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# LEADING LAWYERS

MAGAZINE

MICHIGAN EDITION



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## In Bet-the-Company, Class Action or Individual Litigation, People Seeking Justice Turn to His Team

by Mike Bailey



ROCHESTER—E. Powell Miller has a simple strategy to explain his incredible litigation success—total immersion.

Fortune 500 companies across the country employ The Miller Law Firm PC and him in particular because of his expertise in litigation. He won 13 straight jury trials and secured settlements in excess of \$3 billion for his clients. *Super Lawyers Magazine* and *Leading Lawyers Magazine* have repeatedly named him among the top 10 lawyers in Michigan. Best Lawyers named him “Lawyer of the Year” four times, and in 2019 he was honored as best for bet-the-company litigation.

Miller is obsessed with ensuring justice and will spare no time or expense to make sure his clients receive the best possible representation. That is only possible, Miller believes, if he is completely consumed with every aspect of the case.

“From Dec. 26, 2013 until April 14, 2014, I worked 12 to 14 hours a day on trial preparation,” he says of a case filed in

Minnesota against Wells Fargo Bank. Miller represented several pension funds that had lost a considerable amount of money through Wells Fargo’s securities lending investments during the 2008 financial crisis.

“I hired a kid right out of high school who had no legal training for an apprenticeship. While we were working on the opening, he came up with what I thought was a brilliant idea. He constructed thematic slides of the bank as a car driving along the financial investment highway. At various intersections (which corresponded to timelines in the crisis), the bank could have turned left onto Safety Street or right onto Risky Road. In every instance, the bank turned onto Risky Road.”

Miller says simplifying the case for a jury of laypeople was vitally important since complex financial instruments can be confusing.

“We vetted that opening presentation before mock juries, and all of them said they better understood the issues with that slide presentation. You never talk down to a jury or

appear condescending, but you have to be sure they understand what happened.”

The case was set to be heard in St. Paul that August, but he wasted no time. “I spent five weeks writing and rehearsing the opening statement. I had it vetted by other lawyers. We rented apartments across the street from the courthouse so we could be in court in 10 minutes if need be. We moved an army into those apartments.”

Part of that complex of apartments was a “war room” staffed with paralegals, clerks and attorneys. Miller hired a chef to cook nutritious meals for everyone so no time was wasted.

“It was grueling,” he recalls. “But I have to look at myself in the mirror. I had to give this my all. I promise my clients I will give it my best shot. It is a matter of teamwork. Logistics wins wars.”

More than 100 pension funds lost money, Miller believed, because the bank made questionable and irresponsible decisions. “Everything, of course, was on contingency.

All that expense was our risk.”

That risk paid off when Wells Fargo agreed to settle the case for \$62.5 million on the eve of trial. The total settlement was among the largest recoveries achieved in a securities lending class action stemming from the 2008 financial crisis. The settlement was literally achieved on the courthouse steps the weekend before a jury trial was scheduled to begin.

At the time the settlement was announced, news stories quoted Miller: “Wells Fargo had prevailed in a similar case the year before, but we were not about to back down.”

Robert H. Kurnick, Jr., knows Miller’s skills both as a colleague and as a businessman. Kurnick has been the president of Penske Automotive Group, Inc. (formerly known as United Auto Group Inc.) since April 2008, but he practiced law with Miller early in his career.

“We hire him regularly when we have a litigation problem,” Kurnick says. “He is the best litigator in a very good firm. Why do we hire him? Because we want to win.”

Kurnick says Miller’s legal skills are very well established. But, he says, Miller also thinks like a businessman.

“What makes him so special is his strategic thinking not only about how to win a case but also what’s best for the company. He doesn’t come in and say, ‘Here’s what we’ll do.’ We have conversations about the most effective strategy and, out of that, what’s best for our business. And then he owns it. He is an enthusiastic believer.”

Miller has always believed that anything worth doing is worth doing well. Or exceptionally well in his case. His passion for excellence began early in life. As a child, Miller’s first paycheck came from his dad’s firm. He remembers his first job: dusting the books in his dad’s legal library for 25 cents an hour. He then worked for the firm as a runner, a messenger and eventually a law clerk.

