

I.T. & THELEN REID & PRIEST

## Creating Sizzle with Staid Facts

Trial technology helps clarify a complex accounting case.

By Richard Swanson &  
Veronica Rendon

**H**OW DO you make a complicated accounting case interesting and understandable to a jury? Turn to trial technology.

Thelen Reid & Priest has 450 lawyers, and serves Fortune 500 companies, privately-held companies and small businesses, and individuals. Our practice includes securities, banking and financial services, energy and utilities, entertainment and new media, construction and engineering, and commercial real estate. Our current configuration is the result of a 1998 merger between California's Thelen Marrin Johnson and Bridges, and New York's Reid & Priest. We have offices in New York; San Francisco, Los Angeles and Silicon Valley, Calif.; Washington, D.C.; and Morristown, N.J.

We recently represented a plaintiffs' class of investors in a securities action in the Southern District of New York, *Cromer Finance, Lt., et al., v. Michael Berger, et al.*, Index No. 00 Civ. 2284 (DLC). Our clients sought approximately \$350 million in damages for lost investments in an offshore hedge fund, the Manhattan Investment Fund, which was managed in New York, but was audited and administered by the Bermuda offices of Deloitte & Touche and Ernst & Young.

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From top, left to right: Marcos Vigil, Jon Polonsky, Steven Honigman, Richard Swanson.  
From bottom, left to right: Parker Pringle, Irena Brobston, Veronica Rendon.

In the suit, plaintiffs claimed that the fund's manager created false brokerage and account statements overstating the fund's performance. The manager represented that the fund was performing well even though, in reality, it was performing dismally.

The plaintiffs claimed that the fund's administrator was liable because it had relied upon the false brokerage statements in calculating the fund's monthly net asset value. They also alleged that the fund's auditor was liable because it, too, had relied upon the false brokerage statements in issuing clean audit opinions even though it had accurate brokerage statements in its possession.

Plaintiff's primary trial team consisted of Richard Swanson, Steven Honigman, Jon Polonsky, and Veronica Rendon. We were assisted by co-counsel Richard Stone of Kirby McInerney & Squire.

Originally there were 11 named

defendants, including fund manager, Michael Berger, the Bermuda offices of Ernst & Young and Deloitte & Touche, and both firms' international organizations. Following dismissals and settlements, the plaintiffs focused on the auditing defendants as we headed into trial.

### CHALLENGES

In planning our presentations for the jury, we were faced with a number of challenges, including:

- *How do you make complex, technical accounting issues understandable to a jury?* The audits generated thousands of pages of workpapers that needed to be presented and tied to densely-worded, technical accounting rules.

- *How do you help the jury distinguish between the different roles of the fund's accountants?* Because plaintiffs had settled

with the administrator prior to trial, we wanted to focus the jury's attention on the auditor. (Ernst & Young acted as the administrator and Deloitte & Touche acted as the auditor.)

Unfortunately, our pre-trial jury simula-

*How do you present hundreds of hours of videotaped deposition testimony without losing the jury's attention?*

tions (we gave case presentations to three panels of mock jurors), predicted that jurors would likely lump the accounting professionals together and would not appreciate a key point — that the plaintiffs contended that the auditor had heightened professional obligations. The trial team was concerned that the jury would allocate too much liability to the administrator, who had already settled.

• *How do you present hundreds of hours of videotaped deposition testimony without losing the jury's attention?* Many critical witnesses were located around the world, beyond the trial subpoena power of the court. Those individuals' depositions were videotaped for use at trial, but we faced the challenge of keeping the jury focused on the testimony, because videotaped deposition testimony is not as exciting as a commercial television show.

Yet we needed to rely heavily upon the testimony to provide the evidentiary foundation for our case.

We turned to Doar Communications, a New York-based trial consulting company. We used Doar because the company that we regularly worked with had already been retained by our adversaries, and we had heard many good things about Doar. We hired Doar toward the beginning of the case and used them during discovery to assist with document control.

#### PAPERLESS APPROACH

Early on, we decided to make the trial as "paperless" as possible, and to rely on trial technology whenever we could.

During discovery, Doar created a computer database for all of our case

documents. This proved to be helpful in preparing for trial since it was from this larger database that we were able to load our trial exhibits into Verdict Systems' Sanction II, version 2.5.0.213, a smaller database that we used for trial.

Sanction allowed our team to display documents during opening and closing arguments, as well as during witness examinations. The documents could be shown on video monitors placed throughout the courtroom, for easy viewing by the judge and jury.

The courtroom was set up so that the lawyers would have a monitor at their respective counsel tables, and the judge would have a personalized monitor at the bench. A number of other monitors were placed throughout the courtroom, in various sizes, to allow viewing by the jury.

Using Sanction, during presentations, we could flip instantaneously from document to document, avoiding the delays inherent in working with hardcopies.

The software also allowed us to highlight and magnify certain portions of the otherwise dense workpapers, and have them appear side-by-side with the relevant accounting standards. This helped to explain the complicated accounting issues and maintain the jury's attention. It also helped us to clearly contrast the roles of the auditor and administrator.

Our trial team also used graphic images, including Microsoft PowerPoint slides, to emphasize the plaintiffs' themes. We could toggle between video images of our documents, to PowerPoint slides, to complex graphics — all of which were designed to keep the jury interested and focused on the duties of the auditor.

Using Sanction, we also were able to synchronize videotaped testimony to the exhibits, and use a scrolling transcript of the testimony. This allowed jurors to watch the deponent, and both listen to and read the testimony as it scrolled beneath the deponent's image. It also let them simultaneously view the document being shown to the witness, which appeared on the screen next to the deponent's image.

Another advantage of the technology: It accommodates different "learning styles" of jurors, helping both those who prefer oral and those who rely on visual tools.

The videotapes were edited to present the testimony in the most effective order. We also took out objections, counsel

colloquy, and long pauses — keeping the testimony moving quickly. In a television-saturated society, jurors not only accept visual stimulus, they expect it.

#### PRICE TAG

Of course, the technology comes at a price. In this case, we spent approximately \$350,000 on the technology alone. This cost included document control assistance during discovery, a jury simulation, and significant trial preparation.

In addition to being very costly, a high tech approach is time-consuming and requires significant pre-trial preparation. Synchronized videotaped deposition testimony takes a long time to edit and prepare. Depending on how the court rules on objections, the videos may have to be re-edited at the last minute.

Relying on trial technology can be a mixed blessing. It can both increase and decrease flexibility. Opening and closing arguments must be scripted well in advance of trial to coordinate the display of exhibits and graphics and minimize technical errors. But too much advance work may mean trouble if you run into adverse evidence rulings.

All graphics should be tested on mock

*Technology comes at a price, in both dollars and time.*

jury panels prior to trial. Graphics that lawyers may think will resonate with the jury may not, just as some commercials are more effective than others.

Yet in a large, complicated case, the time, effort and expense are well worth it. In our case, we secured a significant settlement with the accounting defendants on the eve of trial. We attribute much of our success to our adversaries' awareness of our level of trial preparation, and how, through trial technology, we would be able to keep the jury focused on the role of the accountants. **LITN**

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