

Icon Of IP: McKool Smith's Mike McKool

By Kelly Knaub

Law360, New York (April 29, 2016, 4:21 PM ET) -- Mike McKool always knew he would follow in the footsteps of his father — a Lebanese immigrant and trial lawyer who laid the foundation for his legal career — but his rise to the top of the intellectual property field was far more unexpected.



McKool says his father had the "immigrant mentality" that kids should study hard and take over the family business, and as a result the younger McKool spent his summers as a pre-teen court-watcher, attending roughly 30 trials before entering high school and gaining early exposure to what would be a lifelong pursuit.

"He was a very successful trial lawyer," McKool said of his father, who was dubbed "McKool" by immigration officials who couldn't pronounce his similar Arabic name. "And he made me — with an emphasis on made me — go to work with him every day during the summers. And I mean from the time I was about 10 years old."

"I would have much rather been out playing baseball, but that was what he wanted me to do," he continued. "And of course, it served me well, because the courtroom has never been a mysterious place to me or a difficult place for me to operate because of that very early exposure to it."

But despite his longtime plans for a legal career, McKool, who describes himself as "the guy who avoided every math and science class in college," did not foresee that intellectual property would be his calling. The attorney has been practicing law for more than 42 years and has tried more than 100 jury cases, but he spent the first two decades of his career as a commercial trial lawyer.

His entrance into the IP field came years after he co-founded McKool Smith as an 11-attorney litigation boutique in 1991. At the time, McKool observed that patent litigation, which had been a sleepy little corner of general business law, was coming into prominence, and the firm looked to take on some IP work.

"It was just obvious to me that patent litigation was really on the rise and that the amount of the litigation and the importance of the litigation was going to increase exponentially, and it did," McKool said.



Mike McKool

Nobody at the firm had any patent experience, so its attorneys began studying and trying to learn as much as they could about it, McKool said, and they went on to score some big patent cases early on. These include representing defendants in suits brought by Texas Instruments, which McKool credits with starting the Eastern District patent litigation trend.

Ericsson Inc. hired the firm around 1995, and soon after that the company got slammed with a ton of big litigation. The rest is history, as the firm now has nearly 200 attorneys spread out in eight offices from coast to coast, with more than 60 scientist and engineer lawyers.

McKool — who says he feels like he now has a master's degree in electrical engineering after all of the patent cases he's tried and experts he's cross-examined — has earned a reputation as a top-notch IP attorney along the way, with a number of significant wins under his belt. Although he still does quite a bit of commercial trial work, he estimates he spent about 70 percent of his time on patent litigation in 2015.

"When Mike has been the lead counsel for us on cases ... it's a situation in which as a client you don't have to worry about whether things are going to be overlooked or not get done that need to get done," said Frank Vecella, associate general counsel for Ericsson, who has known McKool for 16 years. "He is the most prepared attorney I've ever encountered in my 34 years of litigation practice."

McKool's recent courtroom victories include a case in which he argued on behalf of Versata Software Inc. in its patent infringement suit against SAP America Inc. in January 2013. Five months later, the Federal Circuit affirmed a \$391 million patent infringement judgment against SAP — believed at the time to be the largest judgment ever affirmed by the Federal Circuit.

McKool says he is also proud of the recent matters he worked on for Ericsson — a loyal client to this day — in its big cross-licensing fights with Samsung Electronics Co. Ltd. and Apple Inc., because they were so complex.

The Samsung settlement resolved infringement claims the companies traded in Texas federal court and before the ITC, and the global licensing deal with Apple ended a slew of infringement disputes between the companies that played out worldwide, including lawsuits in Texas and California federal courts as well as an investigation before the ITC.

In the Apple case in 2015, there were eight district court lawsuits and two International Trade Commission suits, and both Ericsson and Apple had at least four law firms representing them, McKool said, noting that Apple had really good lawyers on its side.

