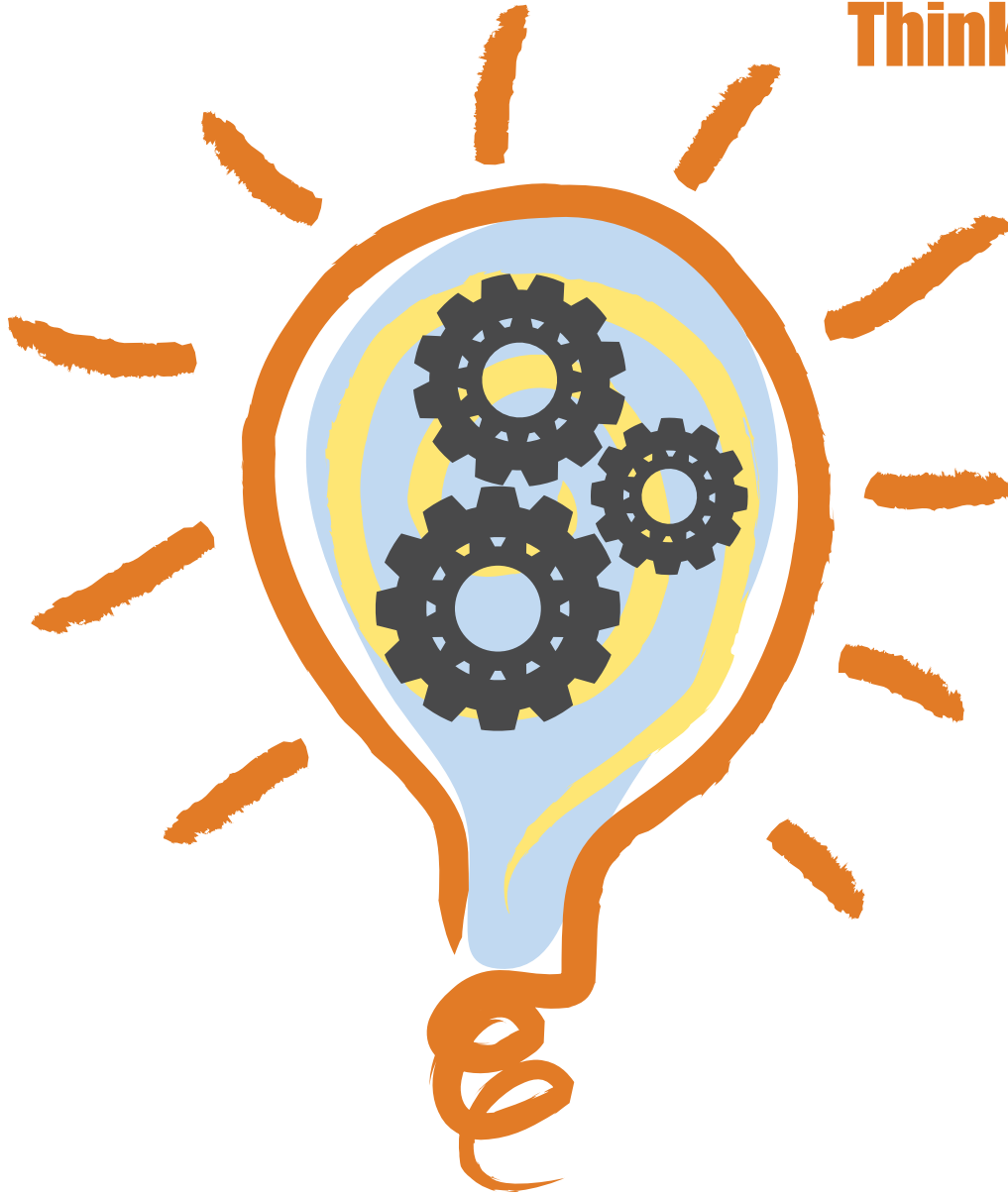


Intellectual Property Law: Thinking Ahead



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With all the advances in technology, medical science, and the ever-growing Internet, it begs the question: What exactly is intellectual property, and what new legal issues arise when your company wants to protect its ideas? To help answer some of these questions, Texas Lawyer's business department brought together leading experts in this field. The following discussion has been edited for length and style.

MIKE ANDROVETT, moderator, attorney, owner of Androvett Legal Media & Marketing, Dallas: *I've asked the panel members to introduce themselves and not only tell you who they are but also describe the nature of their work. So Bobby, if I can start with you, would you please introduce yourself to everyone here.*

ROBERT M. BOWICK, JR., director of the patent department, Matthews, Lawson & Bowick, P.L.L.C., Houston: I've been practicing law for about nine years here in Houston. I've been there basically my whole career. I've been doing mostly patent infringement litigation, but I've dabbled in trade secret, copyright, trademark, and other torts. I've done some prosecution, but very limited. Like I said, I focus mostly on patent infringement litigation, both on the plaintiff and defense side; and I've had several trials in the last couple years.

JOHN W. RALEY, shareholder, Cooper & Scully, P.C., Houston: I've been practicing law in Houston for 25 years. I spent 17 years at Fulbright and Jaworski, and was a litigation partner there. While I was there, I was fortunate enough to have the opportunity

to try cases in a wide variety of areas: products liability, industrial accidents, workers' compensation, medical malpractice, and a lot of general commercial litigation. The last few years I was at Fulbright and Jaworski, I focused more and more on intellectual property litigation; patent infringement in particular. I left my partnership there eight years ago and opened the Houston office of Cooper & Scully, which is a litigation firm. There, I have focused primarily on general commercial litigation and representation of professionals. I have done a lot of patent infringement litigation, particularly in the last few years, and I have teamed up with my friend Bobby Bowick in several cases. Even though we're in different firms, we have partnered together in working up these cases.

