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## Still Ticking

Eight years and \$14 billion later, the fen-phen settlement is a mass tort disaster.

By Alison Frankel

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# Winning Ways

*The three-month trial produced a stunning \$560 million verdict against Medtronic. An inside look at how technology helped streamline and shape the case.*

By Amy Kolz

**O**ON JUNE 17, 2004, MICHAEL DEMANE, the president of Medtronic Sofamor Danek, Inc., testified in a Memphis courtroom that he couldn't recall receiving a 2001 spreadsheet. Wrong answer.

DeMane was a key witness in a patent suit between Medtronic and inventor Dr. Gary Michelson. Michelson's lawyers wanted to show that Medtronic had avoided paying royalties on the doctor's spinal surgical inventions. The spreadsheet, entitled "Michelson Points of Negotiation," was incriminating evidence.

One of Michelson's lawyers, Jeffer, Mangels, Butler & Marmaro partner Marc Marmaro, knew from discovery that DeMane had received the spreadsheet from a colleague as an e-mail attachment. After a brief battle over its admissibility, Marmaro displayed the spreadsheet, and all its incriminating detail, on a 25-foot screen and two 60-inch plasma televisions.

How embarrassing. Marmaro grilled DeMane on the highlighted details. In 2001 Medtronic had been weighing whether to maintain its original license and purchase agreements with Michelson or to license additional technology. The spreadsheet listed three advantages of not striking a deal with Michelson. One was: "Minimize royalties to Michelson." Another: "Litigation may prevent Michelson from finding another partner and may force him into global settlement." Marmaro used the spreadsheet to demonstrate Medtronic's intention to strong-arm the doctor into an unfavorable settlement. DeMane stubbornly refuted Marmaro's accusations, but he couldn't remove the spreadsheet from jurors' eyes.

Trial moments like this led to a stunning half-billion-dollar victory for Michelson last fall, the largest patent award of the year. It didn't come without sweat—a

three-month trial during the sweltering Tennessee summer and a 40-month legal battle between a doctor and a \$60 billion company. And it would not have happened without Michelson's lawyers embracing the power of technology to prepare and present their case. They understood that old-fashioned legal talent was not enough. There was too much paper and too many concepts and actors in this drama. Technology would be the lawyers' magic weapon.

The Michelson case sounds like a simple David and Goliath story, except that the David had a Goliath on this side. In addition to Jeffer, Mangels, Michelson had Kirkland & Ellis, a big-name IP trial firm, and its top IP litigator, Robert Krupka. In his closing, Krupka portrayed the case as one doctor fighting a biomedical behemoth for fair treatment for his inventions. But the underlying details were record-setting in their complexity. The doctor began selling and licensing his inventions to Sofamor Danek in 1994. The first two deals involved over 140 patents and patent applications for spinal implants and surgical tools and techniques. Medtronic acquired the spinal company in 1999, and Michelson's inventions were ultimately incorporated into more than 30 Medtronic products. The two sides agreed to at least ten different contracts over the years.

In May 2001 Medtronic sued Michelson for breaking certain terms under the contracts, including peddling inventions to Medtronic competitors. Michelson and his company, Karlin Technology, Inc., countersued, claiming



that the biomedical company had infringed patents, underpaid royalties, and failed to market his inventions as promised. There were more than 20 different claims between the parties.

Michelson's lawyers needed to search nearly 50 million pages of discovery documents, master multiple contracts and patents, and track dozens of pleadings. They also

**BIG DOLLARS**

High stakes cases aren't cheap.

|   |                      |
|---|----------------------|
| Cost of Michelson's electronic review ..... | close to \$3 million |
| Michelson's cost of technology.....         | about \$6 million    |
| Michelson's legal fees.....                 | \$62 million         |

needed to explain the intricacies of spinal implant technology to a jury. "I used to think I worked on complex cases, but I had no idea what complex litigation was before this," laughs Krupka, a patent lawyer who has tried 19 trials to verdict in the past 15 years.

