PRESENTATION:

LITIGATION OF INTELLECTUAL PROPERTY IN THE UNITED STATES

Judge John C. Coughenour*

Well, I must say this is a very intimidating audience. I have an uneasy feeling that everybody in the room is smarter than me. Unfortunately, you have to listen to me. I'm going to talk a little bit about trials of intellectual property cases. I've been on the bench here in Seattle for eighteen years, and the bulk of my adult life was spent as a trial lawyer who had never had anything to do with patent or trademark cases. Not only that, I didn't want to have anything to do with them.

I want to be talking about our system on a fairly basic level, because I'm working on the assumption that some of you in the room are not entirely familiar with the United States court system, and that many of you in the room, even if you are familiar with the court system, may not have been trial lawyers nor have tried a lot of intellectual property cases. For some of you my remarks may be too basic. I apologize, but I want to reach a larger audience.

As most of you know, high technology cases are largely tried in our federal courts. Although some cases do end up in the state court system, most of the law as has developed on the federal side. I think there is a tendency on the intellectual property side of the bar to prefer filing your cases in Federal Court. We also differ from some systems in that our federal courts are not specialized courts. We have a rare exception represented by Judge Rader of the Federal Circuit, but by and large, with some minor exceptions, we are all generalists at the District Court level. And we do not specialize in intellectual property cases or have specialized courts to try only those cases. Frankly if I were to design the system from scratch that is one of the things I would do. I would have a specialized trial court for intellectual property cases, and I would dispense with juries in intellectual property cases. But neither of those things are likely to happen. I think

* United States District Court, Western District of Washington.

patent lawyers in particular are strongly opposed to either of those; at least every time I have suggested them it has not met with welcome from the audience.

Another major difference that may not occur even to people who practice in our courts is that our judges in the federal system are not trained as judges. Those of you from the continental systems, or Asian systems, know that in many countries around the world judges are trained to be judges. That certainly has merit and good reason behind it, but that is not the case in the United States. In fact, people, particularly on the federal bench, generally don't become judges until they have practiced as lawyers somewhere in the neighborhood of twenty or thirty years. Thus is it is quite common for people to be named to the federal bench when they are in their fifties and have had very little, if any, experience as judges. They may have sat as judge *pro-tems* sometimes, or some will have had state court judging experience, but even those tend to go on the bench at an advanced stage of their career.

That has a number of ramifications, for people such as yourselves who are interested in trying patent, trademark, and copyright cases. For example, let me say this—and this is a pretty remarkable statement if you think about it: I've been on the federal bench for eighteen years, and I have never met another federal judge who was a patent lawyer before he went on the bench. There are very few federal judges in the country that have had any extensive experience in the patent or intellectual property arena. There are very few federal judges who have ever tried, as trial lawyer, a patent or trademark case. What that means is that judges that are going to be sitting on your cases are virtually always inexperienced, uneducated and ignorant about patent and trademark law. That means they need a lot of help from the lawyers.

The biggest criticism I have of the patent and trademark bar is that we generally don't get that help from the lawyers. The lawyers tend to assume because they have spent the last several decades conversing with one another in this strange language that patent and trademark lawyers use, that everybody understands what they are saying. And the fact of the matter is that frequently the only people who do understand what they are saying are the two lawyers in the courtroom. And honestly, often even the judge does not understand what they are saying, and if you think that I don't understand what you are saying, then trust me you are not conversing and communicating with the jury. You must assume, when you try an intellectual property case, that your audience doesn't know what you are talking about, and you might assume that many people in the audience don't care about what you're talking about. You know, one of the things that has always

been amusing to me, is that I have often observed that all the people in the world who give a damn about the issue we're talking about are gathered together in the courtroom. Nobody else cares, and that includes the jurors. You have to make the case interesting, if you're going to communicate with them.

