

Litigators of the Week: This Kirkland Duo Landed a Complete Defense Sweep in an East Texas Competitor Patent Trial

In a patent showdown between rivals in the network security space, jurors sided with Kirkland's Adam Alper and Mike De Vries by finding that their client APCON didn't infringe and that all asserted claims were invalid.

By Ross Todd
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In a patent showdown between rivals in the network security space, jurors in the East Texas courtroom of U.S. District Judge Rodney Gilstrap found on Friday that APCON did not infringe any of the six asserted claims of five different Gigamon patents. What's more, after just two hours of deliberations, the jurors found all six claims Gigamon asserted at trial invalid.

That overwhelming defense result landed APCON's lead counsel, Kirkland & Ellis partners Adam Alper and Michael De Vries, Litigator of the Week honors. The win marks the second time that Alper and De Vries have brought home a major trial win while also navigating courtroom protocols designed to keep courtroom participants safe during the pandemic. Alper and De Vries, who try all their cases together, previously were named Litigators of the Week alongside partner Gianni Cutri in October for winning an \$855 million trade secret jury verdict for Cognizant in one of the first in-person civil jury trials held in New York federal court during the pandemic.

Litigation Daily: Who was your client and what was at stake?

Mike De Vries: Our client, APCON, was one of the leading pioneers in the computer network visibility market and is one of the leading technology companies in that space today. Although the plaintiff Gigamon was not even founded until more than 10



Adam Alper, left, and Michael De Vries, right, of Kirkland & Ellis.

years after APCON's founding, Gigamon claimed that APCON was using its patented technology. Gigamon asserted a lot of patents against APCON, and there was a lot at stake.

Adam Alper: That's right—this was a competitor versus competitor dispute in which Gigamon not only sought substantial damages and a finding by the jury that APCON willfully infringed its patents, but also an injunction that Gigamon intended to shut down our client's company, worth hundreds of millions of dollars in the coming years—literally a bet-the-company case for our client. These types of competitor cases are the primary focus for Mike and me these days, which we believe sets us apart from many others in our field.

Who all was on your team and how did you divvy up the work?

Alper: Mike and I were fortunate that our team at this trial included some of the best trial lawyers at

our firm. **Akshay Deoras** handled the key technical aspects of the case at trial, including a critical cross examination of the other side's technical expert and the direct examination of our technical expert. **Leslie Schmidt** likewise handled critical trial examinations, including a particularly key cross examination of Gigamon's damages expert that also hit liability aspects of our case, and the direct examination of our own damages expert.

De Vries: I agree. Leslie and Akshay are truly top notch trial attorneys who are among the best in the business. Their performance at this trial was critical to the outcome. In terms of Adam and me, we co-lead all of our cases, from beginning to end and at trial, and alternate who handles opening and closings. At this one, Adam handled those aspects of the trial, in addition to key cross and direct examinations, and delivered a closing argument that made it clear who was right and who was wrong, and successfully asked the jury to do justice.

Alper: Mike and I basically share responsibilities for everything on all of our cases, which clients tell us is extremely unique in our business, and highly valued. In this one, Mike cross-examined Gigamon's CEO in a key examination that set the tone for the case, during which he elicited testimony supporting important case themes, and impeached the witness repeatedly, which he used during the examination to expose key credibility problems for Gigamon. Mike also put on the owner and CEO of our client multiple times, including when Gigamon decided to call him adversely as part of their case in chief. Both of these examinations were critical components of our win.

You were brought in relatively late in this case, right before the Markman hearing in June. How did that affect your approach?

De Vries: Frankly, taking over cases from other counsel for trial has become a specialty of ours. In this case, we were glad to be brought into the case with sufficient time to substantively guide the key aspects of the case. So in some ways, we had more

time than we have had in other cases, where clients bring us on primarily because they want us to try the case.

Alper: That's right. The primary liability defense that we presented at trial came out of the Markman hearing in June. Being able to put our imprint on the claim construction process, and the litigation process prior to trial generally, allowed us to build the foundation for the trial defense that we knew we would ultimately need to mount in a competitor dispute like this one.

