

Titan Of The Plaintiffs Bar: Caldwell Cassady's Brad Caldwell

By Dani Kass

Law360 (May 17, 2019, 1:13 PM EDT) -- If Apple could send people back in time, it would likely make them steer Brad Caldwell away from law school. It probably wouldn't have even been that hard: He'd studied to be an engineer, even worked as one for the CIA, before applying for law school on a whim. There was a very real future in which he didn't become a lawyer, and in that future, Apple might have kept the \$1 billion Caldwell bled from it in court.

Apple Inc. is probably not the only big-name company that wishes Caldwell hadn't eyed law school brochures while waiting for a pick-up basketball game to begin: He's won massive patent infringement verdicts against Microsoft Corp., Boston Scientific Corp. and Johnson and Johnson, to name a few.

When he applied for school, Caldwell said he "didn't know what it meant to work on patent cases" and "didn't know what a patent was." He couldn't have guessed that he'd come to have his name on an intellectual property firm, Caldwell Cassady & Curry, or that he'd be recognized as one of Law360's 2019 Titans of the Plaintiffs Bar for his intellectual property work. He just knew he didn't want to spend his life in a lab.

But it was the technical background he gained in a lab — including the year or so he spent as an electrical engineer at the CIA while an undergraduate at Texas A&M University — that drew patent lawyers to him. Once he found patent lawyers who really wanted to go to trial, he knew he'd found his calling.

"Once I got a sense of this whole notion for preparing a case and getting to try it in front of a jury and getting to teach them what we've learned about the case and put our fate in their hands, it was all fascinating to me," he said. "Early on, I realized I just wanted to be a trial lawyer, and it just so happened I had this technical background. ... It was just an accident. I just got lucky that my career path makes sense. I could have ended up as the worst physics teacher in history or something, and it happened to work out great."

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How He Got Where He Is:
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After graduating from the University of Texas School of Law in 2003, Caldwell spent about a decade at McKool Smith PC, where he did his first trial, representing Medtronic Vascular Inc. in its suit accusing Boston Scientific of infringing its patents covering angioplasty catheters and balloons. Medtronic's in-house attorney let Caldwell examine one witness, a risk he said took "a lot of guts internally," given his level of experience. In the end, they won a \$250 million verdict.

While with McKool Smith, Caldwell started getting involved in litigation for VirnetX Inc. The company had left its prior counsel in the middle of litigation against Microsoft, leaving McKool Smith with a big task — trial was less than a year away. Caldwell said he was asked to handle the infringement aspects of the case, so he spent the next eight months preparing for trial. In the end, they won a \$105 million verdict and then took home a \$200 million settlement.

VirnetX stuck with McKool Smith and backed Caldwell and his colleagues Jason D. Cassidy and J. Austin Curry as they launched their new firm.

While the trio had a good relationship with McKool Smith, they wanted to see what they could accomplish if they struck out on their own, Caldwell said.

Curry said it was a no-brainer for him and Cassidy to ask Caldwell to join them as they left McKool Smith, as Caldwell had served as a mentor and was incomparable in court.

"Some of the things I saw him do in court were mind-blowing," Curry said.

Both with McKool Smith and Caldwell Cassidy, Caldwell and his team have taken Apple to court several times on behalf of VirnetX. In 2012, a Texas federal jury found that Apple infringed VirnetX's IP with its FaceTime technology and said the company deserved \$368 million.

The Federal Circuit partially reversed that decision in 2014. Back in the district court, it was consolidated with another case over newer Apple products, leading to another trial where VirnetX won a \$625 million verdict. That verdict was also vacated, and the cases split up, given concerns about juror confusion tied to the consolidation.

Finally, after a September 2016 trial focusing on the older products, the jury came back with a \$302 million verdict in favor of VirnetX. The judge later increased the total amount Apple owed for willful infringement, fees and interest to \$439 million.

Then in April 2018, another Texas federal jury hit Apple with a \$502.6 million verdict for infringing VirnetX network security patents for the newer Apple products. The judge later added another \$93 million in interests and costs.

