

THE NATIONAL
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WINNING

SUCCESSFUL LITIGATORS, POWERFUL STRATEGIES



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We asked our readers to nominate trial attorneys with at least one significant win at jury or bench trial within the past 18 months and have a track record of success over many years. We supplemented these submissions with our own research. The criteria for a “significant win” included substantial damages at stake, establishment of an important precedent being altered or unfriendly jurisdictions overcome.

—MICHAEL MOLINE

Four case studies in undermining witnesses

The plaintiffs built their arguments on their credibility, so naturally the defense went on the attack.

BY MIKE SCARCELLA

Morrison & Foerster partner Michael Jacobs called the case one of the biggest successes of his career—winning for Novell Inc. in a seven-year copyright suit that aimed squarely at the open-source software movement. One key to victory was to undermine the testimony of 10 former Novell employees, including lawyers and the former chief executive officer.

Software company The SCO Group (now called Technology Services Group Inc.) sought more than \$200 million in damages against Novell for alleged infringement of copyrights to the Unix computer operating system, which it claimed it had purchased from Novell in 1995. Open-source developers had built an entire software infrastructure around the disputed technology.

Novell prevailed on most of the major issues on summary judgement. The jury trial, testing SCO’s claim for slander of title, lasted for three weeks in March 2010 in U.S. District Court for the District of Utah. The jury found that the disputed asset-purchase agreement had not, in fact, transferred Unix copyrights from Novell to SCO.

Jacobs was up against those 10 witnesses, including former Novell employees who swore that they’d been involved in the sale negotiations and that the deal included the rights at issue. But the Morrison & Foerster team and co-counsel from Workman Nydegger in Salt Lake City showed that

MICHAEL JACOBS

MORRISON & FOERSTER



HAMMER: A parade of plaintiffs’ witnesses had economic interests in the trial’s outcome.

they weren’t in on the final talks and that, furthermore, many of those witnesses had acquired financial interests in SCO.

Jacobs had what he described as “fabulous” documents—Novell board of directors minutes proving that the company retained all of its patents and copyrights. “We hammered them with that over and over,” Jacobs said.

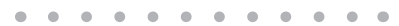
One witness, when confronted with the minutes, admitted: “I guess I didn’t read

TRIAL TIPS

Remember that a trial is about building trust with the jury.

Think through carefully the allocation of issues to the judge and jury.

Do not underestimate the power of in limine motions to shape the trial.



this very carefully....If I had maybe we wouldn’t be here.”

Many of the witnesses for Novell were lawyers—including outside counsel who drafted the agreement. The trick was to make their testimony “human,” Jacobs said.

In January, Boies, Schiller & Flexner partner Stuart Singer argued SCO’s appeal in the U.S. Court of Appeals for the 10th Circuit, where the case is pending.