

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

McKool & Team Score \$85M against Apple

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Mike McKool channeled his inner William Edward Hickson last week: “If at first you don’t succeed, try, try, try again.”

A San Diego federal court jury on Friday awarded the Dallas lawyer’s client, Ottawa-based WiLAN Inc., \$85.23 million in a patent infringement dispute against Apple.

WiLAN claims that Apple infringed on two of its patented technologies regarding voice over LTE communications on its iPhone 6 and iPhone 7. LTE stands for Long Term Evolution and refers to 4G technology standards that are up to 10 times faster than 3G communications.

Apple denies it breached WiLAN’s patents.

This is the second time that McKool and his legal team have taken the WiLAN case to trial. In August 2018, a California jury ruled that Apple had infringed WiLAN’s two patents and ordered the phone maker to pay WiLAN \$145 million.

U.S. District Judge Dana Sabraw upheld the jury’s findings that Apple did violate WiLAN’s patents, but rejected the damage award, saying that the plaintiff’s damage model was flawed.

Judge Sabraw gave WiLAN the choice of having the judgment reduced from \$145 million to a maximum of \$10 million or conduct a new trial to decide damages.

McKool, who has tried more than 120 cases to a jury verdict, chose the latter.

“We approached it as simple mathematics,” McKool said in an interview with *The Texas Lawbook*. “We asked for 40-cents a phone for 189 phones. In the previous trial, we asked for 85-cents per phone.”

The three-day trial ended Friday with the eight-person jury siding with WiLAN.

“Because this was the second time we tried this case, there were very few surprises,” McKool

said. “We took a little more conservative approach this time.”

The jury deliberated about three hours before issuing its verdict.

McKool said that even after more than four decades of trying cases, he still gets nervous during jury deliberations.

“Of all the things I have to do as a trial lawyer, I am still always uneasy when sweating the jury verdict,” he said. “It never gets easier.”

McKool pointed to “the great work from a team of really good young lawyers,” including McKool Smith principals Scott Cole, Ashley Moore and Warren Lipschitz.

“These young attorneys are becoming excellent trial lawyers right before our eyes,” McKool said.

Neither Apple nor its outside counsel, DLA Piper, responded to requests for comments.

FYI, Hickson was editor of the *Westminster Review* when he first published his infamous proverb, “If at first you don’t succeed, try, try, try again.” Later versions and reprints deleted a “try.” But, at the instance of 19th Century English literature scholars, the *Oxford Dictionary of Quotations* revised its quote from Hickson in 1979 to add back the third “try.” In reality, Hickson was quoting Robert the Bruce, King of Scotland, who reportedly told his troops before heading into battle in 1314, “If at first you don’t succeed, try, try, try again.”

McKool and his legal team say they are hoping they don’t have to try a third time.