



LIONS OF THE TEXAS BAR

Mike McKool is on 'Every Corporation's Shortlist'

By Mark Curriden

(May 31) – Corporations call it the “McKinsey effect.” It describes decisions business leaders make when hiring outside experts to advise them when the future of the company is at stake.

Executives and corporate board members, when placed in “bet-the-company” situations, hire elite advisers no matter their costs, such as management consulting firm McKinsey to guide on strategic planning or bankruptcy lawyers from Kirkland & Ellis or Weil, Gotshal & Manges to handle their restructuring.

Even if they fail, executives can say they hired the best.

When it comes to monumental patent disputes, Mike McKool is that lawyer.

“Mike is on the short list of every major company’s legal department,” says former American Airlines General Counsel Gary Kennedy. “Mike and his lawyers know patent law. They understand technology. They work hard to know the client’s business.

“Mike is the epitome of what it means to be a good lawyer,” says Kennedy, who is on the board of investment management firm PIMCO.

McKool has practiced law for 42 years. He’s tried more than 100 cases to juries, resulting in verdicts and judgments far exceeding \$1 billion. Out-of-court settlements added another billion dollars in the pockets of his clients.

Some of the world’s biggest corporations, including Exxon Mobil, Freddie Mac, Lockheed Martin, EDS and American Airlines, have hired McKool to prosecute patent infringements or defend them against such allegations.

Billion Dollar Patents

One of those huge businesses is Ericsson. The world’s largest maker of wireless network technology hired McKool in 2013 to lead its billion-dollar

litigation against Samsung, the globe’s biggest manufacturer of mobile phones.

Sweden’s largest corporation accused the South Korean giant of infringing its huge mobile-technology patent portfolio by refusing to reach a licensing agreement with Ericsson.

“The issue is duty that contractually is undertaken by all parties who participate in standard setting that they will license the technology on fair, reasonable and non-discriminatory terms” – also known in patent circles as FRAND, McKool says. “There was no playbook in 2013.” >



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Courts are required to “look at patents as a portfolio in order to make a FRAND determination,” he says. “You don’t license these patents individually but as a portfolio.”

McKool asked an administrative law judge of the International Trade Commission to issue an order prohibiting Samsung from importing its products into the U.S.

Before the ITC could issue its opinion, Ericsson and Samsung settled the case in December 2013. The terms of the deal were confidential, but Ericsson said publicly that it added \$652 million in revenues for the company during the fourth quarter of 2013.

At age 66, McKool still loves going to court and arguing cases – especially patent disputes – to juries.

“Lawyers make more of a difference in a patent case than other kinds of cases,” he says. “Jurors drive cars. If you have a fender bender, the jurors want lawyers to get out of the way so they can hear the witnesses. In patent cases, they don’t have a clue about what happens inside of a cell phone. Lawyers can be a teacher and a persuader.”

McKool’s expertise in intellectual property law is known around the globe. Only a month ago, Japanese leaders considering significant reforms to the nation’s patent system asked McKool to be a guest lecturer.

“It’s a long trip, but I am honored to be asked for my thoughts,” he says.

Getting an Early Start

Law is genetic for McKool.

His parents were Lebanese immigrants. He attended Dallas’ Jesuit High School, where he served as student body president and thrived in debate. His father, Mike McKool Sr., was a trial lawyer who specialized in eminent domain law and was involved in Democratic Party politics, including serving as a state senator.

“He made me go to work with him every day during summers from the time I was eight years old,” McKool says. “I hated it. My buddies were playing baseball and I was going to the courthouse. I spent a lot of time in the courtroom. That was ultimately of great benefit to me. I was never afraid of the courtroom. It always seemed very familiar to me. That was an advantage.”

McKool says his father, who passed away in 2003, is still his hero.

“We cannot hardly say hello in a brief in less than 50 pages,” he says. “I never saw anything he wrote longer than five pages. It’s something I should imitate more.”

Majoring in anthropology, he graduated *magna cum laude* from University of Notre Dame. From there, he went to the University of Texas School of Law, where he graduated in 1974.

McKool planned to join his father in his legal practice, but he was invited to a reception hosted by Hewitt, Johnson, Swanson & Barbee, which later grew to be the largest full service firms in Dallas. He was so impressed by those he met that he changed his career plans.

“Hewitt Johnson was a great firm with great lawyers,” he says. >



McKool was Hewitt Johnson's 16th lawyer. His first jury trial came only days after he learned that he had passed the bar exam. He represented First National Bank of Dallas, which later became First Republic, on a note for \$24,000.

