

# Litigation Leaders: Kramer Levin's Barry Berke on Being 'Trial Lawyers and Not Just Litigators'

BY ROSS TODD

Welcome to another edition of our *Litigation Leaders* series, featuring the litigation practice leaders at some of the biggest and most innovative law firms in the country.

Meet **Barry Berke**, the chair of the litigation department at **Kramer Levin Naftalis & Frankel**, who is based in New York. Berke returned to the firm last year after serving as chief impeachment counsel to the U.S. House of Representatives in the Senate impeachment trial of former President Donald Trump. He had previously served as special counsel to the House Judiciary Committee during the first Trump impeachment, a role where he gave the opening statement for the committee and questioned key witnesses. We named Berke runner-up for *Litigator of the Week* earlier this month alongside partner **Dani James** after they won a ruling knocking out bribery charges facing former New York Lt. Gov. Brian Benjamin.

**Lit Daily: Tell us a little about yourself—perhaps even a thing or two your partners would be surprised to learn about you.**

Barry Berke: Long before I attended law school, it was my dream to be a trial lawyer. While I developed other interests, including in the political process, when presented with opportunities to pursue those other interests, I responded by saying that my goal has always been to be the best trial law-



Photo: Ryland West/ALM

**Barry H. Berke, partner at Kramer Levin.**

yer I could be. That passion led me to begin my career as a federal public defender in the Southern District of New York, which was the greatest place to learn how to win the most challenging cases. Then I came to Kramer Levin, which has been my only law firm because I have been so fortunate to work with the best trial lawyers and trial partners on the most interesting and engaging trials and cases. We all feel such excitement for the work we do that I believe Kramer Levin has provided the very best platform to realize my goals.

**Your work on the impeachment proceedings took you away from the firm for a couple of stretches of the past few years. How has that time away affected your approach to leading the firm's litigation department?**

I was honored to represent the United States House of Representatives in connection with the two impeachments of the former president, including as chief impeachment counsel for the second impeachment trial focused on the events of Jan. 6. That was especially important to me because of the underlying attack on our democracy, free and fair elections and the peaceful transfer of power. Those issues had particular resonance for me following my involvement in advising and representing several states in connection with the 2020 presidential election, including Pennsylvania, which had the most litigation challenges of any state.

In many respects, my impeachment experiences felt like a continuation of what I have been doing as a trial lawyer for more than three decades. While the issues at stake were vitally important to our country and democratic principles at the heart of our system of government, the passion that I felt in those impeachment roles is similar to the commitment I feel in every trial that we do.

When in Washington, I used to say that I was a New York trial lawyer in D.C. on a temporary tourist visa. While the joke was intended to convey that I hoped to stay above the political scum, it really was true that what I was doing as impeachment counsel was bringing all of my experiences and expertise as a trial lawyer to the halls of Congress. For example, the second impeachment trial in the Senate chambers was very similar to a courtroom trial. We sought to present a seamless narrative accompanied by a vivid presentation of the evidence to support our arguments to try to prove our case to all the Senators that were our jury and to the American people. While we didn't persuade 67 jurors to vote to convict, we did persuade 57 of them, and the vast majority admitted we proved the case, even if they voted to acquit on technical jurisdictional grounds because he was a former president. It also reinforced that trials are the most effective means to resolve conflicting

positions about events and actions that can be proven or disproven through direct and circumstantial evidence

As a result of those experiences, I would say that I have an even greater commitment to our trial craft and a belief that our skills as trial lawyers are indeed our superpowers that are critical to achieving success for our clients. It also was a great reminder of the important role of public service to our firm and litigation department. In addition to my recent impeachment experiences, I have been fortunate to work with so many of my colleagues on issues of importance at the national, state and city level.

My work in D.C. also influenced our recent expansion into D.C. and our launch of a congressional investigations practice. In March, we announced our new D.C. office with the addition of 24 D.C.-based litigators from **Robbins Russell** who have an exceptional reputation for handling major litigation and appeals, including in the U.S. Supreme Court. Then we built on that in September when we announced our new congressional investigations practice which benefits from my work on the impeachments and our large team of litigators with experience representing clients in investigations and enforcement actions before the DOJ, the Securities and Exchange Commission, the Public Company Accounting Oversight Board, and other government agencies and congressional committees.

**How big is the litigation department at Kramer Levin and where are most of your litigators concentrated geographically?**

The litigation department at Kramer Levin numbers approximately 100 lawyers, or about 25% of the lawyers at Kramer Levin.

**What do you see as hallmarks of your firm's litigators? What makes you different?**

We believe that what makes us unique is that we are trial lawyers and not just litigators, and

as a result we approach each case from the beginning as if we will end up trying it. We like to think that as a result of that approach, we have a unique strategic perspective that helps us map out a path to victory early in the case that drives all the decisions we make. That trial lawyer approach has helped us achieve great success for our clients not only for those cases we do try, but also for those cases we get dismissed early, where we achieve a favorable settlement, or where we avoid having a case brought in the first instance.

Because of our success as trial lawyers, most of the litigation matters that we handle come to the firm specifically for that litigation. Clients choose to come to the firm for litigation because they anticipate a trial; they believe the threat of a trial will help achieve a favorable outcome; it is a bet-the-company case; a person's liberty is at stake; it involves a novel area of the law; or there is some other compelling reason why they want to bring us in to handle the matter as trial lawyers, rather than rely on their regular litigation counsel.

