

Icon Of IP: McKool Smith's Sam Baxter

By Ryan Davis

Law360, New York (January 29, 2016, 4:44 PM ET) -- While lawyers from across the country streamed into the Eastern District of Texas as it became a patent law hot spot, McKool Smith PC's Sam Baxter, an East Texas native, used his roots in the region and ability to connect with jurors to earn a reputation of one of the most successful patent litigators in the district.



Many lawyers arguing patent cases in the once-obscure corner of the world must negotiate unfamiliar territory, but Baxter grew up in Waskom, Texas, less than 25 miles from the federal courthouse in Marshall where many patent cases are heard. He also served as the district attorney and a state court judge in Harrison County, of which Marshall is the county seat.

Armed with decades of courtroom experience and insight into how jurors think in what has become the nation's most important patent venue, Baxter secured a \$391 million infringement judgment at trial for Versata Software Inc. in a patent case against SAP America Inc. and notched a \$500 million patent settlement for TiVo Inc. after prevailing at trial against rival EchoStar Corp., among many other high-profile patent wins in Texas.

Ruffin Cordell of Fish & Richardson PC, who has worked on cases with Baxter and litigated against him, said simply that Baxter "is always a true gentleman and one of the finest lawyers I've ever known."

"Sam is the consummate trial lawyer through and through. He's absolutely the complete package," Cordell said. "His storytelling ability is unrivaled. In my view, no one can do it better than he can."

Frances Keenan, executive chairman of the board of Paice LLC, which Baxter successfully represented in a patent trial over hybrid vehicle technology against Toyota Motor Corp., said that Baxter's demeanor and intellect were integral to the victory in the case.

"He has a Southern gentlemanly charm, and under that exterior, he's just wicked smart and good at understanding how people tick," she said.



Sam Baxter

Baxter, who is based in McKool's Marshall office, said that having been born and raised in a small town in East Texas, he's able to understand the point of view of the jurors who decide the numerous patent cases in the district and use that knowledge to find ways to get them on his side.

In the TiVo case, which dealt with digital video recorder technology, "TiVo was really fighting for its life with EchoStar," Baxter recalled. EchoStar and Dish Network Corp. CEO Charlie Ergen, who reportedly has a net worth of over \$13 billion, took the stand in the case, and Baxter used that as an opportunity to drive home to the jury how successful Ergen has been.

"He testified that he owned 7 billion shares of stock, so I told him, 'Sir, you're the only person I've ever met who has 7 billion of anything.' And the jury laughed like hell," Baxter said. "Let's just say the jury was not sympathetic to him."

Baxter said his cross-examination was able to show that Ergen had taken inconsistent positions in the litigation, and jurors sided with TiVo in 2006, finding that EchoStar and Dish infringed TiVo's patents and awarding \$74 million. After many more years of litigation, in which EchoStar was found in contempt of a permanent injunction, the dispute settled for \$500 million in 2011.

According to attorneys who have worked with Baxter, his success in patent cases is the result of his skill at thoroughly understanding and explaining highly technical details, as well as his magnetic courtroom presence.

"Sam has this quality about him that you may have encountered. Some politicians have it: They walk into a room and command attention before they've said a word. It's an innate persuasive ability," said W. Jay DeVecchio of Jenner & Block LLP.

That is particularly apparent in Baxter's cross-examinations, according to his colleagues. He honed his questioning skills as Harrison County district attorney from 1971 to 1985, and has become known for demolishing his opponents' experts on the witness stand.

"He has an ability to read people immediately in ways us ordinary mortals take a while to get to," said DeVecchio, who recently worked with Baxter on a False Claims Act case. "He can size people up and know intuitively where their strengths and weaknesses are."

Baxter said that one memorable cross-examination came in case in which he was representing Droplets Inc. in a suit accusing Sears Holding Corp. and Overstock.com Inc. of infringing patents on website technology. When the defendants put on an expert witness who argued that the patents were invalid, Baxter went to work.

