 million, which was the fifth-largest jump for a firm that wasn't part of a merger last year. Boies, Schiller's $3 million in profits per partner were also the third-highest on The Am Law 100.

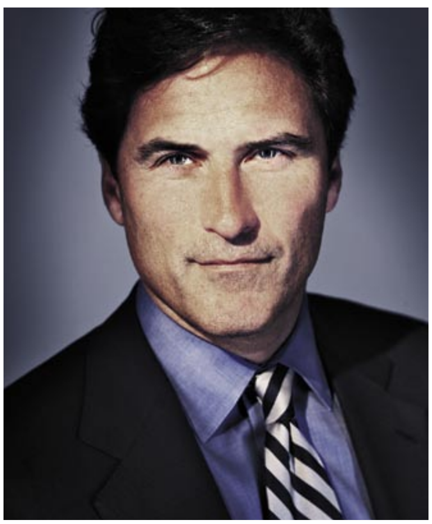
In this economic environment, where the billable-hour model is under pressure, and clients are increasingly asking their outside firms to share in the risk of litigation, the Boies, Schiller strategy—mixing plaintiffs cases with defense matters, picking clients whose work fits with the firm's long-term goals, and employing creative billing methods—looks built for the times. Over the last five years, the firm says, 48

DONALD FLEXNER, DAVID BOIES, AND JONATHAN SCHILLER (FROM LEFT) GREW THE FIRM FROM A BOUTIQUE INTO A LITIGATION POWERHOUSE WITH $295 MILLION IN REVENUE LAST YEAR.

percent of its revenue has come from pure contingency fee cases and alternative fee arrangements.

"We are probably the largest, most diversified law firm that has a long history and extensive experience with alternative fee arrangements," says Boies. "You get a first mover advantage if you're persistent, but eventually people begin to catch up. And I think that . . . people are at least catching up in their thinking, if not in their practice. And if they're catching up in their thinking, catching up in their practice is not going to be that far behind."

BOIES HAS A HISTORY OF TAKING RISKS. Leaving Cravath, Swaine & Moore in 1997 to start his own firm was a big one. The way he tells it in his autobiography, *Courting Justice*, he was at a craps table (naturally) in Vegas when he made the decision.



Last year the firm hired 50-year-old **William Ohlemeyer,** a former associate general counsel of Altria Group, who is expected to be a significant business generator.

Boies bolted because of a simple but intractable client conflict. Cravath's biggest client at the time, Time Warner Inc., parent of the Atlanta Braves, objected to Boies's representation of the New York Yankees in a suit against Major League Baseball over its "revenue-sharing" rules. Boies decided to stick with the Yankees and set up his own shop.

He and Jonathan Schiller of Kaye Scholer cofounded the firm with eight lawyers. Boies set up an office in Armonk, New York, and Schiller opened one in Washington, D.C. Their initial budget was around $4 million. It was the perfect size. Or at least Boies thought so. He figured that he could avoid administrative headaches and take only the cases that interested him.

But the firm proved to be a magnet for business. Clients like the Yankees, E.I. du Pont de Nemours and Company, Philip Morris International, Inc., and CBS Corporation, and new ones like Napster, Inc., and Calvin Klein, Inc., kept calling. Along the way, there was also that small government case against Microsoft Corporation and an election dispute between George W. Bush and Al Gore.

The firm expanded rapidly to meet demand. In 1999 Boies, Schiller brought on another name partner—Donald Flexner from Crowell & Moring. Between 1999 and 2002, the firm tripled in size, from roughly 50 to 150 (it now has 250 lawyers and 32 equity partners). Through lateral hires and firm acquisitions, it also opened offices scattered across the country from Hanover, New Hampshire, to Oakland.

But while the firm has grown, the model has stayed roughly the same and proven remarkably durable. It was and remains built around the idea of representing a core group of clients who need high-end legal work on a regular basis. The firm is also highly selective about which clients it takes on. If a company is not likely to come to them for their biggest and most complicated pieces of litigation, the firm will often take a pass. To make sure that a new matter is worth it, Boies, Schiller charges new clients a minimum engagement fee, which has ranged from $250,000 to $5 million, on top of the time billed. (This does not apply to contingency cases.)