CHRISTOPHER M. McDOWELL, partner, Rose • Walker, L.L.P., Dallas: Rose Walker is a trial boutique in Dallas. We try lawsuits — that's what we do. About 65 percent of the lawsuits are in the intellectual property realm. I've have worked on misappropriation cases since I started practice. In fact, the very first case that I was ever assigned to as a brand new lawyer was a misappropriation of trade secrets case. I've also worked in the hospital industry working on cases from slip and falls to covenants not to compete and assisting companies in being proactive in defending their trade secrets.

ANDROVETT: *Panelists, let's start with a very open-ended question. And that is: In 2009, with all the advances in medical science, in developments on the Internet, the great leaps forward in technology and ideas, can we all agree as to what intellectual property is?*

BOWICK: I doubt it, Mike. I mean, we're lawyers so we're going to disagree.

In a general sense, I think intellectual property is something that's going to give somebody a competitive advantage; otherwise, what's the point. I'm sure you can patent or get a trade secret on a square wheel, but nobody wants to buy a square wheel. So to me, intellectual property is something that's going to give somebody an advantage. Let's say Coca-Cola guards its secret for making Coca-Cola as a trade secret. The goodwill associated with a trademark, a company name, and its products are associated with that name and have quality products or patents and copyrights to protect the copyright protecting the words or the actual work and the patents protecting the actual invention. So I think it's anything that would give a competitor an advantage over their competition. So in a general sense, you wouldn't want to really have intellectual property unless it gave you an advantage because the consumer or the market is not going to want it.

RALEY: I think the name is funny. It's almost a little bit pompous, very "intellectual." We're all so intellectual, and we're the type of lawyers that deal with intellectual things. Really what we're talking about is a way to protect people's ideas; and it is essential to do that for our country to work, for our economy to work, for people to have incentives to continue to work in the garage and develop new ideas — for inventions, patents — or ways to express those ideas — copyright law. That's what we're really talking about. I can't think of a better name for it than the one we have, but the name itself is somewhat stilted.

MCDOWELL: I think it's ever evolving. I mean, we can try to say from a practical standpoint what should be included within intellectual property.

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Robert M. Bowick, Jr. is the Director of the Patent Department of Matthews, Lawson & Bowick, P.L.L.C. His areas of practice include complex intellectual property and business tort litigation and counseling. He is active in all aspects of the drafting and prosecution of applications for both foreign and domestic patents, novelty opinions, patentability searches and opinions, patent validity and infringement opinions, reissue and reexamination proceedings, and licensing agreements. Bowick has successfully tried patent litigation cases before judges, juries, appeal boards and patent prosecutioners. He has received excellent verdicts for his clients, and has actively pursued defending his clients' patent rights. In the last twenty-four months Bowick has secured verdicts totaling over \$90 million. He has also appeared eight times before the U.S. Court of Appeals for the Federal Circuit.

In reality, it can be virtually anything. I think it has and will evolve as the technology changes. When I first started practicing, the Internet was virtually nonexistent. We received faxes delivered to our office every day. Letters were dictated and typed out in a much different way than they are today. Most of my communication on a day-to-day basis with opposing counsel today is by e-mail. It's all to say that the technology a company might have been interested in and vigorously protected may end up being widely known, disclosed, used, or antiquated as new technology develops. At least with respect to my practice, we have seen almost constant moves to new technology. I would guess that in 15 years, the technology will be completely different again. So, I don't think one could say accurately that intellectual property is items one through five and nothing else. I think there's always room for creativity in identifying intellectual property, and that becomes a challenge for a creative company. How does the company identify that property which has a competitive advantage? To protect it, they have to identify it. To identify it, they have to be forward looking to the next technology and for the next idea.

ANDROVETT: *As we've conducted the Texas Lawyer roundtables, the background has been the economy and how economic conditions have imposed on legal strategies and tactics. You hear the stories everyday about how companies may be cutting employees or trimming expenses, but they are also beefing up efforts to exploit their intellectual property. I take note of the fact that all of you have a basis in the courtroom, and so I know that there are other lawyers who make it a business to advise firms about their patent portfolios; and none of you are claiming you're those guys. But maybe looking through the rearview mirror, can you offer any insights or advice to a company? The paradigm in my mind is the GC who has just been told by the CEO, "We're not getting enough out of our intellectual property. By golly, let's increase revenues from our IP 20 percent." How does the company get out of the starting box in that regard? What does that scrutiny look like?*

RALEY: It has to be determined by each company on a case-by-case basis. We have these patents. The question is: Do we enforce them? Do we spend the money to go to court to enforce them, knowing that it could cost a lot, but also knowing that if we don't, the patents are virtually meaningless? Because if you get the reputation that you're a company that won't protect your intellectual property, then you'll just be ripped off out there in the marketplace. That's the cost-benefit analysis that each company has to make. The last time we had a recession, in the mid 1980s, litigation increased; and there were a lot of theories for that. One was: when people don't have enough money to pay their bills they start suing each other. I don't know whether or not that's true, but there did seem to be increased litigation at that time. It remains to be seen whether the same effect will occur now or not. As has been mentioned, in this brave new world of technology that even the most imaginative among us could not have foreseen 20 years ago, it's hard to tell what people are going to do. But each company is going to have to decide: Should we enforce our patents; and if so, which ones? And they have to count the cost before they do that.

MCDOWELL: It is expensive, and I think companies have to carefully weigh the cost of enforcing a patent or protecting a trade secret. But, from my perspective, choosing not to defend your trade secrets and patents, has an entirely different cost. If a company's intellectual property is not protected, for example a trade secret, it can be lost. With the loss of the trade secret, the company also loses any competitive advantage it might have from using the trade secret. So, if a company is going to compete in a hyper-technical environment, I think it has to be willing to protect its trade secrets or potentially lose its competitive advantage with respect to the technology that it is creating. I think the challenge for us is to be able to sit down with a client and explain what it's going to cost, what the risks are, and the potential outcomes. Then, the client can make an informed

decision as to whether protecting its intellectual property justifies the cost.

