



## 005 - Using Plaintiff's Lawyers for High-Stakes Litigation

**Michael Avenatti**  
*Plaintiff Lawyer*  
Eagan, O'Malley & Avenatti

**Clint B. Davis**  
*General Counsel*  
Endocare, Inc.

**Michael Keating**  
*Partner*  
Foley Hoag LLP

**Jodie Kelley**  
*Vice President and Deputy General Counsel*  
Fannie Mae

**Michael V. Ward**  
*General Counsel of Kensington Computer Products*  
ACCO Brands Corporation

## Faculty Biographies

**Michael Avenatti**  
 Plaintiff Lawyer  
 Eagan, O'Malley & Avenatti

### Clint Davis

Clint Davis serves as general counsel of Endocare, Inc., a medical device company located in Irvine, California.

Mr. Davis was a corporate attorney with the San Diego office of Morrison & Foerster. While at Morrison & Foerster, Mr. Davis served as outside counsel to Endocare and represented a number of other life sciences and technology companies in a wide variety of business transactions, contractual arrangements and corporate governance matters. Prior to his employment with Morrison & Foerster, Mr. Davis was a corporate attorney with Troy & Gould in Los Angeles, California, and with Bingham Dana (now Bingham McCutchen) in Boston, Massachusetts.

Mr. Davis holds a B.A. from Rice University and a J.D. from Harvard Law School.

### Michael Keating

Michael B. Keating is one of the principal trial attorneys for Foley Hoag LLP and is Chairman of the Litigation Department. His practice focuses on representing corporate and individual litigants in a range of complex litigation in both federal and state courts. Michael also has substantial experience in the commercial arbitration of disputes both as counsel and as an arbitrator and was selected by the Center for Public Resources to serve on its permanent mediation panel.

Mr. Keating was appointed Special Counsel by the Massachusetts Supreme Judicial Court to the Commission on Judicial Conduct and, later, appointed to be Chairman of the Court Management Advisory Board, which advises the Supreme Judicial Court on all matters of judicial administration.

Mr. Keating has served as a Special Master for the U.S. District Court, is the Past-President of the Boston Bar Association, a Fellow of the American College of Trial Lawyers, and has been ranked by Chambers USA: America's Leading Business Lawyers as one of Massachusetts' leading general commercial litigator.

Mr. Keating received his LL.B. from Harvard Law School and his B.A., cum laude and Phi Beta Kappa, from Williams College.

### Jodie Kelley

Jodie Kelley is vice president and deputy general counsel at Fannie Mae. In that position, she heads the group responsible for managing the company's litigation portfolio, and its responses to governmental inquiries. She and her team also provide the legal support for the company's anti-fraud

efforts, and provide advice to the company on substantive areas including antitrust, insurance, and employment.

Prior to joining Fannie Mae, Jodie was a partner in Jenner & Block's D.C. office, focusing on commercial and regulatory litigation and counseling.

Ms. Kelley earned her B.A. from the Pennsylvania State University, and her J.D. from Harvard Law School.

### Michael Ward

Michael V. Ward recently joined the Kensington Computer Products division of ACCO Brands Corporation as its general counsel.

Previously, he was the senior vice president, general counsel, and corporate secretary for Targus Group International, Inc., the largest maker of laptop carrying cases in the world. During his tenure at Targus, he handled a well-publicized litigation matter against KPMG, LLP, using several plaintiff law firms which obtained a significant favorable result for Targus.

Prior to joining Targus, Mr. Ward spent nearly a decade with a Fortune 100 company in a variety of executive-level and senior counsel roles handling acquisitions, business development, and capital market transactions. In addition, he also managed the litigation for the company, which included antitrust, business practices, and securities actions. Some of the litigation matters he defended were against several "A-List" plaintiff lawyers and plaintiff law firms.

Mr. Ward is a graduate of Albion College and Case Western Reserve University School of Law, and is a frequent speaker at legal seminars.



**Session 0005 – “Using Plaintiff  
Lawyers for High-Stakes Litigation”**

Jodie Kelley

Vice President and Deputy General Counsel

Fannie Mae

ACC's 2007 Annual Meeting: Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



*Using Plaintiff Lawyers for  
Defensive Litigation*

*“Keep Your Friends Close – Hold Your  
Enemies Closer”*

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## *Why?*

*“Seek counsel of him who makes you weep, and not of him who makes you laugh.”*

- **Understand how the other side thinks**
  - **Complacency can be a killer in defensive litigation**
  - **As a risk assessor, critical to understand the weaknesses in your position**
  - **Plaintiffs’ strategies evolve over time**



## *Why?*

*“You can discover what your enemy fears most by observing the means he uses to frighten you.”*

- **Fear Factor**
  - **Plaintiffs know that most cases settle**
  - **Using plaintiffs’ counsel demonstrates that you will try the case**
  - **Assists in helping you avoid becoming a target**



