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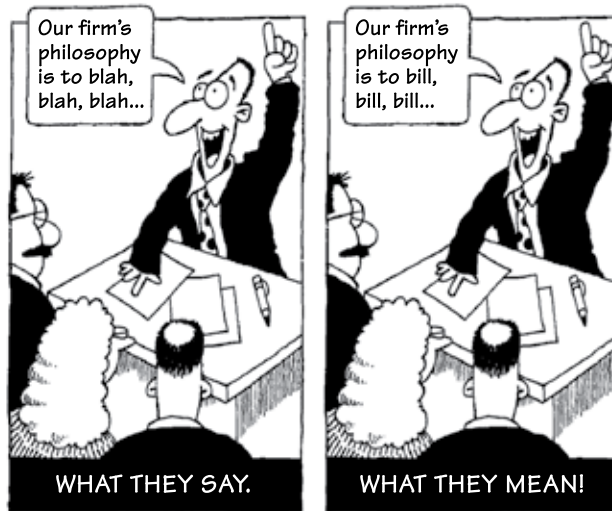
ERIC PINKER



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APRIL 13, 2009 • VOL. 25 • NO. 2

TEXAS LAWYER



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The United States always has been a leader in protecting companies' ideas. But there are issues that create concern within the industry. Two of the main concerns are high litigation costs and poor patents. Whereas years ago the words "intellectual property" brought to mind just copyrights and patents, intellectual property issues now run the gamut. As technology evolves, so do the legal issues surrounding it. So, the Texas Lawyer business department brought together experts in the field to talk about these and other hot-topic issues. The following discussion has been edited for length and style.

MIKE ANDROVETT, moderator, attorney and owner of Androvett Legal Media & Marketing, Dallas: . . . *Steve, if I can ask you to do the honors first. Introduce yourself to everyone here and talk a little bit about who you are, where you work and the nature of that work.*

STEPHEN A. KENNEDY, founder, Kennedy Law, Dallas: Thank you. Mike, first of all, I need to apologize to you for standing you up a year ago today at this event. I was called to trial in Judge Means' court on a copyright infringement case. We were hoping it was going to settle. It didn't, so we had a three-week trial. I was representing the plaintiff in a software copyright case against General Electric and we prevailed. We proved they stole trade secrets, copyright infringement and unfair business practices. The judge dismissed my Digital Millennium Copyright case claim. That specific issue is on appeal with the Fifth Circuit and we might get to

that later on because the Fifth Circuit has never addressed the Digital Millennium Copyright Act. But that's what I was doing a year ago. Over the last 20 years, 60 percent of my docket has been primarily intellectual property litigation matters, and the rest has been general commercial litigation. I've had somewhere between 12 and 15 trials involving intellectual property, about half of those on patent matters and the other half sort of split among the other major areas, which include copyrights, trademarks, trade dress, and then the trade secret side as well. I have my own law firm, Kennedy Law. We're a small group, but growing. And we represent large business organizations from *Fortune* 10 companies in IP litigation matters to smaller startup companies where they're looking for good representation but can't quite afford the fees of a huge firm. My firm is flexible enough where we can accommodate that.

ANDROVETT: *Marty?*

MARTIN E. ROSE, partner, Rose Walker, L.L.P., Dallas: I've been a trial lawyer for 35 years and I got my feet wet trying aircraft products liability cases, which are a lot of fun. I really enjoyed the technology and the science, but after about 40 plus trials, I got tired of the dead bodies and looked around for something else different to do in the courtroom. I wandered into intellectual property work really before it was the fad thing to do. For once in my life, I had good timing. I was a defense lawyer in the tort business when the plaintiffs' bar made a lot of money, and then I started doing some plaintiffs' tort work when our good legislature and courts pretty much got rid of that business. And so, at least on one occasion, I had good timing and that was in intellectual property. I have been doing IP litigation for about a decade now. The firm is about 65 percent intellectual

property and the rest is commercial litigation and some tort work. I do all intellectual property and really enjoy it, but I'm not a patent lawyer. Do not look to me for patent advice. It would be malpractice. I'll probably give it to you, so don't listen. We generally joint-venture with patent firms on the patent side, but I try to encourage my clients to let me try the case. A patent case, in my view, is just like any other trial, a lot of fun but it's a trial. And, of course, on the trade secret side, a trade secrets case is just a fraud case. And it's a lawyer's dream in my view, particularly because the definition is so nice and broad and wishy-washy. But I find that intellectual property is unique, because so many people get focused on the minutia when really a jury just needs to know about the same general big picture they need to know about in any kind of case, whether it's a dog-bite case or intersection accident or an airplane crash. It's good to be here.

ANDROVETT: *Eric?*

ERIC PINKER, partner, Lynn Tillotson Pinker & Cox, LLP, Dallas: We are a firm of 18 trial lawyers here in Dallas. We focus on complex commercial litigations both in Dallas and throughout the country and represent clients on both the plaintiff and defense sides of the docket. Personally, my practice consists not just of complex commercial cases, but also of intellectual property cases and, in general, my time is spent about a third to a half at any given time on intellectual property matters ranging from patent cases to more traditional trade secret matters. Over the past 10 years, I've tried patent and other intellectual property cases involving a range of products, from telecommunications services and products, to nutritional dietary supplement products and the patents that support that product line, to oil and gas technology, including emulsified fuel technology patents. And what we try



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HON. ROBERT FAULKNER

(Ret.) is a mediator and arbitrator with JAMS in Dallas. He successfully resolves copyright, international IP, patent, trade secrets and trademark disputes with substantive experience in technology areas including: design, entertainment, product manufacturing, medical devices, computers, wireless and telecommunications. Judge Faulkner is frequently called upon to mediate, arbitrate, or participate in mock hearings and focus groups in areas such as Markman Hearings or patent litigation. Clients throughout the United States and abroad call upon him for his skills and expertise. A retired Magistrate Judge for the Eastern District of Texas, Judge Faulkner brings over 35 years of distinguished service from the federal judiciary and private law practice. He has earned a reputation of never giving up on a case until it settles. The Judge takes an active role in the cases that he is assigned, looking for settlement opportunities at every stage of litigation from pre-Markman to post judgment.

to do at our firm is apply the same consistent approach that we have to general complex commercial cases to these intellectual property matters. I agree with a lot of what you've just heard. These cases can be extraordinarily complex, difficult and detailed, and the terms that we use can be impenetrable to a jury. What we really try to do is focus on simplifying that message to the jury, developing any consistent themes that a jury can understand, that they can work with and which they can embrace when they go back to deliberate on your case. I am board certified in civil trial law by the National Board of Trial Advocacy and very happy to be here this morning.