ANDROVETT: *Bobby, maybe you can help me with this because this question arises out of a comment you made when we were talking about what is intellectual property. You immediately seized on the notion of it has to be marketable. I wonder sometimes if corporations are now getting bad advice. They read Business Week, they read The Wall Street Journal, they read some story about a company that's really enhanced revenues by exploiting their IP; and they go out and they hit up a bunch of new patent applications and they hire their legal teams to enforce patents. Is there a baseline analysis that needs to be done: Will anyone care about this patent? Is this anything that anybody will use?*

BOWICK: Sure. A lot of start-ups. We saw it with the dot-coms back in the late 90s. Venture capital firms are impressed by IP portfolios. Nobody ever reads the patents. Only an engineer can understand it, but it sounds good on paper. To get back to your original question, I think from a general counsel's perspective you have an engineering department that invents patents, but then they don't see the sales and marketing of it, which that's where you see the competitive advantage. Your guys out there trying to sell a product knows what's competitive, what advantages you have; and maybe more feedback in that area would sort of give a better assessment to a general counsel rather than the engineers that don't necessarily see the competing products and what the customer sees, the advantages of patented features, trade secret features and so on.

RALEY: I suppose there is an obvious question to ask when someone says, "I have 20 patents." The follow up should be: How many of those are actually being used? How many of those products are being made and sold? How many of them are out in the marketplace?

ANDROVETT: *Chris, you used the phrase "hyper-technical industries." The shelf life is probably short. Are more and more industries, because technology sort of becomes ubiquitous, categorized as*

hyper-technical fields?

MCDOWELL: No, I don't think so. Intellectual property, especially a trade secret, has a theoretical perpetual existence as long as it's maintained a secret. It doesn't have to be necessarily technically driven. I think what we all tend to focus on or are technical solutions. But a trade secret can be a unique way that a company does something; and as long as it's maintained a secret, it stays secret forever. So a company can be using intellectual property that's existed for a very long time. And I think that a company has to be diligent about maintaining that secrecy, about using the tools that are available to it to keep it protected. I don't think it's limited to technical aspects, it includes much more than that.

ANDROVETT: *So if you're at a company or if you're a lawyer advising a company, you get your arms around what this IP is, be it in a form of a patent or maybe it should be patented. But then what? Also talk to the sales marketing people, try to understand the commercial viability, maybe talk to outside experts who might say this is a great idea now, but in three years the technology will be obsolete. What other gates do we speed through?*

RALEY: You have to analyze who your competition is out there, and what their products are that compete with your product. If you have a patent which you feel is being infringed, you'll have to analyze how much it will cost to enforce it and whether or not you can do it. And one thing that we've all seen is the smaller company selling their rights to a larger company, who is able to take the fight to the large company that is infringing on the patent. So that's an approach that's possible as well.

ANDROVETT: *John, in talking about the inventor in the garage. He conjured up, at least in my mind, a very pure image of the inventor who has this product, and as we all know, those cases get tried and sometimes characterized as a David versus Goliath. But now we've got this third party. The non-performing entities who often get these patents, and they're the ones enforcing them. I think*



Christopher M. McDowell, a partner with Rose•Walker, L.L.P. in Dallas, brings a trial lawyer's perspective to commercial litigation, business tort, and intellectual property cases. In his practice, he represents corporations and individuals as plaintiffs and defendants in cases involving claims of trade secret misappropriation, covenants not to compete, business and partnership disputes, and other issues. While intellectual property cases are unique, approaching them from a trial perspective and taking immediate action provides the context for a successful strategy. McDowell currently represents a large defense contractor in a misappropriation of trade secrets and anti-trust case. Recently, he successfully defended a water purification company and its president against claims involving breach of a shareholder agreement, covenant not to compete and misappropriation of trade secrets used in the manufacture of mobile, self-sustained water purification systems. McDowell has also represented brokerage firms in the protection of trade secret and confidential information upon the departure of employees.



John W. Raley is a shareholder with the firm Cooper & Scully, P.C. with 25 years of courtroom experience. He has tried cases in a variety of areas, including intellectual property, legal malpractice, products liability, hospital and physician malpractice, pharmaceutical claims, chemical exposure, industrial accidents, railroad accidents, securities and common law fraud, wrongful termination, and malicious prosecution. He has over 30 successful first chair verdicts, and has handled over 150 mediations as lead counsel. He is also a certified NFL Players Association Contract Representative. Raley is board certified in Personal Injury Trial Law by the Texas Board of Legal Specialization, is AV rated by Martindale-Hubbell, and is a member of the American Board of Trial Advocates. Raley has been named in *Texas Monthly's* "Texas Super Lawyers" magazine every year since its inception in 2003. During that time, he has also been listed in "Who's Who in American Law" and in "Outstanding Lawyers of America." He was named in *Law & Politics* magazine's "Super Lawyers" for Civil Litigation and recognized by *H Texas Magazine* as one of "Houston's Top Lawyers" in 2008 and 2009. Raley's clients range from *Fortune* 500 companies to individuals. He is a frequent lecturer on civil litigation.

at breakfast somebody used the phrase patent trolls. Bobby, I think you said you didn't really like that phrase. Talk a little bit about what impact that's having on businesses and the law.