"It was fun," he says. "There wasn't a lot of pressure."

McKool says half of his 100 jury trials came during the first five years of his career in cases where the potential damages were small.

"It wasn't going to make a huge difference in the world if you won or lost. You got to make every mistake in the book," he says. "There's so much pressure today. Some of the companies could go out of business if we lose."

"Changes in technology have made the practice of trial law more expensive."

McKool says computers and the Internet changed litigation.

"Email seems like such a small thing, but it is not," he says. "The documents are a large multiple of what we used to have. Not ten times, but a thousand times because of email."

"I like the old days when you had only 30 pieces of paper as evidence," he says. "Today, the banker's boxes of documents line the walls of the courtrooms. We all want to win and we all think the next fax out of the 17 million is the one that wins the case."

"I'm nostalgic for the old days."

McKool represented the company that came out with the first fax machine in the 1970s.

"We did a demonstration in the court and every juror's mouth was open," he says. "Everyone thought it was the cutting edge of technology."

Building a New Firm

In August 1991, McKool and Baker Botts trial lawyer Phil Smith joined forces to start a new litigation firm with nine other lawyers.

McKool said that Susman Godfrey opened several years earlier and provided a basic blueprint for how to start a national litigation boutique. Even so, McKool said there were times when he "had no idea what we were doing."

"We made every mistake you could make running a business," he says.

Despite this, McKool built one of the nation's largest IP-focused firms with 185 lawyers in eight cities in the U.S.

One of the firm's first big cases had nothing to do with IP law, but it was very high profile.

In 1993, Trammel Crow managing partner Joel Peterson hired McKool to represent him in a multimillion-dollar lawsuit against his employer.

The case "involved his interests in a series of real estate partnerships," McKool says. "Each one had its own agreement and was quite complex. Those contracts determined his interests."

But like so many complicated business lawsuits, the question for the jury was much simpler: Who was the good guy and who was the bad guy?

"A lot of young trial lawyers don't understand that you can get so absorbed into the details of your case that you lose an appreciation for what will actually persuade a jury that is coming new to the case," he says. "Juries are human. They can intake only so much information." >



Trammel Crow Companies realized it was a battle they didn't want to fight and the case settled on the eve of trial.

McKool says most of the cases he handles today have at least \$100 million at stake.

"It costs so much to try patent cases," he says. "The expert fees are several million dollars.

"The courts – at the same time that they are really wanting to get costs down, they are demanding more in terms of patent proof and especially damages proof," says McKool, who points out that it can cost as much as \$30 million preparing the most complex and high-dollar cases for trial.

McKool says the case that was the most fun for him personally came last year when he represented Alcoa Power and Gas, a subsidiary of the aluminum giant founded in Pittsburgh.

North Carolina officials sued Alcoa in 2012 over the ownership rights of a 40-mile stretch of the Yadkin River in the central part of the state, where Alcoa operated four hydroelectric dams and an aluminum smelting plant.

Alcoa countered that it obtained the rights or deeds to the disputed stretch of the river a century ago when it agreed to build and operate dams prior to World War II. As a result of the agreement, Alcoa purchased land along the river to build its operations.

North Carolina claimed that the deed did not include the riverbed of the Yadkin River, which the state claimed it owns.

The big legal issue, according to McKool, was whether the river "was navigable upon statehood in 1789," which could have resulted in Alcoa's

ownership or deeds being voided and Alcoa's property transferred into public trusts for the state.

"I'm a history buff. It was great for me," he says. "Almost all of our experts were historians – historians on the river and experts in boat construction."

In September 2015, U.S. District Judge Terrance Boyle gave McKool's client a complete victory that was worth billions of dollars for Alcoa.

"Why isn't this like some banana republic that confiscates property?" the judge said. "This is really a thinly veiled power grab."

McKool says that his plan has been to practice indefinitely and that he never even thought about retiring until "very recently." He says he is still having fun, enjoys the challenge of the litigation and believes he has several more years as a full-time, active lawyer.

Like many of the great Lions profiled — Harry Reasoner, Steve Susman and Carol Dinkins, to name a few — McKool says he has learned to adjust the intensity of his practice as he has gotten older. Gone, he and the others say, are the days when he could work 18-hour days for three or four weeks in a row. Instead, he says you learn your limits.

"Time waits for no man and age catches up with you," McKool says, echoing the comments of many of the other Lions.

"The Bataan Death March that I've done and imposed on others is not something I want to be doing forever," he says.

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