ANDROVETT: *Judge?*

HON. ROBERT FAULKNER, mediator and arbitrator, JAMS, Dallas: When the trial lawyers talk about making it simpler for the jury, they really are saying they 'dumb it down' for the mediators where they can understand what's going on. And I'm very grateful for that. I was blessed with serving as U.S. magistrate judge for over 25 years. The last was in Sherman for about 11 years, and have been very blessed, probably consider myself one of the more fortunate people in the world. I retired six years ago and affiliated myself with JAMS. And I'm very proud, it's a great organization. I have an opportunity to be exposed to an awful lot of disputes in every area of the law and technology. One of the more interesting cases that I had a couple years ago was the NASCAR litigation where Johnnie Cochran's firm was the plaintiffs suing NASCAR and their corporate entity, and Dave Boies, New York, was representing NASCAR folks. And I got to know all those people on both sides very well and got to go to a couple of races, and that was fun. We settled the case, but it took us about 10 months. And we went all over the country to meet with them, but that was a real challenge. I think most of you have probably followed the Alcatel-Lucent Microsoft war that they had going, and I've been very blessed to be part of that process, which we settled or I wouldn't be talking about it, of course, just a couple of months ago. They were a little unfair to me. They made me go to Paris to finish it up. I'm really grateful for

my experience and look forward to several more years doing the same.

ANDROVETT: *Mark?*

MARK C. NELSON, partner, Sonnenschein Nath & Rosenthal, LLP, Dallas: I guess I'll describe myself a little bit differently. I'm an intellectual property trial lawyer who specializes mainly in patent cases. Throughout my career — I've been practicing now for about 15 years — I've been substantively involved in at least 50 patent cases, including several trials, as well as a smattering of copyright, trade secret, trademark and other high-tech litigation. I approach the cases much like the others said: patent trials are stories and they need to be simplified and told in a persuasive way just like any other case. Also, because many patent cases are quite large and high stakes, it is important to remember that there are really three audiences for a patent trial: the jury, the judge, and the appellate court, that is, the Federal Circuit. Our team in the Dallas office of Sonnenschein Nath & Rosenthal consists of 10 patent attorneys with another 15 or so litigators to help out. Firm-wide we have approximately 50 attorneys that specialize in patent, trademark and other types of IP litigation. I have a biology/genetics undergraduate and graduate degrees and had a former life as a geneticist before becoming a lawyer. And, unlike many attorneys who have left the profession of law and characterize themselves as "reformed lawyers," I guess I'm a reformed scientist.

ANDROVETT: . . . *I can anticipate, knowing a little bit about your backgrounds that we're going to cover a lot in the next hour-and-a-half. We're going to probably talk a little bit about advising a company on protecting these IP assets. I know we're going to talk about patent reform. I anticipate we'll talk about trial tactics. Judge, we'll probably talk about the relative merits of alternative dispute resolution versus going to trial. But I also know this is a thoughtful group, so if I might, I'd like to venture far afield to start this thing out and talk to you a little bit about a line of thought that's not predominant, but exists out there. Often cited is Mark Lemley, who's a law professor at Stanford Law, who suggests that the whole term "intellectual property" is a bit of a misnomer, and a commentary citing Lemley as sort of the Godfather of this says the*

term carries a bias that is not hard to see. It suggests thinking about copyright, patents, and trademarks, by analogy, with property rights for physical objects. Parenthetically, this analogy is at odds with the legal philosophies of copyright law, patent law, and trademark law, but only specialists know that. These laws are, in fact, not much like physical property law, but use of this term leads legislators to change them to be more so since that is the change desired by companies that exercise copyright, patent, and trademark powers. The bias of the phrase "intellectual property" suits them. As suggested as alternatives to the phrase "intellectual property" are such phrases as "imposed monopoly privileges" and "GOLEMS" for government-originated legally-enforced monopolies. Now, I'm not asking any of you to be legal philosophers here, but in what you see, does this notion that intellectual property, the phrase, everything that flows from that is designed to protect what I would call the moneyed interests?

ROSE: It sounds like hogwash to me. I mean, if I own a piece of property, I'd like to make certain that the laws will support my ownership of the piece of property. And I'm no law professor, that's for sure, but it seems to me that while you could fuss about the rules and you can fuss about the legal principles, and some of our recent Supreme Court decisions are good examples, don't we all want to protect that which we have created, own, and use to make a profit or to live in? I don't see a difference. And perhaps some here will have a more finely-honed view of it, but it seems to me that intellectual property is as valid as real property or any other interest that's worthy of protection, because it creates value for its owner and user. So I don't see it.

PINKER: Well, I certainly think intellectual property is valuable and important and it's what a lot of us spend time doing. It's important also to recognize that it has some very significant differences from tangible property and I think that distinction is oftentimes blurred — the right of possession, the right to exclude others. There are certainly similarities, but there are differences from the fact that these rights are non-tangible. With intellectual property, what we're really talking about is a bundle of rights as opposed to a plot of

land, a box, an item or a thing. And that's a different concept that we oftentimes don't focus on. To some extent, intellectual property lawyers have convinced the public to look at these as tangible items of property, when in fact concepts and ideas are more free-form than that. So they're important sets of rights, but it's important to understand these are sets of rights as opposed to tangible items.

KENNEDY: I would say that I agree with Professor Lemley's conclusion, but I don't agree with his analysis. I think the words "intellectual property" are a little bit stilted, maybe even arrogant. What we're really protecting are people's ideas. For example, a man or a woman's right to use their name and their right of publicity, that's also part of intellectual property. So that term really doesn't capture all of the elements that people practice in this area. In Europe, they don't use the phrase "intellectual property." My French clients call it "industrial property," because it's actually closer to the meaning that they intend for it to have because they're protecting all of the things that the industry produces. So I wouldn't agree with his analysis here, but I think the words "intellectual property" probably don't accurately describe everything an IP lawyer does.

NELSON: Just one last thought on that. While he (Professor Lemley) may be legally correct in characterizing recent Supreme Court decisions as moving away from thinking about certain types of intellectual property as "land or property," I'll tell you what, if you're trying to explain the concept of a patent to an East Texas jury, analogizing it to a piece of land is certainly something that the jury understands — they get it. Trying to phrase it as Professor Lemley did is just not a practical alternative. At the end of the day when we're trying these cases, the object is to get a jury verdict in your favor. So while the philosophies of the east and/or west coasts may be relevant in the abstract, in practice describing patents or "intellectual property" using land or another analogy is very important to getting real people (ie., a jury) to understand the issues.

