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What's So Special About Patent Law, Judge Asks

U.S. District Judge Lucy Koh, Northern District of California

Image: Jason Doiy/ The Recorder

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PALO ALTO — Want to know what U.S. District Judge Lucy Koh really thinks about patent litigation?

Companies demand too many do-overs; the U.S. Patent and Trademark Office behaves like no other federal agency; and the recent suggestion in a *New York Times* op-ed that lower court judges have the power to make so-called patent trolls pay for vexatious litigation is unfair and misleading.

Koh issued her pronouncements Tuesday night on a panel moderated by Weil, Gotshal & Manges partner Edward Reines that also included the founder of patent aggregator Intellectual Ventures, the GC of Cisco Systems Inc. and the charismatic chief judge of the U.S. Court of Appeals for the Federal Circuit.

The standing-room only crowd at the Association of Business Trial Lawyers annual program in Silicon Valley came expecting fireworks, just not necessarily from the junior district judge, who humbly referred to her courtroom as a "speed bump on the way to the Federal Circuit."

The buzz leading up to the dinner was all about IV's Peter Detkin, the Intel Corp. lawyer turned patent aggregator credited with coining the term "patent troll," and Cisco Systems Inc.'s Mark Chandler, the outspoken GC whose views on patent litigation abuse are widely known. While they exchanged a few barbs and Chief Judge Randall Rader charmed the audience, it was Koh who stole the show with a mile-a-minute tirade, decrying the seemingly endless process of patent re-examination that complicates and confuses patent disputes.

Defendants complain about the high cost of litigation and then prolong cases by running back to the PTO for a do-over, Koh chided, referencing the agency's recent decision rejecting a business method patent on post-grant review, after the same patent resulted in a $345 million verdict.

In other areas of administrative law, like employment discrimination, parties must obtain final agency action before coming to court, Koh said, and can't go back in the middle of litigation for a second bite of the apple.

"What is so special about patent law?" she fumed. "Why do you all get 5 billion do-overs?"

It sent murmurs through the crowd of IP litigators — mostly those who represent tech companies in expensive, protracted cases. Glances were shot across dinner tables.

"I didn't create that process," Chandler eventually responded.

"Let's switch topics," Reines said.

Koh has served just three years on the federal bench but refereeing the smartphone and tablet war between Apple Inc. and Samsung Electronics Co. has no doubt contributed to her jaded views.

On the topic of fee-shifting and the recent opinion piece authored by Rader with law professors Colleen Chien and David Hricik, Koh called it "a little bit unfair" to suggest district judges can balance the scales in frivolous patent cases with more vigorous fee shifting.

It's not the case that her peers aren't "manning up" she said. Under §285 of the Patent Act, judges may award attorney fees only in "exceptional cases."

"The law sets a really high bar," Koh said, quipping: "We can't cite a *New York Times* editorial as authority."

Rader, who sat two seats away, took the chiding with good humor, pointing out he was only one-third responsible for the op-ed.

"I agree" he said diplomatically, "with at least one-third."