And I must say, I observed once—and got in trouble for it—that "patent trial lawyer" is an oxymoron. Most patent lawyers come to their profession with an engineering background. Engineers are not known for their ability to communicate verbally. Pardon me if I offend. It is a fact of life that a lot of intellectual property lawyers have a hard time describing things in a way that the average juror can understand, and even that the average judge can understand. Far too often they get so close to their profession, and their specialty within the profession, that they can’t see the forest for the trees.

Another point that is often lost on people who are trying intellectual property cases is that to us these are each just another trial. These cases are not something that warrants an entirely different approach to things. They aren't something that deserves everything else to be shoved aside so that the dispute can be resolved with an intensive scrutiny and an inordinate amount of time devoted to it. Its just the next case out of the pit, and we have to try it, get on with it, get it over, and get to the next case. As a consequence, when you try these cases you will encounter a significant amount of impatience from the bench, and even more impatience on the part of the jury.

That is something that is just not appreciated by a lot of trial lawyers, because they are so close to the issues. Their case is so important to their clients and their careers that they think it is just as important to the judge and the jury—and it frankly is not. It doesn't surprise me that jurors get angry at lawyers who drag things out. And patent cases are the worst, in terms of lawyers dragging things out in a way that offends the people who are going to be making the decision. If you remember nothing else that I say here today, remember this: the people who will decide the case, whether judge or jury, don't appreciate with the same degree of intensity the importance of the issue. Secondly, they want to get out of the courtroom and on with their lives, which do not revolve around the design of a transistor, or what have you. If you are perceived by the trier of fact, judge or jury, as an impediment to their getting on with their lives, you are going to pay a price. If on the other hand you are perceived as someone who is trying the case efficiently without wasting time, speaking succinctly and briskly, it will be appreciated by people who want to get out of the courtroom and on with their lives.

One other major message I'd like to impart about intellectual property cases is that these, more than any other cases that I have encountered on the civil side, tend to be big, drawn out and expensive. Patent cases, more than any other cases, have a tendency to get out of control. They are viewed by the company as "bet the company" litigation, and as a consequence there is a no-holds-barred, World-War-Three, take-no-prisoners, scorched-earth approach to these cases. One of the things that frequently happens in these cases that causes them to go out of control is that the defendant will file an antitrust counter-claim, and then the whole world is opened up for discovery. It will take years, if you let them do it, to conduct discovery on the counter-claim, and usually the counter claim is a lawyer's dream that was thrown in for negotiation purposes. But the counterclaim takes on a life of its own, resulting in hundreds of thousands, even millions, of dollars in attorney's fees. If you are going to file an antitrust counter-claim in one of these suits, make sure you know what you are doing. Make sure you understand the scope of discovery you open up when you do it, and what you are turning the case into. Even if the case doesn't have an antitrust counterclaim part, intellectual property cases tend to get out of control and take far too much time.

This leaves me with on final suggestion that I'd like to make. It may very will be that litigation and resort to the courts should be safety net and a last resort to resolve cases like this. Perhaps litigation is the worst way to resolve these kinds of disputes. The uncertainty that results from these highly technical questions being answered by people who are ignorant about the science and even the law having to do with the issue results in the inability to predict outcome, and therefore much higher likelihood of trial than an average civil case. A trial result can be devastating to one side or the other. I have never seen a patent or trademark case that went to trial in my district where I thought the winner walked outside the courtroom saying, "Wow! Look what we did!" Usually they walk outside the courtroom, scratching their heads saying, "My god, look at how much money we spent, and how little we got out of it."

What I am suggesting is that in this area, perhaps more than just about any other, careful consideration should be given to resolving the case in a way that allows people who understand the issues—mediators, trained lawyers—to have input into the issues by means of private mediation, private dispute resolution with judges who know patent and trademark litigation, private attorneys sitting as judges—things like that. In my mind, perhaps the worst way in the world that your clients can be served in an intellectual property case is to build a case and take it into Federal Court. Thank you.