

abtl REPORT

NORTHERN CALIFORNIA

Managing the Runaway Patent Case

Judges in the Northern District of California have plenty of opportunity — and need — to practice effective case management in patent cases. The Northern District had the second highest number of patent cases filed among federal district courts across the nation in 2001, a total of 167. While these cases constituted just 2.5% of the Northern District's total civil filings, that percentage was higher than in all but five other districts. Patent filings in this district rose slightly to 172 patent cases in 2002.

It is no secret that patent litigation is extremely expensive. According to a 2001 survey by the American Intellectual Property Law Association, the median cost in California of “smaller” patent cases (client exposure of \$1 million to \$25 million) was \$1.75 million through appeal and reached \$3 million for the top quartile. The same survey pegged the median cost in larger cases (over \$25 million at risk) at \$4.5 million and the top quartile at \$6 million.

Patent litigation is also very resource-intensive for the courts. The raw number of patent cases significantly understates the percentage of judges' time devoted to

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Hon. Elizabeth D. Laporte

Practical Lessons from a Complex Patent and Trade Secret Trial

Imagine how quickly you age when you wait for the jury for nine long days to reach its verdict in a case that could cost your client over \$1 billion. On February 19, 2003, after seemingly interminable deliberations, the jury in *Mentor Graphics Corporation v. Quickturn Design Systems, Inc. and Cadence Design Systems, Inc.* returned a verdict in favor of our clients, the defendants, on all submitted issues. The jury found no trade secret misappropriation, no common law misappropriation, and no patent infringement, and found clear and convincing evidence that each asserted patent claim was invalid. The fourteen-day trial, held before Judge Susan Illston in the Northern District of California Federal Court, was actually a consolidation of four separate actions filed by the plaintiffs over the course of three years.

The importance of the trial to the parties was obvious: over \$270 million in claimed damages on the trade secret claim and over \$60 million sought on the patent claims, along with a request for treble damages. Waiting for the jury during those nine long days was especially nerve wracking because there were two findings of infringement on summary judgment against defendants before the trial began. As plaintiffs pointed out at every turn, defendants were already found to be “infringers” and the jury should focus on the amount of damages, not on defendants' “excuses” for why the patents were invalid. During those nine days, we had plenty of time to reflect on how we and our opponents conducted the trial and the lessons learned from presenting enormously complex facts and concepts to a jury. Some of the most valuable lessons we learned are described below.



Frederick Brown

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Practical Lessons

Technology in the Courtroom

Technology, properly used, can be a powerful tool to help jurors understand the facts. The trick, of course, is to employ the right technology in the right way so the technology enhances the message being delivered. Despite (or, perhaps, because of) the fact that each side had identified dozens of potential witnesses and designated thousands of exhibits, Judge Illston limited each side to 30 hours for direct and cross-examinations, including rebuttal. Thus the trial, including opening statements and closing arguments, consumed “only” fourteen trial days. This “chess-clock” format placed pressures on both sides to present their cases efficiently. Inordinate time spent presenting hundreds of exhibits could have led to disaster.

Disaster was averted for both sides by a nearly seamless integration of multi-media presentations. Before trial, the parties decided upon one company to manage all the technology in the courtroom, which included everything from the basics (microphones, Elmo projectors, etc.) to the more complex (flat panel and projection screens for video deposition testimony, scanned documents and animated graphics). Plaintiff’s counsel went a step further and quite effectively used touch-screen monitors from which they could control scanned documents and demonstratives. The multi-media technology allowed the



Sean Lincoln

jurors to read the exhibits simultaneously with the witnesses and to focus on highlighted sections pointed out and enhanced on screen by the lawyers. Compared with the old method of publishing exhibits by passing them to the jury, this technology enabled the lawyers to present more exhibits to the jurors and enhance the jurors’ understanding of those exhibits.

With few exceptions, the technology worked very well and enhanced, rather than detracted from, the message of the presentations. One exception was a large flat panel monitor placed between counsel table and the jury, for lack of a better location. In addition to partially blocking the view of the jury from the counsel tables, the monitor also frequently distracted some jurors, who had to turn away from the witness or counsel in order to see what was on the screen. The large projection screen across the courtroom allowed witnesses and counsel to interact with the video presentations more effectively when the monitor was turned off. Our strong recommendation is to avoid multiple screens for the jurors. One large well-placed projection screen for the jurors is sufficient.

Though the technology generally worked very well, the parties’ desire to have a backup plan in case the technology failed meant that both sides had many binders of exhibits packed into the courtroom. Perhaps the day is close at hand when the document scanning and retrieval technology is reliable enough that counsel will feel com-

fortable coming to trial without multiple backup paper copies at the ready. Until then, forests will continue to suffer. Also, the parties generally provided paper copies of exhibits in organized notebooks for each witness. This allowed witnesses to see the documents in the original form and to flip through the pages when necessary to answer a tough question.

One unusual use of multi-media technology came during plaintiff’s examination of a former executive of one of the defendants. After cross-examining the witness on the stand, plaintiff’s counsel excused him and the next day played excerpts from his video deposition testimony taken when he was still employed by defendant. This procedure allowed plaintiff to juxtapose the witness’ live testimony against his deposition without having to ask the witness the same questions and “impeach” him with previous sworn answers. Plaintiff saved this technique for some “juicy” examination at deposition used for impeachment. Because counsel were required to notify us in advance about excerpts they would play and when they would use those excerpts, we asked the Court to allow the witness to return to Court and watch his testimony. With leave of the Court, the witness remained in the courtroom, then got back on the stand for redirect testimony by defendant.

The Court too made use of technology by playing for the jury, as part of the Court’s pre-instructions, the video produced by the Federal Judicial Center, “*An Introduction to the Patent System*.” This video was quite helpful to the jurors to understand some of the terms used later in the trial such as “PTO” and “invalidity.” As one might expect, the jurors had virtually no previous knowledge of the patent system, so the video provided some common patent vocabulary that counsel then used during opening statements and throughout the trial. The video also made the jurors comfortable at an early stage of the case. In the context of this case, the video was balanced and fair and should be considered by all trial lawyers in patent trials.

