

THE WALL STREET JOURNAL.

SUNDAY, AUGUST 12, 2012

© 2012 Dow Jones & Company, Inc. All Rights Reserved.

Patent-Litigation Specialist Diversifies

Shifting Intellectual-Property Terrain Triggers Soul-Searching at McKool Smith

By ASHBY JONES

The path to success has gotten rockier for the Dallas-based law firm McKool Smith, which is coming off a remarkable 12-year run based largely on lucrative wins in patent-litigation cases.

The 177-lawyer firm, one of the biggest law-firm success stories of the past decade, faces dramatically different terrain today than it did back in 2000, when Mike McKool, the firm's co-founder, bet that pursuing infringement claims against technology companies could lead to big payoffs.

To the casual observer, it might appear that we are living through a golden age of patent litigation. Prominent technology companies like Apple Inc., Samsung Electronics Co. and Microsoft Corp. are battling in venues all over the world, largely over the designs and features of smartphones and tablets.

Despite the appearance created by the smartphone wars—which have yet to render a big-dollar jury verdict in favor of a plaintiff—patent litigators and intellectual-property experts say that in recent years, federal legislation and court rulings have made it harder for plaintiffs to win patent cases. Critics, including some judges, have cast deep doubt on patent litigation generally, largely on grounds that the U.S. Patent and Trademark Office has issued too many dubious patents in recent years.

As a result, McKool Smith is finding itself facing headwinds.

"McKool is a very good firm with remarkably good leadership," said Max Grant, a patent



Events led co-founder Mike McKool to turn his firm into a patent juggernaut. McKool is now branching out to other disciplines to keep its run going.

litigator and partner at Latham & Watkins LLP who has followed the firm's rise. "But the landscape has changed, and there's a lot of talk within the patent bar over whether McKool can keep it up—and if so, how."

Mr. McKool didn't set out to get rich pursuing cases for plaintiffs—or to build a patent juggernaut. When he founded McKool Smith in 1991 with another Dallas trial lawyer, Phillip Smith, the firm had about a dozen lawyers, none of whom specialized in patents or intellectual property. "At the time, I couldn't even spell patent," said Mr. McKool, a calm-tempered, courtly Texan

who will turn 63 later this month. "Our designs back then really were pretty simple—to create a really fantastic business-litigation boutique that we'd keep pretty small."

But over the next few years, a confluence of events persuaded Mr. McKool to change his mind.

In the early-1990s, Dallas-based semiconductor giant Texas Instruments Inc. launched one of the first wide-scale efforts to aggressively license its patents and sue over them.

The strategy brought a stream of federal patent litigation to Texas, much of which was filed in federal courts in

the eastern part of the state. Over the next several years, judges in the Eastern District of Texas, which includes the cities of Marshall and Tyler, gained attention for their deft and speedy handling of patent cases. Patent plaintiffs, which often have wide latitude in where they can file suit, started flocking there.

So, in 2000, Mr. McKool opened an Austin office with a handful of patent litigators, and committed to using firm money to fund cases on behalf of plaintiffs. "It was a big undertaking, to roll the dice solely on the fact that the Eastern District was getting hot," said Sam Baxter, a partner who joined

(over please)

THE PUBLISHER'S SALE OF THIS REPRINT DOES NOT CONSTITUTE OR IMPLY ANY ENDORSEMENT OR SPONSORSHIP OF ANY PRODUCT, SERVICE, COMPANY OR ORGANIZATION.
Custom Reprints 800.843.0008 www.djreprints.com DO NOT EDIT OR ALTER REPRINT/REPRODUCTIONS NOT PERMITTED

DOWJONES | Reprint Solutions

the firm in 1995. "Plus, we had no earthly idea how to try patent cases."

The gamble paid off for Mr. McKool, who is consistently described as a buttoned-up lawyer with a shrewd business sense, rather than a brash or swashbuckling Texan. In the years that followed, while the firm took on a good amount of corporate-defense work, the firm's lawyers racked up at least a dozen big wins and settlements for plaintiffs in patent cases, many of which started as lawsuits filed in Marshall.

The firm uses a host of different fee arrangements for its cases, but generally takes between one-third and 40% of a recovery, figures that are common in contingency-fee litigation. Mr. McKool declined to discuss details on the firm's finances.

The wins included a \$290 million jury verdict in 2009 against Microsoft on behalf of a small Canadian company called i4i Inc.; a \$200 million settlement in 2010 with Microsoft on behalf of VirnetX Holding Corp.; and a \$345 million jury verdict last year against SAP America and its parent, SAP AG

on behalf of enterprise-software maker Versata Software Inc. The Versata case is now pending at the U.S. Federal Circuit Court of Appeals.

Lawyers and legal experts say that while the firm partly happened to find itself in the right place at the right time, its success came through the strength of its lawyers, many of whom were handpicked by Mr. McKool to join the firm.

"McKool succeeded where others didn't because, frankly, their lawyers are better," said Henry Bunsow, a patent litigator in San Francisco who has opposed McKool in several cases.

Whether the firm can keep the run going is an open question. Recent rulings from the U.S. Supreme Court and federal courts of appeals have made it harder for plaintiffs in patent cases both to prove they were damaged by infringement and to win injunctions against defendants.

Scholars and other critics have raised questions about effectiveness of the entire patent system. In perhaps the most high-profile indictment, Richard Posner, an influential federal judge, in June tossed an entire patent case

between Apple and Google Inc.'s Motorola Mobility unit, and prevented the companies from refiling their claims.

The 2011 federal patent-reform law, called the America Invents Act, also made it tougher for a plaintiff to haul a handful of defendants to a single court, a strategy McKool employed to great effect in East Texas.

And there are signs that the Eastern District of Texas is becoming less plaintiff-friendly, said Edward Reines, a patent litigator at Weil Gotshal & Manges LLP in Silicon Valley. In February, McKool Smith lost a huge case in Tyler when a federal jury invalidated patents held by McKool client Eolas Technologies Inc. that purported to cover much of the technology behind the World Wide Web.

The developments have triggered some soul-searching at the firm. "Cases that we would have jumped at five years ago we don't consider for a second today because they just wouldn't pay," said Doug Cawley, another prominent lawyer at the firm. "We just can't be the firm we used to be."

The firm has branched out. In 2007, in response to signs that

Congress was, in Mr. McKool's words, "getting serious about changing the rules," the firm launched an office in New York, where it has branched into legal work for the financial-services industry. In 2009, it opened an office in Houston, largely devoted to bankruptcy. Last September, it took over a 35-lawyer Los Angeles litigation boutique, and in May, the firm opened a small office in Silicon Valley.

Some lawyers and legal experts say that if anyone can make a big expansion push work, it's McKool, chiefly because it can use money from its big-ticket wins to lure top talent from other disciplines.

Others, like Newport Beach, Calif., legal consultant Peter Zeughauser, caution against rapid overexpansion, especially in expensive markets like New York and Silicon Valley. But broader success, if it comes for McKool, will likely look different than the type experienced by the firm in the past decade.

"It's diversification," said Weil's Mr. Reines. "You're probably not going to catch as many marlin, but a steady supply of trout can be just as nutritious."