Medtronic and its lawyers, McDermott, Will & Emery and Baker, Donelson, Bearman, Caldwell & Berkowitz, declined to comment. The company, however, argued in court that it did not infringe Michelson's patents, that it had an implied license for any infringements, and that certain of its products in dispute did not incorporate Michelson's inventions. At press time both sides were going through posttrial motions.

Jeffer, Mangels was leading the discovery process as Michelson's original counsel. Medtronic handed over 2 million pages of paper documents stored in over 1,000 boxes, says associate Wayne Ball. As the boxes started piling up during the summer of 2002, the document review was decidedly low-tech. Associates combed through the stacks of pa-

**BIG NUMBERS**

Not just the verdict was jumbo-sized.

|   |               |
|---|---------------|
| Total number of Michelson animations displayed in court ..... | 18            |
| Days of jury deliberations.....                               | 20            |
| Number of Michelson lawyers.....                              | 36            |
| Number of depositions.....                                    | 69            |
| Number of expert reports (both sides).....                    | 42            |
| Total days at trial (excluding deliberations).....            | 46            |
| Number of witnesses.....                                      | 46            |
| Number of verdict form pages.....                             | 58            |
| Total number of Michelson slides prepared.....                | 1,000+        |
| Displayed at trial.....                                       | 600+          |
| Size of litigation databases.....                             | 700 gigabytes |
| Number of exhibits at trial.....                              | 892           |
| Total docket items.....                                       | 2,000+        |

per and indexed them using Word or Excel. The review proved to be too time-consuming. The lawyers needed an electronic-based database, but the firm didn't have a standard system. "People typically didn't use a lot of technology in our cases [before]—it was mostly paper-based," concedes director of information technology Vincent Klein.

Kirkland, which had begun working on the case in the fall of 2001, was experienced with trial technology. Kirkland lawyers offered to build a Web version of its Lotus Notes database for its cocounsel, but the security risks and time constraints ultimately killed the idea, explains Kirkland senior legal assistant Michael Dobszewicz. The Jeffer, Mangels IT team had to look elsewhere. It evaluated options ranging from Concordance litigation software to a custom-built Microsoft Access database. The firm finally settled on Summation, Concordance's chief competitor and a product some firm lawyers knew. Summation required less customization than Access, a huge benefit for a small IT department, says Klein. (Concordance declined to comment.)

APS Document Management Group, an outside vendor, scanned the paper documents and coded them, so that they would be accessible on computers, both at Jeffer, Mangels and remotely at Kirkland. The system worked well, but not flawlessly. The database frequently froze for Kirkland staff, says Dobszewicz. And each time new information was added, the IT team had to reindex the database. One member of the Jeffer, Mangels IT staff worked the lobster shift in order to handle those updates. (A Summation official says that a new Web version solves the problems, other than indexing, that the lawyers encountered.)

Discovery of Medtronic's electronic documents created a different set of obstacles. When Jeffer, Mangels partner Dan Sedor first requested Medtronic's electronic documents in the summer of 2002, he met fierce resistance. The company claimed that it would cost as much as \$300 million, require 40 contract attorneys, and take three years.

Michelson lawyers eventually filed a motion to compel electronic discovery in January 2003. Like many cases today, the electronic feud centered around backup tapes. Michelson and Medtronic couldn't agree on the number of backup tapes to review, how to search them, or the cost. In May magistrate judge Diane Vescovo delivered a compromise. Michelson would pay approximately 40 percent of the cost of retrieving electronic documents from 124 selected backup tapes. Medtronic's discovery consultant, Kroll Inc., would extract the files authored or modified by 40 key Medtronic employees and search

**THE MARCH OF TIME**

A three-month trial culminated a three-year case.

**2001**

- ▶ **MAY**  
Medtronic files complaint against Michelson.
- ▶ **OCTOBER**  
Michelson files counterclaim.
- ▶ **2001-02**  
Battle over protective order governing confidentiality of discovery documents.

**2002**

- ▶ **SUMMER**  
Jeffer Mangels requests Medtronic electronic documents. Medtronic claims requests will take three years to fulfill at a cost of \$300 million.
- ▶ **SUMMER & FALL**  
Michelson team begins receiving paper discovery documents, in all more than 2 million pages housed in more than 1,000 boxes. Bickering over e-discovery continues.