FAULKNER: Of course, it's never about the money, I've been told many times.



STEPHEN A. KENNEDY,

founder of Kennedy Law, has successfully represented clients in matters ranging from small IP arbitration and employment matters to large-scale multi-district cases involving software copyright infringement, high-tech patent infringement, copyright misuse, patent-antitrust, as well as litigation and counseling concerning IP transactions. Over the last five years, he has tried four patent cases, four copyright cases and obtained results for clients including a \$125 Million jury award, a \$27 Million contempt and sanctions award and an \$11 Million settlement. In December, 2006, he obtained an order granting \$27 million in sanctions against a party in violation of a preliminary injunction in a software copyright case. In April, 2008, he obtained a jury verdict awarding \$4.6 Million plus attorneys' fees and taxable costs.



MARK C. NELSON,

partner at Sonnenschein Nath & Rosenthal LLP, is a member of the firm's Patent Litigation Practice. He has nearly 15 years of experience litigating large, multifaceted patent infringement cases in federal district courts and before the International Trade Commission. Nelson's experience in patent litigation spans a number of diverse technologies, including biotechnology; semiconductor products and the processes used to make such products; telecommunications and networking; satellite communications; electronic circuitry; Internet business methods; computer software; explosives used in automobile airbags; soft drink bottling technology; electric motor technology; automotive speakers; cosmetics; asexually reproduced plants and asynchronous assembly techniques. In addition, he has experience drafting and negotiating IP license agreements, counseling clients on setting up and maintaining IP licensing and/or IP capture programs, performing corporate IP due diligence, opinion work and patent prosecution. He also has handled copyright, trademark and trade secret matters. Nelson teaches IP Litigation as an adjunct professor at Southern Methodist University's Dedman School of Law.

But there is an economic value to a company spending a lot of money to develop new products and add to the technological expertise of their particular products, and it keeps the economy going. I have many cases where the person that has spent a lot of money — actually, this week it was over \$100 million developing some technology that then someone else came in and started using, and, of course, a lot of times maybe starts beating the other company in the marketplace, and that's serious business. If we're going to encourage people to innovate and keep our economy growing and things, you've got to protect those interests or they won't invest the money.

ANDROVETT: *If you might assist me with this, I'd like to do a little trend tracking. It was only last September that we visited this topic of intellectual property. Going back through this transcript, it's implicit that times were still good; companies were very much focused on either reaping the benefit of their patent portfolio or getting around to identifying what assets had value and protecting them. Here we are now in March. The economic climate certainly is different. What impact, if any, have you seen with your clients or with corporate America generally in terms of their treatment of their intellectual property.*

KENNEDY: What I'm seeing and hearing is that a lot of companies are coming to the conclusion that now is the time to invest. And we've all heard about Intel's huge investment that they're making in their intellectual property and research and development that has been publically announced. If you're going to make an investment, buy low. And right now, at least this company, Intel, has decided that now's the time for them to buy low and make the investments in their intellectual property, build new plants, hire more engineers and file more patents so that they can protect their intellectual property. Intel has certainly got a very good track record of executing on their intellectual property objectives.

NELSON: We are seeing several trends. To pick up on Stephen's point, what we're seeing with respect to companies filing for patent applications is a change in focus away from sheer volume and more on quality. The companies are wanting

to make sure that their key investments, their key research, is protected. The focus is not so much on getting X number of patent applications out the door in a given month, but on the quality of the patent applications that are being filed in key strategic areas. Another thing we're seeing within companies is looking at the intellectual property, and particularly the patents, as a way to increase bottom line revenue. We're being retained to look through patent portfolios and organize these assets in a meaningful way to help companies/clients determine what particular assets they have. And, based on that analysis, clients are seeking advice on how to monetize that IP. For example, we are seeing IP being monetized by selling off blocks of patents and other IP that a company no longer uses and/or companies assigning IP rights to non-practicing entities who then go out and bring lawsuits. Lastly, in litigation, I'm not sure if this is a factor of the economy or just of the ever-rising cost of patent litigation, but we're certainly seeing a lot of cost pressures and creative billing pressures. Companies are focusing more than ever on the cost of litigation and making sure that it's being done for the right reasons.

ROSE: I agree with that. We're always trying to persuade clients to either do a pure contingency-fee case in a plaintiff's situation or at least a mixed-fee case where you have a chance to share in the win with your client. And for our big multinational clients, a lot of them are in the defense and aerospace industry, this downturn really is not very meaningful in terms of our business. A couple years ago, we started seeing these high-tech organizations caring more about protecting their intellectual property, where in the past they would allow their executives to go off and begin a startup, compete with them and perhaps use some of their technology gleaned while they were employed without fussing. Now they are more interested in pursuing litigation and protecting their intellectual property, which is a smart thing. But now they're asking about contingent fees and mixed fees, and I think for the smaller businesses, that is always the issue, and we'll see more people now trying to get the law firm to bear the risk and the expense rather than the company.

One of the advantages of having practiced a long time, I guess, in one business, for litigators it's always been true that a bad economy is good for our business. I mean, people in good times in a commercial setting will let a deal gone sour just go by the wayside because they're making lots of money. But when times get tough, whether it's monetizing your IP or suing on that cost overrun, they're really interested in doing that. So sadly, for the business folks, it's always a good time for us litigators to deal with a down economy.

PINKER: Following on that, from a trial lawyer's perspective, what I have seen more and more frequently are clients looking to monetize their intellectual property, find ways to proactively go into the marketplace and sometimes into the court system to either find licensing, to find ways to obviously attack competitors, but to really take that intellectual property and find a way to monetize it in the commercial marketplace. You can now see companies that have historically been reluctant to bring plaintiffs' cases and bring patent infringement cases that are reviewing their portfolios carefully and deciding what they want to do to get value out of them. The simple truth is that all the time, money, and effort that they've spent developing that portfolio isn't helping their bottom line if they don't do anything with the patents once they get them. I've been talking to some clients who are in bankruptcy that have started hiring people and proactively reviewing their portfolios to decide, as part of the bankruptcy process, what they're going to do to monetize the intellectual property portfolio. And following on some of the earlier comments, the second thing that we see more frequently is the increasing pressure on costs, the skyrocketing costs that these cases have, particularly when you have large companies and the discovery that goes with that. I've seen clients try to get creative in terms of managing that cost, whether through contract people or through shared-cost relationships with the lawyers. In fact, I've had a client try to move document reviews and production almost entirely in-house with their own expertise so that they're capable of doing good, comprehensive searches of their own systems and producing the

types of discovery that oftentimes today you would have to go to outside firms or some of the very large firms to be able to produce. People are really looking to get a handle on it. And, from my perspective, those come both from document productions and from prior art research, which can sometimes be extensive and very expensive.