As a student at the University of Detroit High School, he became interested in and later consumed by debate. He and the debate team traveled all over the United States competing in—and winning—debate contests. That thrill of verbal competition led to a passion that translated into legal work. It also formed lifelong friendships. “My debate partner, Kevin O’Shea, became a law partner,” he recalls.

#### DEBATE SUCCESS A LEGAL INCUBATOR

By 1979, Miller and his squad were the best overall debate team in the country. Because of that prowess, he was recruited to Georgetown University by the debate coach Dr. James Unger, who also moderated presidential debates. As a freshman, Miller competed in national collegiate debates, including one at Harvard University.

“We were competing at Harvard in the

national debate tournament,” Miller recalls. “We had two freshmen on the team. Against long odds, we survived the preliminary rounds and made it into the elimination rounds, winning battles in the sweet 16 and elite 8, then defeating Dartmouth in the semifinals by a 3-0 vote.

“I remember we ran a case on search and seizure at a newspaper, and we were losing to Dartmouth—getting our butts kicked. But we found an internal contradiction in their argument.” That opening was all the future litigator and the team needed to pull out the victory.

Northwestern University was no match for the confident Georgetown team in the finals, and Miller as a freshman won a major national tournament at the varsity level.

Law school seemed the natural next step after competing in literally hundreds of debates all over the country, so he enrolled in Wayne State University where he graduated third in his law class.

“I’ve always been able to think and speak on my feet, and I was fortunate to get early trial experience. It is rare to get to trial anymore. Many cases never get that far because we can settle them early. Litigation is a tool to get a result, but it is not an end in itself. It’s no doubt better to settle a case and avoid a trial where you could end up overpaying or, if you (are on the other side), taking less.”

Trial skills are still necessary, Miller says. “I believe in peace through strength. You want to have a track record of success.”

So, Miller makes it a priority to instruct younger attorneys how to prepare for trial and how to actually try a case. He put together a pamphlet that summarizes his philosophy on everything from jury selection to opening and closing arguments, as well as presentation of evidence and examination and cross-examination of witnesses.

“The jury verdict form is like a take-home exam,” he says. “The questions the jury must answer are the keys to the case. Our preparation and discovery must be framed around those key questions.”

Miller believes in being very visual so the jury can see as well as hear the case he presents. He also stresses spending considerable time in opening statements, on which, as the Wells Fargo litigation demonstrates, he spares no time or expense.

“I want my opening statement completed one month before trial. I use it as a road map from which I will answer the questions on the jury verdict form. We tell them the key exhibits and testimony we will present and what we will prove. It is a very powerful approach. We never disappoint a jury. In closing we tell them, ‘I told you we would prove A, B and C, and we did.’ I would rather under promise and

over deliver.”

Miller seldom under delivers. As a young attorney, he was part of a team prosecuting a case for Pulte Homebuilders over wood roof sheathing that would deteriorate when exposed to high temperatures. Miller says the defective product affected about 14,000 homes in about seven states. The wood was purchased from Hoover Treated Wood Products Inc. of Thomson, Georgia, and was treated with chemicals to make it fire retardant. But when the sheathing became hot, it deteriorated.

“The wood was like potato chips,” Miller says. Workers on the roof or even kids who were retrieving a ball could fall right through. “Lots of builders got burned by this,” Miller says.

After 3½ years of litigation, Miller helped secure a \$23 million jury verdict to compensate Pulte for the replacement of many of the roofs, a development that gave him the confidence to believe he could succeed on his own.

“I decided to start my own firm. I sold my car and my house, downsized and had \$35,000 with which to begin—just me and another attorney. I filed three class action lawsuits in Michigan.

“One was a securities fraud case against the Michigan National Bank Company’s acquisition by the National Australia Bank. The second was a consumer protection case against a gas company regarding exposure to carbon monoxide from gas water heaters. The third was against Intel Corporation concerning the Pentium processing chip, which caused users to make fourth-grade math errors. I was the first in the country to file that suit.”

Miller looks back on that with some amazement. “We were a two-person firm just starting out. We had no significant capitalization and took on three giants.” And against long odds, they prevailed in all three. “We now had the capitalization we needed.”

But Miller also learned a valuable lesson. “I was naive. Huge law firms in San Francisco and New York copied our case against Intel and ran with it. They made millions off of my work. I made, I think, \$175,000. So, I became a lot more sophisticated about how I handled those cases.”