BOWICK: They say beauty is in the eyes of the beholder. I mean, what is a patent troll? There is no standard like lots of things. A non-practicing entity. I don't think anybody would say Thomas Edison was a patent troll, even though he made one light bulb and then he licensed it and made a fortune. I don't think anybody would criticize that with that innovation. Lots of garage inventors out there don't have a means to hardly pay for the patent application process which costs thousands of thousands of dollars. They have to partner with venture capital or sell it to competition to afford the patent litigation, which we all know is very expensive. So, labeling these people is a good defense tactic, especially in front of a jury or just in a meeting, say, we're being attacked by patent trolls. I look at an example of the guy — I'm an ex-jock. You probably watch football. You see the little yellow line that marks the first down that they sort of electronically print on the screen. Well, a guy invented that and patented it. He couldn't go out there and enforce Fox or ABC to use that or license it. They liked the idea to use it. Probably had to sue and take the license that way. He didn't have a network to implement his invention, so he had to use whatever means possible. I think it's all based on the factual circumstances. But just to label people as trolls or non-practicing entities, a lot of people don't have the ability to practice the inventions.

MCDOWELL: Well, I think where I see something that's just a little bit different is where a person or entity buys a patent, but has no intention of practicing or using the patent. They're buying the patent for the sole purpose of going out and trying to foreclose others from using that patent or gain a recovery from the patent through litigation. To me, that's a little bit different from what Bobby is talking about, but something that has existed for some time with companies, in effect, buying lawsuits.

From a trial perspective, I think that changes everything. When you're going to present something to the jury, having the inventor sitting on the stand and saying, "This is my invention, I invented it, I'm practicing it" is best. Certainly another entity that comes along and says, "I bought this patent from this inventor and we're practicing it and we're using it actively" is better than a company that has no intention of practicing the patent, no intention of using it, and is in the courtroom saying that while they are not going to use it, they want to foreclose another from using it.

ANDROVETT: *Chris, if someone were to criticize the paradigm as you've just described it, would it be because they're gaining the system? It's not a pure enforcement? Because some might say everything you say is true, Chris, but so what?*

MCDOWELL: This is an area of evolution. It's true, you've got intellectual property. It's property. It can be sold. It can be licensed. It can be treated in those ways. I think from a visceral, practical perspective, it makes a difference in the enforcement.

RALEY: I think Chris is saying it's a different image at trial, and we all agree with that. I mean, patents are intrinsically anti-competitive. That's the whole idea. But if you have on the one hand someone who labored in his garage or in his lab to build something, and even if he sold it to another company because he wasn't strong enough to take on the big company, it's still his idea. That is one image. Another image is of somebody who never made it, never sold it, never had any intention of doing it, but wants to preclude others from doing it who are making it and selling it and therefore doing good things for society. That's a completely different image. So, depending on what side you are in the case, you're going to try to emphasize the facts that support your side.

BOWICK: Mike, let me add something to that. For the purposes of trial, I've dealt with this issue before. It's very important to keep the inventor, whether he sold out ten years ago, involved in the litigation. Have him there every day during the trial and be one of the key

witnesses to sort of go through how he invented this. Whether it was in his garage or some cubicle, you want to emphasize the toil that he had to come up with this invention. A technique to sort of down play this, your non-practicing entity and you just want to stop competition; I've used just sort of an analogy that works in Texas, at least. You buy a piece of land and you have oil under there. You don't have to drill for oil. You might wait for the oil prices to go back up to \$150 a barrel, but you have the right to keep somebody else from coming and drilling your oil. That plays sometimes — at least in Texas, with the understanding of analogizing to a piece of property in your right to drill for oil when you feel like you want to drill.

RALEY: I was going to add, it's so important with the inventor, whether or not he or she is the named plaintiff anymore, for them to understand that this is about them. This is about their life's work. This is about their toil. Because the more a jury hears that they've had to work hard, particularly if there was trial and error, the more likely it is that they'll be wanting to validate that work and enforce the patent. So you want the inventor to know that you feel deeply that this is really their story, regardless of who the plaintiff is now. That's if you're on the plaintiff's side, of course. On the defense side, you'll be taking a different approach.

ANDROVETT: *I probably have a skewed perspective, but going back eight or 10 years ago, I did not pick up the paper and every day, or week, see a story about a fairly resounding patent verdict. Not so long ago in the eastern district there was one over a billion dollars. It strikes me that we have a rare opportunity here because we have three people who have a trial perspective on how these cases reach full-time resolution. So, I'd like to explore some of these dynamics; and we've already started talking about this. John, you talk about your long career. You've done a lot of different kinds of cases. You mentioned product liability and you probably did a fair amount even of insurance defense. How is a patent case different than trying*

those other cases?

RALEY: The numbers are completely different. One thing that I've come to understand is if you're on the plaintiff's side and you can show evidence supporting those numbers, the fact that it is a large number alone doesn't seem to matter that much anymore. I think people are desensitized to it, either by hearing about the cost of certain items of government spending or the salaries of professional athletes or entertainers. Large numbers don't seem to bother people as much as they used to. Of course, you have to have evidence supporting them. But if you do, more likely now than in the past, they're willing to give them.

MCDOWELL: At the end of the day, whether it's a patent trial or whether it's a slip and fall trial, they're the same. It's about people. It's about fairness. It's about who's right. It's about the jury deciding who they're going to believe. So, it's about the witnesses. Yes, the numbers are larger. The expense of getting to trial is greater than it used to be, whether it's through electronic discovery, which drives an awful lot of the expense, or whether it's through just the cost of preparing a case properly for trial. But, I think at the end of the day, it's about fairness; and I think that's what the jury is going to be looking for. Who do I believe? What are they telling me, and is it fair? And if they believe that a big number is a fair number, I think they're going to award a fair number, whether it's large or small.