ANDROVETT: *Judge, you've got a broad view, both as a federal magistrate, now as a mediator, and in times like this — and I acknowledge this may be an extraordinary time — parties who come in to mediate, is the pressure point such that they're more likely to settle or less likely? Or can you tell yet?*

FAULKNER: Just a couple of weeks ago, a Taiwanese company that had been reluctant to settle had apparently told their west coast attorneys that they want to shut down the litigation and try to settle the cases. And, of course, that was great news. I don't know if everyone feels that way, but they tell me that intellectual property litigation is expensive. I'm sure, not these gentlemen, but there are a lot of companies that are eager to settle their cases and clear their docket.

ANDROVETT: *Anybody else seeing that?*

ROSE: I've got a case with Judge Faulkner right now. I think he hopes that the litigants are more into settling than they've been in the past.

FAULKNER: And he's not that happy right now, is he.

ROSE: The question is: Are you flush or are you tight? If you're tight, you're trying to cut your costs, settle the case, and go home. If you're flush, you're flush. And without getting into economics, a lot of businesses are doing just fine. Those that are doing just fine will continue to look at this as the cost of doing business and there are opportunity costs and I think Eric is exactly right. People are trying to monetize their intellectual property and preserve their assets.

ANDROVETT: *How does a lawyer advise a company about monetizing its intellectual property? What does that look like?*

NELSON: The first thing I do is get with the client and figure out what is the end game. A lot of people throw the phrase "monetize IP" out there, but don't have any idea of the end goal. Recently, I received



ERIC PINKER,

board certified in civil trial advocacy by the National Board of Trial Advocacy and a partner with Lynn Tillotson Pinker & Cox, LLP, represents clients in a wide range of complex commercial and intellectual property disputes throughout the country. While in private practice, Pinker has recovered more than \$120 million for his clients and protected defendants from claims valued at more than \$200 million. He has handled numerous patent infringement and other intellectual property matters involving technology ranging from nutritional supplements to telecommunications devices. Most recently, he successfully tried a patent infringement case in which both patents were found to have been willfully infringed, leading to the entry of a final injunction and an award of attorneys' fees. In recognition of his accomplishments, he has been recognized in 2007 as one of Lawdragon's 500 Leading Lawyers in America; as one of The Dallas Business Journal's 2006 Top Corporate Defenders; and from 2003-2008 as a "Texas Super Lawyer" by Texas Monthly.



MARTIN E. ROSE,

a trial lawyer and founder of Rose•Walker, L.L.P. in Dallas, handles patent and trademark infringement and theft of trade secrets cases on behalf of a variety of businesses including those in the aerospace, energy and computer software sectors, as well as others. Currently, his IP docket includes work on behalf of McAfee, Raytheon and L-3. He has won multimillion dollar verdicts and settlements for his corporate clients and his verdicts twice have made the National Law Journal's list of Top 100 verdicts. In 2002, Texas Lawyer named Rose a "Go-To lawyer." He has been named to the list of "Texas Super Lawyers" each year for the past four years and last fall was chosen for Lawdragon's list of the 500 Leading Lawyers in America. In 2006, Rose was named to the inaugural class of top business defense lawyers by the Dallas Business Journal.

a call from an in-house IP attorney who was in a bit of a panic because the GC had come in and said, in essence, "we've got all this money on research and development and all these patents; we've never made any money on them so go make me some money." So the first thing we did was figure out what the end goal was (ie., to make money by selling the assets, by licensing, by knocking out competition so the client could raise prices on its product). Once we had defined the end game, then we worked on achieving it by putting the plan in place. The details of the plan, however, depend on the particular facts. If a company has valuable IP that it can license without a lawsuit, a so-called "carrot-type" licensing program, that's wonderful. But, unfortunately, third-parties are not usually that interested in paying money and thus a so-called "stick" licensing program involving litigation is often the model. It is sort of like the school yard—it is hard to be known as a tough kid unless you have been in at least one fight. It's very hard to get anybody interested in licensing intellectual property when the licensor has never enforced the intellectual property. It is also important to remember that many companies utilize multiple plans to achieve their end goals. Large companies, in particular, have recently begun to sell off patents in areas of technology that they have moved away from to third-party companies (a/k/a non-practicing entities) who then go out and enforce those patents. These sales may be strictly for money, or for a combination of money and a stake in the enforcement program. In that way, a company can participate in patent litigation without having to invest the money to fund it or have its name associated with the litigation in the popular press. These sorts of arrangements align entities that in the past may have been mortal enemies in new and unique ways.

ANDROVETT: *In terms of the juris prudence, there seems to be a lot of mixed signals out there, but the overarching meaning was that some of these patent rights and the ability to enforce them are being hemmed in. I'm thinking about the whole venue question. And, by the way, this week Congress has introduced yet the latest patent reform bill. I'm interested in all of your perspectives*

on where are we going in these areas. There's someone who may be working at a corporation or an in-house attorney who is trying to decide these issues of how aggressive they should be in pursuing new initiatives and new patents and how aggressive in defending the same. Talk to me a little bit about what you see out there.

PINKER: Well, patent litigation is certainly here to stay. It has been growing explosively over the past few years, in this part of the country in particular. There is a tremendous amount of money being invested into the underlying technology and into litigation about that technology, and I don't think that is going to change anytime soon. There certainly have been some court decisions and some attempts within the legislature to restrict the extent of these, to elevate the proof standards, to make it more difficult to obtain large verdicts or willfulness findings and to treble damages. And those efforts will continue as more and more attention is given to the very large verdicts that sometimes come out of these cases and to the amount of money that's being spent in these cases. There is both that frustration with the amount of money and the effort being given to these cases, as well as a growing desire to prosecute them on the part of the plaintiffs. So it's here to stay. I think efforts to reign in awards are here to stay as well. And, frankly, a lot of those efforts have been designed to make patent litigation more similar to litigation elsewhere. For example, the recent decision to create the recklessness standard for willful findings is very similar to what you would see in a typical tort case, where punitive damages awards will require the plaintiff to prove, at a minimum, gross negligence or, more likely, intentional or reckless conduct. So you're bringing the law into alignment here with where it's been elsewhere in tort law, but you're also creating a higher standard than previously existed, and I think you'll see continued efforts to do that, to reign in the perception that damages are out of control.