#### TAKING ON A MAJOR INSURER

That sophistication and skill gained from early practice manifested itself in a behemoth case against AIG, one of the nation’s largest investment and insurance companies stung by massive losses during the 2008-2009 financial crisis. Like many lenders, AIG invested in mortgages and sold tranches or slices of a pool of those mortgages to investors. Many of those mortgages were not AAA rated, and AIG failed to disclose the risks to the various purchasers. In some cases, high-risk mortgages or those in significant danger of default, were intermingled

in a portfolio with more secure mortgages to spread the risk enough to be insignificant.

Investors led by the State of Michigan Retirement Systems, which oversees several state pension plans, accused AIG of failing to disclose the risks it took on through its portfolio of credit default swaps and a securities lending program. They said that failure led investors to buy stock and debt they otherwise would not have bought, resulting in billions of dollars in losses.

Miller served as co-lead counsel on the class action suit designed to recover money on behalf of investors who were not informed of those risks. In 2015, they announced a \$970.5 million settlement.

Miller says class action suits often have a negative connotation because the public perceives them as enriching lawyers but producing settlements that do not benefit the class. While he acknowledges that this does occur, he personally settled three such suits in which everyone in the class was made whole even after all attorneys' fees were paid.

One involved the Siemens Corp. Employees alleged the Siemens Medical Solutions division breached its contract by instituting a 30% across the board reduction in 1998 bonuses. Miller says the settlement of \$14.4 million was significant because the company agreed to settle for 100 cents on the dollar and paid attorney's fees. This allowed for the full recovery of all money owed to the workers.

He also recovered full restitution for T-Mobile customers who had been overcharged in violation of their contractual agreement with the carrier. Part of that contract provided for unlimited "T-Zones," a feature that included unlimited internet, email and mobile web content for \$4.99 a month.

But T-Mobile charged one user additional fees for those services in the amount of \$19.74. That user requested a refund. While T-Mobile admitted it had erred, it declined to refund the entire amount because the user did not

object to the charges within the time limitations. The suit alleged that T-Mobile had probably collected millions of dollars improperly. The settlement provided for full reimbursement to all T-Mobile customers who were improperly charged.

The third case, an Employee Retirement Income Security Act (ERISA), was filed on behalf of employees who alleged miscalculation of pension benefits. Employees received full recovery in the settlement.

That pattern of success has continued unabated with no loss of energy or enthusiasm—no matter the case—as client Cliff Lunney knows firsthand. Lunney's company owned several Jimmy John's franchises in several states and sought to sell the company, a move that was blocked by the corporation controlling the fast food chain.

"I guess you would call it a simple contract dispute," Lunney says, adding that it was anything but simple. "They were bullying us. We were a relatively small company with about \$40 million in sales, and their sales were in the billions. They told us we were not allowed to sell the business (and the franchises). They blocked the sale and essentially stuffed a third-party contract into our sale agreement. So, we took them to arbitration."

Lunney says most franchisees owned three or four stores, not the several dozen his company owned. He says Jimmy John's had a history of bullying small franchisees. In discovery, they discovered notes from corporation officials essentially saying they should let Lunney try to go to arbitration where he would discover how costly and time consuming it was.

"I started looking for a firm to represent us, someone who would think outside the box. That's when I found Powell. He is a very genuine guy. I know that is a cliché, but he did more than just give me a good pitch. He was side-by-side with me throughout the case. I felt comfortable with him. And his preparation was amazing."

Lunney says Miller outworked the opposing counsel, a respected Chicago law firm, and the result was the largest arbitration win against Jimmy John's in history.

Helping people in danger of being crushed by large corporations is a theme that runs through Miller's career. He served as liaison counsel in a price-fixing suit brought against auto parts suppliers. That suit alleged the manufacturers and some Japanese companies inflated the prices of the parts, which resulted in higher end costs to the final vehicle purchaser. Miller was part of a team that represented those car buyers.

While a few cases are still pending, the bulk of them have been settled for \$1.1 billion. Miller says class action suits are not only about the money but also about helping people who have no other means of redress.

Those suits also bring about positive change, such as one that indirectly led the Federal Drug Administration to ban ephedrine in dietary supplements.

