

## Icon Of IP: Morrison & Foerster's Rachel Krevans

By Ryan Davis

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Defending a patent case in the Eastern District of Texas is daunting for any attorney, and it becomes even more so when the case hinges entirely on persuading the jury the patent is invalid. When Morrison & Foerster LLP partner Rachel Krevans pulled off that feat for EchoStar, it helped cement her reputation as a gutsy, tenacious patent litigator.



Rachel Krevans

Forgent Networks Inc. accused essentially the entire cable and satellite industry of infringing its DVR patent, but as the trial approached in 2007, all the defendants except for EchoStar Corp. decided to settle, including one the weekend before jury selection. Krevans and EchoStar decided to push ahead to trial, knowing full well the challenge they faced.

At the time, no patent defendant had won a case in the Eastern District of Texas for three years, and there had reportedly been only one previous defense jury verdict in a patent case in the district. Moreover, EchoStar and Krevans felt that the best argument was that Forgent's patent was invalid, and they decided to take the issue of infringement off the table.

"We had to go in front of the jury with a very simple story that's true and doesn't sound like a bunch of double talk," she recalled. "We said we're not contesting infringement, but this patent should never have been granted. No one had done that down there before."

The strategy paid off, as the jury deliberated for about an hour before deciding that Forgent's patent was invalid as anticipated, obvious and lacking in adequate written description. Forgent then effectively walked away and never appealed.

Presenting a defense focused only on invalidity "was a risky strategy, but a simple strategy," and EchoStar had confidence in Krevans to make it work, said Jeff Blum, senior vice president and deputy general counsel of Dish Network, which was later spun off from EchoStar.

"That takes guts and that takes leadership," he said, describing Krevans as "one of the smartest, most talented and nicest litigators I've ever worked with."

Throughout her career, Krevans has worked on some of the most high-profile, high-stakes patent cases

in recent history, including representing Apple Inc. in its epic smartphone patent dispute with Samsung Electronics Co. Ltd., now at the U.S. Supreme Court, and guiding Bayer HealthCare LLC to victory in a case brought by Abbott Laboratories even though the Federal Circuit used the case to make it harder to prove inequitable conduct.

Her cases have spanned a wide range of technologies, but she is distinguished by her attention to detail and ability to firmly grasp the science involved and explain it clearly to judges and juries, attorneys who have worked with her say.

Harold McElhinny of Morrison & Foerster LLP, who has tried six cases with Krevans, said that clients are always impressed that she has complete mastery of every aspect of the case.

"She cannot be bluffed, she cannot be fooled, and she cannot be ignored," he said.

Though she has risen to prominence as an intellectual property litigator, Krevans began her career as a tax attorney. She said tax law appealed to her because she liked the idea of becoming an expert in one area of the law, rather than having to learn an entirely new set of facts for each case as a litigator. After several years, however, she started thinking about a change in the late 1980s.

"I realized that what I actually liked best was learning new things," she said. "I switched as a very senior associate, which was a little scary careerwise."

Krevans started as a litigator with a general trial practice, but after handling several patent cases, including one she found particularly fascinating that dealt with the first man-made version of the HIV virus, her focus shifted to patent work.

"It wasn't a conscious decision to only do IP work, but it kind of crowded everything else off my docket," she said.

She said she owes a "tremendous debt" to the more senior lawyers at the firm who created opportunities for her to take more responsibility in cases for clients who liked her work.

"That kind of unselfish behavior is not seen everywhere," she said.

In the hypertechnical world of patent law, where key issues can be decided by lay juries with no scientific background, the most successful litigators are often those who can make their case in clear, persuasive terms, and Krevans' colleagues says she is exemplary in that regard.

"She has an uncanny ability to take really complex subjects and make them simple, especially in front of a jury," Blum said.

He said part of the strategy in the EchoStar case was to explain to the jury that Forgent's patent must be invalid because the claims did not match the patent's specification, meaning it didn't adequately describe the invention. He recalled that Krevans conveyed that to jurors by comparing the patent to a "gelephant," a fictional creature with the head of a giraffe and the body of an elephant.

According to Krevans, the key to prevailing in a patent case is to tell a story that helps explain the technology and the issues.

"You have to have a story, so the judge and the jury want your client to win at a gut level," she said. "It can be really challenging for people who work on patent cases to remember that they're just like anything else in that way, you have to tell a story. If you let the case get to be too much about the science, it can be a challenge."

Even so, in order to tell that story, attorneys in a patent case need to know the science inside and out. To do that, Krevans said, whenever she gets a new case she works with Morrison & Foerster's "fabulous" patent prosecution group to find a colleague who is an expert in the technology and can teach her about it.

"I try to keep track of what was hardest for me to grasp and what it was that helped me get it," she said, then she uses that as the foundation of her presentation to the court.

McElhinny said the hard work Krevans always puts into understanding the technology pays off in the courtroom.

"She's very thoughtful and very dogged in terms of figuring it all out," he said. "She's confident and has a winning strategy going in."

Wes Overson of Morrison & Foerster, who has worked closely with Krevans for 15 years, has seen firsthand how she can dazzle people in the courtroom.

In one case they worked on together, they represented one of a large group of co-defendants, and Krevans was chosen to handle a major part of the claim construction hearing for the defense side. That caused some grumbling among the high-powered attorneys for the other defendants, who wanted to argue themselves and expressed their concerns to Overson.

"But then she gets up there and blows everyone away," he said. "All the attorneys on the defense side came up to me and said she was the best lawyer in the courtroom."

In addition to securing a jury verdict for Apple in two different trials against Samsung, both of which are now on appeal, Krevans helped Yahoo win summary judgment in 2012 on claims brought by Augme Technologies Inc. The Federal Circuit later affirmed the decision in the case, which involved online advertising technology.

In the Bayer case, a district judge ruled that Abbott's blood glucose test strip patent was unenforceable because of inequitable conduct. The Federal Circuit took the case en banc and made it more difficult to prove inequitable conduct in a decision referred to as *Therasense*, but Krevans persuaded the judge on remand that the patent was still unenforceable under the tough new standard.

She also represented Sandoz Inc. in its closely watched dispute with Amgen Inc. over the interpretation of the Biologics Price Competition and Innovation Act, in which the Federal Circuit sided with Sandoz on a key issue last year.

Overson said that Krevans "has more mental energy than anyone else I've ever worked with," which she puts to use by becoming an expert on every aspect of the case, from the key legal issues to the minutiae of the science.

"The depth she gets into in her cases is remarkable, particularly given how many cases she's worked on,"

he said.

Working on a case with Krevans is an intense and demanding experience, Overson said, but she makes it enjoyable, and the entire team knows that she is working just as hard as they are. Even when everyone else thinks a brief is great and ready to go, "Rachel will say, 'We still have 12 more hours, let's make it better,'" he said.

"That's probably one of the qualities of a very successful lawyer: Nothing is ever good enough," he said.

--Editing by Jeremy Barker and Katherine Rautenberg.

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