**2003**

- ▶ **JANUARY**  
Michelson team files motion to compel electronic discovery.
- ▶ **MAY**  
Federal magistrate brokers a compromise and appoints a special master to referee future disputes.
- ▶ **SUMMER-FALL**  
Medtronic identifies more than 500 gigabytes of potentially responsive material. Michelson team turns to visual-mapping software "to find multiple needles in multiple haystacks."
- ▶ **FALL**  
Deposition season

**2004**

- ▶ **APRIL**  
Jeffer Mangels team moves to Kirkland offices. Kirkland litigation staffers build database for 10,000 potential trial exhibits.
- ▶ **MAY**  
Plaintiff team moves to Memphis and begins pretrial hearings.
- ▶ **JUNE-AUGUST**  
Trial
- ▶ **SEPTEMBER 28**  
Jury awards Michelson \$159 million in compensatory damages and unpaid royalties.
- ▶ **OCTOBER 12**  
Jury awards \$400 million in punitive damages.

those files for more than 1,000 keywords, such as "Michelson" or various patent numbers. Medtronic lawyers would then review the results for responsiveness and privilege. Judge Vescovo also appointed special master

Patterns is a sophisticated search software program that organizes millions of electronic documents by key names or concepts. Each time a lawyer enters a search request, Patterns displays the document hits in amoebalike bubbles clustered according to their relationship to the keyword and their shared concepts.

mer associates and several attorneys on leave, including Brennan Swain and Rob Frisbee, two associates who had been on a press junket following their win in the reality show *The Amazing Race*.

**TO THE RESCUE**

Vendors helping the Michelson team.

|   |                              |
|---|------------------------------|
| APS Document Management Group                   | document scanning and coding |
| Attenex's Patterns software                     | electronic evidence          |
| DecisionQuest                                   | jury research                |
| FTI Consulting, Inc., and its TrialMax Software | trial presentation           |
| Forensics Consulting Solutions                  | electronic evidence          |
| In Sync Consulting                              | computer forensics           |

This visual mapping distinguished the software from competitors such as Autonomy, Engenium, or Dolphin, says K.J. Kuchta, president of Forensics Consulting Solutions.

The electronic review conference room was like the back of a special operations truck, says Swain. Forensics Consulting Solutions, which had advised Jeffer, Mangels on electronic discovery, brought in seven black computers to run the Patterns software. The attorneys became known as the Death Star Pilots, and their days were regimented. From 9 A.M. until 8 P.M., they reviewed the data in 1,000-document batches. A special master delegate was always present to ensure attorneys weren't saving, printing, or copying files. (Medtronic had agreed to provide the data for Patterns in its original file format under the condition that it couldn't be copied.) When the delegate needed a bathroom break, work stopped, and the data hard drives were locked up.

Alan Balaran, a Washington, D.C., lawyer and electronic evidence expert, to execute her order and act as a referee. Medtronic eventually isolated more than 500 gigabytes of potentially responsive material.

Michelson attorneys would use Patterns to sift through the hundreds of gigabytes of Medtronic files and then request a smaller subset for production.

Finding critical documents such as the points of negotiation spreadsheet dispelled doubts about the software. "I remember seeing that document and thinking this is the reason we fought so hard for the electronic information," says Ball.

The Michelson team needed a system to narrow the request. "We had to find multiple needles in multiple haystacks, and we knew [from the production of paper documents] we were going to get a lot of junk," says Sedor. Attenex Corporation's Patterns software fit the bill.

Many lawyers are reluctant to trust a process that doesn't involve reviewing every single document, but time was short. Michelson's attorneys needed to prepare for more than 40 depositions scheduled for that fall. The discovery deadline was in mid-November, and the trial was initially scheduled for January 2004. Jeffer, Mangels enlisted sum-

It was also fast. Roughly a dozen Death Star Pilots sifted through 44 million elec-

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tronic pages in less than four months. By December, the team had requested approximately 8 million electronic pages for production. But the process wasn't cheap. Michelson's total cost for electronic evidence review eventually ballooned to almost \$3 million, including approximately \$850,000 in attorney hours.

