

Litigators of the Week: Mike McKool and Scott Cole of McKool Smith

By Jan Wolfe
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Mike McKool



Scott Cole

Humongous patent infringement verdicts are practically a dime a dozen these days. Unfortunately for patent plaintiffs, the U.S. Court of Appeals for the Federal Circuit has a habit of throwing the mega-awards out the window.

McKool Smith showed Wednesday that it doesn't just win big patent verdicts. The firm also has what it takes to make them stick.

In a 24-page opinion, the Federal Circuit affirmed a \$345 million verdict Versata Software Inc. won in a software patent case against SAP AG. The appeals court also mostly affirmed an injunction barring Versata from distributing its infringing software. McKool Smith partner Scott Cole represented Versata at trial in 2011, and name partner Mike McKool handled the oral argument at the Federal Circuit.

Versata sold business software in the 1990s, before SAP came to dominate the market. Versata brought suit in 2007 in U.S. district court in Marshall, Tx., claiming that SAP willfully ripped off its ideas. McKool Smith took the case on a contingency fee basis.

In 2009 a jury awarded Versata \$138 million in reasonable royalties. In the following months, however, the Federal Circuit issued a string of decisions reining in damages awards, prompting a magistrate judge to vacate the verdict and order a new trial on damages.

Undeterred, Cole and his colleagues at McKool Smith won a \$345 million verdict in a do-over trial in May 2011. The jury awarded \$85 million in reasonable royalties and another \$240 million in lost profits. The \$85 million in reasonable royalties was particularly impressive: A judge had disqualified a key Versata expert witness right before trial, leaving Cole to build his reasonable royalty theory through cross-examination of an SAP expert who pegged the figure at just \$2 million.

SAP appealed, of course, arguing that Versata's methodology

for calculating lost profits was flawed. Given the high stakes, McKool Smith might have brought on a Federal Circuit specialist, like Donald Dunner of Finnegan Henderson Farabow Garrett & Dunner. Back in 2009, when McKool Smith won a \$290 million verdict for i4i Inc., Mike McKool went out of his way to hire Dunner for the appeal, telling *The American Lawyer* that he's the best in the business.

This time around, Dunner wasn't available because SAP had already retained one of his protégés at Finnegan, J. Michael Jakes (perhaps best known for arguing *Bilski v. Kappos* at the U.S. Supreme Court). McKool decided to handle the Federal Circuit argument on his own, even though as the leader of a rapidly growing firm, he doesn't spend as much time in courtroom as he used to.

McKool assured us that arguing the appeal himself wasn't an ego thing. "We're not the jealousy type. We want what's best for the client," he said. "Frankly, I would have been glad to have Don Dunner, but that wasn't an option." McKool also pointed out that his firm is no stranger to the Federal Circuit. "We're earning our spurs," he said.

Thanks to Wednesday's ruling, Versata's verdict against SAP will go down as one of the largest ever to survive a Federal Circuit challenge. (The biggest, to our knowledge, is Polaroid Corporation's \$873 million win against Eastman Kodak Co. in 1990). The ruling comes just a month after the appeals court reversed the biggest patent verdict of 2011, a \$593 million award against Johnson & Johnson Inc.

"We spent a lot of time with the damages experts, discussing economic theories in detail," Cole told us, even though "sometimes that's not what the jury wants to hear."

In other words, it's tricky to keep jurors awake while also laying a solid foundation for appeal. But in this case, McKool Smith pulled it off.