Not only is he dedicated to helping his clients but he also is deeply concerned about attorneys in his firm. "I'm always looking to do things differently," he says. "So, each child born to one of our partners gets free college tuition. Full rides at no cost. The money is placed in the Michigan Educational Trust, and the child can attend any of the 14 state universities, including Michigan and Michigan State. That's part of our loyalty to our partners and our commitment to people."

In the community, Miller supports the Detroit Urban Debate League, which works to create debate programs in underserved high schools. He is also involved with the University of Detroit Jesuit High School and Academy as well as the Joe Niekro Foundation.

#### MICHIGAN'S LARGEST ARBITRATION AWARD

Miller's obsession with justice extends beyond class action suits to fighting for individuals he believes have been wronged.



Miller in his office with part of his baseball and basketball collection

Peter Karmanos is co-founder of Compuware, a company whose products are sold to information technology departments of large businesses. The company also provides testing, development, automation and performance management software for programs running on mainframe computer systems.

Karmanos, who is also minority owner of the National Hockey League's Carolina Hurricanes, is a "colorful man," Miller says. He has been known to speak often without a filter on his comments.

During an interview after having won an award for his charitable work, Karmanos made comments about the current board of directors of Compuware that were viewed as unflattering.

The Compuware board cited a non-disparagement clause in his contract and used the interview and those comments as the basis to fire him and cancel his retirement benefits and stock options. Miller represented Karmanos in arbitration against the company he co-founded.

"I was telling an old friend of mine who was a retired attorney about what had happened, and he told me he knew someone I should talk to. So, he set up a breakfast meeting with Powell and two of his associates," Karmanos recalls.

"From the very beginning, I knew this was going to be a different experience. He knows and loves the law, and he made the whole case interesting and fun. And calling it fun is something given that it was an emotional case. But I enjoyed every minute of it because of Powell's energy and creativity."

True to Miller's script, his opening statement was the stuff of legend. "It was like straight out of a movie. I'm sitting here now remembering that, and I'm smiling just thinking about it," he says.

"They offered us zero to settle. They were so overconfident," Miller recalls. "Our case was based on two things. First, we asserted those comments had to be materially damaging. If damaging to the company, then the stock price should have been affected. It was not, nor did any analyst change their recommendations, and there was virtually no publicity or articles about what he said in analyst publications. Secondly, they always knew he was 'Pete,' and they knew his personality. They even had a roast at which they joked about 'Peteisms,' and they were all laughing about his colorful use of language."

The high-profile case included testimony from the former CEO of General Motors and a family member of a nationally known political family.

"This was like the movie *Casablanca* where the police captain (Claude Rains as Louis Renault) blows his whistle in Bogart's club and says, 'I'm shocked, shocked to find that gambling is going on in here.' They all knew



One of Powell's many collectibles, an electronic Ebbets Field replica



Powell with Winston Churchill's *A Distant View of a Town in the South of France*

he was profane, but they all made millions off of him."

At the end of the case, an arbitrator awarded Karmanos \$16.5 million, the highest such award in Michigan history.

Miller's passions away from the office include his family—wife Karol and daughters Hannah, 21, and twins Katie and Liah, 18. The family loves to travel together to exotic places including Africa, the Caribbean islands, France, Hawaii and England. "We try to plan one family trip a year," he says.

Aside from family, his greatest interest is in collecting political and sports memorabilia. Like everything else, he does not do it partway.

Miller has a massive collection of baseball cards on display in the Detroit Institute of Arts, including the complete set of all players from the years 1909 to 11. That includes the most coveted card of all time, the Honus Wagner card. Fewer than 60 of were ever produced, and one sold at a 2013 online auction for \$2.1 million.

There are 524 unique cards in mint or near

mint condition on display from those early years, along with bats used by Babe Ruth, Shoeless Joe Jackson, Ty Cobb and others, along with a World Series baseball from the 1909 series.

"I also have letters from Ty Cobb that show him to be a compassionate, caring man," Miller says. "I think history gives him a bad reputation that is undeserved."

Miller also cherishes letters he has purchased that were originally written by Benjamin Franklin, John Adams and George Washington, the latter of which appealed to a Colonel Hitchcock to muster men for military service after the British took New York. The letter implores Hitchcock to "feel the necessity of the measure" as the colonials try to win the war against superior British forces.

That total commitment and dedication to whatever cause or interest he has is the hallmark of his life.

"If you had to summarize Powell in two words," says Kurnick, "it would be 'total immersion.'" ■