

Trial Ace: McKool Smith's Samuel Baxter

By **Andrew Strickler**

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McKool Smith PC's Sam Baxter has been recognized for his "folksy" Texas charm and ability to touch the hearts of jurors, but his willingness to draw verbal daggers in court and crush witnesses was on display in some of his latest courtroom victories, adding to an already impressive trial record.

The Law360 Trial Ace, McKool Smith principal and former state judge said his gentleman style with opposing counsel and litigants — well-seasoned with down-home wisdom and delivered in an East Texas drawl — doesn't preclude tough treatment of even sympathetic witnesses, just as long as jurors remain on his side.

"I'm an old prosecutor, and I spent a lot of years in the pit going after criminals, so when I need to put a hard edge on, I can do it," Baxter said. "But when I need to be little kinder and folksier, well, I can do that too."

David Berberian, the chief executive officer of Droplets Inc. and a McKool Smith client, was in a federal court in Marshall, Texas, to see the attorney dismantle a key defense witness in Droplets' patent infringement suit against Sears Holding Corp. and Overstock.com Inc.

The case brought by Texas-based Droplets against online retailers and others focused on Web features such as search-suggest, mouse-over and shopping carts — and the incorporation of the technology into the websites of a slew of major retailers.

The defense expert in the case presented a report showing invalidity of the patents that he claimed as his work, but the McKool Smith team uncovered that many pieces of the report had been lifted from documents by defense attorneys, right down to the typos.

Berberian said Baxter methodically questioned the expert, a veteran of many trials, using a screen and projector to illuminate an improbable number of repetitions between the expert's report and other documents. Jurors sat rapt.

"Baxter just laid it out, page after page, and you could just feel the heat building in the room," Berberian said. "It wasn't a personal attack. He was letting the facts speak, but in the end, the expert basically gave



Sam Baxter

what amounted to a full admission that parts of the report were plagiarized.”

Berberian contrasted the attorney's tough treatment to his own direct examination, when Baxter led him on the stand through the story of his own life and career and the work he and others had poured into Droplets' technology.

“It was like he was playing the music in the courtroom he wanted the jurors to hear right then, and he was able to show them that we were real people who had suffered a real harm,” he said. “It was masterful.”

The federal jury came back in three hours with a \$15 million verdict for Droplets.

For Baxter, that win was just one of a handful of multimillion-dollar trial victories.

Last year, Baxter served as a lead trial counsel on behalf of highway safety whistleblower Joshua Harman in a closely watched False Claims Act case against Trinity Industries. In that trial, he also had the gloves off for a defense expert, a retired engineer in his 70s who had been involved in the testing of guardrails at the heart of the lawsuit.

“Eventually I got him to admit that, yes, they had failed testing, and yes, if they performed this way out on a highway, it would be terrible,” he said. “He was a nice guy, and I treated him with respect, but it was devastating testimony.”

Baxter added that a central challenge in the Trinity case was to present Harman not as an “out-there” crusader, but as a devoted expert on modified guardrails blamed for dozens of deaths and injuries.

“He had dedicated two years of his life to driving around” to examine guardrails and crash scenes, he said. “I wanted to bring that passion to the courtroom ... but if he looked like he was over the line or some kind of nut case, that would have been bad.”

In October, a jury found Trinity liable for changing the design of guardrails without getting approval from the U.S. Federal Highway Administration and then misrepresenting them as an earlier, approved version even though they were more dangerous. A Texas federal judge in June tripled a \$175 million verdict against Trinity and assessed more than \$138 million in penalties.

In 2011, Baxter was a trial lead for Versata Software Inc. in its patent infringement suit with business management software maker SAP America Inc., landing a \$345 million jury award.

He was also a trial leader for Medtronic Vascular Inc. in a patent case related to balloon angioplasty catheters and polymers against Boston Scientific Corp., winning a \$250 million verdict. Other big-ticket patent trial wins came for clients such as TiVo Inc. and Pioneer Corp.

Baxter is an East Texas native who worked as a Harrison County district attorney between 1971 and 1985, trying approximately 150 cases and winning all but two felony cases and a handful of drunk-driving trials. He went on to serve four years on the bench as a Texas state district judge.

In 1989, Baxter entered private practice. He tried about 20 cases, including 15 personal injury cases and five complex civil disputes, before joining McKool Smith in 1994, according to the firm. Since then, he has tried another approximately 20 cases, racking up an impressive list of multimillion-dollar verdicts in

intellectual property and other matters.

Practicing alongside Baxter in some of those verdicts was McKool Smith principal Josh Budwin, who also worked on the Medtronic and Versata cases, among others. He described the Trial Ace as having the kind of authenticity and authority with a Texas jurors few other lawyers can hope to match.

Budwin added that watching Baxter at trial has taught him, “you don’t have to focus on every miniscule issue ... but on where the witness is coming from and anything that [addresses] their credibility.”

“Trials are about people, and that’s something I’ve learned from Sam,” he said.

--Editing by Christine Chun and Philip Shea.

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