The Importance of the Pretrial Statements

At various points during the trial, the Court used the pretrial statements as a touchstone for resolving issues that arose in the proceedings. For example, during the defense opening statement, plaintiff objected and announced for the first time that two key witnesses, who were also named plaintiffs, might not be coming from their homes in France to testify. Plaintiff’s counsel argued that since the defense had not designated any deposition testimony from these witnesses and they could not be compelled to come into this jurisdiction, any reference to their deposition testimony during the opening was improper. The Court overruled the objection and noted that plaintiff’s pretrial statement had included a witness list that stated these witnesses “will testify” about certain subjects while the same list disclosed that some other witnesses “may testify” about other subjects. In light of the pretrial statement, the Court allowed defendants to quote the witnesses’ deposition testimony during the opening and to supplement our deposition designations

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to include testimony from these missing witnesses. The Court also used the pretrial statements to limit the opinions that could be presented to the jury by the experts.

“Will This Help the Jury Understand the Case?”

With multiple patent claims from multiple patents and multiple asserted grounds for invalidity for each claim, all presented at warp speed under the chess clock limitation, the parties were at risk of losing the jury in the complex factual and legal details of the case. Throughout the trial, Judge Illston repeatedly stressed the importance of helping the jury understand the issues in the case. One tactic she used to help the jury was to permit the parties to introduce into evidence certain summary charts and graphics used by the testifying experts. Relying on *United States v. Bray*, 139 F3d 1104 (6th Cir. 1998), the Court found that allowing these summaries into evidence (and thus into the jury room) would assist the jury in its deliberations. See also *United States v. Wood*, 943 F2d 1048, 1053-54 (9th Cir. 1991); *United States v. Winn*, 948 F2d 145, 157-59 (5th Cir. 1991).

Two other suggestions from the Court also turned out to be very helpful to the jury. Since each side was represented by several counsel, each handling different witnesses and different parts of the case, the Court suggested that each attorney introduce himself or herself and explain who he or she represented each time the attorney stepped forward for a new examination. Though counsel introducing themselves for the fifth or sixth time might have felt repetitive, jurors greatly appreciated the re-introductions because they always were certain which side was asking the questions despite the changing faces of the questioners. While we all think we have a special bond with jurors, we often look like just another lawyer in a dark suit, with few distinguishing features for the jurors to remember us. These repeated introductions were very helpful to the jurors and should be considered in other cases.

The Court's other very helpful suggestion was to have the clerk take a Polaroid snapshot of each witness just before he or she was sworn in. The first witness was taken by surprise (we were too), and must have found it a bit odd that he was being photographed as in a "lineup." The idea was to provide the photographs to the jurors during their deliberations to help remind the jurors about which testimony went with which witness. This wonderfully simple but effective technique should be considered for all long trials with many witnesses. One suggestion we would make is to have the pictures taken digitally with a high resolution camera, to allow the parties to import these pictures into their summary graphics for closing arguments.

The Model Patent Jury Instructions for the Northern District of California

In crafting the jury instructions, the Court elected to use, in large part, the Model Patent Jury Instructions for the Northern District of California. We understand that this may be the first time these model instructions have

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Preparing the Lay Witness

For most inexperienced witnesses, the prospect of testifying in a deposition or courtroom fills them with dread. Public speaking rates as most people's greatest fear, even ahead of death. The rigor of cross-examination, typically the focus of a deposition, produces even greater anxiety.

Many a well-intentioned attorney has done more to scare and unsettle a witness during preparation than to help. Typically an attorney's effort at witness preparation amounts to a lecture in "*don't-do-this*," "*don't-do-that*," and "*by-the-way-you-shouldn't-do-this-either*." Actors refer to this as the impossible task of "trying to play a negative objective." Focusing only on the negative can leave witnesses overly self-conscious, trying their best to avoid pot-holes, but having little idea what they *should* do.

In preparing lay witnesses to testify, attorneys should consider not only the content of the testimony but the communication skills of the witness and the emotional issues, particularly anxiety, that can interfere with effective communication. Investing your time and attention into guiding the lay witness through the intimidating process of oral examination will make your case narrative sharper and more compelling.



Lois Heaney

Getting the Story

Witness preparation isn't just about training witnesses. The first step is often an opportunity for the *attorney* to gain training in something most basic: listening. Attorneys are usually comfortable talking; many witnesses are not. Attorneys are prone to interrupting witnesses and overly anxious to "get to the point." They often focus narrowly on the legal issues or on a particular definition of relevancy. This approach can leave a witness tongue-tied and cause him to limit the information he imparts. A more open-ended approach will allow a witness to feel heard and able to speak more freely. When the focus is on developing and learning how to express the story, the witness should do more talking than the attorney.

Witness preparation begins with interviewing the witness, mindful that the scope of the interview may be quite different from the final testimony. An open-ended interview explores what occurred and under what circumstances, and how the lay witness knows about the events. The interview should explore the relationships between key people, their history together, their conflicts, motives and feelings, how the witness has dealt with these feelings, who he has talked to about it, and so on.

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Preparing the Lay Witness

Frequently, witnesses have not had an opportunity to put the events in any context. Contextualizing tends to improve a witness' ability to remember and discuss the issues and events. The process requires the interviewing attorney to carefully listen to the witness, summarize the key points back to the witness, and then probe for clarity and detail. The more information you glean from the interview, the more substance to pick and choose from for testimony, and the better you will understand your witness.

The atmosphere in the preparation session is important. Create a less formal air by posing questions that allow the witness to find her own words (*e.g., Tell me about...or, If you were to explain this to your best friend, what would you say?*) This process helps the witness open up and may help reveal important elements of the story.