There's a practical purpose for turning down work: It frees the firm to take on more profitable matters in the future. That's been especially true in the financial industry. Although the firm has a small but growing corporate department, it doesn't depend on all the major banks for work—unlike many New York firms. As a result, it can be strategic about which financial institutions it represents. According to Schiller, the firm has declined to take certain assignments from some banks, so that it can be free to sue them in the future. And its clients don't seem to mind. At the same time that it has represented The Goldman Sachs Group, Inc., Barclays PLC, and Bank of New York Mellon Corporation, the firm has sued UBS AG over the sale of auction-rate securities and Citigroup Inc. over its failed merger with Wachovia Corporation. "That says to me that they do cutting-edge legal work for big clients," says Matthew Biben, deputy general counsel for the BONY, who says he doesn't have a problem with the firm suing other banks.

Outside of the three senior partners, **Christopher Boies,** David's 41-year-old son, brings in the most business. He heads the 26-lawyer corporate department.

When they started out, Boies and Schiller had a business plan that called for 40 percent of the firm's time to be devoted to repeat clients; about 30 percent for one-off engagements; and about 30 percent allotted for plaintiffs class action suits, where the firm could reap 30 percent of a settlement or verdict. The firm never ended up devoting that much time to pure contingency fee cases, but the fees reaped from them have generally increased over the years.

Both Schiller and Boies had developed a taste for plaintiffs work before they started their firm. While at Cravath, Boies had represented the government against financier Michael Milken on partial contingency, and Schiller had taken on a company called McCaw Cellular Communications, Inc., in a class action breach-of-contract suit. Having their own shop allowed them to be more aggressive in filing class actions. "The idea was that we wouldn't have to be as highly leveraged if we were able to achieve some premiums over the hourly rate through contingency cases and some of those one-shot matters," says partner William Isaacson, who came with Schiller from Kaye Scholer.

Among the first suits Boies, Schiller filed was an antitrust class action against bulk vitamin manufacturers. The first call had come to Schiller when he was at Kaye Scholer. A lawyer had asked Schiller if he would investigate whether Hoffman–La Roche Ltd.—which Schiller had sued before—was engaging in a conspiracy to fix the prices of vitamins.

There was considerable risk involved. The government had not initiated an investigation, which meant that much of the groundwork—finding informants and locating key documents—had to be carried out and financed by lawyers at what was then Boies & Schiller. Ultimately the firm spent $10 million in attorney time and $2 million in out-of-pocket expenses. But the return paid off royally. After the suit was filed in 1998, most of the defendants agreed to settle the case two years later for more than $1 billion. As cocounsel, Boies, Schiller took home attorneys' fees estimated to be between $45 and $55 million.

Today, the class action suit remains central to the firm's model and helps distinguish it from most of The Am Law 100. In the upper echelons of corporate defense firms, filing a class action is still considered taboo. And while some firms will take on a contingency fee case periodically, Boies, Schiller seeks out opportunities every year. The firm is currently acting as co–lead counsel in a securities fraud case against a Madoff "feeder" fund, an antitrust action against Chinese manufacturers of vitamin C, and a RICO suit against Amway Global.

Filing the suits is partly philosophical. Seeing a case from a plaintiff's side, the Boies, Schiller lawyers argue, informs their work as defense lawyers. They can better size up a case from the start and know what costs will be involved. Then there's the potential economic upside. "The core clients keep the lights on, but the contingency fees provide a turbocharge to our revenues," says Boies, Schiller partner Richard Drubel, Jr., whose docket includes nearly 90 contingency fee cases.

Boies, Schiller lawyers who do this work have a taste for risk, a talent for sizing up the odds, and the ability to impress well-placed attorneys who can refer cases. A few Boies, Schiller partners have become widely known in the highest stratosphere of the plaintiffs bar. Stuart Singer, for example, has teamed up with well-known plantiffs lawyer Willie Gary. And Isaacson regularly works with Michael Hausfeld, one of the country's leading antitrust lawyers. As a result, they often get referrals for the best cases.