ROSE: I actually have an observation I'd like to ask the panel to comment on. I've got two completely disparate clients. One is a major software company and the other a major aerospace and defense contractor. Both — in completely separate

conversations over the last several years — expressed a frustration and an uncertainty about whether to pursue protection of their intellectual property through the patent process exclusively, or through trade secrets or to change their focus and emphasis. The software people particularly think that the problems with delay in getting a patent as well as the uncertainty of the process make it more desirable to go the trade secret route. But trade secrets, of course, have a lot of pitfalls and weaknesses of their own. And I hear the same conversation from the folks that are in labs doing high-tech work that is part of the program and military defense programs, and I'm wondering if others on the panel here have had those kinds of conversations with your clients and those kinds of debates about what's the better way of protecting our property.

KENNEDY: The recent case *KSR*, from the U.S. Supreme Court in 2007, involving a redefining of the obviousness standard is on point and leads right into what you're talking about. In that case, the U.S. Supreme Court said that the Federal Circuit's standard for reviewing the obviousness defenses and the invalidity case was incorrect. What the U.S. Supreme Court did not do was actually state a better standard and produce something that the Federal Circuit can use. So now the Federal Circuit has on its hands, and has had for about two years, a situation where the tests that they adopted, which actually clarified things and made it more understandable and you could advise your clients on something has now gone away and there really hasn't emerged the true standard on defining obviousness. We talked about new legislation at this seminar two years ago and we were all optimistic about it then but nothing happened. I'm not optimistic here today about new legislation. Congress has too many other things on their plate. So in advising clients, then, I would simply tell them there is this uncertainty out there; however, if you protect it as a trade secret and you fail to take every possible means to protect it and it leaks out, you're in trouble; you've lost it forever. And that was one of the issues in the *General Electric* case I tried a year ago. General Electric asserted the defense that my client

did not protect its intellectual property, its trade secrets, and that they were gone forever, and we managed to demonstrate, that my client had the state of art security and the trade secrets were preserved. But it was a huge question. My client was at risk of all of its trade secrets being held to be publicly available because they didn't properly protect them. There's a huge downside, risk, to advising your client to maintain something as a trade secret. So I would tend to recommend perhaps the more certain event that you can protect it in a patent, and although there's uncertainty in the courts, there's more case law that will help you than will harm you in protecting an invention.

ANDROVETT: *Eric, if I could circle back a little bit, I remember that recently you had a case that really turned on this obviousness standard. And I'll torture this, but in loosening the standard we sort of go from having a motivation, a specific suggestion and an act, to now someone recognizes what a benefit and they can't get a patent. What are you seeing in your case and in other ones that have flowed from KSR?*

PINKER: What I think you'll see is substantially less certainty in the process, and less certainty encourages people to litigate that issue. I'm not convinced yet that the change in the legal standard is going to have as dramatic an impact on obviousness decisions as perhaps a lot of commentators have said. But I think it will have a substantial change in the amount of time and the amount of effort given to litigating that issue because there is now that lack of a clear test, and there's the ability to look for and apply prior art from different places without that combination having been existent in the prior art before. That's going to encourage people to continue litigating that issue more than it has in the past. Motive to combine will continue to be important, obviously, and may continue to ultimately be dispositive, even under the new standard, but it remains to be seen how courts are dealing with it. I think it's a much more subjective process. As a result, a lot more time and effort is going to be spent litigating that issue with the results being far less certain right now.

NELSON: I want to jump in on that for a minute and also go back to one other point as well. What *KSR* doesn't say is



MIKE ANDROVETT

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exactly what the panelist said. It doesn't set forth the test for obviousness. And where a lot of uncertainty is coming in is not only at the trial court level, but at the federal circuit level. There's a couple of fairly recent federal circuit cases, *Leap-Frog* and *Muniauction, Inc. v. Thomson Corp.*, (which involved a computerized auction system), where the Federal Circuit basically views obviousness through the lens of "I'll-know-it-if-I-see-it," test, sort of like one Supreme Court justice's definition of pornography. *Muniauction* is particularly troubling because the Federal Circuit reversed a jury verdict of non-obviousness by in essence saying based on what we see in the record "we're looking at the invention and it's obvious to me. End of case." Prior to *KSR*, you did not see these types of Federal Circuit rulings. Thus, while I agree that *KSR*'s impact is likely limited, it does, in my opinion, affect at least business method patents, that is, patents directed to taking something old and putting it on a computer or the Internet. Looking at the bigger picture — I liken the changes in the law to a pendulum. The pendulum had swung fairly far in the patentee's favor in the early 2000s, which is the genesis for the push toward patent reform. In the last three or four years, however, the pendulum has swung back the other way. The Supreme Court has, I think, taken nine patent cases in the last few years and patentees are 0 for 9. Likewise, the Federal Circuit has issued several *en banc* decisions and patentees are 0 for whatever in those decisions. Patents last a long time, however, and trade secrets last even longer. And so what I've advise clients is to seek the best protection possible and recognize that the law may change, so protect key ideas and inventions in as many ways possible, because it's not going to be possible to anticipate where the law will go. I have not had the time to read the new patent reform bill, but because a lot of previously proposed changes to the patent laws have now been addressed by recent Supreme Court decisions, it will be interesting to see whether the newly proposed legislation takes those decisions into consideration.

ROSE: I want to speak about *KSR*, because it represents a really disturbing



trend to me that is not limited to intellectual property but is pervasive in our court system at every level. *KSR* was a summary judgment case, and the district court looked at mounds of evidence and opposing expert views and decided there was no triable issue of fact, even though they had experts who said that there were triable issues of fact on the question of obviousness. The circuit court of appeals looked at it and said, I think correctly, "These are triable issues of fact here." The fact-trier is a jury, ladies and gentlemen. We're in a society that gives us the right to trial by jury. So what's our Supreme Court do? They spend about 16 pages fact-finding, and they decide that the district court was right and it is obvious. And I really think it was said perfectly; it's in the eye of the beholder. Well, if it's in the eye of the beholder, that's a fact question, not a question of law. And the Supreme Court says, "Oh, of course, this was not a triable issue of fact." The district court of appeals thought this was a question for summary judgment. I think all of us, as business people and lawyers, ought to be concerned that our courts are becoming fact-finders and trying to supplant the role of the jury in our legal system. And it's a problem. And *KSR* is a good example, but certainly not the only example.

FAULKNER: I had a case where there were three defendants. Two of them settled out, and then *KSR* came out before the third one settled. And they said, "That's us." And they went to trial, and kind of unbelievably challenged invalidity

and did not contest infringement. And they won on invalidity right after the *KSR* case came out. Certainly it affected the law in the area.