Karen Jo Koonan

Carrying Part of the Story

Your witness will need a clear sense of how his testimony fits into the overall case. What is the objective of his testimony? What important points must he get across? What special perspective or piece of the story does this witness carry, and what does he alone bring to trial? Identifying these points helps a witness stay on focus and ensures his testimony is not merely duplicative of other witnesses. Parties often feel that they carry the entire weight of the trial in their testimony. Explaining how their testimony is only one part of winning the trial can help relieve a sense of unbearable burden.

Five Sentences

Once the attorney has fully explored the witness' story, ask the witness to tell the story in five sentences. This interactive exercise helps both witness and attorney understand the heart of the story. Once that is articulated, the witness (and the attorney) have a guide to determine what is relevant and what is not. If a piece of information helps to explain one of the five sentences, it is important; if it does not, the jury need not hear it.

Telling the story in five points should include the universal elements of every story:

- Good guys and bad guys;
- A beginning, middle and end;
- Motives;
- Turning points; and
- A crisis. (The crisis resolution is often the jury's verdict, thus pulling the jurors into the story).

Hidden Fears: Anticipating Testimony

Most lay witnesses and clients worry over some element of their testimony. Some will be upfront with their

fears: "Can they ask me about..." or "they can't ask me that, can they?"

Ask the witness to list the things that worry her and then press for more; try to get down to the real source of concern. It may help to have the witness play the role of opposing counsel, cross-examining on these points. This exercise often reveals hidden anxieties and issues needing clarification. Role playing allows the witness to watch someone model an effective way to handle thorny problems. Not infrequently, some of what a witness is worried about is beyond the scope of direct or cross-examination; learning that fact alone often has a calming effect.

Working Too Hard

Anxiety about testimony leads some witnesses to "work too hard" at their testimony. They try to cover too much ground in direct, and they are too calculating in cross-examination. Often these witnesses are busy anticipating where the cross-examiner is going and making pre-emptive efforts to head-off the inquiry. To jurors, this conduct frequently looks like evasion or an attempt to outsmart opposing counsel. The effort can backfire and leave jurors distrusting the witness; jurors may start to "root" for the attorney who is dealing with an obnoxious witness.

Witnesses need to understand both the important points to defend and the points they can concede that will actually enhance their credibility. Witnesses may unwittingly magnify the cross-examination by projecting disproportionate import to a question that the jurors might otherwise have ignored.

Jurors are less likely to remember a flawed response than they are to recall an overall negative impression and draw a detrimental conclusion about the character of the witness. Some of the worst evidence is better dispelled by humility than by evasion or defensiveness.

Stage Fright

Much of a witness' anxiety is fueled by not knowing what is going to happen. The courtroom or deposition is a foreign setting for most lay people. Courtrooms are designed to intimidate and are built to house an adversarial confrontation. Witnesses tend to do better when they know the physical setting.

Take, for example, the thoughtful, logistical preparation that one lawyer did with a young blind client. In the days preceding trial, the attorney and client visited the courtroom while court was out of session and the client learned the path from the door to the witness stand, enabling him to walk unassisted. He learned the feel of the witness box, the sound of his attorney's voice from different locations, the position of the jury box and bench, how to sit in the witness chair and own that space, and how to leave the witness chair. He became so comfortable with the setting that later during his testimony, the attorney standing in the well tossed him a whistling football, which he caught while seated in the witness chair.

While we rarely have a blind client, the exercise of getting to know the stage is worthwhile for anyone. Visit the courtroom with the witness one afternoon when court is

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not in session, and take seats at counsel's table, at opposing counsel's table, the witness stand, and in the jury box. Let the witness, especially your client, know what the courtroom feels like from all vantage points.

But What Do I Do With My Hands?

Lay witnesses are often nervous and may not know what to do with their hands, feet and bodies in general when called to testify. Practice helps witnesses learn to recognize behaviors that may distract the jury. Some witnesses may massage their hands, tap their feet, cover their mouths, tap their fingers, rock, grimace, grind teeth, smirk, and engage in a myriad of other activities which detract from testimony. During practice you have an opportunity to observe and help witnesses change these mannerisms.

Some lack of ease over sensitive issues makes sense and may even make testimony more compelling. But overt physical habits can undermine the credibility of the testimony and alert the observant lawyer or juror that something is amiss. Take seriously what you observe in preparation, probe further into the discomforting topic, and help the witness find tools to handle the unease. Assistance can be as simple as showing the witness where to place their hands, to keep feet flat on the floor, to sit up, make eye contact, and to breathe.

Focus On The Jury

Parties often come to court prepared to "do battle" with the other side. Remind the witness that the reason for testifying is to share information with *the jury*. The witness is not testifying to express anger, outsmart the other side, or prove something to the judge. It is the jury who will make the decision in the case — not the other side, nor their lawyers. Shifting the focus to the jury often defuses a witness's anger and helps those who are especially guarded to open up.

Where To Look

Lawyers often ask witnesses to look at the jury when they speak. Typically witnesses need to feel comfortable with the questions and with their testimony in order to look away from the examiner and speak to the jury. When they recall that they are in court in order to share their story with the jury, it will be easier for them to look at the jurors. Some witnesses do so naturally; others can be directed with statements such as, "Tell the jury..." An attorney can help guide a witness by moving toward the jury box during the examination, or by standing at the end of the box so the witness turns toward the jury yet still maintains eye contact with the attorney.

Confidence

Confidence is an important factor in effective testimony. Explain to the witness that confidence in the story being told, confidence in the jury, and confidence in counsel will make the witness more effective. The witness is asking the jury to have confidence in *him*. If the witness fails to express personal confidence in the story, the jury will have a harder time believing him.

Confidence in the lawyer enables a witness to let go of any anger that may create a distance between witness and jury. It enables the witness to focus on the jury, knowing the attorney will conduct the battle with the other side.

Lawyers are right to be concerned that the witness not appear coached or *overly* confident — that the testimony remains fresh and authentic. Practice sessions, however, will usually enhance the witness' communication skills.

