

MVP: Winston & Strawn's Michael Elkin

By Mike Curley

Law360 (September 29, 2021, 4:03 PM EDT) -- Michael Elkin of Winston & Strawn LLP notched a big win for PepsiCo Inc. in a suit alleging it stole the idea for a 2016 Super Bowl commercial and defended online archive Wolfgang's Vault against some of the largest music publishers in the world, earning him a spot as one of Law360's 2021 Media & Entertainment MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Elkin told Law360 that the Wolfgang's Vault case, his last in-person trial before the COVID-19 pandemic shut down courts across the nation, was the highlight of his year, calling it a "nice end to the real world as we knew it."

Elkin was defending the company, which hosts a collection of live music recordings, against a suit from major music publishers over the copyrights to the songs. In the bifurcated trial, liability had already been established, so in February and into March 2020, Elkin headed to the courtroom for a damages trial, which he said is always an uphill battle.

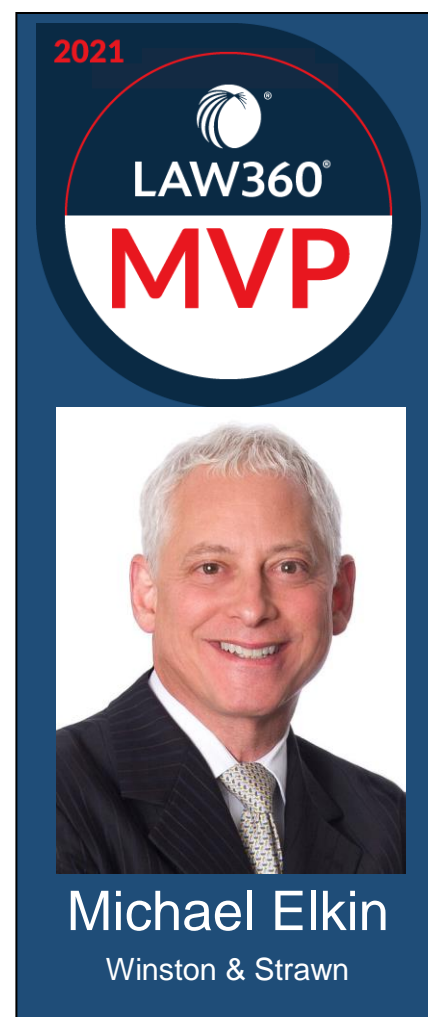
"It's always a challenge in a damages trial because there are always going to be repeated references to the wrongdoing that your client committed, and so you're always being faced with a barrage of attacks," he said. "You always worry about the jury taking that out in a very destructive way."

To overcome that challenge, Elkin said he needed to focus on the mitigating factors and present his witnesses in such a way as to get the jury to "look at things more objectively." And in this case, while the plaintiffs had sought more than \$30 million in damages, the jury only awarded about \$189,000. When the publishers pushed for a new trial, Elkin successfully opposed that bid as well.

HIS BIGGEST CHALLENGE THIS YEAR:

As a trial attorney first and foremost, Elkin said the biggest hurdle he faced in the last year was the pandemic bringing courtroom activity to a halt.

"Even with the remote work environment, not being able to be physically present in court takes the



edge off, and I think that trial lawyers are really at their best when they feel a sense of adrenaline running through their body," he said. "I think it just brings out the very best in terms of performance."

He said he's insisted, wherever possible, on holding conference calls and court proceedings through video platforms so he could watch the facial expressions and body language of others involved in the cases.

"That was the biggest challenge, how we can continue to serve our clients without meeting them," he said. "We were able to learn that we can function, with the advent of high tech, in a way that we never could have in the past."

OTHER NOTABLE CASES:

Another highlight of the last year, Elkin said, was when the Second Circuit affirmed the 2019 dismissal of a suit against Pepsi alleging that the company had stolen the concept behind its 2016 Super Bowl ad "The Joy of Dance."

The case concerned an ad that featured Janelle Monae singing as she moved from room to room, with her costume and the set changing in each room. The plaintiff, an ad agency, argued that those ideas came from a pitch that it had presented to Pepsi, but which Pepsi rejected.

In court, Elkin successfully argued that concepts such as having a pop star singing and changing costumes as the camera moved from room to room were "stock features" and not taken from the plaintiff's original pitch. He said they hearkened back to a previous ad the company had run in 2001 featuring Britney Spears.

After securing a win on summary judgment in November 2019, Elkin secured another win in the case in May 2021, when the Second Circuit affirmed the judgment.

"That was a fun case, for sure," he said. "It sort of scratched our head when we looked at the issues initially, because you knew right away that this would have to eventually be decided on summary judgment."

HIS PROUDEST MOMENT:

Elkin said his proudest moment wasn't one of his wins at court, but seeing a younger attorney that he had mentored climb up the ladder to become a leader and a "first-rate trial lawyer" in the process. Jennifer Golinveaux, who works in the firm's San Francisco office, became co-head of the firm's intellectual property practice, and his proudest moment was when she was promoted to that position, he said.

"I love doing what I do in the courtroom, but I love to mentor younger lawyers," he said. "When you see someone like this, who's been toiling in the vineyards for a number of years, really emerge as a leader, it makes me especially proud."

WHAT MOTIVATES HIM:

Elkin said he often feels like he's in the "crosshairs of the digital media revolution," and is thrilled to be part of the process of shaping the boundaries of legal principles that surround emerging technology and entertainment.

Pushing those boundaries is what keeps him energized, he said, adding that he feels very fortunate to be

part of the ever-evolving digital media landscape.

"Some of our cases have opened up new opportunities for business models that have been legitimized and there are other opportunities where we can't quite get the courts to go along with what our clients are potentially doing, so of course there are, to a certain extent, obstacles that we have to overcome," he said. "But just to be part of that process, to be able to help shape the boundaries of legal principles around these emerging technologies, and how consumers access media and entertainment, is thrilling to me, personally."

HIS ADVICE FOR JUNIOR ATTORNEYS:

Elkin said when students come out of law school, they often have a preconceived notion of what they want to do. His advice is to not be stuck on picking a side, but rather to go with the side that comes to them, he said.

"We're lawyers first and foremost," he said. "There's no cause — we have a client, a living, breathing organism, and that is what we have to address. We have to be an advocate, and we are not the client."

Being able to see things from both perspectives helps any attorney, he said, and puts them in a good position to represent whichever side they end up on, be it plaintiff or defendant. And that, he added, is the most important lesson he can pass on.

— *As told to Mike Curley. Editing by Kelly Duncan.*

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2021 MVP winners after reviewing nearly 900 submissions.