The looming January trial and a swelling wave of case paperwork also forced Kirkland & Ellis to adopt a new system in the spring of 2003. Lawyers were furiously preparing motions and exhibits on contract interpretation. The two sides filed more than 30 different documents, including briefs and exhibits, defining contract claims on the term "technology" alone. There were eventually more than 4,000 pieces of correspondence and 2,000 docket items. With 15-40 documents circulating each day to more than 15 lawyers, this meant a lot of photocopying.

Kirkland wanted to eliminate some of the paper. The documents were scanned and deposited in a Lotus Notes database, something Kirkland routinely does. But then litigation support specialist Nancy Perkins took an extra step and sent out a daily e-mail listing new documents, with hyperlinks to all of the documents.

Kirkland also turned to Walnut Creek, California-based MIM Legal Video and Graphics's Patents Plus to manage the ever-thickening maze of documents. Patents Plus helps lawyers create online color-coded and hyperlinked indexes of key case documents. The system allowed attorneys to find frequently used files without searching Lotus, digging through binders, or bugging legal

and that was carried over into Patents Plus."

With the rescheduled June 2004 trial quickly approaching, lawyers desperately needed a way to keep track of more than 10,000 potential exhibits. Kirkland's Perkins constructed a Microsoft Access database. Attorneys could quickly isolate and print batches of exhibits related to particular subjects. Perkins would update the database during trial, noting when a document was admitted and whether it was redacted. This critical system allowed attorneys to stay in control of the evidence in the courtroom, says Kirkland partner Marc Cohen.

But first the Los Angeles-based team needed to move 1,800 miles to Memphis. Jeffer, Mangels created a coffin-sized "server on wheels" to house the joint case databases and moved into Kirkland's downtown office a month before the trek to Tennessee. In May an 18-wheeler transported the team's equipment and three years of case work to a 10,000-square-foot office a block from the courthouse. During the peak of trial activity, that satellite office would house more than 40 lawyers, legal assistants, and secretaries, along with computers, printers, and a supply room.

Having established their back office, the lawyers then set their sights on the courtroom. They installed an Internet connection

**T**he Michelson attorneys who reviewed documents became known as the Death Star pilots.

assistants. The system grew to more than 400 index pages, mapping everything from discovery requests to the summary judgment pleadings. The color cues helped lawyers keep track of the progress of a case that was record-setting in its complexity, says Krupka: "I started out as a patent lawyer [favoring] colored pens and highlighters,

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in Judge Jon McCalla's courtroom that would allow attorneys to instant-message requests for last-minute documents or even lunch. The Michelson and Medtronic teams jointly spent more than \$50,000 to install a 25-foot screen and two 60-inch plasma screens in the courtroom. Medtronic also used technology in the courtroom, but jurors said their lawyers were less aggressive in using these tools.

At the same time, the Michelson team was facing its most critical challenge—the trial presentation. They knew that a group of ordinary men and women would have to absorb a staggering amount of detail and complexity. The jury would ultimately reach a decision using verdict forms totaling 58 pages and 285 questions. They would need visual aids to learn the contracts, the time line of a ten-year relationship, and more than 40 witnesses.

The presentation had to sell the story of a wealthy California surgeon while dismissing the claims of a \$1.6 billion Memphis-based business with 1,200 local employees. "There were more than 20 witnesses on the other side saying the light was red, and I needed to prove that the light was green," says Krupka. The attorneys had two essential tools—documents and Dr. Michelson.

Written agreements, product brochures, and memos would have to become star witnesses, blown up and highlighted with color. Michelson's testimony would be as critical. The doctor had to teach the jury the value of his inventions, complex tools and implants used to treat patients with degenerative disc disease and back pain.