Preparing For Cross

Not infrequently, a client (or friendly witness) is engaging and expansive on direct examination, then shuts down on cross. The contrast is glaring to a jury and tends to undermine the credibility of the witness.

The contrast in manner can be mitigated if direct is handled as more of a give-and-take between attorney and client. Reassure the witness that s/he need not cover all the bases at once — that the attorney can be relied on to ask follow-up questions. (At the same time, witnesses need to understand that attorneys cannot "lead them" in direct examination.)

If your witness tends to ramble, try an exercise where you first conduct an open-ended interview; then do another exercise in which the witness must limit his/her response to ten words or less. To identify and alleviate fears, try a pretrial exercise in cross-examination in which the client plays opposing counsel. If the practice is thorough and touches on all the sensitive areas, the witness at trial will already be familiar with potential questions and have considered appropriate responses. Additionally, these practice sessions may have a "sobering effect" on witnesses, particularly clients, who may begin to see weaknesses in their case that they might otherwise have ignored.

A note of caution: a tough practice session in which the client does poorly can injure the attorney-client relationship. In order to achieve the rigor of a tough exam, it is helpful to have another skilled and well prepared attorney (or team member) conduct the practice cross-exam. Also, the inclusion of a consultant on the trial preparation team may allow new perspectives and even "constructive criticism" to be more easily expressed — without damaging the relationship with the client.

Pace of the Case

An attorney achieves effective cross-examination by controlling the pace of the questioning and keeping the witness off guard. Witnesses can regain some control over the pace by learning to pause before answering and seeking clarification of poorly phrased questions.

Explain to the witness the natural inclination to quicken one's responses when questions are asked quickly. This tendency creates three problems:

- The witness doesn't take the needed time to think about the question and an appropriate response;
- The witness's lawyer does not have time to object; and

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them. When the Federal Judicial Center last studied the relative “weights” of different categories of cases in terms of judicial resources, based on a sample of only 27 patent cases during the years 1987-93, it estimated that patent cases used about double the judicial time involved in the average civil case. In the decade since that study, the demands that patent cases place on judicial resources have increased dramatically, fueled in part by the holding in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), that claim construction is a matter of law to be determined by the court. Many judges and practitioners believe that the average patent case consumes at least ten times the judicial resources as the typical civil case.

Many judges, like me, enjoy the outstanding advocacy that the distinguished attorneys in the patent bar bring to our courtrooms, and find intellectual stimulation in the complex issues involved in patent cases. At the same time, however, patent cases have a tendency to spin out of control, leaving no stone — even no grain of sand — unturned. They tend to generate far more no-holds-barred discovery battles, motions for “clarification” and reconsideration, and multiple motions for summary judgment than many other civil cases put together. For example, in one recent patent case, the parties have so far filed five motions or cross-motions for summary judgment, fifteen discovery motions, two motions to amend infringement and invalidity contentions, and four motions for reconsideration or clarification, as well as a number of other motions.

Issues that are unique to patent cases further tax judicial resources, and often involve unfamiliar, even cutting-edge, scientific issues. The parties frequently ask the Court to construe a host of claim terms. To do so, courts must apply legal doctrines that bear little resemblance to other areas of law. For example, Chief Judge Mayer of the Federal Circuit summarized a key doctrine in the recent *en banc* oral argument in *Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.* (U.S. Court of Appeals for the Federal Circuit, Action No. 95-1066, February 6, 2003, after remand from United States Supreme Court), as follows: “Well, the *Markman* scenario was really a charade. We declared that facts are law, then we pretend to review them *de novo*. You want us to keep digging that hole?”

The reasons for the intensity of patent litigation may range from the enormous economic stakes and competitive issues often involved to the lure of the heightened prospect of reversal on appeal when key issues are routinely reviewed *de novo*. For example, one article calculated that in 2001, the Federal Circuit modified the district court’s claim construction in 40% of the published cases where claim construction was expressly reviewed. (C. Ullsperger, *Lessons in Claim Construction from the Federal Circuit*, *Intellectual Property Today*, June 2002, at a-b.) For construction of means-plus-function claims, that number rose to 56%. (*Id.*) With such a high rate of reversal, the author concluded that patent litigants view district

court proceedings as nothing more than the first, very expensive, round in the litigation.

Whatever the cause, judges in the Northern District, like their colleagues across the country, must search for effective ways to manage patent litigation. The most basic rule of federal procedure obliges judges to endeavor “to secure the just, speedy, and inexpensive determination of every action.” Fed. R. Civ. P. 1. This mandate is challenged by the reality that one trial judge, aided by a solitary law clerk assigned to each case, and juggling a large and diverse caseload, must handle several patent suits staffed by teams of highly specialized attorneys and experts.

Case Management Conferences

One important tool for streamlining the process is the case management conference. Because the Federal Rules of Civil Procedure no longer allow individual districts to set a shorter deadline for service than the 120 days allowed under Rule 4(m), the Court now automatically schedules all civil cases for an initial case management conference about four months after filing. If service is achieved quickly, counsel may wish to ask the assigned judge to advance that date to get the case moving and discovery started earlier. At the initial case management conference, attorneys should be prepared to discuss whether the *presumptive* deadlines for disclosure of infringement and invalidity contentions and selection of disputed terms in the Patent Local Rules should be modified, and why.

Lawyers sometimes overlook the fact that the schedule set forth in the Patent Local Rules is only presumptive. Indeed, the rules require the parties to confer before the initial case management conference on whether to propose modification of those deadlines. For example, if the suit involves only one patent, one product and a few disputed claim terms, the patentee may want to ask the judge to shorten the deadlines. Similarly, a party should use the initial case management conference to tell the judge if it would save time and money to tee up an early motion that could significantly narrow or even dispose of the case, based on focused discovery. Counsel should also bring to the Court’s attention as early as possible any major obstacles to the progress of the case or to settlement. Also, while judges often wait to set a trial date until after claim construction, if counsel believes a trial date should be set earlier, she should be prepared to ask for trial setting and explain why.

