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## Tribalism and Customary Practices of the EDTX

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# Tribalism and Customary Practices of the EDTX

## Moderator:

*Professor Debra Lyn Bassett, Southwestern Law School*

## Panelists:

*Samuel F. Baxter, McKool Smith*

*Otis W. Carroll, Ireland Carroll & Kelley, P.C.*

*Michael E. Jones, Potter Minton*

## INTRODUCTION BY PROFESSOR XUAN-THAO NGUYEN, SMU DEDMAN SCHOOL OF LAW:

PROFESSOR NGUYEN: I am so pleased to have Professor Debra Lyn Bassett as the moderator for this panel. Professor Bassett is a well-known scholar, and she was named the Justice Marshall F. McComb Professor of Law at the Southwestern University School of Law in Los Angeles. Prior to that, Professor Bassett was the Judge Frank M. Johnson Jr. Scholar Distinguished Chair at the University of Alabama School of Law. In 2009 she left Alabama and moved to Los Angeles. Those of you who are in the complex litigation and civil procedure fields would have read her work on ruralism and federal litigation, particularly legal ethics and biases against rural people. If you look at her extensive biography, with all of the law review articles and books that she has written in this field, it is clear that any time we want to have discussions relating to ruralism, Professor Bassett is the authority. With that, I now turn the panel over to Professor Bassett, and I am sure that this particular panel will be fascinating. Thank you.

PROFESSOR BASSETT: Good morning. Many thanks to Professor Nguyen and to SMU Dedman School of Law for inviting me to participate in this symposium. I am very glad to be here. Although I am the moderator for this panel, I am going to offer a few comments at the outset that will serve as sort of a transition from the first panel to this one. [Professor Bassett's article *Ruralism and Patent Litigation in the Eastern District of Texas*, appears in this Volume, *infra*, at 293].

We have a distinguished panel to take the discussion from here to a discussion of their perspectives on the customary practices of the Eastern District of Texas. Our panel includes Mr. Otis Carroll, Mr. Mike Jones, and Mr. Samuel Baxter. Our first panelist to speak will be Mr. Carroll.

With over twenty-five years of litigation experience, Mr. Carroll is one of the preeminent trial lawyers in East Texas. Having long focused his practice on complex civil litigation, Mr. Carroll has successfully tried numerous patent, civil-fraud, oil-and-gas, anti-trust, and breach-of-contract cases. A fellow of the American College of Trial Lawyers and American Board of Trial Advocates, Mr. Carroll is admitted to practice before the Fifth and Eleventh Circuits and before the Federal District Courts for the Northern, Southern, and Eastern Districts of Texas. Mr. Carroll previously practiced with the firm Foreman & Dyes and served as an Assistant United States Attorney for the Eastern District of Texas. He is a graduate of Texas A&M

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University, from which he received his bachelor's degree, and from the University of Texas School of Law.

MR. CARROLL: Thank you, Professor Bassett. When I was asked to speak on this panel and was told that the topic would be tribalism, it kind of left me with a question as to where to start. Because tribalism, in my view, is not necessarily a bad thing. We were all members of tribes. So what I thought I would start off doing is to tell you a little about the tribal area that this whole symposium is about.

Who has been east of the Trinity River? A lot of people. Let me tell you a little bit about the tribal area that you are hearing a lot about. It starts in far Southeast Texas in Beaumont. Who has been to Beaumont? A lot of people have been there. It goes far north into Texarkana. Who has been to Texarkana? A few people have. And it goes as far west, some of you may not know this, as Cook County. Who knows where Muenster, Texas is? Muenster, Texas is in the Eastern District of Texas. Gainesville, Texas is also in the Eastern District of Texas. The Eastern District of Texas starts six miles up Texas State Highway 75. Which, by the way, was a huge political war zone in the 1980's after the savings-and-loan meltdowns, and here is why: Nobody from the big banks wanted to have bankruptcy litigation in our bankruptcy courts. And so Phil Gramm carried a bill to exclude Collin County from the Eastern District of Texas because so many people in the banking industry thought it wrong that they had to litigate their bankruptcy wars in front of our bankruptcy judges. That did not pass, by the way. This tribal area has a lot of anomalies. My favorite is that the Northern District of Texas in Denton is in the Eastern District of Texas. Texas A&M University-Commerce [formerly East Texas State College] is in the Northern District. So you cannot necessarily know you are in the tribal area just by the name East or North. Everyone knows that you cannot make much sense out of county names and city names in the tribal area. Everyone knows, I am sure, that Rusk County does not have a town named Rusk in it. Henderson County does not have a town called Henderson in it. Tyler County does not have a town called Tyler in it.

There are three towns with these names, but they are in different counties. The tribal area is the home to tribal courts presided over by tribal judges, much like in other areas. The chief judge—the “chiefliest” chief as we call him—is in Texarkana, and each of the other chief tribal judges has his own domain. You are going to hear from two of them, I understand, this afternoon—Judge Ward and Judge Davis. Now the point, I think, of this discussion is to talk about the locals—about the local guides, the local help—who try to help you navigate through the tribal areas and the tribal courts, because the tribal judges differ in great respects in their temperament. Most of them are pretty calm and pretty even-tempered, but some of them are famous—even notorious—for their violent rages. That is why a lot of people from out of town think it prudent to hire locals.