**When the special master delegate needed a bathroom break, work stopped and the hard drives were locked down.**

Michelson's lawyers needed to tell a visual story. In mid-April the team turned to Annapolis, Maryland-based FTI Consulting, Inc. A team of FTI consultants helped create more than 70 slides and 18 animations for the doctor's seven-day direct examination. Graphics illustrated the human spine and how Michelson's implants and surgical techniques worked. Their work ultimately

made an impression on jurors. "The animations were really detailed," says foreman Gary Cummings. "It made it a lot easier to gather the facts when I heard [Dr. Michelson's] testimony and then could see those demonstrations."

The expected one-month trial became a three-month trial, and FTI consultants became permanent fixtures in the makeshift Memphis office. They created more than 600 slides to aid the Michelson case. Their graphics, for example, clarified the testimony of Michael Leetzow, Michelson's expert on patent infringement and royalties. Leetzow's testimony was critical but technical. There were multiple claims on six different patents that related to 13 different Medtronic product systems.

"We all thought this would be the stage where jurors might be dozing off," says Kirkland's Cohen. To combat boredom and confusion, the team created 200 colorful slides to take the jurors claim by claim through Leetzow's analysis. Slides compared original patent files to the relevant Medtronic products, highlighting pictures and descriptions from Medtronic brochures. The jurors didn't fall asleep. "Everything [Leetzow] showed us was a big help," says juror Gitana Bonds, who remembers the challenge of relating the patents to the accused products.

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Video was another instrument in the L.A. lawyers' toolbox. When Medtronic witnesses contradicted their deposition testimony, the lawyers played video clips of that deposition. The jurors could see, hear, and judge the contradiction for themselves. When Medtronic vice president Lawrence Boyd described a spinal instrument in court, seconds later they saw Boyd denying knowledge of that instrument in his deposition, remembers Jeffer, Mangels partner Stanley Gibson. "We were really impressed," says juror Bonds, a courtroom veteran who has served on nine different juries. "They could put [those clips] on the screen at a moment's notice."

It wasn't as easy as it looked. Michelson's lawyers created detailed witness outlines with clip file numbers for virtually every statement made in deposition. Cohen remembers preparing 60 clips for one Medtronic expert, but playing only two during his examination. The Michelson team also kept paper copies of deposition testimony to hand over to opposing counsel before playing each video. "By giving the other side pages of the deposition testimony to impeach [their witness], you show the jury that you're organized and under control, that you're not trying to ma-

nipulate with technology," explains Krupka.

Slick trial technology won't work with some jurors, so Michelson's lawyers didn't depend entirely on fancy graphics and videos. The lawyers also displayed skeletal models and let the jury pass around surgical instruments and prototypes, a practice favored by jurors such as Deborah Beavers, a registered nurse. "The power of mixed media

posite stance, placing an IT expert at the table. "I like to do one thing at a time well; my brain is too small," laughs Krupka.

FTI's Will Thomas sat next to the attorneys for all 46 days of the trial. Using two laptops, Thomas had to be able to pull up any one of the close to 900 exhibits quickly. "There was zero tolerance for error in the courtroom," he says. Thomas held dress rehearsals for key witnesses and opening and closing arguments. He spent hours at night and on the weekends reviewing examination outlines with attorneys to ensure that every slide, exhibit, and video clip was ready for prime time. "It seemed like we were filming a TV movie—everything was so organized and structured," says Cummings. Thomas subsequently joined Kirkland's Chicago office as a trial technician.

After a three-month trial and a month of deliberations, the jury awarded Michelson approximately \$159 million in actual damages. Two weeks later, the jury awarded \$400 million in punitive damages. Michelson's lawyers estimate that they spent roughly \$6 million on technology, about 10 percent of their \$62 million in legal fees. If the award stands up on appeal, technology may have been the case's only bargain.

E-mail: [akolz@amlaw.com](mailto:akolz@amlaw.com).

**T**here is no such thing as being too prepared. Kirkland prepared 60 video clips for one witness but used only two.

is that you can make the same point in different ways while keeping [the jury's] attention," explains Cohen.


Courtroom technology, of course, is only effective when it runs smoothly. Some lawyers like to control their own systems to ensure things run smoothly. But the Michelson team, and Krupka in particular, took the op-

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