I hear that Judge Gilstrap had jurors wearing clear facemasks, face shields, or both. You guys won Litigator of the Week for winning a trial tried to a masked jury in New York last fall. How well could you see jurors' faces this time around? And what sort of difference did that make?

Alper: The court's COVID-related trial protocols were extremely thorough. All of the participants at trial felt extremely safe the entire time because of the court's procedures.

De Vries: I agree, and thought that the clear masks used by the jurors really did allow us to engage with the jurors more fully during the trial presentation. We could see the jurors quite well and think that the court's innovation in that regard is something that is likely to be emulated by other courts around the country as COVID-related protocols continue to develop.

Your opponent was asserting claims from five different patents in this trial. Was it a challenge to ensure that your defense was organized and coherent?

Alper: The number of different patents and networking technologies was certainly a challenge. But that did not change Mike and my trial philosophy, which is that, even in the face of complexity, it is critical to be laser-focused in presenting a straightforward defense to the jury based on not just technical evidence but also common sense.

De Vries: Adam and I and our team certainly achieved that approach. Though there were five different patents, there was one primary liability defense

that we presented consistently throughout the trial, from the beginning to Adam's close where he used a very accessible analogy to bring the defense home and counter the analogy that the other side tried unsuccessfully throughout the trial to urge the jury to adopt.

This case went from complaint to trial in 20 months, in the middle of a pandemic. What made it move so quickly?

De Vries: In short, it was the court's strong commitment to allowing the litigation to move forward in a safe and effective manner despite the pandemic. This was hugely important to our client. We believed the claims were baseless from the beginning, and Gigamon issued a press release touting its case against APCON at the time it filed the case.

Alper: We believed strongly that our client was wrongly accused and were anxious to expeditiously resolve the claims so APCON could move on with competing with Gigamon in the marketplace, rather than the courtroom.

Adam, you told my friend and colleague Scott Graham that the jury's invalidity finding sent "a message" to Gigamon. What sort of message did it send?

Alper: It is unusual for a jury to so resoundingly reject a plaintiff's claims. To see the jury not only find non-infringement, but also invalidate every single patent claim presented to them from all patents asserted at the trial based on a deliberation that lasted only two hours told us that the jury rejected everything the plaintiff was saying and the concept of the lawsuit itself.

How, in a year when so many trial lawyers have been sidelined, have you two managed to get into the courtroom for clients multiple times?

De Vries: At the end of the day, we are just trial lawyers who thrive in courtrooms and before juries. I think that clients recognize that passion. As a result, I believe they are more apt to have the confidence to try their cases when they are in the right, and also will seek us out to handle trying their cases when perhaps

their existing counsel does not have quite the same trial enthusiasm that we do.

What's next for you two?

Alper: We're going to keep trying cases to juries, which is what we love to do. Mike and I have another jury trial that begins in less than four weeks in the Northern District of California, this time representing a trade secret owner against a major competitor over software related technology. We are very much looking forward to getting back in a courtroom in front of jurors—as Mike said, we thrive there.

De Vries: We've been successful bringing our client's cases to trial in a safe manner during the pandemic. In this upcoming case, in the midst of the pandemic, when jury trials were not able to move forward in that court, we suggested to the court the idea of conducting the trial outside in an outdoor concert venue. The court is moving forward with inside jury trials now, and we are grateful to be handling one of the first civil case jury trials to move forward in the Bay Area since the pandemic, just as we did in New York last fall.

What will you remember most about handling this matter?

Alper: There were so many great developments in the case that led us to the outcome that occurred. It is hard to pick just one. But one thing I can say for sure is that both Mike and I have tremendous faith in the American jury system's ability to achieve justice. We see it trial after trial, in the way juries respond to the evidence, and notions of what is right and what is wrong.

De Vries: I agree. Our country's jury process is the greatest in the world, and to see it moving forward in the face of a global pandemic shows us both the strength and resilience of our country's democratic institutions. It is that hope for and confidence in the future that we will remember most, and we are just grateful to be part of that.