ANDROVETT: *I know with the eastern district, depending on which point of view you have, one of the topics of discussion is that they have a jury pool that is maybe more sophisticated about technology issues or patent issues. That's a big district, and that strikes me as wishful thinking. But I wonder, is there a special juror for these kinds of cases? I hear what you're saying, Chris, but it sounds like what you're saying is these cases still boil down to the same principles of fundamental fairness and people and testimony and truth. But I can't help but wonder, is there not some nuances about patent infringement cases?*

BOWICK: It depends on what side you're on just like every case. As a



Mike Androvett is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

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plaintiff, you probably don't want as many technical people, engineer types that might actually read the prior art line for line; whereas, a nontechnical person is going to look at the battle of the two experts, and say, who's lying or who's more credible, who do I believe? An engineer might get back in a deliberation room and go through those prior art patents and read them and say, Well, what is No. 62 on Figure 4, and does that say the same or obvious.

RALEY: Bobby and I have seen this in cases we've mock tried before, trying them where someone with some engineering experience gets in the jury room and says, "Look, let me tell you about what I know about this, because I've been in this area and I'm looking at this patent and if you look here on this line it says this, but if you look over on this diagram, it says that." And suddenly it's not at all about the evidence that was presented. It's about the background of this juror who has now completely taken off with the jury. I think that's a dangerous situation for a plaintiff, or a defendant quite frankly. I'm not sure on either side whether I would want somebody like that, because that's just a bomb that could go off and the shrapnel could hurt either side. So I wouldn't be in favor of that. Generally, I'm a strong believer in the jury

system. I think that 12 people from all walks of life, with hundreds of years of collective experience, most of the time can tell when somebody is not being straight with them. They look for that, and they can see subtle things that they may not even be able to describe out loud that help them to see that this person is not being truthful and honest with them. As we all know, credibility is very easy to lose in trial and very difficult to get back once it's lost. Most of the time juries have a way of figuring things out the right way, no matter how technical the case is. And as has been mentioned earlier, every case is a story; and it's our job to try to find a way to make the story persuasive and to make the jury want to get up in the morning and come to trial and hear a day of a patent case. If we snicker about that, we've got the wrong image altogether. Because, as trial lawyers, if we forget that it's about keeping it alive and interesting for them, then we've lost before we've started.

MCDOWELL: It depends on the case. It's all about simplicity. I mean, one of the true joys of trying a case in a complex area is figuring out how to take something complex and distill it down to something simple. It has to be something that can be explained easily, grasped and understood. In some

cases, I'm going to want an engineer. In some cases, I may not want any engineers. It depends on what the evidence is going to look like. It depends on how the story needs to be told. Every case is unique. Every decision needs to be decided upon based on the evidence that you have, the jury pool that you have; and that's why voir dire is so important. You've got to be able to look these jurors in the eyes, ask them some questions, evaluate who I think is going to be good for my panel based on the evidence we're going to be presenting, and be able to move forward in putting the jury in the box that's going to be the most favorable for my particular side and be able to grasp what I know I'm going to be presenting as I try to take something that's technical and boil it down into something that's simple, understandable, and direct.

ANDROVETT: Bobby, I heard you say that you and John worked together?

BOWICK: Correct.

ANDROVETT: Would it be roughly accurate that you are the more technical guy and John is the more trial guy?

RALEY: That's laughter from my law firm.

BOWICK: Yes. I'm the engineer, and he's the — what is it, history major?

ANDROVETT: There's a point in my asking this question. Chris talked about telling a story. My work involves helping lawyers with the news media; and sometimes when I'm working with a lawyer, not John, but they'll say to me, "Hey, I know how to communicate with the jury, therefore, I know how to communicate with the media." Honestly, when I hear a lawyer say that, a red flag goes up because I know that in a jury box you typically don't have eight cameras and reporters who are very rude shouting questions at you all at one time. So my point is: Sometimes in telling me, "Hey, I'm ready to work on this thing," I know that more work needs to be done. Do you find working with John or some other trial lawyer, that there is a bit of technical immersion that you have to put them through, despite the fact that they might say to you — and I don't mean to be flip about this because I know John would address this very seriously — I can try a products liability case





on a Monday and try your patent case on a Friday? I mean, how do you get that trial lawyer to pay attention?

BOWICK: It's a good mix. John and I work in trial. When we were getting ready for a trial, I was trying to simplify this giant line diagram, so I drew little stick figures and lines. And he goes, "What is that?" I said, "How can it be any more simple?" So it is nice having the two different perspectives because something that's simple to an engineer is not necessarily simple to a history major, and you've got to keep that in mind with a jury. You've got to keep it as simple as possible. John and I've used different type of props that are household items. I mean, we used a fishing pole to explain how a drilling rig works, and the jury can sort of understand and see the thumb on the spool and cranking the line up. It sort of brought it close to home, I think, better than necessarily \$20,000 in animation showing something they've never seen before and will never see again; but breaking down simple things that they know and use and that they can almost get their hands on. I think bringing somebody in that's not an engineer brings that perspective.

RALEY: We used a grocery store fruit scale to show an oil rig's weight on bit and held that up in front of the jury. Things like that from their lives help them grasp and understand what we are trying to say. Back to the themes we

were talking about, we want to try to couch the case in a way consistent with the values of the community, whichever side we're on. And one of those values is that hard work, and integrity should be rewarded. If we can pitch the case that way, by emphasizing the facts that show that background, it's important. When a pure patent lawyer and a pure trial lawyer work together, they just have to be patient with each other because they're speaking different languages. Sometimes what Bobby says to me sounds like Swahili, and I just have to ask, like I do so often, "Bobby, what does that mean?" And he's patient enough to explain it. Eventually, he explains it in a way that the jury will understand as well; and then we know we're set.