Boies, Schiller doesn't have set rules for taking contingency cases but follows guidelines that include: a solvent defendant, more than a 40 percent chance of winning a settlement, and at least $50 million in damages. A contingency fee committee made up of four partners—Singer, Isaacson, Drubel, and Stephen Zack—takes an initial vote on whether the firm should take the case. After they weigh in, it goes to the three name partners for their review.

Then it all comes down to confidence. In a 2000 price-fixing case against auction houses Sotheby's and Christie's International plc, Manhattan federal district court judge Lewis Kaplan asked firms seeking to become lead counsel to bid for the job. How much would they guarantee the class of Sotheby's and Christie's customers before

COMPENSATION: THINK DIFFERENT

WHEN DAVID BOIES AND JONAthan Schiller started their firm 12 years ago, they envisioned a practice and a compensation system that would set them apart from many firms in The Am Law 100. They wanted to strip away some of the subjectivity of partner compensation and increase the ability to pay associates on performance.

Although the compensation system has been modified over the years, those ideas are still in place. At the associate level, performance is measured mostly by billable time. Associates at Boies, Schiller are paid salaries comparable to those of other top law firms. Where they can distinguish themselves from their colleagues is through their bonus, which is calculated with a formula that's based on hours spent on billable matters. For typical associates, it goes like this: Their blended rate is multiplied by their total hours for the year, which is then multiplied by 0.3. An associate's starting salary is then subtracted from that number, and that's his or her bonus. Under that formula, an associate making $160,000 who billed 1,800 hours at a blended $250 hourly rate may end up with no bonus (although exceptions can be made). But an associate who billed at the same rate who worked 3,000 hours can make a $65,000 bonus. Associates who participate in successful contingency fee cases can do even better.

The same principles apply to partner compensation. A portion of a partner's take-home pay is also determined in part by a formula: a blended rate times annual hours times a multiple of up to 0.4. A partner—nonequity or equity—can also receive financial credit for client matters. There are three opportunities to earn a percentage of the annual revenue brought in from each matter: originating partner (2.5 percent) who first brought the client to the firm, billing partner (5 percent) who brings in a specific matter, and responsible partner (5 percent) who runs the matter day to day. There are also opportunities to participate in a contingency fee case. If the case is successful, partners can receive a percentage of the premium—the amount received over the normal rates—in proportion to the hours he or she worked on the case.

There is one additional aspect of the compensation system—the equity assigned to each equity partner every year, which is based on a point system. Most partners start with half a point and work their way up. According to a lawyer at the firm, a point in recent years has been worth around $400,000. As part of a transition to the future, Boies says that some of the firm's older partners have begun a "slope" down of their equity stakes. —A.L.

attorneys' fees?

Drubel had planned to work with his old colleagues at Susman Godfrey, who had first told him about the case. But lawyers at Susman felt that Boies, Schiller's bid was too high, and that there wouldn't be enough for attorneys' fees. That turned out to be wrong. The case, which ended up settling in months for $512 million, netted Boies, Schiller around $26 million in fees.

But not every case hits. Last July the firm, acting as cocounsel in an antitrust case against computer chip makers, lost a critical class certification motion. The case subsequently settled for around $1 million, but Boies says he estimates that the firm will only recover around 25 percent of its lawyer time. "If you're going to lose a case, it's better to lose it early," he says.

At Boies, Schiller, there's a built-in incentive for picking winners and losers: It has a direct impact on a lawyer's income. Part of a partner's compensation at the firm is tied to hours billed, so for a partner who devotes time to a contingency fee matter, there can be some lean years before the case settles. Year to year, a partner's income can swing by $1 million, say some at the firm.

Historically, the financial fates of Boies, Schiller associates who worked on contingency matters had also been tied to their outcome. The hours associates billed on those cases were not counted toward their yearly bonuses. But after hearing complaints from associates who felt unfairly tied to the outcome of contingency fee cases, the firm changed its policy. In 2007 it began giving associates the option to either count their contingency work as billable time for compensation purposes, or share in the profits when the case settles.

The arrangement is set up nicely for the house to win either way. If an associate chooses to bet on a contingency matter, he or she must be around from start to finish on a case to collect any money. That can be a long wait. This policy tends to weed out the true believers in the firm's long-term goals from the get-rich-quick types. On the other hand, if the associate chooses to count his or her contingency hours as regular hours each year, the firm will incur that short-term cost. But it also means that there's more money to go around if a case hits.