After the initial conference, many judges conduct periodic case management conferences at which the judge and the parties address how best to efficiently and justly manage the case. For example, if multiple summary judgment motions are expected, attorneys should address the sequence in which to bring them. A judge will not be happy if she decides a series of summary judgment motions, only to find that a later one regarding, for example, the on-sale bar, moots all the earlier work.

In any event, in all but the simplest patent cases, the parties should endeavor to file separate motions for summary judgment on discrete issues, to be heard at stag-

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PETER BENVENUTTI

On CREDITORS' RIGHTS

Large Chapter 11 cases can generate a lot of litigation. Creditors facing the prospect of payment of only a fraction of their claims understandably are inclined to support litigation to enhance their recovery. The estate's litigation claims — which may be among its most valuable assets — include both causes of action owned by the debtor entity at the time of the bankruptcy filing (for example, breach of contract or malpractice), as well as claims created by the Bankruptcy Code, such as for avoidable preferences and fraudulent conveyances. To aid in evaluating potential claims, the Bankruptcy Code provides discovery procedures, including the right to compel production of documents and oral testimony, that can be pursued without first having to file a lawsuit.

The Bankruptcy Code assigns the bankruptcy trustee authority to initiate and pursue most types of litigation on behalf of the estate. In liquidating bankruptcy cases under Chapter 7, an independent trustee is appointed as a matter of course. In a Chapter 11 reorganization case, however, appointment of a trustee is very rare, and requires a specific showing of cause. Instead, in the typical case where there is no trustee, the debtor — under the direction of its existing, usually pre-bankruptcy management — serves as the “debtor in possession” with most of the powers of a trustee, including the status as the estate's litigation representative.

This can create some obvious difficulties. The debtor's management is often less enthusiastic than creditors about bringing litigation that attacks its own pre-bankruptcy decisions and transactions, especially if the defendants include current or former officers, directors or other insiders. Recognizing this tension between the interests of management and creditors, the bankruptcy courts have developed a practice of authorizing the Chapter 11 creditors' committee, usually comprising representatives of the largest unsecured creditors, to investigate and prosecute litigation on behalf of the estate when the debtor's management is unwilling to do so.

This practice was recently called into serious question by the Third Circuit Court of Appeals. *Official Committee of Unsecured Creditors v. Chinery (In re Cybergenics)*, 2002 WL 31102712 (3rd Cir., Sept. 20, 2002); *rehearing granted and opinion vacated* 310 F3d 785 (Nov. 18, 2002). In *Cybergenics*, the original panel held that only the trustee (or the trustee's Chapter 11 analog, the debtor in possession) — but not the creditors' committee — could be authorized to prosecute fraudulent conveyance actions on behalf of the estate. The panel construed the language of Bankruptcy Code section 544(b) — that “the trustee may” avoid certain pre-bankruptcy transfers — in

light of the Supreme Court's decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1 (2000). *Hartford* had interpreted the same phrase in a different Bankruptcy Code section (section 506(b)) to preclude any party other than the trustee from pursuing recoveries. Considering itself bound by *Hartford*, the Third Circuit panel held that the bankruptcy court lacked the power to authorize a committee to prosecute actions under section 544(b).

Because the Third Circuit includes Delaware, the venue of choice for major Chapter 11 filings, this decision generated a great deal of controversy in bankruptcy circles. It not only precluded bankruptcy courts from prospectively authorizing creditors' committees to bring avoiding actions, but it also called into question the legitimacy of numerous avoiding actions already brought or threatened by committees. In addition, though both the *Cybergenics* and *Hartford* decisions relied on the “plain meaning” of the statutory language and hence were limited to claims authorized by the words “the trustee may,” the underlying logic that the trustee or debtor in possession is the only authorized estate litigation representative arguably applies to most other lawsuits that might be brought on behalf of the estate.

In response to the uproar created by the panel's decision, the Third Circuit granted rehearing *en banc*. On May 29, 2003, the *en banc* court issued a 50-page split decision [*Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, ___ F3d ___, 2003 WL 21231913 (3d Cir. 2003)] in which it concluded by a vote of 7 to 4 that the Supreme Court's *Hartford* decision is distinguishable. It held that neither *Hartford* nor the statutory language “the trustee may” precludes a bankruptcy court from invoking its “equitable powers” to authorize a committee to bring “derivative” claims on behalf and in the name of the estate when the trustee unjustifiably fails or refuses to bring the claim.

This holding accords with post-*Hartford* decisions of the Second and Seventh Circuits [*Term Loan Holder Comm. v. Ozer Group, LLC (In re Caldor Corp.)*, 303 F3d 161 (2d Cir. 2002); *Fogel v. Zell*, 221 F3d 955 (7th Cir. 2000)] — neither of which discussed *Hartford* — so there is no split in the Circuits. Still, it remains to be seen whether the Supreme Court ultimately accepts the Third Circuit's efforts to distinguish *Hartford* or instead concludes that the original *Cybergenics* panel and the *en banc* dissenters got it right. If the latter position prevails, look for a substantial decline in litigation brought on behalf of bankruptcy estates.

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Peter Benvenuti



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gered times throughout the litigation, if only to allow the Court to devote more time to the parties' arguments on each issue. Filing a large number of unrelated motions for summary judgment on the last day to file dispositive motions creates a burden on the judge, who must master many intricacies of the patent case all at once, while still managing all of her other cases. Federal judges rarely have the luxury of devoting all of their time to any one case for an extended period of time.

The judge and the parties should also identify the most opportune times for settlement. I use the word "times" advisedly, because if earlier efforts do not succeed, later ones may bear fruit. Patent cases do settle, but at a significantly lower rate than other civil cases (estimated by one law firm at 76%). Further, patent cases often settle only after huge expenditures by the parties, typically in the range of \$1 million per side. If the parties see a chance to settle earlier, they should ask for the Court's assistance, whether in focusing discovery or directing them to effective alternative dispute resolution, including settlement conferences before Magistrate Judges.

