

# MINNEAPOLIS ST. PAUL BUSINESS JOURNAL

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**Jon Singer, 43**  
Principal specializing in  
pharmaceutical litigation  
Tenure: Almost 10 years

**Bill Woodford, 31**  
Associate specializing  
in patent litigation  
Tenure: 5 years

**Mike Kane, 48**  
Principal specializing  
in intellectual  
property litigation  
Tenure: 8 years

**John Adkisson, 37**  
Principal specializing  
in plaintiff patent  
litigation  
Tenure: 6 years

NANCY KUEHN / MINNEAPOLIS/ST. PAUL BUSINESS JOURNAL

## Money, arrogance, intrigue

Twin Cities lawyers  
take on the most bizarre  
case of their lives in  
MIT vs. ImClone Systems

**BY ALYSSA FORD**  
CONTRIBUTING WRITER

Patent lawyers don't usually see this kind of drama: witness and lawyer intimidation; famous, Nobel prize-winning scientists; jailhouse depositions with white-collar crooks; a cancer drug with sales in the multimillions; a fat settlement, two and a half hours before trial.

MIT vs. ImClone Systems was a patent case settled just after daybreak Sept. 10 for \$65 million. It revolved around genetic elements — developed and patented in the 1980s by Massachusetts Institute of Technology (MIT) scientists Susumu Tonegawa and Stephen Gillies — that ImClone used to make its cancer drug Erbitux. The pow-

erful drug is used to delay, if only by a few months, the deaths of people with late-stage colon or rectal cancer.

Fish & Richardson lawyers Jon Singer, John Adkisson, Mike Kane and Bill Woodford got involved with the case in early 2004. Repligen Corp., the plaintiff and exclusive licensee of those genetic elements, had hired the law firm when ImClone refused to acknowledge Repligen's license agreement and compensate the Waltham, Mass.-based biotech company for a portion of the sales of Erbitux.

The Minneapolis attorneys thought the case might be fairly cut-and-dried. Not so.

"There was something funny about this case, right from day one," Singer said. "It was a fascinating, once-in-a-lifetime case,

# CASE: ImClone fires defense team prior to settlement

but the suit inspired incredible vitriol.”

High-powered New York law firm Kenyon & Kenyon argued that the defendant, ImClone — known for its role in the Martha Stewart scandal — should not be held liable for the patented genetic material because MIT and Repligen had given a research-and-development license to the National Cancer Institute.

It was a crazy argument, which the judge on the case later called a “gaping hole,” but it was the first sign that this would be a hardball case. Almost every deposition and document had to be forced by a court order. Later, the opposition counsel would file a dozen motions, including one to hide from the jury the fact that Tonegawa was a Nobel Laureate.

“Some of [the motions] were hilarious,” Singer said. “The judge got up there and said, ‘Denied, denied, denied,’ over and over.”

## Vending machine virtuoso

In year two of the case, Woodford and Adkisson traveled to the East Coast to depose disgraced ImClone CEO Sam Waksal, at his current residence: a minimum-security prison in upstate New York.

At the welcome desk — no layers of security here — a man in civilian clothes stepped up and said, “Hi, I’m Sam Waksal. I understand you’re here for the deposition. Follow me. I got the best room in the place.”

Adkisson and Woodford followed Waksal to a chalkboard classroom, with a clanking air conditioner and a litter of musical instruments. Waksal talked for five hours, revealing he knew quite a bit about the Repligen case, despite his lawyers’ protestations to the contrary. During one break, Waksal gave the Minneapolis lawyers a guided tour of the vending machines at the prison.

“During the deposition, he got into his high-flying days in the late ‘90s, when he was closing big deals at the Four Seasons and he was the Manhattan socialite,” Adkisson said. “Then we were out at the vending machines, and he was telling us which sandwiches he thought were good. How he recommended the chili. It was the wildest dichotomy.”

## Out of line

The same summer that Waksal was deposed, researcher Gillies was at his laboratory at EMD Lexigen, a subsidiary of KGaA Merck, the distributor of Erbitux in Europe. He was testing some genetic material he had had in his freezer for 15 years against the chemical components of Erbitux. MIT had requested the tests to prove the patent was valid and that ImClone had infringed on it.

This test, revealed in December 2005 to the opposing counsel, showed the patent was valid, and that ImClone had infringed on it.

Kenyon & Kenyon lawyers were unhappy when they found out about the tests and demanded Gillies be deposed for a third time.

In February 2006, lawyers for ImClone asked the scientist if he had permission to use his lab for the testing; if anyone knew he was testing the materials; who his boss was; and so forth. Internal e-mails circulated through ImClone, which later came to light in court, hinted at using its KGaA Merck connection to shut Gillies up.

In fact, that’s what happened. After meeting with KGaA Merck officials, Gillies told his lawyers he wouldn’t be willing to cooperate with his alma mater, MIT, in the prosecution of a case to defend his own intellectual property.

Woodford and his colleagues were incensed.

“I think we were all shocked,” he said. “I mean, we’re practicing patent litigation here.”

Kane added, “You’ll see this in the criminal world, when the mob or a drug gang will try to take out a witness. But in the civil world, it’s very, very unusual. When we did the legal research on this, we could only find a couple of cases to refer to.”

Shock turned to anger when Kenyon & Kenyon lawyers argued in a hearing that they had done nothing improper and in fact, Mike Kane should be sanctioned, for reasons which are under seal of the court.

On June 7, 2007, a U.S. District Court judge sanctioned Kenyon & Kenyon lawyer Paul Richter, who had questioned Gillies during the February 2006 deposi-

tion, stating Richter had attempted to intimidate the scientist. ImClone fired Kenyon & Kenyon five days later, and hired Washington, D.C.-based Wiley Rein law firm to take over the case.

## Home stretch

Once the lawyer and witness intimidation was boxed up, Singer, Kane, Woodford and Adkisson began preparing for a trial they thought would have long been over.

Kane and Singer got a \$150,000 MIT education from Tonegawa as they prepped him to explain molecular biology to the jury.

“I would ask him a question, and then he and Mike would confer for five minutes, and then he would go off on this lofty explanation of formulas, cells, antibodies and double helixes, with all these drawings all over a chalkboard,” Singer said. He described talking to the Nobel Laureate as a “once in a lifetime thing.”

When Kane and Singer reported back to the team, Woodford recalled, they were a sight. “They had big, ridiculous smiles, and their hair was all messed up. It looked like they had been on a great date.”

But Tonegawa would never deliver that mind-bending oration to the jury. At 6:30 a.m. on the morning of the trial, a separate settlement team at Fish & Richardson inked a \$65 million deal with ImClone.

After the settlement, a band of sleep-deprived lawyers debunked from Boston to Waltham, Mass. When they were introduced, all 45 employees of the company jumped up for a riotous standing ovation, knowing that their \$20 million biotech company was now worth more than \$60 million thanks to these bleary-eyed lawyers from Minneapolis. Waiting for them was a massive lunch buffet.

“They had gone to the local Chinese place and ordered everything on the menu. The food stretched all the way down this massive conference table,” Adkisson said, shaking his head in amazement at the reception and gratitude they received from Repligen.

**Alyssa Ford is based in Minneapolis.**