

Litigators of the Week: Standing Your Ground in the EDTX

Hewlett Packard Enterprise Co. might have looked a bit foolhardy in defending a patent case over technology that other mega-companies had decided to license. But against the odds, HPE's three-firm trial team secured a knockout win.

By **Ben Hancock**

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To an outside observer, Hewlett Packard Enterprise Co. might have looked a bit foolhardy. It was standing its ground in defending a patent case, over a technology that other tech giants like Cisco and Alcatel-Lucent had decided they should just pony up and license. Trial, of course, would be in the Eastern District of Texas. Potential damages topped \$90 million.

Surely, this would not end well.

But seemingly against the odds, HPE's three-firm trial team this week secured a knockout win. They convinced an eight-person jury not only that HPE did not infringe plaintiff Network-1's "Power over Ethernet" patent, but that the patent itself was invalid—calling into question the licenses negotiated with over two dozen other tech companies that had chosen not to fight.

For that, we're giving the title of Litigator of the Week to all three of HPE's co-lead trial counsel: Jennifer Doan of Haltom & Doan, Mark Ferguson of Bartlit Beck Herman Palenchar & Scott, and David Dolkas of McDermott Will & Emery.

There can be such a thing as too many cooks in the kitchen. But in separate interviews Thursday, the three attorneys all described how cooperating in preparation for trial and dividing the labor once it was underway strengthened their case. Bouncing around ideas with peers who would challenge them, they said, helped find the most effective strategies.



Mark Ferguson, Jennifer Doan and David Dolkas

"When you're just one firm, you sometimes tend to breathe your own exhaust a little more than you would if there are two or three others," said Ferguson. "I think all of us adjusted at times."

The gravity of the jury's decision in favor of HPE was underscored by a statement that Network-1, a publicly traded non-practicing entity, put out in reaction to the verdict on Tuesday.

"This is a very disappointing result," Corey Horowitz, chairman and CEO of Network-1, said in the release. "We have spent 14 years licensing the Remote Power Patent and currently have 27 of the industry's largest PoE vendors as licensees to this important technology."

That licensing activity has generated over \$116 million for the company, he added, saying that Network-1 may appeal.

At trial, each of the attorneys had distinct roles. Doan, whose Texarkana-based firm is local in the Eastern District, led jury selection and told the overall story of the case—delivering opening and closing arguments, as well as putting on some of the key fact witnesses.

“I don’t necessarily think I’m the smartest person in the room—especially in this group—but I definitely think that I hear with the ear of the jury,” said Doan, with a trademark Texas twang.

“You need a really competent Texas trial lawyer down there,” said Dolkas, who is based in Silicon Valley, near HPE’s headquarters. “Someone who the jurors can identify with who is also really skillful is a must.”

Doan also took on the task of explaining the complex history of the patent at issue, which had survived two inter partes reviews, and explaining to the jury why they were in a position to render the patents invalid.

“We wanted the jury to know [they] are the first people who have ever heard from David Fisher,” Doan explained, referring to the engineer and entrepreneur who she said first came up with the Power over Ethernet technology. Fisher was one of the key fact witnesses in the case.

Patent trials are always tricky animals because of the technical subject matter. The patent at issue was a method and apparatus for detecting whether a connected device can receive power over Ethernet. Sending power to a device that doesn’t accept it, like a laptop, could fry it.

Rather than shy away from getting into the nitty-gritty details, HPE’s team put on witnesses who could open up an Ethernet switch and explain how the technology works. That, the attorneys said, was key in getting the jury to side with their arguments.

“I just don’t believe that people can’t understand things if you give them the information to be able to understand,” said Ferguson. “They aren’t going to be an electrical engineer at the end of this, but neither am I.”

Ferguson led the non-infringement part of the case, making the argument that the relevant standard for the technology meant that HPE could not infringe, and that Network-1’s patent covered only one method for detection.

Dolkas headed up the damages part of the case. Part of his cross-examination of Network-1’s expert was conducted in a closed courtroom, but he said generally that he focused on laying out for the jury things that were left out of the expert’s testimony.

“Fortunately, we didn’t get to damages, so I don’t know how effective I was,” he said with a laugh. He also underscored how the trial team cooperated. “It wasn’t just like we did our own thing.”

Ben Hancock is a San Francisco-based reporter covering litigation, technology, finance, and the future of law. He can be reached via email at bhancock@alm.com or on Twitter: [@benghancock](https://twitter.com/benghancock)