

THE NATIONAL LAW JOURNAL

JUNE 21, 2010

An **ALM** Publication



WINNING

Profiles of successful litigators
and their strategies

A SPECIAL REPORT



WINNING

A theme kept recurring during our reporting for this year's "Winning," *The National Law Journal's* annual profiles of successful litigators. It was the thrill of defending the underdog—the "little guy," as Mark Topel puts it. The Kasowitz, Benson, Torres & Friedman attorney managed to portray Jay Lapine in that light while persuading a Northern California jury to acquit the former general counsel of McKesson HBOC Inc. of involvement in a financial scandal that cost stockholders \$9 billion.

"For me, it's like Wheaties for breakfast," Topel told us. "Good defense attorneys are motivated by a basic desire to represent the underdog. It's a strong psychological pull."

We asked our readers to nominate attorneys who could claim at least one significant bench or

Profiles of successful litigators and their strategies.

jury trial verdict within the past 18 months and who had a record of success over many years. We looked for cases in which substantial damages were at stake or in which the attorneys prevailed in a hostile jurisdiction (A list of winners dating to 1985 is available at NLJ.com).

After carefully scrutinizing their records, we settled on the 10 attorneys profiled in these pages (and an 11th attorney who is profiled on NLJ.com). Each one is the model of the modern litigator, and has a great story to tell.

Take Richard Marmaro of Skadden, Arps, Slate, Meagher &

Flom, who managed to persuade a judge to allow defense witnesses to testify under a grant of immunity, which led a prosecutor to lean on one of the witnesses, which led the judge to toss the stock-options backdating case and related U.S. Securities and Exchange Commission action against a bunch of former Broadcom Corp. executives.

Or Jerry McDevitt. The K&L Gates partner fought the politicized George W. Bush Justice Department to a hung jury in defending a Pennsylvania official accused of corruption, engineered a change in judges and finally got the charges tossed on the basis of a faulty warrant. He dropped 20 pounds while he was at it.

"You don't stop fighting. You don't stop preparing," he said. "It's a love-hate thing."

—MICHAEL MOLINE

In patent dispute, litigator passed the acid test

The key to winning, he says, is explaining complicated science in terms that make sense to a jury.

BY RICHARD ACELLO

David Doyle has mastered the job of explaining patent law and its application to life sciences in a way that doesn't leave jurors saying, "Huh?"

In January 2009, Doyle, a partner in the San Diego office of Morrison & Foerster, took on the defense of the

San Francisco Bay Area's Applied Biosystems Group (A.B.), a unit of the \$3.3 billion Life Technologies Corp., against allegations of patent infringement. The U.S. District Court for the Northern District of California jury already had ruled for the plaintiff in the case, Illumina Inc., during an earlier phase of the trial concerning the patents' ownership.

At issue was the technology for human gene sequencing. A.B. and archrival Illumina have competing sequencing technologies for mapping the human genome, the ultimate goal of which is individualized medical care based on a patient's unique genetic makeup. Both A.B. and Illumina offer systems to dramatically improve the speed, and reduce the cost, of sequencing. Illumina was

DAVID DOYLE | MORRISON & FOERSTER



DOYLE: The case came down to this: "If you drink water, you'll be fine. If you drink acid, you'll die. How can they be the same?"

attempting to block A.B. from launching its technology.

The biggest challenge, he said, was that the case was tried before a single jury over a month in a two-phase trial. The first phase addressed the ownership of the relevant patents. The second phase, Doyle's responsibility, dealt with the infringement issues.

"We were already starting in the hole, like having to argue about the death penalty after the jury found that your client had killed somebody," Doyle said. "It had that aspect to it."

Part of the strategy was for Doyle to limit his exposure in the first phase. "Because it was the same jury, they had to know me, so I had to play some role in selecting the jury in the first case but not too big a role so they would consider me a fresh face," he said. "You have to be realistic on these issues of credibility—it wouldn't be smart to have go through one phase and, if that didn't go well, pop up in the next phase."

Doyle said that, in highly technical cases, it's critical not to get bogged down in science with juries. "My view of patent cases with the juries and judge is the story of who the jury should want to rule for," he said. "It's so difficult for the jury to understand the technical and legal issues, so that story and having it presented by people the jury will like is so critical."

Doyle realized early that he had to grab control of the "invention story," he said. "We had the disadvantage of being the 800-pound gorilla because A.B. invented the automatic gene-sequencing machine," Doyle said. "Illumina wanted to present itself as a cool upstart."

Fortunately, A.B.'s invention had come from a small Massachusetts subsidiary it had acquired, Agencourt Personal Genomics. "They were a group of cool, young scientists," Doyle said. "Illumina didn't have the story because they

COURTROOM TIPS

Have a theme to your case to which the jury will relate and that can carry the entire case. If they accept your theme, it's likely the jury will rule in your favor.

Have witnesses who can carry that theme for you. You can't expect to do it by yourself. Limit witnesses who can't carry your theme to what facts you need from them.

It's all about the opening statement. You might have fewer opportunities to connect with the jury than your key witnesses. If you have not convinced the jury in the opening, it's highly unlikely you're going to win the case.

had acquired the patents and they had their inventor, but he was not nearly as appealing as the Agencourt group, which had a nice range of personalities. So now it wasn't A.B. versus Illumina, it was Illumina versus Agencourt."

Next, Doyle had to distinguish the two technologies to show that A.B.'s was unique and not merely an extension of Illumina's. The claim related to the probe each company used to cut DNA linkage. The difference between them came down to two atoms. Doyle had to convince the jury that the two-atom difference was substantial. He framed the issue as the difference between acid and water. The claimed linkage had to be cut with acid, whereas A.B.'s linkage is cut with silver diluted in plain water.

Doyle seized on the difference: "If you drink water, you'll be fine. If you drink acid, you'll die. How can they be the same?"

The jury unanimously agreed that A.B.'s probe was not the equivalent of Illumina's probe and rendered a verdict of noninfringement. "I don't worry about how much science a jury can handle, because the truth is they can handle very little, but there are two aspects to this," Doyle said. "They think they can handle and understand more than they do, but that's just human nature. And, the jury wants to know who sounds like they know the most. They want to hear the scientists and hear them convey that they're the people the jury can trust—it all comes down to trust. To trust your side in a patent case, the jury has to feel your side really knows its stuff."

Packaging the scientific testimony in a straightforward way is crucial, he said. "So when I compared the acid and water—there's a green theme here too—can these two be the same? I was saying these machines are not too different than you and me," Doyle said.

Thomas Ross of Marshall, Gerstein & Borun in Chicago was Doyle's opposing counsel. He and Doyle had two court-ordered discovery conferences in spring 2008. They squared off "at a big conference table," Ross said. "[Doyle's] a tough combatant, but he has a practical side, too, and I think we accomplished a lot in those discovery conferences, as far as making things more economical for our clients, and I appreciated his efforts."

Richard Acello is a freelance writer in San Diego.

Reprinted with permission from the June 21, 2010 edition of THE NATIONAL LAW JOURNAL © 2010 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. #005-06-10-24