Claim Construction

Claim construction is typically the first major event in a patent case. Parties have been known not infrequently to propose fifty, one hundred or even more disputed terms for construction by the judge. Secretly, counsel may realize that only a handful of terms are likely to really make a difference. Yet they hesitate to give up any possible arrow in their quiver, no matter how long a shot, in view of the enormous stakes and the uncertain contours of this rapidly changing area of the law. Ironically, there is a doctrine named "patent exhaustion" which does *not* refer to the sinking feeling that afflicts a judge faced with such a proposal. This kitchen sink approach reminds me of an old saying about my generation: "They died with their options open." Not a wonderful fate. Pursuing all issues indiscriminately, no matter how peripheral or unlikely to prevail, runs afoul of a basic rule of effective trial preparation: shaping the case as early as possible with a compelling theme and a few key issues.

This strategy also risks alienating the judge and eroding counsel's most precious asset: credibility. Judges notice when they spend a lot of time and energy struggling with a claim construction issue, only to find out later that it did not matter to the case. Losing credibility with the assigned judge can hurt counsel in other cases before that judge, an especially bad prospect if, as is likely, counsel will have other, perhaps even related cases in front of the same judge. And no one should be surprised to learn that judges talk to each other about the good, the bad and the ugly that they encounter in their courtrooms. While attorneys need to retain some flexibility to address new facts and developments in the law, they must not forget these important tradeoffs.

Judges approach claim construction differently. Non-adversarial tutorials one or two weeks in advance of the

Markman hearing to educate judges in neutral terms about the basic technology and science are widely used, and can be very helpful, whether conducted by attorneys as some judges prefer, or by experts, as others do. When it comes to construing disputed terms proffered by the parties, some judges, like me, will construe all of them *unless* the parties propose an extreme, unrealistic number. Then, the judges, employing their powers of judicial persuasion, send the parties back to meet and confer and come up with a more manageable number. If all else fails, the judge may ultimately have to impose a realistic limit on the number of terms to be construed. Judges recognize that they may need to construe additional disputed terms later, in ruling on summary judgment or motions in limine, or at trial. In practice, however, judges often find that the multiple terms that the parties so passionately urged them to construe at the outset no longer seem to matter later in the case, and the parties often do not request construction of additional terms.

Several judges in the Northern District have begun to routinely limit the number of terms that they will construe at a pretrial *Markman* hearing. For example, Judge William Alsup sets a numerical limit in each case at the initial case management conference, usually between four and eight terms, leaving construction of any additional disputed claims until summary judgment or trial. He finds that this technique sharpens the parties' meet and confer process regarding disputed claims. Judges Phyllis Hamilton and Jeffrey White have standing orders setting a presumptive, but rebuttable, limit of ten terms, and a procedure for exceeding that limit.

These limits on claim construction are intended to focus the parties' and the Court's time and energy on the terms that really matter to resolution of the case, whether by settlement or further litigation. On the one hand, some patent practitioners worry that these limitations do not allow enough latitude as the case unfolds or frustrate resolution on the merits. On the other hand, other practitioners recognize that limits can save money and speed up the process, and have beneficial, self-disciplinary effects like the seven-hour limit on depositions, or the allocation of a certain number of hours of trial to each side.

Even when no express limitation is imposed, the meet-and-confer process should lead the parties to winnow down the number of disputed terms to those that they really cannot agree on *and* that make a significant difference to the outcome. This process may require prior discovery on the real world impact of the different possible constructions, including information on how the accused device actually works. If numerous terms still legitimately remain at issue, judges may decide to schedule sequential *Markman* hearings.

In this district, *Markman* hearings are usually held in advance of summary judgment motions. After much experience with this approach, however, Judge Ronald Whyte is moving toward holding claim construction and summary judgment motions at the same time. Potential advantages of this approach include understanding the

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WALTER STELLA

On EMPLOYMENT

E-mail and Internet use are now integral parts of the typical worker's daily routine. Despite their obvious benefits, these new modes of communication have the potential to be misused in ways that decrease employee productivity and risk employer liability. Recreational workplace Internet surfing and personal use of employer provided e-mail reduce employee efficiency. Employees' misuse of their employer's computer system may expose the employer to legal liability. Openly viewing sexually explicit websites or sending offensive material obtained from the Internet may create a hostile work environment. Moreover, inappropriate messages sent via a company's e-mail system could expose the company to claims of harassment, discrimination or defamation.

To maintain employee productivity and limit potential liability, many employers have considered monitoring their employees' use of e-mail and the Internet to ensure appropriate business use. They must also consider, however, that both federal and state laws limit monitoring of employee communications and that such monitoring implicates employees' constitutional and common law rights to privacy.

Under federal law, the monitoring of employee communications by an employer is governed by the Electronic Communications Privacy Act 1986 (ECPA), 18 U.S.C. sections 2510 *et seq.* Under the ECPA, the lawfulness of a company's monitoring activity depends on whether employees' messages are acquired during transmission or while stored on the company's server. As a general matter, it is unlawful to intercept messages in transit unless the company has obtained prior consent to monitoring from at least *one party* to the communication. Nevertheless, a company's retrieval and review of messages stored on its server is generally permitted under the ECPA. *See, e.g., Konop v. Hawaiian Airlines, Inc.*, 302 F3d 868 (9th Cir. 2002).

Under state law, what constitutes acceptable monitoring is less certain. The California Invasion of Privacy Act prohibits wiretapping and eavesdropping under certain circumstances. Cal. Penal Code sections 630-637.5. California's wiretapping statute prohibits intercepting or recording communications without the consent of *all parties* to the communication. Cal. Penal Code section 631. Thus, like federal law, interception of messages in transit is prohibited in California. But unlike federal law, consent of one party alone is not enough. Accordingly, even if a company has obtained effective consent from its employees to the monitoring of their communications, interception of an employee's communications with people outside the company might result in criminal liability.