MCDOWELL: You know, this kind of reminds me in a slightly different context of Mark Twain's statement, "I would have written a shorter letter if I had more time." I think at the end of the day the trial lawyer has to create a simple story, but that doesn't mean that the trial lawyer is going to do his work from a simple perspective. There's got to be an incredible amount of learning that goes on with the trial lawyer. He has to understand as much of the technology as he can conceivably grasp. Even with that said, what we do at Rose Walker is either joint venture with a pure patent firm or involve our IP partner within our firm. We have him with

us not only handle pure IP issues, but to help us walk through the technology as we get to a trial because we have to put the time in; and that's one of the things that makes it a little bit more expensive to try a very technical case. We have to put the time in to understand it.

RALEY: What we're describing is our technique for working up and trying these cases. Not everybody does this. When I started doing intellectual property work, a partner at my former firm invited me to do it with him. And he said, "If you will be lead trial counsel on my cases, I will protect you on the law and on the science." And together we've worked the cases up. That's what Bobby and I are doing now. That is an approach that not everybody takes. You see trial lawyers trying to try cases without patent lawyer backup, which is very dangerous; and you see patent lawyers without a lot of trial experience trying to try the case themselves, which may or may not work out for them.

ANDROVETT: *Talk about the judges in these cases. I've heard it said that you should have a special class of judge. I know that Judge Ward in the eastern district gets a lot of props for being knowledgeable and actually liking patent infringement cases. When we do the e-discovery panels, we discuss the new federal rules and the role of the judge, and occasionally, a lawyer on the panel will say something like, "If we could get the judge out of the way, the case would go a lot better, because the*

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judges sometimes don't like the e-discovery rules. How about in the patent infringement area or intellectual property litigation? Generally, how important is it that the judge be knowledgeable and like those kinds of cases?

MCDOWELL: Well, it certainly doesn't hurt for the judge to like patent cases. And I think that's one of the things that we've seen over in the eastern district. The judges like them. They understand more about how patent law works through experience. In a misappropriation of trade secret case, I don't think that makes a great deal of difference. It is tort law, and I think most judges understand tort law. I don't think any extra area of specialization or expertise is necessary; but I do think it helps if it's something that the judge really likes and enjoys. Over in the eastern district we saw a lot of cases filed, and whether it's because the number of cases were filed or whether it's because the judges really like that law and drive that docket.

BOWICK: Well, I think the success in the eastern district is starting to spread. The southern district last year adopted similar local rules and sort of made trying a patent case a lot easier. A bunch of hurdles that the lawyer has to jump through, but it tees the case up better for the judge's perspective. I hope they don't go to a special judge. I know there have been proposals for that. We'll end up like in bankruptcy

court and probably lose the jury system, which like John said, I think is very important in any trial.

RALEY: We all want judges who will not allow discovery abuse either in the requests or the responses. We all want judges who will rule decisively and fairly, and we all want judges that will allow both sides to try their case and then let the jury rule. We all want trial judges who believe in juries.

BOWICK: I think the judges, if there's a perception they don't like a patent case, I think it's a frustration with the reversal rate of the federal circuit being higher than any typical appellate court, as well as lawyers who come in there and assert a hundred patent claims and argue over what is eminent. People sort of make ridiculous arguments sometimes or appear on their face to be ridiculous.

RALEY: If we could help the judge to understand that this is basically a fraud case or a theft or conversion case and reduce it to terms that he or she can deal with, that this is not some sort of a hyper-technical deal. There is technical language and there are technical issues in the invention, but really what's going on is someone that either has or has not stolen the idea.

ANDROVETT: *John, you mentioned that when you get into these IP cases the numbers can be enormous. In the old days, really what you were trying to get was an injunction; and that hammer has*

been significantly inhibited. We have been talking about making it a simple story for the jury, but now we're asking them in many instances to extrapolate the harm to a company in what may appear to be intangible ways. For example, a patent that involves commerce on the Internet that they haven't really been in because their invention has been stolen and somebody else is profiting. Talk to me a little bit about making the damages case.

BOWICK: The key is to make what I call the royalty base. What is the product that is infringing on that sale, being as big as possible and then attributing the 16 specific factors. Maybe there are 20. Sort of play that to increase the royalty percentage, whether it's 1 percent or 10 percent of the royalty base large group. On a case-by-case basis, it depends on the profitability, the margins, and things like that, of how you can sort of sell that to a jury. Of course, the lost profits, if you're practicing a patent is generally higher; but somehow making that royalty base larger, so that if you can get a 2 percent royalty, it's 2 percent of something larger versus something smaller, which is basically common sense, and usually end up with a swearing match between the two experts, because the plaintiff expert is going to say 10 percent, the defense expert is going to say .025 percent, and typically, the jury split the baby. So I



think the jurors realize, from talking to juries after verdicts, that both sides are way off; so they need to meet in the middle somewhere.

RALEY: I think you need to get the number out there early; and ideally, if you have documents from your opposition that are supportive of that number, such as e-mails, or something else internal. For example, in a trial we had, the opposition said that our number was “outrageous” in opening statement, and we adjusted our strategy to make our very first exhibit an internal memo from our opposition with almost exactly that number, and then we said: “You know, this is from them ... we didn’t write this.” So you can desensitize them to that. Of course, you have the opposite approach on the other side. But we have found that if a jury is sufficiently indignant, if they feel that a theft truly has occurred, they are more likely to accept the numbers of the plaintiff.

MCDOWELL: It always comes back to the jury and the fact that the jury wants to do the right thing. So, whether you have an expert that tells the number, whether you have witnesses that testify about facts that then the expert uses to tell the number, at the end of the day, you have to show the jury that this number that I’m putting up here and asking you to award is just. And if you can explain it and you can make the jury understand that it’s a right number and it’s a just number, then I think the jury will award that number. It all comes back to simplicity and fairness regardless of whether you’re using an economist or an accountant. At the end of the day, the jury has to believe in their calculation and believe that it’s fair. We’re not overreaching. We’re not trying to get something we’re not entitled to. We’re just trying to get what we’re entitled to base upon the conduct that the jury has to then find.

