

Employment MVP: Orrick's Lynne Hermle

By **Lana Birbrair**

Law360, New York (December 02, 2011, 9:59 PM ET) -- Orrick Herrington & Sutcliffe LLP partner Lynne Hermle was instrumental in defending McAfee Inc. in a case accusing the software company of making its former general counsel the fall guy in a criminal and civil stock options backdating probe, earning her a spot on Law360's list of Employment MVPs.

On Nov. 7, the Ninth Circuit tossed the last claims in the suit brought by general counsel Kent Roberts, accusing McAfee of defamation, invasion of privacy and malicious prosecution for allegedly feeding federal investigators misleading and false information. Hermle had already gotten the first two claims dismissed in the lower court.

"It's certainly one of my favorite wins of my career," she said. "It's a hugely important case on so many levels, and I'm just so thrilled with the decision."

The dispute stemmed from a 2006 think tank report identifying McAfee and others as companies whose records suggested executives were backdating stock options without adjusting the books or getting proper approval.

With a potential securities violation lurking, the U.S. Securities and Exchange Commission contacted the company. Realizing an investigation was likely, Roberts told McAfee executives that his options had been backdated, and he was fired.

Complying with orders from the SEC and U.S. Department of Justice that companies should disclose wrongdoing by executives, McAfee posted a press release on its website identifying Roberts' alleged misdeeds. The former general counsel was then criminally prosecuted and subject to civil suits for stock option backdating and other securities violations.

After a jury acquitted Roberts on some charges and the U.S. attorney's office dropped the others, Roberts sued McAfee for malicious prosecution and defamation arising from the press release. Roberts claimed that McAfee used him as a scapegoat to draw attention away from other board members under scrutiny from market watchers and regulators.

Hermle quickly recognized that all of Roberts' claims stemmed from reports to the government, testament in government trials or press releases — prime breeding ground for a strategic lawsuit against public participation, or a SLAPP.

Under California's anti-SLAPP statute, McAfee could shift the burden of proof to Roberts: If he couldn't prove that he would probably prevail on his claims, the suit would be tossed.

U.S. District Judge Phyllis J. Hamilton dismissed the defamation and invasion of privacy claims as time-barred, but two malicious prosecution claims survived. McAfee then appealed to the Ninth Circuit, which found that McAfee had probable cause to believe Roberts was guilty of a crime, and tossed the last remaining claims.

Hermle, who began practicing employment law 30 years ago, tackles equally complex cases regularly, having tested each of California's wage and hour exemptions and defeated class certifications in statewide suits for global companies including Apple Inc., The Gap Inc., Morgan Stanley, Home Depot Inc. and Williams-Sonoma Inc.

Along with her win in the McAfee suit, Hermle spent the last year successfully defending Apple in a wage and hour class action seeking rest break penalties on behalf of certain retail employees and obtained the dismissal of a suit accusing Morgan Stanley of violating labor codes by requiring employees who have brokerage accounts to maintain them with the firm.

Hermle says she enjoys employment law because it is always developing and changing, and she appreciates the fact that it is very connected to her clients' businesses.

"I've always loved employment law," she said. "It's very people and issue-driven, so we get to work really closely with clients, which is a huge part of why our jobs are so fun. There's never a dull moment."

After starting in a small employment boutique, Hermle went to work in-house with AT&T Inc. before being recruited by Orrick in 1987. Although cases rarely go to trial, Hermle says that some of the greatest highlights of her career have taken place in the courtroom.

"I really value all the jury verdicts and the trials," she says. "It's rare in today's world to be able to have a client who has the resources and the time and the willingness to take a test case to trial."

One of her favorites, *Maghribi v. Advanced Micro Devices Inc.*, was a 2002 suit in which an Arab-Muslim executive sued the technology company over allegations of discrimination, seeking \$200 million in lost compensation and additional emotional distress and punitive damages.

"It was soon after Sept. 11, so it was tried in an era of very heightened sensitivity," Hermle says. After less than two hours of deliberation, however, the jury returned with a verdict in favor of AMD.

Hermle's husband and son came to watch her closing argument, an experience that made the case particularly memorable for her.

"My son might have been 10, and he did criticize me later and told me it was too long," she said, laughing. "It was true."

--Additional reporting by Carolina Bolado and Richard Vanderford. Editing by Kat Laskowski.