

TRIAL TIPS

KEEPING IT SIMPLE

How William Lee took a complex technology, turned it into a cartoon, and convinced a jury to take his side against defendant Hewlett-Packard. —By Susan Hansen

Between juggling his own cases and overseeing his firm Hale and Dorr's merger with Wilmer Cutler Pickering, high-profile litigator William Lee had his hands full last May. But Lee stuck to a simple principle in devising strategy in client EMC Corporation's trial against Hewlett-Packard Company: He kept the case short, sweet, and easy to understand. And he left the heavy lifting in the trial preparation to partner Cynthia Vreeland.

Keeping it simple in the ten-day trial was tricky, given the complex technology at issue. EMC claimed that HP infringed three computer software patents for remote and local mirroring of digital data. The technology allows computer data to be copied and stored on another computer in a remote location as it's being created. EMC originally filed suit in Massachusetts federal court in 2000 against StorageApps, a small Bridgewater, New Jersey, company that sold mirroring software. HP became lead defendant in the case after it bought StorageApps in mid-2001 and continued selling the software.

In his opening argument, Lee gave jurors a crash course on mirroring technology using cartoonlike graphics that showed two computers talking to each other via thought bubbles. "If you don't teach it, [the jury] can't understand it," says Lee, 54, the lead litigator on EMC's seven-member trial team and co-managing partner of the newly merged Wilmer Cutler Pickering Hale and Dorr.

At trial, Lee's first witness—EMC vice president Don Swatic—explained that mirroring technology, first patented in the mid-1990s, was a major breakthrough in the marketplace. He also recounted how EMC's two core mirroring products—SRDF and TimeFinder—helped it land a long list of blue-chip customers, including American Airlines, Inc., American Express Company, the Pentagon, and the U.S. Postal Service, and brought EMC billions of dollars in revenue. The mirroring software enabled EMC to shoot past IBM Corporation, Swatic told jurors, to become

leader of the remote data replication market.

Next, Lee called former EMC inventor, Moshe Yanai, who explained how he developed the software. Lee kept Yanai's testimony short because he worried that Israeli-born Yanai's accent might be difficult to understand.

Princeton University computer science professor Don Clark was the only EMC witness whose testimony lasted more than 60 minutes. Clark spent three hours detailing how HP's software infringed EMC's patents. "Lawyers tend to give things more time than they require," says Lee. "I believe witnesses should be up there briefly, clearly, and succinctly."

Lee also played videotaped deposition testimony from the two designers of StorageApps software in which both conceded that there were basic similarities between their product and EMC's.

When HP's turn came, its lead counsel—Mark Ferguson of Chicago's Bartlit Beck Herman Palenchar & Scott—argued that EMC's patents were invalid, since others had developed the mirroring technology first. Even if the patents were valid, HP didn't infringe, Ferguson argued. He called on Ethan Miller, a University of California computer science professor, to show jurors the fundamental differences between HP's mirroring software and EMC's.

On cross Lee referred to the deposition testimony from the StorageApps software designers, and pointed out that Miller's take on the technology behind HP's mirroring software contradicted what the designers had said. "When Miller testified, he had to say they were wrong," Lee says. Lee also noted that the StorageApps designers lived in Massachusetts, a short drive from the court in Worcester. "We made the point that the two people who knew the most didn't show up to testify," Lee says.

After a day and a half of deliberation, the jury found that HP infringed the three EMC patents. Damages will be determined in a still unscheduled proceeding. EMC is also seeking an injunction to block HP from selling its Continuous Access Storage Appliance data-mirroring software.

Bartlit Beck's Ferguson declined to comment. But the firm has already asked the court to overturn the verdict or grant a new trial.

John Gunther, EMC's vice president and assistant general counsel, declines to say how much the company will seek in damages. He notes that so far, sales of HP's mirroring software have been limited, and he says winning an injunction, not monetary damages, was EMC's main goal in the case. "If we get an injunction, that's going to slow [HP] down," says Gunther. "That means a lot to us."



William Lee says witnesses must be brief, clear, and succinct. Got that?

Case: EMC Corp. v. Hewlett-Packard Co.

Winner: EMC

Technology: Software for remote copying of digital data

The Stakes: EMC's dominance of the billion-dollar market for remote data mirroring software, along with unspecified damages in the case.

Lessons Learned: Keep witness testimony short and sweet.