"I was in charge of quarterbacking all of that for Ericsson and dealing with all the lawyers on our side, negotiating issues with lawyers on the other side and arguing motions," said McKool, who was dubbed "the quarterback of litigations" by Ericsson. "We tried one of those cases in December in the ITC, and the rest of them were set for 2016," McKool said, adding that it recently settled.

The terms of the deal were confidential, but Kasim Alfalahi, Ericsson's chief intellectual property officer, told Law360 in December that revenue in 2015 from all agreements with licensees, including Apple, would be between 13 billion and 14 billion Swedish krona (\$1.53 billion to \$1.65 billion).

The Samsung fight, likewise, had two ITC cases tried, and McKool was in trial in the ITC in October 2013 when the government shutdown hit, forcing a three-week hiatus. The parties settled before the initial

determination date by the administrative law judge in that case, with Samsung agreeing to pay \$650 million plus ongoing royalties to license standard-essential patents from Ericsson.

For McKool, work at the firm he co-founded continues lifelong roots in the Dallas region.

He grew up in the city, where he attended high school, before heading to Indiana to major in anthropology at Notre Dame. He returned to the Lone Star State to enroll in the University of Texas Law School.

After graduation, McKool began practicing law at a firm called Hewett Johnson Swanson & Barbee, which eventually became Johnson & Gibbs. When he left to found McKool Smith, he said, it was the largest firm in Dallas.

McKool Smith principal Douglas Cawley, who began practicing at Hewett Johnson with McKool in the 1970s and has known McKool for 41 years, described McKool as having "amazing powers of focus and concentration."

"When you are working on a case with him, he is like a laser focused on the relevant tasks in that case," Cawley said.

In the 1990s, when Cawley was with the former firm Hughes & Luce LLP — now a part of K&L Gates LLP — McKool brought Cawley on as co-counsel in one of the Ericsson cases, and Cawley eventually joined McKool Smith in 2002.

Cawley compared McKool to certain generals during the Civil War who would run toward the sound of guns, instinctively going where the action was.

"He is willing to be and expects to be in the absolute hottest part of the action," Cawley said. "And a lot of people shy away from that. A lot of people hope that someone else will really take responsibility for that and handle it, but Mike instinctively assumes a leadership role in the most difficult parts of any case."

Beyond the courtroom, McKool recently returned from a trip to Japan, where he had been invited to speak to lead members of the Japanese cabinet about patent litigation in the U.S. The Japanese government, McKool said, is considering both substantive and procedural changes to its overall patent laws.

McKool describes himself as very detail-oriented when trying cases, but he says that the danger of being too detail-oriented in the courtroom is that the jury isn't down in the details.

"On the plaintiff's side, you have to make your client likeable to the jury, and the story of the invention is just critical," McKool said. "They have to be interested in it. And they have to be empathetic with the struggle that's involved in inventing."

Being able to sway the jury with the story is so crucial, McKool said, he and Cawley took a Robert McKee storytelling course in New York to hone their storytelling ability in the courtroom.

In a fender bender case, McKool said, juries want lawyers to get out of the way so they can hear what the witnesses have to say. Jury members understand everything they need to know about who stopped

too quickly or who wasn't paying attention, but they often have no clue about what goes on inside technology like a cellphone, he said.

"The lawyer in the patent case is not just a persuader — the lawyer is a teacher," McKool said. "And of course, you teach because you're an advocate in a way that presents your client's side of the case. But they're hungry for information, and of course you have to make it understandable for somebody who's just going to hear about it for four or five days. That's why I think lawyers make a bigger difference in patent cases."

McKool described himself as a "radical" in the way you treat people in this process, emphasizing how important it is to always be respectful, civil and sincere.

"In my opinion, there's never any reason to show disrespect, even for somebody you're cross-examining," McKool said. "It's not a game. There are real issues at stake and you're trying to get justice. And you can do an effective cross-examination without being abusive."

--Additional reporting by Ryan Davis and Vin Gurrieri. Editing by Jeremy Barker and Catherine Sum.

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