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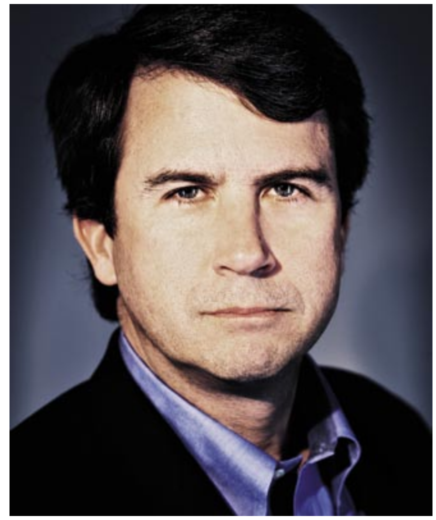

A contingency fee committee made up of four partners, including **William Isaacson,** takes an initial vote on whether the firm should take a case.

BOIES, SCHILLER LAWYERS SAY THAT THE firm's experience with contingency cases made them more comfortable with alternative billing structures for their core group of clients. When the firm represented Tyco International Ltd. in securities class action suits following its accounting scandal in 2002, Boies, Schiller was willing to submit to a holdback on a certain percentage of its fees pending a review every 90 days. After the review period, Tyco and Boies, Schiller lawyers would sit down to negotiate what percentage of the holdback the firm would receive. And if certain goals were reached—a case was settled within nine months, or there was no discovery of management—the firm was eligible for a "success fee." Gardner Courson, the former deputy general counsel for Tyco who negotiated agreements with Boies, Schiller, recalls that few firms were willing to accept an alternative fee deal.

Other large, traditional firms "weren't comfortable [that the arrangement] was going to be fair," says Courson. "They said, 'You're in trouble, we're fabulous, and here are our rates.' . . . To David's credit, he put money at risk."

Boies, Schiller's comfort level with risk allowed it to share in the upside of one of the largest antitrust settlements in history. In 2004 the firm filed an antitrust suit on behalf of American Express against Visa Inc., MasterCard Incorporated, and eight banks, alleging a conspiracy to keep American Express out of the credit card business. Within four years, the case resulted in more than $4 billion in settlements. Some of the money has already come in. According to a Securities and Exchange Commission filing last year, American Express has received $1.49 billion in pretax payments from the settlement.

American Express chose Boies, Schiller as its firm in May 2003 following a beauty contest. Both the client and firm are mum about what exactly the fee arrangement entailed, although David Boies acknowledges that it involved a flat fee and a contingency fee. According to a lawyer familiar with the deal, Boies, Schiller received a $5 million annual fee during the four-year case and is due to receive north of $150 million as part of a contingency formula, some of which was paid to the firm last year.

Flexner says that the fee negotiation, which came after the firm was picked, was quick and uncomplicated. He also confirms that Boies, Schiller, which at one point had 90 attorneys and paralegals on the case, could have been burned if the case didn't turn out well. "We could have lost a lot of money," says Flexner.

The firm has lost money so far on The SCO Group, Inc.'s doomed litigation against International Business Machines Corporation and Novell, Inc., over its UNIX software code and technology. Under a deal struck in 2004, Boies, Schiller agreed to cap its fees, and those of two other firms it hired, at $31 million in exchange for a percentage of any recovery. But the cases haven't resulted in any recovery, and in 2007 SCO filed for bankruptcy. Boies, Schiller is continuing to pursue the litigation through the appeals process. (SCO's case against Novell is pending before the U.S. Court of Appeals for the Tenth Circuit, while the IBM case is currently stayed.) According to one Boies, Schiller lawyer, the firm is "way into the red" on the matter.

But Boies, Schiller continues to put down bets. Patent litigation is one of the newest areas where it's pushing alternative fee arrangements. Two years ago, patent litigators D. Michael Underhill and Eric Mauer joined the firm from McDermott Will & Emery and Morgan, Lewis & Bockius, respectively, where they spent most of their time defending companies by the hour. But at Boies, Schiller they have exploited a wide range of fee arrangements. Along with Isaacson, they are currently representing a three-employee software company, ROY-G-BIV Corporation, in a patent case against a joint venture between the Japanese company Fanuc Ltd. and General Electric Company.