RALEY: If the judge will allow you, I think this is something that needs to be dealt with in voir dire. I think it’s best to deal with it orally. There are those who think it can be dealt with by a jury questionnaire. But if you say to the ladies and gentlemen after you’ve kind



of laid out some of the background, “We want to be up front with you. The evidence we submit will indicate that a damage of this amount is appropriate. What we’d like to ask you is: What do you think about that? If the evidence is sufficient to persuade you that that is the correct number, would you be able to award it?” And try to get a commitment in that regard, if possible, that if the evidence is sufficient to persuade them, they could do it. Of course, the defense will be working the other way. But the sooner you get it out there, so that it’s not something that’s just thrown into the closing argument, and then they go back to the jury room and say, “that’s absurd.”

MCDOWELL: I think you need to show it, too. I mean, you’re going to have an expert that’s on the stand. Numbers tend to get lost. We have access to a lot of great technology, and we make extensive use of it. Use the technology at trial so that the jury sees exactly how this calculation is being made and they see that this isn’t some high-level mathematics and a lot of smoke and mirrors. This is very simple. You can lay those numbers out in a very simple straightforward way. And I think it lends itself to credibility and fairness; and the jury can grab a hold of, not only what they’ve heard, but what they’ve seen.

RALEY: For example, you’ll have the

numbers of the opposition, you can show how many millions of dollars they’ve made with the infringing product over a certain time period, and then you can have the evidence that a reasonable royalty is this percentage, so they can see where the number comes from. It’s very logical. It’s very consistent and it’s appropriate.

BOWICK: From the defense perspective, they always say the best defense is a good offense. In a patent case, if the defendant can countersue for infringement of one of its patents, it keeps both sides honest. The plaintiff patentee can say the royalty for me is 10, 15 percent; but from my infringement it’s only 1 percent. It makes both party’s experts be honest, and the jury is going to flesh that out pretty quickly. So it does make both sides take more of a reasonable position just so that they’re not so far off when it comes to trial.

ANDROVETT: *You’ve almost got me convinced this is manageable, that you can tell the story and articulate the damage or lack thereof. But, Chris, your colleague, Marty Rose, back in March — this is a rough paraphrase — but in talking about experts he cited the example where there are two experts, and one expert says the damage is a thousand dollars and the other expert says the damage is a gazillion dollars. Marty basically said somebody’s got to stop the madness. How do*



the experts impact the jurors when they come from such totally different directions? And what can you do as the trial lawyer to enhance the testimony of your expert and maybe cast some doubt on the testimony of the other guy's expert?

MCDOWELL: The first thing I'm going to do is make sure that what my expert is saying is credible and lines up with the facts. I don't want to have an expert that's taking a position that doesn't make any sense in connection with the facts. What's the old saying? Pigs get fat, hogs get slaughtered. I don't want my expert making claims that aren't justified. I think if I bring an expert and the expert can explain clearly and concisely exactly how they're making their calculation and that calculation is tied to the evidence in the case, I think the jury is going to see that. And if the other expert doesn't do it, I think that it becomes a credibility issue; and juries are very good at solving that credibility problem.

RALEY: I think the first question I want to know before I wade in too deeply in cross-examination of the opposing expert is: Is this man or woman basically intellectually honest? And you can normally figure that out pretty

quickly. Hopefully, you can learn that in a deposition. If not, you can learn it pretty quickly in trial. If they are, then you can have tightly framed questions of things that will help your side, that if the expert is intellectually honest, will have to agree with. So you can establish some of your points that way. If the expert, conversely, is somebody that is so much of an advocate that he or she is taking a position contrary to what even the jury knows is the correct and truthful answer, then their bias is exposed, and they lose the credibility that we've talked about. So that's the approach on cross-examination, to try to get a handle on that. Are they horribly biased and therefore not credible? Are they wrong on science or on law or whatever their testifying about? Humor is sometimes appropriate if they are grotesquely biased, because the jury can sometimes be astonished by that. I mean, they expect some advocacy. But if somebody says it's dark when it's noon and the sun is shining, they may snicker a little bit; and then you know that you're in good shape.

BOWICK: Just from interviewing a couple of jury panels after a couple verdicts recently, the juries know there's

bias. I mean, they get these forensic economists, which is sort of like IP. It's a big word for, I guess, a CPA. But they know they're biased. They're being paid \$700 an hour. They've billed their client \$200,000 for the testimony, and they know that they're so far apart, the madness as you described, they generally want to meet somewhere in the middle, unless they're so outraged by other facts that they're going to go either all the way with the plaintiff or all the way with the defendant. So, to me, it's sort of you're either going to lose the case and get zero damages, you're going to split the baby, or you're going to get a grand slam. That's just from my perspective.

RALEY: I try to commit them early on. I say, look, sir, I know you're charging \$700 an hour and you've made a hundred thousand dollars so far in this case; but I want to ask you, will you give straight-up answers to straight-up questions no matter who it helps or hurts in this case, will you be a straight shooter in front of this jury? They will always say yes. And then you can start to probe that. And if they're not, the jury sees that they have violated what they have pledged to do.

MCDOWELL: And if you get that commitment, you can work to show that one of the facts the expert relied upon was wrong or an assumption is incorrect. It puts the expert in a bind. Once the jury sees that there are contrary facts and assumptions, it goes back to credibility.

RALEY: Of course, the most dangerous expert is the one that does a little bit of both and gives you the honest, credible responses that you ask for with the minor things and then when the major thing comes along, totally guts you in a very sincere and honest way. Then you try to score the points you can and get that expert off stage as quickly as possible.