This also means that in addition to our usual retentions at the beginning of a case, we are often brought into cases after the initial motions are denied, or when it becomes clear that a trial is likely, to try to find a path to victory at the summary judgment or trial stage.

**In what three areas of litigation do you have the deepest bench? (I know it's hard, but please name just three.)**

It is hard to identify three specific areas of litigation that we do the most because as trial lawyers, we are brought into such a diverse range of cases that have a trial dynamic. We go where the action is because those are the cases that have the greatest demand for trial lawyers and lead to us being called. An example of this happening is our recent success representing Amgen in connection with a dispute against Novartis involving the development of a new drug for the treatment

of migraines that was pending in the Southern District of New York. We were brought into the case by Amgen following the denial of a motion to dismiss because of the likelihood of a trial despite the fact that we had no prior experience representing the company. Nevertheless, our approach as trial lawyers helped the client pursue a path to victory and achieve a favorable settlement following the close of discovery.

For this reason, we do handle a very wide range of litigation cases. One of our busiest areas is clearly white-collar and regulatory matters, in part because that is the area of law likely to result in trials. As usual, we had a busy docket of criminal and regulatory trials in the past year, and have a similar schedule of white-collar trials set for 2023.

While our white-collar practice receives great attention and recognition, it is one of many areas that get us into the courtroom. We also are regularly involved in some of the highest profile financial litigation and complex commercial disputes, especially those that are battled in the courtroom. And we are handling a variety of issues related to congressional investigations in connection with our recent practice launch in that area.

**What were some of the firm's biggest in-court wins in the past year, and can you cite tactics that exemplify your firm's approach to success?**

Kramer Levin trial teams achieved many notable wins this past year.

Some of our biggest wins came in criminal and regulatory law matters. For example, earlier this month a judge in the Southern District of New York granted our motion to dismiss all of the bribery charges in the bribery case against former New York Lt. Gov. Brian Benjamin. Charges of bribery, honest services wire fraud and conspiracy to commit those two offenses were dismissed. We had been scheduled to try the case in January 2023.

In May, a jury in the SDNY cleared Kramer Levin client James Im, a former Nomura bond trader, of

all claims stemming from the SEC's fraud case against him. The SEC alleged that Mr. Im lied to other bond traders about pricing, profit margins, and bond ownership. Mr. Im's defense demonstrated that such talk was routine market conduct and ultimately had no impact on the pricing of such securities.

We also secured the dismissal of the government's case against client Ric Blake, stemming from a U.S. Department of Justice investigation into price fixing in the poultry industry. And we represent Dr. William Harwin, the founder of Florida Cancer Specialists, charged with violating the Sherman Act. Following a three-week jury trial in September, a mistrial was declared after the jury indicated it was deadlocked. Additionally, we continue to represent Stephen Calk in the Southern District of New York on charges arising from \$16 million in loans made by Mr. Calk's bank to Paul Manafort, the former campaign manager for Donald Trump's campaign in 2016. Although Mr. Calk was convicted at trial, our advocacy at sentencing resulted in a sentence of only one year and one day, which was far below the sentence the government was seeking. In addition, the judge granted bail pending appeal, indicating that the issues we had raised challenging the verdict were potentially meritorious.

We also had some big commercial litigation wins. For example, in August a federal district court in Washington, D.C., granted Kramer Levin client EIG Global Energy Partners' motion for summary judgment against Petrobras, the state-owned Brazilian oil company, on liability and denied Petrobras' cross-motion for summary judgment in its entirety. The court found that Petrobras defrauded EIG and aided and abetted fraud in connection with a Brazilian deal sponsored by Petrobras to build and charter twenty-eight oil drilling rigs to drill for oil off the coast of Brazil.

In March, we won the dismissal with prejudice of a lender liability complaint brought by plaintiffs who wanted to develop Wade Park, a 176-acre parcel on the "\$5 Billion Mile" outside Dallas, Texas, that includes the Dallas Cowboys' headquarters and training center, Toyota Stadium, and high-end, mixed-use developments. The decision in the SDNY is an important victory for lenders, as it analyzed and upheld contract provisions that are customarily used to protect lenders. And in another case, a unanimous five-judge panel of the Appellate Division, First Department recently affirmed dismissal of all claims against Kramer Levin's client Invesco Ltd. as successor to the Oppenheimer Funds, in *Black Diamond Capital Management v. Oppenheimer Master Loan Fund*.

### **What does the firm's coming trial docket look like?**

As usual, we have a busy schedule moving forward. For example, we are defending Sirius XM, the satellite radio company, in a major patent infringement case brought by a large German applied research institute. The case has been to the Federal Circuit twice and is scheduled for a two-week jury trial in October 2023, in Delaware federal court.

We are also representing Usama Malik, the former CFO of Immunomedics, a biopharmaceutical company acquired for \$21 billion by Gilead Sciences, in defense of insider trading charges brought by the SEC and the U.S. Attorney's Office for the District of New Jersey. The criminal trial is also scheduled for October 2023.

And as noted above, Kramer Levin client EIG was granted summary judgment on liability against Petrobras in August. The district has stayed the case pending resolution of a second Petrobras interlocutory appeal on foreign sovereign immunity. We believe strongly in our position on the appeal and that a damages trial in 2023 is likely.