

## A Frond Farewell

In-house animators show how little microbes can cost big.

By Claire Duffett

In the early 1990s, Costa Rican fernery workers began to notice a problem with some of the leatherleaf fronds they picked. Usually hardy, the triangular-shaped green plants — used as accents in floral arrangements — were stunted, discolored, leafless, and twisted in abnormal directions. Some growers regularly sprayed the plants with Benlate, a fungicide manufactured by DuPont. All the crops came from a Benlate-treated parent source in Florida.

By the mid-90s, companies began to sue the Wilmington, De.-based business for knowingly distributing a harmful toxin. In 2001, 27 Costa Rican growers joined the herd. In March 2006, *Super Helechos, S.A., et al., Euro Flores, S.A., et al., v. E.I. Du Pont De Nemours & Co., Inc.*, case no. 01-06932 CA (23), went to trial in the 11th circuit court in Miami-Dade County, judge Amy Steele Donner presiding.

A year earlier, in the same courtroom, DuPont defended a similar case pursued by TicoFruT, the main citrus producer in Costa Rica. This time, the plaintiffs hoped evidence pinpointing



Costa Rican fernery workers discarding deformed fronds at the Tico Verde nursery in mid-2005.

the scientific reason for Benlate's damage would generate a different result. Denver's Holland & Hart ([www.hollandhart.com](http://www.hollandhart.com)) represented the growers along with local Miami counsel, solo Don Russo.

Two elements — video and animation — played a key role in the Helechos trial presentation, said Pen

Volkman, director of graphics and video services with Holland & Hart. Film of the ferneries showed the severity of deformed crops and also illustrated how the industry relied on high technology.

Ultimately, the lawsuit hinged on establishing a scientific link between Benlate and the disfiguration of the ferns, said H&H partner Peter Houtsma. "First we had to develop the science, then we had to put it in a form that the jury could understand."

The evidence indicated that Benlate caused irreparable damage by disrupting the bacterial balance on the plant's surface, argued plaintiffs' expert witness Joseph Kloepper, an Auburn University botanist. His theory became the centerpiece of the plaintiffs' arguments.

"Like when you take antibiotics, you have bacteria in your stomach that are perfectly fine and necessary for proper digestion that get wiped out with the bad bacteria," Volkman said. The "good bacteria" Benlate killed off prevented excessive growth of fluorescent pseudomonas. When these bacteria could reproduce unfettered, they infected the plant and caused deformities, he explained.

Holland & Hart attorneys traveled frequently to Costa Rica during discovery, and Volkmann joined them three times to record operations at the various ferneries, using a Sony DCR-VX2000 mini DV camcorder. Volkmann's team used Apple Final Cut Pro 5 to edit the video. Particularly potent was footage that depicted workers separating fronds into "toss" and "keep" piles. For some ferneries, less than 30 percent of their crops were saleable.

Volkmann and his seven-person team of designers — Pam Miller, Jason Bullinger, Don Yost, Damian Griffin, Nick Bouck, Matt Wessel, and Chance Dodd — had the challenge of illustrating Benlate's microbial interaction with the fern, and the chemical's lasting hormonal effects, in a simple, compelling way.

The group used Maya 8 from Autodesk Inc. ([usa.autodesk.com](http://usa.autodesk.com)) to create 3D animations depicting how the bacteria infects and deforms leatherleaf fronds. The animation showed fluorescent pseudomonas spreading and destroying in a red wave after Benlate kills off its predators.

The animation team prepared presentations on Apple Computer Inc. ([www.apple.com](http://www.apple.com)) PowerBook laptops, PowerMac G5 workstations, and Dell Inc. ([www.dell.com](http://www.dell.com)) Precision 670s with dual Intel Corp. ([www.intel.com](http://www.intel.com)) Xeon processors. Attorneys used Dell Inc. laptops.

After they created the visuals, the team's lawyers vetted the graphics for potentially inflammatory elements, said Steven Andersen, a Holland & Hart partner. A necessary step, he said, because the team must offer jurors a simplified, dramatic portrayal without exaggerating claims when depicting complex science in graphic form.

H&H used **TrialDirector** 4.5, a presentation program from inData Corp. ([www.indatacorp.com](http://www.indatacorp.com)), to present documents, animations, and video. The team ran the program in the courtroom from a 1 Beyond

([www.1beyond.com](http://www.1beyond.com)) workstation, and stored its presentations on 500 MB GTech hard drives from GTech Corp. ([www.gtech.com](http://www.gtech.com)) and Seagate 400 MB back-up drives from Seagate Technology Inc. ([www.seagate.com](http://www.seagate.com)).

During discovery, H&H turned to familiar faces for help with document review: Catalyst Repository Systems Inc. ([www.caseshare.com](http://www.caseshare.com)). CRS is a spin-off of Holland and Hart, lead by CEO John Tredennick, who was an H&H litigation partner for 25 years.

### THE DEFENSE

Lawyers from the Miami office of Shook, Hardy & Bacon ([www.shb.com](http://www.shb.com)), and attorneys from the Denver and Chicago offices of Bartlit Beck Herman Palenchar & Scott ([www.bartlit-beck.com](http://www.bartlit-beck.com)) represented DuPont.

Shook Hardy, which DuPont initially retained, recruited Bartlit Beck in 2005 because of its prior work in the winning case against TicoFrut, explained lead counsel Jeffrey Hall, a Bartlit Beck partner.

The defense team hired FTI Consulting Inc. ([www.fticonsulting.com](http://www.fticonsulting.com)) to help coordinate its presentations. Bartlit Beck used FTI's TrialMax 6 software to run Microsoft Corp.'s PowerPoint and other graphic file formats, and used Adobe Professional 6.0 and 7.0 to modify images. But it chose not to use 3D graphics or animations.

TrialMax helped the team to pull up and highlight portions of documents "on-the-fly," Hall said. "It's so much easier to call it out yourself instead of saying, 'Mr. Jones, will you please call out paragraph three? No, the one below that one, the one above that one,'" Hall explained.

Each of the four Bartlit Beck and one Shook Hardy attorneys who examined witnesses used IBM ThinkPads — T42 or T43 models — and the team used a Hewlett-Packard Co. HP LaserJet 4250 in the courtroom, Hall said.

Hall said he also used a low-tech tool, a dry-erase whiteboard — when cross-examining witnesses because

it gave him the ability to change questioning according to responses.

The defense team communicated from its war room and in the courtroom via an intranet constructed by the firm's in-house IT department, he added.

### JOINT COLLABORATION

The two teams collaborated on some courtroom equipment, to keep costs and bulky equipment under control.

The defense team installed an eight-foot Da-Lite ([www.da-lite.com](http://www.da-lite.com)) Deluxe Insta Theater, placed behind and to the right of the witness stand. It also brought a Samsung projector to display documents on the overhead screen.

H&H provided 17-inch Dell LCD monitors for the judge, witness stand, both counsel tables, and the control area on the right of the gallery.

Because both sides provided equipment, the teams reached an agreement not to charge one another any fees for use, Volkmann said.

### THE VERDICT

On May 17, the jury delivered its verdict, finding DuPont responsible for \$57 million in damages. The percent of liability ranged between 30 and 55 percent of damages, varying by fernery, with jurors attributing the remaining fault to contributory negligence by the growers.

Post-trial motions are pending. **LTN**

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