ANDROVETT: Let's talk about another area of uncertainty. And this is the Eastern District. The Volkswagen case would purport to limit plaintiff access to that venue. The Eastern District, clearly a hot district, for a while perceived as very pro-plaintiff. Many legal scholars said, despite some of those headline-grabbing results in the Eastern District, it actually was very defense-friendly because you could move those cases in and out and defendants didn't get bled dry. As recently as a couple of weeks ago, reading one of Judge Ward's opinions, he's reduced to calculating the mileage from the airport in Tyler to airports in other places around the world to defend that district's hold on a case. Where is the litigation going in the Eastern District, certainly on this notion of venue, but then any other insights that you might have on this whole conundrum about is it pro-plaintiff, pro-defense?

KENNEDY: I would have to say that the Volkswagen case, like [the Dallas Cowboys' player] T.O., is overrated. If you read that case carefully, it's absolutely clear that this specific case had no business being in the Eastern District of Texas. It was a personal injury case. The automobile was owned by people in Dallas. It was bought from a car dealership in Dallas. The accident occurred in Dallas. All the witnesses were in Dallas. The driver of the other vehicle who caused the injury and death was a resident of Dallas. The police officers and the medical examiners were all from Dallas. There was no tie to the Eastern District of Texas except for the plaintiff's lawyer, and that's where they chose to go. That was the only tie. So I think people are making a little bit too much out of this case. It doesn't change the law. This has always been the law. You can transfer a case for the convenience of the parties under certain circumstances. The standard is left unchanged. Thus, if you've got a patent client and you can demonstrate that your product is being sold in the Eastern District of Texas, and, in fact, if you can get somebody who lives in the Eastern District of Texas to go purchase one, that will be enough for jurisdiction. If you can demonstrate a witness and that a sale occurred in the Eastern District, you can, in that

case, overcome the obstacles of *Volkswagen*. So I'll let other panel members speak to this. Maybe they feel differently, but I don't think it changes the basic standard of the law. There's nothing special about the case except that it involved the Eastern District of Texas.

FAULKNER: I want to address what Steve said about T.O. [Laughter]. I had a case with Jerry Jones. It was an oil and gas case and it was soon after T.O. had come to Texas. And he got a call from T.O. during the mediation — true story — and he said T.O. was hurt and Coach Parcells wouldn't let him leave the field, and he wanted Jerry to call Parcells. And Jerry said, "Oh, I'm not going to call Parcells." Anyway, he had kind of learned his lesson earlier, I guess. But it added to our mediation that day.

ANDROVETT: *Do you have any insights on this Eastern District question based on your previous tenure, knowing the judges there and...*

FAULKNER: You know, I do. I feel like I understand why cases are filed in the Eastern District, and it is because the judges have an attitude that the patent cases or intellectual property cases should be treated with respect and they've adopted rules that will move the cases along. And as most of you know, to get a continuance is a pretty big event in the Eastern District. And they tend to their business. And that's why people file. I had a case we mediated in Chicago. The attorneys were from Chicago and L.A., and the case was pending in Pittsburgh, and it had been pending for four years and nothing was happening. There was no *Markman* hearing, there was not a schedule, and they just could not find relief. And what happens a lot of times — and I think the federal court has a lot of wonderful judges — is attorneys will file a case in a district and that case ends up with a judge that is not real familiar with patent litigation and they don't have law clerks that are familiar with patent litigation and then it tends to get put back on the back burner and you just cannot get any decisions, and they wilt. There are a lot of districts that have a lot of judges that are very involved. But the Eastern District judges will move the cases and that's why people come there.

ANDROVETT: *Does anyone disagree with*

Steve's hypothesis that really this is much ado about nothing.

ROSE: I think Steve's exactly right. If you read the *Volkswagen* case, it's sort of embarrassing, frankly, that it went as far as it did, particularly because I do agree it's pretty easy to keep venue in the Eastern District, and *Volkswagen* is much ado over nothing. I will say, it's sort of funny, if you're a Texas lawyer and you have a plaintiff and you're trying to figure out whether you should stretch your venue a little bit to go where you want to go, you might figure out who your defense counsel is likely to be. I've actually had a case where a law firm, which I will not name, whether one coast or the other, actually did not fight venue, and if I'd known that, I would have been a little more aggressive on where I filed, but I still did file in the Eastern District. And I subsequently learned that that law firm, which is a very big law firm, believed it was a badge of honor to be able to tell people that they had an IP docket in the Eastern District of

Texas. And you might question whether your client's interests were best served or not, but it was actually true. I thought for sure we were going to see a venue fight no matter what. My facts were not as bad as *Volkswagen*, but there might have been more natural venues for me to file in. So that's an interesting little sideline to this current Eastern District fad.

PINKER: *Volkswagen* was one of those cases where the pendulum swung so far to the extreme, it needed to be corrected. But I think the effect that's we're going to see is less in the legal standard that is applied, which as both of them have said really hasn't changed in any material way, but the psychology is very different now. Defendants have some hope when they file venue challenges, and that encourages them. And the other thing is I think judges think about these venue issues more carefully than perhaps they might have earlier. I had a case not too long ago, it's still pending, that was transferred from the Eastern District to the Northern



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District shortly after *Volkswagen* came out. It was factually dissimilar in every conceivable way. And there were good grounds to support the ultimate decision, but part of that decision was driven by the fact that *Volkswagen* had just come out. That affected everyone's approach and everyone's thinking. So I agree that the legal standard really hasn't changed in any significant way. I think the psychology has changed and people are looking at the motions more closely with a little bit more hope than they had before, and the judges are a little bit more cognizant of the fact that there is a lot of review and a lot of scrutiny. And in your example earlier about a federal judge sitting around and calculating mileage, that's a great example of what they have to think about now to defend their jurisdiction and their ability to move forward.