The case, filed in the Eastern District of Texas two year ago, claims infringement of patents related to ROY-G-BIV's software. David Brown and Jay Clark, founders of ROY-G-BIV, won't reveal the precise nature of the fee arrangement for fear of giving an advantage to the other side, but they confirm that they have not paid a cent to Boies, Schiller or its cocounsel Heard, Robins, Cloud & Lubel, Kip Glasscock, and Heim, Payne & Chorush. And yet, they say they'll have Boies, Schiller with them every step of the way—to the U.S. Supreme Court if necessary. They also confirm that Boies, Schiller could do very well if their case is successful. "The arrangement on that side is very fair," says ROY-G-BIV's Brown.

Underhill says he's looking at about five similar cases. After a full scrubbing, he says he'll take one or two. To him, taking on risk is part of the new legal landscape. Underhill predicts that some firms will likely try to move toward the Boies, Schiller model, but he remains skeptical that any will be able to pull it off. In any case, he doesn't sound particularly concerned.

SUCCESSION: TALKIN' 'BOUT MY GENERATION

ALTHOUGH DAVID BOIES TURNED 68 in March, no one is planning his retirement party. He remains the firm's biggest business generator, a senior member of management, and its most sought after trial lawyer. This spring, Boies was preparing for a high-profile trial scheduled for June. The veteran litigator will represent Maurice "Hank" Greenberg against the company he used to run, American International Group, Inc. The dispute concerns billions worth of AIG stock owned by a Greenberg-controlled entity called Starr International Company, Inc.

The law firm's other two managing partners aren't planning to leave soon, either. Donald Flexner, 67, and Jonathan Schiller, 62, say they want to keep practicing for the foreseeable future. If Boies, Schiller & Flexner were a public company, that would be welcome news to its shareholders. The importance of the three managing partners, especially Boies, can hardly be overstated. But long-term investors may wonder: What happens after those three are gone?

There are some signs a transition is under way. At one point in the firm's history, Boies estimates, he was responsible for about 60 percent of the business. Today, he says, he generates around a quarter of the firm's total business. Another quarter comes from Flexner and Schiller.

The rest is generated by a group of mostly younger partners. Outside of the three managing partners, Boies says, his 41-year-old son Christopher, who heads a 26-lawyer corporate department, is the biggest business generator. His clients include The Goldman Sachs Group, Inc., Plainfield Asset Management LLC, and the Yankees Entertainment and Sports Network, LLC.

On the litigation side, there's a solid core of youthful talent and experience. Damien Marshall, 39, who works out of the firm's Fort Lauderdale office, has drawn praise for his work on a Racketeer Influenced and Corrupt Organizations case filed in Russia against client The Bank of New York Mellon Corporation. The same is true of 41-year-old Michael Brille, who last year served as co–lead trial counsel for Genesco Inc. against The Finish Line, Inc., and UBS AG to enforce a $1.5 billion merger agreement. David Shapiro, a 54-year-old former U.S. attorney based in the Oakland office, recently won a rare class action trial on behalf of American Express Company. Jonathan Sherman, 46, has garnered publicity for his work advocating for cameras in the courtroom for Courtroom View Network. And last year the firm hired 50-year-old William Ohlemeyer, former associate general counsel of Altria Group, Inc., who recently established a client relationship with Pfizer Inc.

No one, of course, is claiming to be the next David Boies. The question, as many in the firm see it, is not whether they can replace Boies or Flexner or Schiller, but whether they can collectively turn a 12-year-old firm into a brand that transcends the founding generation. Williams & Connolly, which has thrived despite the absence of founder Edward Bennett Williams, is frequently cited by younger partners as an example of a firm that has made the transition. Does Boies, Schiller have a Brendan Sullivan, Jr., or two?

"I do think they have bench strength," says Thomas Sager, general counsel for E.I. du Pont de Nemours and Company, a regular client of the firm. "I'm not saying they're all A players, but [the firm does] a good job of vetting" attorneys they hire and make partner.

But Sager admits that the bench "may not get what I consider the David Boies–type of assignment" in the immediate future: "That comes with time and familiarity." —A.L.

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