

Litigator of the Week: Sharing the Limelight-and Reaping the Glory

By Jenna Greene
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Jenna Greene: Tell us a little about your client and why they brought this case.

Mike McKool: The patents asserted in this case teach ground-breaking inventions applicable to cellular communications. The lead inventor is WiLAN's Chief Technology Officer, Ken Stanwood. The technology is in use throughout the world and applies particularly in LTE smartphones. My client saw these as "crown jewel" patents that Apple was using, but had refused to license.

JG: Was there an over-arching narrative to your trial presentation?

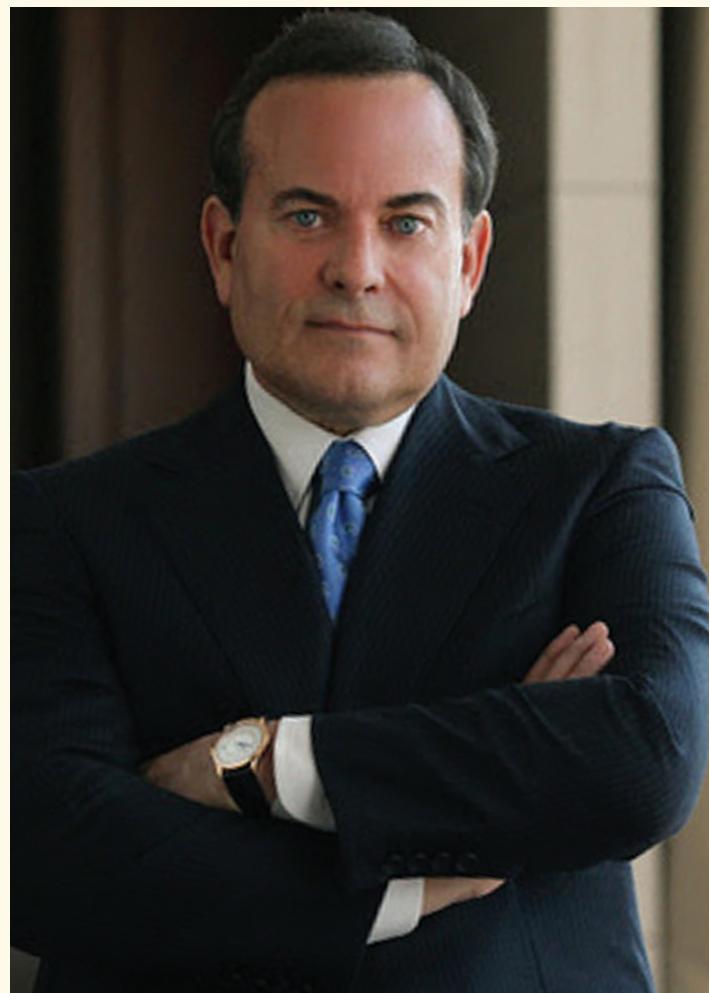
MM: The narrative we presented was the compelling invention story involving the brilliance of the lead inventor. In the late 1990's, he was a man whose 13 years designing military communication systems made him uniquely situated to propose cutting edge advances in cellular technology.

JG: What were some high points during trial?

MM: The high point for me was the testimony of the lead inventor, Ken Stanwood. Although his brilliance was on display, he also exhibited the humility of his beginnings as a small town kid raised on the Oregon coast from a family of millwrights. My client's chairman, Jim Skippen, was also an open and genuine witness who represented the company well.

JG: What about obstacles?

MM: It's always tough to go against Apple in California. The company has 52 percent of the



U.S. smartphone market, and it is viewed positively by most Californians. Jury selection, always critical, was particularly so in this case. Judge [Dana] Sabraw submitted the most in-depth and revealing jury questionnaire I've experienced. That took much of the guesswork out of the selection process.

JG: Any unconventional strategic choices on your part?

MM: I've learned over the years that one of the case killers for a plaintiff is a damages ask that strikes the jurors as excessive. It can damage overall credibility and poison your whole case. While the \$145.1 million we asked the jury to award WiLAN is a lot of money, one could have argued for more. I believe that keeping the damages proof extremely reasonable was a credibility boost and a major asset for WiLAN.

JG: You had a formidable opponent in DLA Piper's John Allcock. Do you think litigation is like tennis, where you tend to perform better if you're matched against a strong player?

MM: The kinds of cases we handle always present us with highly skilled opponents, and John was no exception. Going against the best certainly has made me a better courtroom lawyer. I generally walk away from each trial admiring my opponents and appreciating the skill and experience they bring to the courtroom.

After 45 years of doing this, I remain convinced that sincerity and humility are a trial lawyer's most important qualities. I always try to advocate those aspects of my client's case that I genuinely believe. Arrogance does not wear well in court.

JG: You shared the closing argument with a firm associate, Warren Lipschitz. What made you decide to do that?

MM: I made the decision to share the closing with Warren fairly late in the trial after observing him present our inventor witness and cross examine an expert. I have never felt that youth in itself is

a drawback. Looking back, I appreciate that I was given trial time and responsibility when I began my career. Judges and juries like young lawyers and root for them.

Warren is smart, utterly genuine, and an advocate who exudes belief in the positions he espouses. He was an astute collaborator on the dozens of strategy calls we had to make before and during the trial. He also presented our inventor witness, who I felt made a positive impression on the jury, and so Warren's identification with the inventor I judged to be an asset. In his part of the closing, Warren was superb. He's already a pro.

JG: The jury found infringement on all claims in about 1.5 hours of deliberation. What does that tell us?

MM: Normally, such a quick verdict would be interpreted as a good sign for the defendant. In this case, when I heard that we had a verdict so soon, it didn't worry me. It's pretty clear from the speed of deliberations that the jurors here were of a like mind on who should prevail. When that comes out in the jury room, it usually doesn't take long. I was optimistic on this one.

JG: How do you (and your client) feel about the award?

MM: Obviously, we feel great having all the liability questions answered in our favor and being awarded every penny we asked for. My client of course was extremely pleased. We all believed in the importance of the inventions we asserted, and the patents were truly the stars of this show. That the jury recognized that is gratifying.