NELSON: I guess I would disagree a little bit. I think the legal standard, or perhaps more accurately the way that the legal standard is being applied, has changed a little bit with *TS Tech*, which is a Federal Circuit case, and with *Volkswagen*. What the Eastern District of judges focused on prior to *Volkswagen* was that the plaintiff's choice of forum was a factor in the test and it was a factor that was given very significant weight. And what *Volkswagen* says is it's not by itself a factor. The plaintiff's choice of forum is entitled to weight, but you apply all the other regular things, and if the balance of those factors overcome that weight, it should be transferred. And that is a different focus, and it's produced different results. There has been maybe six or seven — I'm in the process of writing a paper on this — cases transferred out of the Eastern District since *Volkswagen* and *TS Tech*, and I'd agree with what Eric said in that those cases were very much where the pendulum had swung far—there was no Texas connection to any of the plaintiffs or defendants. Most recently, however, a case came out of Oklahoma where the *TS Tech/Volkswagen* analysis was done and resulted in a case where the plaintiff was an Oklahoma corporation was transferred to the west coast. In *Media Queue*, the judge found that plaintiff's incorporation in Oklahoma and its purchase of defendants' products in Oklahoma were

all done to manufacture venue in Oklahoma. Important to the decision was that plaintiff had incorporated in Oklahoma three weeks before the lawsuit was filed. There are a lot of cases pending in the Eastern District of Texas where there are companies incorporated in the Eastern District of Texas that arguably do business, and arguably don't do business, in that district. I've not yet seen cases transferred from the Eastern District of Texas where the plaintiff is a Texas corporation, but if the *Media Queue* rationale is picked up in the Eastern District, then I think the *Volkswagen/TS Tech* decision will really have an effect on the number of filings. I agree with everything that Judge Faulkner said the Eastern District is a fabulous district and I love trying cases out there. The judges are some of the brightest judges in the country and they give the cases respect and they get them done. One of the things that has happened is the district is a victim of its own success in that the dockets have gotten so crowded that the time of trial has expanded and it's up to three years or more now in Judge Ward's court. So plaintiffs are looking elsewhere to file, not because they're concerned about the district, but because they're trying to get to trial faster.

KENNEDY: I just wanted to clarify or perhaps sharpen a point that you made. In Footnote 2 of the case, the court distinguished the difference between the plaintiff's choice of forum and the plaintiff's choice of venue. And the court admitted the lawyers got it wrong because they addressed the issue of a plaintiff's choice of forum. That is not the standard in a motion to transfer venue. That is a different standard. The court goes on to describe in detail the difference between a plaintiff's choice in forum and a plaintiff's choice in venue and then defines what the plaintiff's choice of venue standard should be. That's an important distinction to make. Choice of forum and choice of venue are not the same, per the

Fifth Circuit. And I stand by my position that it does not change the plaintiff's choice of venue or the plaintiff's choice of forum standards. But you need to know the difference, and this case explains that.

NELSON: I agree that's what the case said. What the judges had done prior to *Volkswagen/TS Tech* was treated the plaintiff's choice of forum or the plaintiff's choice of venue, whatever you want to call it, and they are different things, but they had treated the plaintiff's choice



as a separate factor in the analysis and given that choice a lot of weight. In fact, in many of the Eastern District of Texas cases where transfer was denied, which it almost always was, the plaintiff's choice of forum and/or venue, however the judge chose to express it, was a factor and often the overriding factor in denying transfer. I've filed and defended against a multitude of these motions and, in my opinion, the standard, or perhaps more accurately, the court's application of the standard, has changed.

FAULKNER: One of the key factors, though, that's yet to be decided, I think, is a lot of the cases now have multiple defendants. I think most of my cases have multiple defendants now. And what do you do when you have a plaintiff in California, a defendant in New York, and someone else in Chicago or — well, then is there a better forum than the Eastern District? And I don't know what



the answer will be, but just because the Eastern District might not be central to it, are there other forums that are more fair to the parties — we don't know the answer to that yet.

NELSON: Let me pick up on that real quick, because there was a great decision out by Judge Everingham a couple of weeks ago involving that scenario. I cannot remember exactly how he phrased his analysis, but his decision was basically that in such cases Texas is as good



as anywhere and better than a transfer to the east or west coast: transfer denied.

AUDIENCE MEMBER: *I'm Ken Glaser from Gardere. I've found an interesting trend that's increasing more and more. I'll be interested in your response. The fights apparently are now moving into the patent office through a re-examination proceeding. The defendant, armed with the knowledge that in an interparty re-examination they are likely to prevail. First of all, when it's contested they're likely to prevail nearly 60 percent of the time are starting to increase the filings of the re-examination coupled with a motion to stay the litigation. And I think that now, particularly with the legislation that's before congress to expand the basis upon which re-examinations can be filed, it's my opinion that the fights are going to be moved more and more to the patent office and that you'd have a better chance of invalidating a patent by patent examiners than you would by a jury. I was wondering what your thought about that is.*

NELSON: I think that's certainly going to be the trend in some jurisdictions. It depends on where your case is filed. Northern California, for example, stays patent cases fairly routinely based on pending re-exams. Eastern District of Texas, on the other hand, doesn't. It

also depends on how far along the case is procedurally. A stay is much more likely if the re-exam is filed very early on before significant discovery and other things have happened, versus if it's done near the end and judges are likely looking at it as gamesmanship, just trying to delay the trial. The other place where this could come into effect is in the International Trade Commission ("the ITC"). After *E-bay* injunctions are no longer the norm, and more and more cases are being filed in the ITC. There, the stay pending re-exam argument has been fought and lost. The ITC did not stay the case. And so that's another option. Other courts also consider that type of re-examination procedure. For anybody who isn't aware of it, *inter partes* re-examination is a process at the patent office where both sides of the process participate in the process, as opposed to *ex parte* re-exam where the process is started and then it's really the patent-holder and the patent office going back and forth. There is no adversarial nature to *ex parte* re-examination. Because of the lack of adversarial nature, *ex parte* re-examination does not achieve the same results as *inter partes* re-examination. In the *ex parte* case the patent often survives and comes out of

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re-examination a lot stronger than when it went in. *Inter partes* re-examinations result in the claims either narrowed or canceled more than 60% of the time, but if the patent survives it still comes out stronger. Bottom line, re-examination is a good tool that clients and lawyers, particularly defense lawyers, should have in their arsenal.

PINKER: I think both of these are sort of related. On the one hand, you have the ITC as a way for the plaintiff to try to accelerate the process and create more pressure on the defendant. On the other hand, you have the re-exam process as the defendant's way to try to buy more time, and if they're successful, to obtain a stay that may lengthen the case as much as two years or more. The most recent statistics I've seen show that the average life of a re-exam is somewhere in the order of 24 months now. And you have literally an explosion in terms of the number of re-exam requests that are being submitted. I think it was 680 to 700 last year alone, and I suspect the number will continue to go up, particularly with some of the new standards that are being applied. For this district — and I've done a fair bit of work on this because it's a ripe issue right now in a current case that I'm handling — it seems to be an open question as to what will happen. Of the nine contested stay motions that have been filed in the Northern District of Texas, five were denied, four were granted. It's very much of an open issue as to how the judges here are going to evaluate that issue and I think they're going to look at the traditional factors in terms of when was it filed, was there an awareness that there was a pending litigation, is it designed to slow the process down, is it designed by the defendant to essentially deprive or delay the plaintiff's right to a jury trial? Those are questions for which there really isn't a clear answer, at least in this district yet, because there is literally almost an even split. As I said, five of the nine decisions denied the stay, four of them granted, and then there are a few others where the motion was joint, which of course were granted.

