

Texas Powerhouse: McKool Smith

By Michelle Casady

Law360 (August 4, 2021, 2:02 PM EDT) -- Whether it was representing clients in International Trade Commission investigations or taking on Apple and Comcast in intellectual property fights, McKool Smith PC's Texas attorneys brought home a steady string of victories that earned it a spot as a 2021 Texas Powerhouse.

The Dallas-based firm was founded in 1991 by principals Mike McKool and Phillip N. Smith Jr. with a team of 13 attorneys, and has maintained deep Texas roots, with 67 of its 125 attorneys staffing its offices in Austin, Dallas, Houston and Marshall. The firm has outposts in Los Angeles, New York and Washington as well. McKool Smith was also named a Texas Powerhouse the previous two times the award was given in 2018 and 2019. The awards were suspended in 2020 because of the coronavirus pandemic.

In its early days, commercial litigation was the firm's bread and butter, but it soon branched out into patent infringement work, and McKool Smith's national reputation expanded with its success in that arena.

"The changes have been immense," founder Mike McKool said of the firm's strategic focus over the years. "Number one: when we founded the firm in 1991, none of us had any experience trying patent cases. I know we didn't have any technically trained lawyers and we weren't pursuing patent cases in our business development efforts."

The transition to patent cases becoming the firm's focus, he said, was "serendipity" when now-longtime client Ericsson contacted McKool Smith in 1995 with a proposition: They had secured a patent-focused firm to handle a suit that was headed to trial and wanted a "really solid trial firm" to work hand-in-hand on the case.

"In the process of dealing with that over three or four years, we figured out the basics of trying a patent case, then the Eastern District of Texas became a prime patent venue because of the speed with which the judges wanted to proceed," McKool said. "So that was kind of a lucky thing for us, but we took advantage of it and became very well known and very successful."

While McKool Smith is one of the smaller firms to make Law360's list of Texas Powerhouses, it has secured for its clients what it says are more of the highest dollar verdicts in the past decade than any



other law firm. Firm principal Ashley Moore said that track record has been an aid in recruiting clients and attorneys to the firm.

"I think the way we stay competitive is by going through our roster of trial wins and studying how we can best accomplish a fantastic result for our clients," she said. "If you look at our history, we have more nine-figure jury verdicts than any firm in the country."

Last year, a jury in the Eastern District of Texas was convinced by a team of McKool Smith attorneys that Apple had infringed the patents of client PanOptis. The August 2020 trial — the first in-person jury trial to take place in the U.S. since the beginning of the COVID-19 pandemic — resulted in a \$506 million verdict for the infringement of five patents covering 4G LTE technology.

A new trial on damages has been ordered to ensure the amount the jury awarded is fair and reasonable, but the courtroom win still stands. And retrying a case for damages isn't new territory for McKool Smith attorneys, either.

In the Southern District of California, McKool Smith's Texas-based attorneys helped secure an \$85 million patent infringement verdict in January for client WiLAN Inc. in a dispute with Apple involving wireless communication technology used in its iPhones. The first time the case was tried, in the summer of 2018, firm founder McKool said it ended with a \$145 million verdict.

"After post-trial briefing the judge granted a new trial on damages and felt the damages proof we had was not tight enough," he said. "But we got every penny we asked for in the first trial and in the second we got every penny we asked for. It was a very satisfying win because these cases, they get reversed and retried, and just require a lot of diligence and you have to stay with it and continue to be enthusiastic with it."

Apple has been denied a new trial in that case and has appealed to the Federal Circuit, where the case remains pending.

And in three separate International Trade Commission investigations, the firm's lawyers hauled in victories for TiVo TV in a long-running dispute with Comcast alleging infringement of set-top boxes.

McKool Smith attorneys have defended their clients' wins on appeal, too, such as in the case of Soaring Wind Energy LLC's \$63 million award against the American arm of China's state-run aerospace corporation, Catic USA Inc., which the U.S. Supreme Court declined to disturb in October 2020.

In that case, McKool Smith attorneys, led by Lew LeClair, got the U.S. Court of Appeals for the Fifth Circuit in January 2020 to affirm the \$63 million arbitration award, but the company later resisted attempts to enforce the judgment. That required McKool Smith's team to move to hold Catic in contempt of court, and on the response date for that show cause motion, Catic filed for bankruptcy in Los Angeles.

McKool, who left his job as the head of litigation at Hewett Johnson Swanson & Barbee, later known as Johnson & Gibbs, to launch his own firm, said his firm's successes can be chalked up to the team-minded approach he has made paramount.

"I was dismayed by the amount of internal competition," he said of his prior firm. "You have a certain size pie and people were competing with each other for the bigger slice of that pie, and I just said 'We're

not doing that. We are not going to allow that.' So we have a culture where we enforce that fact — that people are to be team-minded first."

--Additional reporting by Lauren Berg, Dani Kass, Dave Simpson and Morgan Conley. Editing by Ellen Johnson.

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