AUDIENCE MEMBER: *I haven't heard anything about trademark enforcement yet. Is what you have said so far equally applicable in the area of trademark enforcement?*

BOWICK: Well, my experience with trademarks, generally, it's an injunctive relief you're seeking. It's very difficult because you have to show but for the trademark infringement you would have made those sells, which is sometimes a difficult standard. It depends on the size of the company. But somebody in Seattle, Washington, selling a product that you're not in that marketplace, you're never going to meet that burden generally. It's getting easier now with internet sales and so forth. But that standard under the Lanham Act, to me, is difficult to prove damages. That's why generally you don't see huge burdens in the trademark cases. You're just trying to shut down somebody from passing off a same name or the exact same name for product.

AUDIENCE MEMBER: *Do you do seizures under the act?*

BOWICK: I've never done one. I know there are a lot of them done in Houston, especially at the Ship Channel where they find purses and things like that. But it's usually from a Chinese or Singapore company. So it's not a damage issue because you might get a piece of paper, but you're not going to collect it.

AUDIENCE MEMBER: *John, you indicated that when you have a very*

biased expert witness you find that humor is helpful. Can you give us an example of that?

RALEY: Well, a recent experience, the expert did agree initially that he would be a straight shooter with the jury. So we started asking questions that the jury knew the answer to because there had been a couple of weeks of testimony and they've heard from other witnesses the correct answers; but he was fighting. Eventually, we gave a question that everybody knew the answer was "yes." Everybody in the courtroom; the jury, the judge, the bailiff, the clerk, everyone knew the answer was "yes." And he said, "Absolutely not!" And there was this silence in the room. And I said, "Oh, you're out of control!" That was an inappropriate comment, of course; but everybody laughed, including the judge. And the judge reminded me of the comment, outside the jury's presence, many times later. But I think it was a moment where the jury could see who this guy was and what he was doing.

ANDROVETT: *I know from years of working in live television it is an established truism that more things can go bad than good when you try to be funny on the air. There's a certain group of people*

who have an art and who can really do it, and they can go it on the fly. But honestly, when on-air people are talking about this amongst themselves a couple of things they say is, don't try to share air time with dogs or kids because you'll just get killed, and don't try humor unless you really know you're funny. Is it the same in the courtroom?

MCDOWELL: There's a real risk. The risk that you run is you've got 12 people that all have different sensitivities. They all hear things differently because they're running it all through their own filter. So what I may think is just absolutely hilarious in the form of a question to an expert, might come off as arrogant, flip-pant, disrespectful, and numerous other things. So I think from my perspective, when you have a witness, especially an expert that is so biased and so over the top, if it comes across in the direct that way, he may be a candidate for no questions or for a bunch of questions that you know he's not going to agree to because it's clear to the jury what this guy is all about. I don't use a lot of humor because it doesn't come across very well for me. I agree, it can be really powerful if it all comes together well, but there are risks.

RALEY: I think you have to earn





the right with the jury. You've got to have enough credibility to get away with something like that. I certainly wouldn't want to do something like that the first day of trial; but if we've all been together in this room for weeks and everybody is, quite frankly, a little weary of it all, sometimes they appreciate a little bit of humor. But it has to be the right place at the right time. It has to be appropriate. You're right, nothing is worse than an attempted humor that backfires. You never want to be flippant. You always want to be professional and courteous. Even with a biased, hostile, expert witness, you still want to keep courtroom decorum at all times. Even when I said that thing that I referred to earlier, I did it in a courtly, professional way.

AUDIENCE MEMBER: *Even though the purpose of a patent is intrinsically anti-competitive, isn't the objective of the patent system to create a legal framework for a more equitable competitive environment? And with that, would the panel speak with respect to where we are trending as far as a more equitable competitive environment, or are we trending more to allowing a more robust inventive and innovation society?*

RALEY: Well, I certainly agree with your first point that this is the purpose of patent law, to encourage the invention of useful arts. And the whole idea behind it was there may be, and indeed are, many people who think of great ideas but aren't strong enough financially to take on somebody that steals that idea. We have always felt in this country that we will be better off if new ideas are encouraged. This is an incentive to continue to create for the betterment of society. So, yes, I agree with your first point. As to the trend, I might turn that over to my learned friend who has read the cases on it.

BOWICK: Well, I agree. The patent system is to promote the progress of the science of the arts; that is, somebody invents a drug that cures whatever and publishes it for the world. The only reward for inventor is prompt disclosure. So the whole world gets to view that document; and they go, Oh, that's the key to the next step of the next invention. And it's sort of supposed to build on itself. I don't know what the trends are. The patent filings, at least until last year, were up. So people are filing more patents. More patents are being rejected now, whether

interpreting the Supreme Court's decision in *KSR*, the patent office, it really hasn't affected litigation yet. That's how you explain the difference between motivation and suggestions to combine versus obvious to try. A patent is valid if it's obvious to a person of ordinary skill. So I don't think that's really played out in the courts yet because the jury makes that decision. Now, the judge or the federal circuit might interpret it differently; but from the patent office side, they're rejecting an overwhelming number of patent applications since the Supreme Court rule. I don't know what the industry is doing as far as trends in filing more or less inventions, but you're correct, the filing of applications is down from what it was a year ago. That could be the economy. That could be *KSR* or both.

MCDOWELL: I think companies are more critically evaluating their intellectual property. They're thinking about: What kind of idea do I have? Is this something that I can adequately protect as a trade secret? Is this something that I need to treat in a different way than filing a patent? But in any event, companies have to think about how the property gives them a competitive advantage. I'm either going to gain a competitive advantage in the form of a monopoly or I'm going to gain a competitive advantage in the form of using this to compete actively in the marketplace. I think companies are being more careful about how they go about evaluating the competitive advantage sides of the equation. I think as long as we live in America, where we're trying to always gain that next competitive advantage, we're going to continue to encourage companies to develop ideas that are going to allow them to succeed in a competitive marketplace. ❖

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