Slowly and methodically, he revealed to the jury that the expert's purportedly independent report had been copied verbatim from documents written by the defense attorneys, going so far as to repeat the typos. Baxter kept the expert on the stand, going through example after example, until it was clear that attorneys wrote the report.

"After an hour of that, I felt bad for the poor guy at that point," Baxter said. Not only did the expert look bad in the eyes of the jury, he said, but the attorneys for the defendants also looked complicit and anything they said began to seem suspect.

"When you have those moments, it's a good day. They don't come along very often," he said.

Baxter's work convinced the jury, which found that the defendants infringed and awarded Droplets \$15 million in January 2015.

That case is far from the only time a cross-examination by Baxter zeroing in on an expert's weaknesses has won the day in a patent case.

"I've seen him cross-examine an expert who knows the material inside and out, and at the end of 20 minutes, the jury is convinced that Sam Baxter knows more about the technology than the expert," Cordell said. "That's not true, but it's the impression he leaves."

Baxter, who was a judge in Harrison County from 1985 to 1989, got in on the ground floor of the patent litigation boom in the Eastern District of Texas. He defended Samsung Electronics Co. Ltd. in an infringement suit brought by Texas Instruments Inc. in 1996, well before the district was flooded with patent cases.

A Dallas attorney contacted Baxter seeking his help representing Samsung, given his familiarity with East Texas. Baxter, whose practice focused on complex commercial litigation and railroad personal injury work, initially turned down the offer, informing the attorney that he'd never handled a patent matter before.

"He was persistent, and thank goodness he was," Baxter said.

After the Samsung case settled, another patent case soon came through the door at McKool Smith. Baxter's career was launched on a new path that now usually finds him representing patent owners suing Samsung and other tech giants, which he said he finds more exciting and rewarding than defense work.

Despite nearly two decades of experience in patent law, Baxter is quick to note that he is not a patent lawyer by training and often faces a learning curve as a "non-techy person" handling cases involving complex technology.

"I'm what's known as the lowest common denominator," he said. "If you can explain it to me, you can explain it to anyone."

He said that his goal in patent cases is always to teach the jury about the technology and help them understand how it works and why it's important, "without talking down to them and without talking gobbledygook."

Keenan said that Baxter was able to do just in Paice's case against Toyota. The company's patents on hybrid vehicle technology were developed by Alex Severinsky, an electrical engineer who moved to the U.S. from the Soviet Union in the 1970s.

He began researching fuel efficiency after being stuck in a gas line during the 1979 oil embargo and obtained hybrid vehicle patents in the 1990s. At trial, Baxter was able to show jurors how Toyota's popular cars infringed the patents, said Keenan, who is also chief financial officer of the Abell Foundation, a nonprofit community organization in Baltimore that has invested in Paice.

"Sam was not a patent lawyer by trade and did not have a technical background, but what he brought to the table was the ability to hear very complicated subject matter and explain it clearly to the jury," she said.

After winning one trial, the Paice dispute was set for another round at the U.S. International Trade Commission when the parties settled. Keenan said Baxter's ability to listen and resolve the differences between Toyota and Paice was the catalyst for the deal.

"He found a way to break through the tension that had built up in seven years of hard-fought litigation," she said.

Baxter said that while it's always nice to settle a case on favorable terms, he and his colleagues at McKool do not hesitate to go to trial if they can't secure the deal they want. That means the firm handles a large number of patent trials, and opponents know that squaring off against McKool in the courtroom "is not going to be a walk in the park," Baxter said.

"At the end of the day, we're not afraid to say, 'Ladies and gentlemen of the jury and may it please the court,' " he said.

When Baxter is the one saying those words, "it's a thing to behold," said DeVecchio, who noted that many attorneys from McKool came to closing arguments at the case they worked on together just to see Baxter in action.

"I've been doing this for 37 years and I'm a real skeptic, but I'm not a skeptic about this guy," DeVecchio said. "He's a force of nature, that's how a partner of mine described him. He's like a tidal wave or an earthquake: You cannot resist him."

--Editing by Katherine Rautenberg and Patricia K. Cole.

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