

FINANCIAL TIMES

WEDNESDAY DECEMBER 1 2010

US INNOVATIVE LAWYERS | FT.COM

Litigation: experts in legal battle

By Jane Croft

The US litigation culture allows lawyers to demonstrate eye-catching creativity and innovation in presenting their legal cases.

Law firms are prepared to go to extraordinary lengths to humanise and explain dry, technical cases to jurors, sometimes commissioning complex animations or being technically innovative by forcing a redefinition of the law.

Latham & Watkins, for example, commissioned \$650,000-worth of animations and graphics to help a jury understand a complex court battle over the patent for an artificial blood vessel that has revolutionised vascular surgery. The law firm secured a victory for CR Bard, a medical technologies company, after \$658m in litigation that had raged for decades with its rival WL Gore & Associates.

Max Grant, co-chairman of the intellectual property litigation practice group at Latham & Watkins, says the graphics were an important element in the case and showed the jury exactly how artificial blood vessels worked and how the patent had been infringed.

His legal opponents relied instead on more traditional still photographs and pictures of operations. "People learn better when they hear and see at the same time," Mr

Grant says. "There is research saying that 80 per cent of how we learn is visual, so we used animation as a good way to teach the jury."

The animations transmitted the information more clearly than a video of an operation could.

Mr Grant adds: "In the US, animations can sometimes be used at the opening of a case but it is unusual for them to be used throughout the trial to explain how the devices work. A jury can be looking at something small such as a round white tube, and the animation can help explain to them what it does and why it's so valuable."

It was essential that the animations were precise. "It was like a medical school in there, with textbooks and research books everywhere, to ensure that everything was technically accurate," he says. "Even though it's an animation, if something is technically inaccurate, that undermines your credibility."

Also unusual in this case was the use of video clips showing key witnesses' deposition testimony. This meant that the testimony in court could be compared with earlier video evidence, which could be replayed immediately. It also allowed the jury to look at body language and pick up on hesitations...

....Meanwhile, Latham & Watkins was also involved in two landmark

environmental law cases before the US Supreme Court that led to the law effectively being redefined.

The firm defended railway companies from being made liable for the pollution of others, in a landmark case under the Comprehensive Environmental Response, Compensation and Liability Act. Latham attorneys successfully challenged the imposition of joint and several liability for clean-up costs at a site leased by the railroads to a polluter that later became insolvent.

Latham's victory means that landowners, manufacturers and transporters will not be held liable for billions of dollars of recovery costs caused by the pollution of others.

Latham's lawyers crafted a creative solution that involved a return to first principles and 19th-century law. Effectively becoming legal historians, they delved deeper into the common law of joint tortfeasors than anyone had done before.

With many US legal battles dragging on for years and even decades, innovation or being able to consider new ways to tackle old legal disputes is as highly prized a quality as a lawyer's tenacity.

Abridged from 'Litigation: experts in legal battle' 1 December 2010