



From left: principals Douglas Cawley, Scott Hejny, Scott Cole and Mike McKool, associate Phillip Aurentz and principal Tom Graves.

WINNER ■ INTELLECTUAL PROPERTY

## McKool Smith: Patently Successful

by MARY ALICE ROBBINS

McKool Smith focuses on big-ticket litigation with an emphasis on intellectual property, according to Mike McKool, the firm's co-founder and a principal in Dallas and New York City.

Between 50 percent and 60 percent of the firm's business focuses on IP matters, McKool said.

"We have over 60 scientist and engineer lawyers," he said.

Information provided by McKool Smith shows that the firm has 187 lawyers in eight offices, including four Texas offices where 108 attorneys practice.

One of McKool Smith's most significant victories in recent years came in *Versata Software Inc. v. SAP America Inc.*, a patent infringement case that resulted in an approximately \$391 million verdict for the firm's client—a verdict left intact on Jan. 21, when the U.S. Supreme Court denied SAP's petition for a writ of certiorari. McKool Smith represented Versata, which alleged in its 2007 complaint, filed in the U.S. District Court for the Eastern District of Texas, that SAP had infringed its pricing software patent.

Scott Cole, a McKool Smith principal in Austin and lead counsel for Versata, said there were two trials in the case. Cole said the first trial ended in August 2009 with a \$138.6 million verdict for Versata, which the trial court set aside "because of changes in damages law."

In a Jan. 6, 2011, order, U.S. Magistrate Judge Charles Everingham wrote that he

erred by admitting testimony and a damages model presented by a witness for Versata. Everingham ordered a new trial on damages.

According to the May 13, 2011, verdict form in the second trial, the jury awarded Versata \$260 million for "lost profits" and \$85 million for "reasonable royalty." Prejudgment interest increased the judgment to about \$391 million, which the U.S. Court of Appeals for the Federal Circuit upheld on May 1, 2013.

Cole said, "It's somewhat rare in patent cases to have a lost profits claim."

Lawyers from Ahmad Zavitsanos Anaipakos Alavi & Mensing in Houston worked with the McKool Smith team on Versata's case.

The case continues. The U.S. Trademark and Patent Office's Patent Trial and Appeal Board invalidated Versata's patent claims at issue in its suit against SAP on June 11, 2013.

Cole said Versata appealed the ruling to the Federal Circuit, where the case is pending. In an April 21, order, U.S. Magistrate Judge Roy Payne denied SAP's motion to stay execution of judgment while the PTAB proceedings are pending.

On Oct. 28, 2013, McKool Smith secured an approximately \$173 million verdict on behalf of Florida-based ParkerVision Inc. in another patent infringement suit. The client had filed *ParkerVision Inc. v. Qualcomm Inc.* in 2011 in the U.S. District Court for the Middle District of Florida in Orlando.



### McKool Smith

### BY THE NUMBERS

	Firmwide	Texas
Department size (headcount)	187	108
Department as percent of firm (headcount)	100%	
Department as percent (revenue)	100%	

The first amended complaint, filed Feb. 28, 2012, alleged that Qualcomm had infringed ParkerVision's patents relating to radio receivers and the down-conversion of electromagnetic signals. The trial was conducted in two phases, with the jury finding at the end of the first phase on Oct. 17, 2013, that ParkerVision's patents were valid and that Qualcomm had infringed the patents, according to the verdict form. As noted in the verdict form for the second phase of the trial, which ended Oct. 28, 2013, the jury awarded ParkerVision \$172.7 million for direct infringement and inducement but did not find that Qualcomm's infringement was willful.

McKool Smith Dallas principal Doug Cawley, who represents ParkerVision, said the most difficult thing at trial was explaining the technology. It is hard for lay people to understand the patents and the technology involved in the patents, he said.

One of the unusual things about this trial, Cawley said, was its "outstanding, well-educated jury." He said the eight jurors included an individual with a Ph.D. in electrical engineering, a person with a Ph.D. in nursing, a lawyer, the owner of a networking company and one person with a bachelor's degree in computer science.

Cawley said that, in preparing evidence, he usually is aiming at a jury of average citizens. After voir dire in the *ParkerVision*

case, he found himself with a different kind of jury.

"I had to re-aim the evidence for a much more educated, sophisticated jury," he said.

Although McKool Smith more often makes headlines for winning verdicts for plaintiffs, the firm also scored a major defense win in 2013 in *Deere & Co. v. Duroc LLC*.

Scott Hejny, a Dallas principal in McKool Smith, said the firm began defending Bush Hog Inc. and its parent company, Alamo Group Inc., against Deere's \$16 million patent infringement suit in 2013. Deere had alleged in its complaint that Bush Hog Inc., Alamo and other defendants had infringed its patent for rotary cutters.

As noted in the Dec. 19, 2013, verdict, the jury in the U.S. District Court for the Southern District of Iowa found that none of the defendants had infringed Deere's patent and had proven that each of the claims in the patent "would have been obvious to a person of ordinary skill in the art" when Deere obtained the patent.

"We won on noninfringement and invalidity," Hejny said.

Deere filed its notice of appeal on March 27. ■

Mary Alice Robbins is an Austin freelance writer and former senior reporter with Texas Lawyer.