KENNEDY: I had a unique solution. I got a temporary restraining order and a preliminary injunction against the



United States patent office from proceeding with a re-examination proceeding. It was a Section 256 case where my client was the sole true inventor of Lasik or PRK. Unfortunately, his partner handled the business aspects of securing the patents to the invention and identified himself, and not my client as the inventor. So in response to the Section 256 case to correct inventorship, our adversary put it back into re-exam to increase the number of claims and define them so narrowly that my client could never prove he conceived and reduced to practice each and every item in each and every claim, and therefore he could not be the sole inventor but just a joint inventor. So what they were essentially doing was redefining the patent, or metaphorically mowing down parts of Blackacre when my client is the one saying, "But I own Blackacre; you can't mow it down, any portion of it, until we decide who owns it." So we went to the United States District Court in DC and we were successful in obtaining an injunction against the patent office from proceeding with the reexamination process until a court decided who invented it. And I think that was the right result. And I'm seeing this trend, as Mr. Glaser pointed out, more and more where law firms seem to automatically file or trigger these re-exam proceedings as a matter of course as soon as their client gets sued. But certainly

there are some creative things that you can do, perhaps, depending on the facts, to adjust to that situation.

ANDROVETT: *Judge, a couple of minutes left. I'm going to ask you to be as objective as you possibly can be. We've made a little joke at the very beginning about it's never about the money. But we heard a lot of conversation about going to the courthouse and how expensive this kind of litigation can be. Can you talk a little bit about whether mediating these cases or arbitrating these cases can be more efficient, less expensive for someone sitting in the audience today or reading this on Texas Lawyer later on trying to decide which is the best way to go?*

FAULKNER: Well, of course, most of the cases that are resolved are resolved by settlement, most of the time by mediation. Sometimes the parties will deal with one another directly, but most of the cases don't get to trial. There are not enough trial days in the world to try all the patent cases that need to be tried. I would urge some communication between the parties prior to a mediation. People get mad when someone sues them and they don't talk to one another except in the battles at the courthouse. I had a case this week where we all got together and they said, "The only thing important to us is the injunction and we want an agreed injunction, and we'll argue about the money, but we will not debate the issue on the injunction." That was the plaintiff's position. And the

defendants said, “Oh, we’d never do that.” And we were through at ten o’clock. I was kind of embarrassed. People came from a long way. And I just wondered, “Well, why didn’t someone communicate that before mediation?” Also, be careful when you talk to the other side about money, because if you ever mention a figure that is maybe lower than your client would accept, you’re just ruined, because they throw it in your face, “Well, someone else told me that this case might settle for this amount of money,” and it’s just a burden to get over. Plaintiffs are a unique lot and I love them, and apparently the rule is always ask for 150 times more than you really want. At mediation, the hardest part of the day is that first hour or two to try to get both parties in a range to settle the litigation. When you start excessively high, the defendants are reluctant to try to walk up that ladder and see if there’s a range that you can talk in, and it makes for a short day. Last week I got a \$150 million demand, and that was the end of the day. The defendant didn’t want to talk anymore. So, there should be some kind of concept of what you’re going to do when you come to mediation. If you really want to settle the case, and sometimes people do and sometimes they don’t, but it’s essential that the right people are there. And if it’s a lot of money involved, boy, you desperately need a business person there or you’re just not going to get it done, because if numbers have been mentioned within the party, then the person kind of working for the boss is not going to be the one to lower that number or raise that number. They just won’t do it. In the *Alcatel-Lucent* litigation, we went for a year-and-a-half until I insisted on a high-up business person from both groups, and finally got together and we resolved the case. And that’s happened in several cases that I’ve had.

ANDROVETT: *Marty, the judge is talking about mediation, but I remember your law firm partner, Hal Walker, railing against arbitration and how — and this is a crude paraphrase — basically in his view it was no more efficient than going to trial and in some cases could be more expensive, and when it was all said and done, you were almost behind square one.*

ROSE: Judge Whittington is here today,

and Judge Whittington and I are arbitrators in a case together, so I’m going to be in deep trouble. But, yeah, Hal and I do generally hate commercial arbitration because — and with all respect to JAMS who are great guys and we use y’all a lot — there aren’t any rules and there’s no case law and if someone wants to prevaricate and stretch things out and do a lot of discovery, it’s worse when you haven’t got a judge who can slap them and you haven’t got a rule of civil procedure that you

can rely on to get where you want to go. But I really want to go back to what Judge Faulkner said, and I’m grateful he didn’t use me as an example because it’s not a pretty story, but I would suggest that if we had some more uniform case law on what the measure of damages ought to be in both the patent arena and the trade secret arena we might be better off. I have a case with the same set of facts and two great renowned experts in damages in the field, and one guy’s got a damage model that’s \$658 million and the defense guy has got a damage model of \$2,500,000, and they’ve both got case law to support it and we’re not going to settle the case because of it. And that’s worse than a wrongful death case. I mean, how hard can this be, guys? Clearly, they’re the same set of facts, and learned economists; you ought to be maybe 10 percent apart or 15 percent apart, but not that kind of a gulf. So I think a big problem in settling cases in this field today is a lack of any common agreed theory to measure damages. I do think, for example, we are now seeing, finally, after decades, future damage awards being considered in a patent case instead of the injunction route. That’s a tremendous development in the right direction but still pretty controversial. Judge Clark did it in a case I tried down in Beaumont last year, and I think the plaintiff thought it wasn’t a very good result, but it’s the right thing to do. If you’ve got a jury and they’re deciding damages in the past, why don’t



you have the jury decide damages in the future, too? And if they can do it in a dental malpractice case, they can do it in an intellectual property case.

KENNEDY: I think arbitration can be fixed. It is a good thing in general. But the problem is, when the corporate lawyers write up the arbitration agreement, it isn’t specific enough. And I think if they wrote those agreements so that they specifically had terms providing tight deadlines, for example, completing arbitration within 60 days of the time of the selection of the arbitrators, had a time limit, in other words, and then specified that you will follow certain Rules of Civil Procedure and then specified the amount of discovery that will be permitted, if you define all of those terms in the arbitration agreement, you can avoid some of the pitfalls that have caused efficiency issues for arbitration.

FAULKNER: Absolutely. ❖

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