

WINNING

Here we highlight the fun part of the legal profession—dueling it out in the courtroom. We asked our readers to nominate trial attorneys who scored big during 2011 and who had demonstrated a track record of success. We looked for compelling stories about courtroom strategy, the courage to face long odds and victories that made a difference. These five litigators or teams all fit the bill.

Licensing dispute inspired yelling and screaming

Plaintiffs defeated first-flight defense team in dispute over hypertension pharmaceutical.

BY LISA HOLTON

The story started with Fasudil, a hypertension drug intended to prevent pulmonary arterial hypertension, a particularly fatal form of angina in young women. A Japanese pharmaceutical manufacturer planned to make it available at a fraction of the cost of its competitors. But when it found its efforts blocked by a European biotech company, the Asahi Kasei Pharma Corp. went to court.

The three-year fight that started in California state court in 2008 ended in April 2011 in a \$577 million jury award won by Morgan, Lewis & Bockius' San Francisco office. Representing Asahi against Actelion Ltd., Morgan Lewis partners Christopher Banks, Rollin Chippey II and Benjamin Smith worked against well-funded opponents — Actelion spent more than \$100 million on its case — and an international cast of witnesses to deliver, in Banks' words, "a story with a simple theme: This was all about an anti-competitive act of killing a lifesaving drug."

Chippey, the senior partner on the case, said, "We were able to get a jury to award us for damages on a product that hadn't been [U.S. Food and Drug Administration]-approved and hadn't experienced a sale."

The court later cut the award to a little

CHRISTOPHER BANKS, ROLLIN CHIPPEY II & BENJAMIN SMITH
| MORGAN, LEWIS & BOCKIUS



(LEFT TO RIGHT) BENJAMIN SMITH, ROLLIN CHIPPEY II AND CHRISTOPHER BANKS OF MORGAN LEWIS & BOCKIUS

Trial Tips

1. Keep a simple theme: Any case with a scientific storyline needs a simple theme, but it's particularly important in a case with an international cast of witnesses and experts.
2. Trial begins at deposition: We approached every deposition as if it were a trial examination.
3. Team is everything: Disputes and egos, that didn't happen here. It can't. We trusted each other and we were incredibly flexible in the moment in court.
4. The best experts are the ones who can best tell the story. Résumés certainly count, but so does caring about the case.

more than \$415 million and the case is under appeal.

The licensing case was supposed to last less than three weeks but stretched out for three months. Sparks flew. In court papers, the Morgan Lewis attorneys accused their opposing counsel — led by Joseph Cotchett of Cotchett, Pitre & McCarthy of Burlingame, Calif., and Stephen Scheve of Baker Botts in Houston — of “yelling, finger-pointing, and screaming” at the trial judge to cause a mistrial.

Aside from that, the defendants “spent as much or more time on their crosses of our witnesses as we spent on directs,” according to Banks, who delivered opening statements. Smith led the coordination of the scientific data and testimony into a coherent package for the jury.

The Morgan Lewis team assembled testimony and documents showing that Actelion specifically acquired CoTherix Inc. — which developed the drug with Asahi in 2007 — to leave the market free for its competing drug, known as Tracleer. The team called scientists directly involved in the development and use of Fasudil over professional scientific witnesses.

Both sides had to prepare testimony from

individuals with varying facility in English. The parties brought in a Japanese/English translator from Hawaii, and Morgan Lewis worked with its witnesses before trial to make sure their language skills were courtroom-ready.

CRUCIAL DECISION

The decision to go with actual researchers who'd help develop the drug and doctors who'd prescribed it to good effect was a crucial one, Banks said, because they offered not only an easy-to-understand account of the drug and its potential, but also a powerfully emotional story about “how much they believed in the drug” and their disappointment that its path to market was blocked.

The case originated in Morgan Lewis's San Francisco office. When Asahi went to court, its original attorneys had to step away due to a conflict. Banks, Smith and associate Tera Heintz ran the case until mid-2010, when Chippey and Sharon Smith, another associate, were brought in to handle expert discovery and trial prep.

“Ben, Tera and I remained the core because we had the most history with the facts, documents and witnesses. We literally

lived this case for three years,” Banks said.

“Among the five of us, we've all known and worked with each other for years, know each others' strengths and weaknesses, and are friends outside the office. We were not afraid to disagree on strategy and challenge each others' assumptions and conclusions,” he said. “Ben, Rollin, Tera and I largely wrote our own exams, with a lot of help from Sharon, and we'd then review each others' drafts to make sure we weren't missing anything. It was a great experience — the best trial team any of us have been a part of.”

The cohesiveness of the younger team didn't go without notice. John Dwyer, partner-in-charge of Cooley's Palo Alto, Calif., office, handled some of the third-party witnesses in the case. “They had celebrated trial attorneys on the other side, and Chris and Ben held their own. They were humble in the courtroom and their performance was the best. You walked away thinking, ‘They're the next generation.’ “

Lisa Holton is a freelance reporter in Chicago.