Overall, Caldwell said he's taken Apple to trial six times and won each time. This also includes a case on behalf of Smartflash LLC in 2015, which brought in \$533 million but was later overturned when the patents were invalidated; and another case on behalf of Cellular Communications Equipment LLC — in September 2016, the same month as a VirnetX trial — which landed a \$22.1 million verdict.

Johnny Ward of Ward Smith & Hill PLLC was Caldwell's co-counsel on those cases, and he said he was constantly impressed with Caldwell's trial skills, especially given how young Caldwell is: He won each of these verdicts before turning 40.

What really sets Caldwell apart is how soon he starts planning for trial and how involved he is from the beginning, Ward said.

“He’s taking it in from intake, assuming there will be a trial,” Ward said. “From beginning to end, he’s always thinking about how things are going to play out in trial, and that is a real advantage.”

Several colleagues said Caldwell truly shines in his ability to connect to juries and get the answers he wants in cross-examination. McKool Smith principal Ashley N. Moore, who said Caldwell served as a mentor, called his jury presence “spectacular,” noting that he’s relatable and good at breaking down complex concepts.

“It is a spectacle to behold,” she said of his work in the courtroom.

Curry said that “he forces conviction on the minds of people that are listening.”

“When he’s driving a point home in cross-examination, it’s a very well-thought-out, common-sense point that he’s able to drive home with just such conviction that if you are sitting there and you’re trying to decide who’s right about something, there’s something about his style and presentation and confidence that you just want to be on his side, because the definite impression is that his side is the correct side, the well-thought-out side, the reasonable side,” Curry said.

And while those colleagues said cross-examination is where Caldwell is best, he said that a redirect after a rough cross-examination is a challenge he particularly enjoys.

“It’s a moment where you have a big realization about yourself: Am I going to shrivel up a bit and disappear, and [the witness] didn’t do so well and that’s on me? Or are you going to have the adrenaline fuel you in the right way to where you, on the fly, organize and articulate and execute on a redirect to rehabilitate this guy?” he said.

Caldwell said the “happenstance” way he ended up in law makes him relate to juries, as he wants to lessen the craziness of having to take in hours’ worth of technical information at once. He also said he wants to avoid playing discovery games, fighting the case in paper briefs and treating cases “like a law school exam” as many lawyers do by default.

“At the end of the day, there’s an entirely different art, which is standing up in court with a jury of six, eight, 12 people sitting there, learning something for the first time, and realizing that not only do you have to be savvy about the law, but these people are going to have a really, really strong BS detector, and you need to teach them, and they’re going to see right through anything you do that’s gimmicky,” he said.

More recently, Caldwell has expanded his client list to include Match Group LLC, the owner of Tinder, as it tries to enforce its swiping IP against rivals Bumble Trading Inc. and Tantan, a Chinese dating app. Those cases are ongoing, but so far Caldwell has been able to stop Match Group’s patents from being invalidated as not patent-eligible under Section 101 of the Patent Act.

Caldwell noted that he doesn’t exclusively work on plaintiffs-side cases, but he is drawn to them more, especially when he gets to represent individual inventors trying to protect something they really believe in. For example, he represented Acantha LLC in patent infringement litigation against Johnson and Johnson unit DePuy Orthopaedics, winning an \$8.2 million verdict in August 2018.

“I talked to a number of firms, and everyone said, ‘Johnson and Johnson is a very litigious company, do you know what you’re getting into?’” Acantha inventor David Talaber said. But he knew the patent was solid, and he was glad to have Caldwell take that seriously and accept the challenge. “[Caldwell] always wants to be the guy wearing the white hat. If the other side starts slinging mud, he tries to stay above the fray, and that made it reassuring to me. [It’s] a life’s work that we’re putting out there. We’re not sitting on several thousand patents — this is our life.”

In cases like Acantha’s, Caldwell said the people behind the company and its technology are sitting in the court with their families, and they form deep bonds, something that doesn’t happen when representing larger corporations.

“It’s a much more personal relationship than the other side,” he said.

--Editing by Katherine Rautenberg and Alyssa Miller.