**Why?**

*“Tell me who you live with and I will tell you who you are”*

● **Credibility**

- **If it is a credible plaintiffs’ firm, plaintiffs are likely to understand that the defense is meritorious**



**Why?**

*“The best way to destroy an enemy is to make him a friend.”*

● **Other**

- **Build relationships**
- **Engender trust**
- **Make future resolutions easier**



### *Examples*

- Housing Discrimination Case
- Sox/Whistleblower Case

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



### *Cautionary Notes*

- These are plaintiffs' lawyers
  - Possible limits on arguments they make
  - Examples

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## *Cautionary Notes*

*“A fool and his money are soon parted.”*

- Arrangement can be cost effective - but it doesn't have to be
  - Contingency
  - Hourly arrangements
  - Hybrid/other arrangements

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## **Session 0005- “Using Plaintiff Lawyers for High-Stakes Litigation”**

**Michael V. Ward, General Counsel,  
Kensington Computer Products**

ACC's 2007 Annual Meeting: Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## The Times, They Are A-Changin’

- A decade ago, Plaintiffs trial lawyers were considered the enemy by corporations and businesses, and nothing more than “ambulance chasers,” and worse. And the thought of hiring one to represent a large company was considered heresy.
- Recently, however, attitudes have changed and corporations have increasingly turned to Plaintiffs trial lawyers to represent them on a contingency basis in “bet the company litigation.”

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Examples

- A Florida personal injury lawyer represented billionaire Ronald Perelman in his recent \$1.4 billion win in a securities fraud case against investment bank Morgan Stanley.
- Targus Group International used 2 plaintiff law firms in a well-publicized auditing malpractice lawsuit against KPMG,LLP.

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago





## Why?

- **Increased Emphasis on Legal Fees and Costs**
  - Outside legal fees are routinely cited by General Counsel as their number one concern.
  - As hourly fees have increased and have begun to approach \$750 - \$1000 an hour, companies are growing more and more sensitive to hourly firms “running the meter” during litigation.
  - “Paying as you go” via an hourly fee structure drains cash that can otherwise be used for operations, capital improvements, etc.

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

- **Increased Legal Fees and Costs Have Resulted in “Barriers to Entry” When It Comes to Litigation**
  - Suing another large or larger company can be prohibitively expensive for a company that must resort to an hourly fee arrangement.
  - In many cases, a contingency fee arrangement is the only structure that allows a company to go “toe to toe” with another deep, or deeper, pocket.

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

- **Companies Have Adopted A More “Results Oriented” Approach to Litigation**
  - Expending hundreds of thousands or millions of dollars in hourly legal fees without any guarantee of success causes considerable “heart burn” among corporate executives and boards.
  - Accountability generally matters in a corporation - using an hourly legal fee arrangement requires one or more executives to be accountable for the sizable expenditure if things “go South.”

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

- **Contingency Fee Agreements Are Consistent With Executives’ Way of Thinking And The Environment In Which They Operate Day to Day**
  - Entrepreneurial in nature.
  - Align interests of client and attorney.
  - Adoption of risk in exchange for potential reward.
  - “Pay for performance” – one only gets paid if the target is met.

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

- **Companies Have Slowly Come to Learn That Plaintiffs Lawyers Generally Have A Stronger Ability To See A Case Through to Completion (i.e. Trial Lawyers vs. “Pre-Trial” Lawyers)**
  - Actually have trial experience and thus threats of trial are not “empty.”
  - Know their way around the courthouse and a trial.
  - Are able to take complicated issues and explain them to lay jurors.
  - Do not require that a “real trial lawyer” be brought in during the eleventh hour to actually try the case (at a considerable additional cost).

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

- **Media Reports of Large Verdicts By Plaintiffs Lawyers Are Now More Readily Disseminated To The Masses, Including Corporate Counsel**
  - Corporate executives and boards are impressed by reports of large verdicts.
  - Leads to a desire on the part of executives and boards to go with a lawyer that has a proven track record of big \$\$\$ successes (i.e. experience with large dollar verdicts/settlements).

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

### ● Tort Reform Has Led Many Plaintiff Contingency Lawyers To Target Commercial Litigation

- Largely insulated from many of the damage caps.
- Can serve to balance out a portfolio of cases and act as a “hedge” against tort reform.

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago



## Why?

### ● Other

- Plaintiffs lawyers are less likely to have conflicts.
- Plaintiffs lawyers are less likely to have competing interests (i.e. pre-existing relationships in the same industry).
- Plaintiffs lawyers are less likely to be concerned about upsetting the establishment and more likely to relish the role of staunch advocate.

ACC's 2007 Annual Meeting:  
Enjoying the Ride on the Track to Success

October 29-31, Hyatt Regency Chicago