It is unclear, however, whether reading the contents of communications stored on a company's server is prohibit-

ed by state law. California's eavesdropping statute prohibits anyone who does not have the consent of *all parties* to a "confidential communication" from eavesdropping upon or recording that communication by means of "any electronic amplifying or recording device." Cal. Penal Code section 632. "Confidential communications" include any communication carried on in circumstances that reasonably indicate that any party to the communication desires it to be confined to the parties, so personal e-mails would likely be covered by the law. But it is unclear whether reading them while stored on a company's server is prohibited, since reading stored messages might not constitute "eavesdropping" with the aid of an "amplifying or recording device." Unfortunately, there is no published opinion addressing this issue.

In addition to statutory limitations on an employer's ability to monitor employee communications, an employer must also consider whether monitoring would violate an employee's right to privacy. At least one California court has held that notifying employees in advance that their use of company computer equipment may be monitored eliminates an employee's expectation of privacy. *TBG Insurance Services Corp. v. Superior Court*, 96 Cal.App.4th 443 (2002). In *TBG*, the employee was terminated after monitoring revealed that he had visited pornographic sites using his work provided computer.

Personal use of e-mail and the Internet — and the problems potentially caused by such use — are an inevitable fact of life in most workplaces. However, before employers resort to monitoring these activities in an effort to avoid any problems, they must consider the legal limitations placed on them. To ensure compliance with federal law, and maximize the probability of complying with state law, any monitoring of this activity should be limited to stored communications only. Moreover, to minimize an employee's expectation of privacy, employees should be notified in advance of any intention to monitor their e-mail or Internet usage, and that any personal use is done at the user's own risk.

Of course, monitoring is not the only means for an employer to reduce its potential liability from misuse of its computers. To minimize the risks for employers and address employees' legitimate privacy concerns, employers should implement a comprehensive policy covering e-mail and Internet use. Many computer usage policies prohibit accessing pornographic sites at work and forwarding or engaging in harassing, discriminatory, or defamatory communications via the Internet or e-mail. Although difficult to enforce strictly, these policies help show that any such communications are not authorized by the employer.

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Walter Stella



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Practical Lessons

been used. Though, at the time of this writing, the case has not yet completed the post-trial motions or appeal, a few observations about the model instructions may assist others using them.

First, while the jury was able to follow the instructions to dive into the complex legal and technical issues, the instructions did not address what turned out to be an important question asked by the jurors near the end of deliberations: "If the jury finds a claim to be invalid on one ground, does it need to decide the other possible grounds for invalidity?" At the plaintiffs' request, the Court answered that the jury *did* need to rule on all asserted grounds for invalidity. Clearly, the jury would have preferred to know that answer up front through the instructions or the verdict form. The jury was very attentive and studied every instruction in detail.

Second, the jury also questioned the meaning of the model instruction regarding "statutory bars" (Model Patent Jury Instruction B.4.3a2). "Statutory bar" does not refer, as some have surmised, to drinking establishments set up by acts of Congress. Instead, the term refers to the fact that a patent claim is invalid if the patent application was not filed within the time required by law. For example, a patent is invalid if a device or method using the claimed invention was sold or offered for sale in the United States, and that claimed invention was ready for patenting, more than one year before the patent application was filed. The jury asked whether the statutory bars were part of the other grounds for invalidity such as obviousness or anticipation, or were separate grounds for invalidity. The question highlighted a potential ambiguity in the instructions, which was resolved through the inclusion of several additional questions on the jury verdict form. Besides highlighting the ambiguity, the question demonstrated that the jury could and did sort through the complexities of the patent jury instructions.

Third, jurors might have benefited greatly from having at least some of the patent instructions provided at the beginning of the case. Of course, this is a common comment from jurors in cases involving complex legal issues and is not always appropriate in light of the frequency with which legal issues change or are decided by the Court prior to the jury deliberations. Perhaps the Model Patent Jury Instructions could be expanded to include model pre-instructions on certain issues to be used in cases where there is no real doubt that those issues will ultimately be decided by the jury.

Since few complex patent cases are actually tried, we were pleased to have the opportunity. The trial taught us that with the help of technology, jurors can understand and adjudicate the complex issues presented by technology cases.

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Preparing the Lay Witness

- The line between the question and the answer may blur, causing jurors to later recall the question posed as the witness's response.

The witness needs to understand that she will not be able to control the cross-examiner's questions; she can only control her answers and the tempo of the give-and-take.

Practice As Therapy

Thorough preparation can have a therapeutic effect on the witness. Witnesses typically improve when an attorney gives them sufficient attention: when their fears are addressed and the judicial process is demystified. In the end, rigorous witness preparation helps the witness stay focused on telling the jurors the information they need to make the right decision.

Lois Heaney and Karen Jo Koonan are trial consultants at National Jury Project/West in Oakland, CA. An earlier version of this article appeared in the 10/27/00 issue of the Los Angeles Daily Journal. Copyright 2000, Daily Journal Corp. Reprinted with permission. lheaney@njp.com and kkoonan@njp.com.

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MARY MCCUTCHEON

On INSURANCE

In this challenging economy, Directors & Officers Liability (D&O) Insurers are increasingly called upon to respond to securities claims based on restated financials of troubled companies. In cases where those financials were submitted to the insurer as part of the application process, insurers increasingly, and aggressively, attempt to rescind the policy. The insurers argue that it is not “equitable” to require them to honor a contract obtained under false pretences. However, rescission itself may not be “equitable” when the policy is a renewal of a prior policy issued by the same insurer.

D&O policies are “claims-made” policies, providing coverage based on when the claim was asserted, not when the wrongful act which is the basis of the claim was committed. Exceptions to this rule, however, are provided at both the front and back end of the policy. A carrier issuing a new policy usually includes a “retro date” in the policy, which specifies that any act committed before a certain date (often the date of inception of the policy) is excluded from coverage, even if the claim is made during the policy period.

As the policy expires, the insured can take advantage of provisions extending coverage for claims based on acts committed during the expiring policy period which arise at a later date. One provision is an “extended reporting option” which, if the insured or insurer refuses to renew the policy, allows the insured to purchase (for a hefty premium) an additional period in which to report claims based on acts committed during the expired policy period. In addition, D&O policies provide that sufficient notice of a potential liability occurring during the policy which might give rise to a claim at a later date triggers coverage under the expiring policy, even if the claim is asserted afterward. By these provisions, an insured can be reasonably certain that it has continuity of coverage, even if it renews with a different insurer. Moreover, a company who stays with the same insurer has an expectation of continuous coverage, even if an occurrence in one policy period gave rise to a claim in a later period.

Suppose a D&O insurer has insured a high tech or telecom company for several years after a successful IPO. As business slows and the NASDAQ plummets, it is discovered that the sales department has been misstating revenues, causing a restatement of a prior 10 K. The usual securities and derivative actions are filed, and the company declares bankruptcy, leaving directors and officers to defend themselves. They turn to their D&O insurer, only to discover that during the course of the renewal the

insurer asked for the 10 K which is now being restated, and now seeks rescission of the policy as to all insureds.

The insurer asserts that it would never have offered coverage for a company if it had known the “true” financial picture of the company when the policy was renewed. It claims, as is required for rescission, that it would be inequitable to force it to bear this risk. In fact, the reverse is true — it would be inequitable to allow it to escape a risk it had already contracted to cover and which, in essence, had accrued under the expiring policy, merely because of a fortuity of timing.

What actually would have happened if the insurer had known the “true” financial condition of the company and refused to renew? (Or raised premiums so that the insured could not renew?) Presumably, the insured would have known the “true” facts as well. It would have purchased the extended reporting option or provided a notice of circumstances, and preserved its coverage when lawsuits ultimately were filed.

When the insurer issued the expiring policy, it accepted the risk of claims for wrongdoing in that period. And, by the discovery period option and notice provisions it accepted the risk of claims made after the policy period which had their origins in events taking place during the policy period.

As a matter of pure contract law, this argument probably fails. Rescission, however, is based not on contract law, but on equity. A court in equity has a great deal of discretion to avoid harsh results that might be mandated under a strictly legal view. See *Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1552 (1998). Rescission is simply a determination that it would be more unfair to enforce the contract than to restore the parties to the status quo immediately prior to the contract. So, not only should a court consider what the *insurer* would have done “if” it had known the true facts, but also what the *insured* would have done “if” the true facts had been known: report the risk under the proceeding policy’s notice of circumstances provision or purchase a discovery period.

Although none of the reported cases allowing rescission of D&O policies have thus far addressed this issue, when addressing the rescission of a renewal policy, the first question should be: what is really “fair?” It is unfair to allow the insurer to reconstruct the contract with the benefit of 20/20 hindsight without allowing the insured to do the same.

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Mary McCutcheon



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Managing the Runaway Patent Case

claim construction issues in a more developed factual context (just as the Federal Circuit does on appeal), and possibly eliminating the need to construe some disputed terms. On the other hand, if the judge adopts a construction that differs from that proposed by either party, further summary judgment proceedings may be necessary.

Discovery

Avoiding discovery trench warfare poses another challenge. Outside of the courtroom, some practitioners confess that the scorched earth battles have gotten out of hand and they would welcome being reined in (“stop us before we fell more forests”). Whether due to high stakes, deep pockets, the ability of a better heeled party to bleed its less well-funded competitor to death, or an unfortunate culture of patent litigation, patent cases tend to have disproportionate discovery battles — too often over issues that the parties should have been able to resolve themselves. Unfortunately, counsel sometimes forget how negative a reaction they engender on the bench when they lose their civility, professionalism and sense of proportion in nasty discovery disputes. When I was in practice, I always knew which side was at fault (the other one). Unfortunately, it is often difficult as a judge to figure out which party is really at fault, and hard not to conclude that all the parties share the blame. Also, while imposing monetary sanctions on the losing side may have a prophylactic effect in some cases, sanctions require the judge to engage in collateral proceedings regarding the reasonableness of the amount, and may backfire by emboldening the winning party to bring less meritorious motions in the future.

Meaningful efforts to meet and confer are essential. Preferably, meet and confer discussions should be conducted face-to-face, and certainly not just by letter or voice-mail, contrary to the sometimes overlooked requirements of Civil Local Rules 1-5(n) and 37-1. Case management conferences can help set the tone by focusing discovery on what is really necessary at a given stage of the case, and establishing which disputes the judge expects the parties to resolve themselves (for example, in the usual case, where depositions should be taken).

Some judges, like me, employ “progressive discipline” for runaway discovery fights. If parties engage in repeated unnecessary discovery battles, the judge escalates from verbal warnings, to monetary sanctions, to requiring the senior partners and top company officials to meet and confer in person before any more discovery filings and to attend hearings in person, and ultimately to considering issue preclusion sanctions. For cases that require constant judicial intervention, where the parties can afford it, outsourcing to a private discovery special master may be the only alternative to tying up limited public resources.

Another important but difficult issue is ensuring that parties with highly disparate resources have as level a

playing field as possible. Allowing a wealthy litigant to bludgeon its less well-heeled adversary — perhaps a new entrant into the market — into submission by needlessly proliferated, unduly expensive litigation tactics is antithetical to the basic goal of securing “the just, speedy, and inexpensive determination” of the suit. At the same time, doing justice also means allowing legitimate discovery and motions to be developed and decided.

Managing complex and high-stakes patent cases requires frequent judicial involvement. Striking the proper balance between efficiently and fairly adjudicating these cases and reigning in exorbitant demands on the parties’ and the Court’s resources presents a significant challenge. As patent law itself evolves, so too will the techniques that courts employ to manage these cases. We need all the help we can get from thoughtful practitioners.

Elizabeth D. Laporte is a United States District Court Magistrate Judge for the Northern District of California, and is also a Member of the Board of Governors for the Northern California Chapter of ABTL. Magistrate Judge Laporte handles patent cases through trial on consent of the parties.

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