The theory is that the locals can sense the change in the atmosphere—like some old timers can tell you when a northern wind is about to blow—

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and they know when the judge is about to blow up. They can hopefully tell you when you are up on the line. That is a good thing. That is a particularly good thing for the locals because they naturally get paid for those auguries. It is a good thing a lot of out-of-town lawyers conclude to pay whatever price the locals insist on. A lot of times, the locals are told it is a hold-up price. We also know that the circus comes to town, and the circus leaves, but we will still be there. The key to knowing about the local practice is to know that it is largely driven by perception. The perception is, just like the professor was talking about, are you in Mayberry? The locals typically are peaceful and easy to get along with as long as you respect their customs and are generally mindful of the fact that, by and large, they want to be where they are. Judges, lawyers, jurors, bailiffs, court reporters, clerks—they are there not because anybody has drafted them and frog-marched them over there, but because that is where they want to be. So I guess one of the points that I thought about today is: What is different, tribalism-wise, from the practice in the Eastern District of Texas versus in Manhattan or in the Western District of New York or in the Northern District of California?

One time, I had a lawsuit in the Southern District of New York, and I was warned that the most important thing that would happen to me was being admitted to practice before the Southern District of New York. I was told that this was a big deal because the Southern District of New York was very snobbish about who they let in. They did not want just any jackleg lawyer coming in and practicing in their courts. I was summoned before my judge in his chambers before the case got going. He asked me what it was that we could get done before the case got going. I mentioned to him that I was not admitted to practice in the Southern District of New York. He looked at me, kind of sternly over his glasses, and said: "Well, do you have your paperwork?" I said: "Yes, I do, Judge," and I handed him this big stack of forms. He looked at it and he flipped through it. He said: "It all looks in order," and "Raise your right hand," so I did. He said: "Welcome to the Big Apple!" So that is kind of how it is east of the river. We try not to take ourselves so seriously. Maybe that is one of the reasons that the professor here sees some of the articles about us. One of the reasons that we are institutionally taught not take ourselves too seriously is best exemplified by a comment that Judge Bob Parker made when he was our Chief Judge before he went to the Fifth Circuit.

Judge Parker had instituted a plan in our district twenty years ago that was called Civil Justice Delay and Expense. The deal was that we were a pilot program to come up with a local rule plan that would streamline civil litigation. Judge Parker's plan was very radical in a lot of respects, and I will never forget one of the things that it did: it dramatically restricted the numbers of depositions that you could do. I will never forget Judge Parker's response. He had a big meeting with a lot of the lawyers, and everybody was mad about the new rule on depositions because we made a lot of money on depositions, particularly in toxic tort. Somebody said: "Where do you get off changing that rule?" I will never forget what Parker said: "Every day of the week in this judicial district people go on trial for their liberty in criminal

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cases, and there are no depositions taken in criminal cases. What the lawyers have to do is to get out there and get the facts on their own. That is a pretty dramatic gear shift for civil lawyers, but you are going to have to do it.” You know what? We did it. That same mentality explains why we have the guidance from our trial judges—they were all a part of that time when Judge Parker told us that it would not be business as usual.

So getting back to this whole question about tribalism, when you come to our tribal area and hire a local to help you in whatever business you have, you will find that all of the locals have two common points of wisdom that they will pass on to you. The first point of wisdom is that we locals, by and large—whether it is a virtue or a vice—believe we are required to try and get along. That is just kind of how we are built over there. We plead guilty to the article that the professor read, the accusation that we in fact know one another. We see one other on the street, and we may even go to church together, those of us who go to church. We may have social acquaintances, and that carries over after five o’clock. So what the locals in our form of practice and our world view do not want is to be required to pretend to be somebody that we are not just to please someone’s notion of what a real tough trial lawyer is like. That is just not the way that most of us operate over there.

The second thing that all of the locals will tell you is that whether it is tribalism or just the way we do things, it is best that you not only do what the judges say they want, but also do what the judges imply that they want. We will tell you what your common sense tells you, and that is that you can learn a whole lot by opening your ears and closing your mouths when these judges talk, because oftentimes, they will tell you exactly what they want and what they do not want. The genesis of that requirement, whether it is tribalism or local practice is really simple and self-evident: your locals are kind of like hostages in a mafia sit-down. The warriors go away and the hostages stay. So when somebody leaves to go back to Los Angeles, New York, or Dallas, we are still here. The bad taste of an experience in a trial stays with these judges a long time, and frankly, we locals are tried by the company we keep. So we try to be pretty selective, because we want to make sure that when one of the judges climbs on us, it is for something that, frankly, could not have been helped.

The last thing that I want to talk to you about is what I call the perception of influence. Judge Faulkner used to be one of the magistrate judges up in the Sherman division. When Judge Faulkner started mediating patent cases, he asked me, because he and I are long-time friends: “What is the best advice you can give me to mediate these patent cases?” I said: “I will give you the same advice that Franklin Jones, Jr. gave me about practicing trial law, and that is: never, ever, ever explode the myth that you have special favor with the judges.” And he said: “You know, these mediators start off by saying, ‘Now let me tell you what is not going to happen. Whatever you do, the judges will not know anything about it.’” I said: “The minute the mediator says that, you can forget about it.” Why? Because there is no reason to believe that you have to act right because a judge will not know. And so this

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idea about the locals having influence or not having influence depends on what you call influence, and that is: do we have our professional reputations on the line every time we stand up in a patent case or any other kind of case? The answer is yes. And is that important to us from the standpoint of when we stand up the next time in front of a judge? That answer is also yes. And that is what we have to offer.

So everybody knows that change is in the wind. We hear it every day. We hear about the imminence of patent reform. I guess a lot of you all remember when tort reform happened, and before tort reform, a lot of us used to try tort cases, but not anymore. And likely the time will come when patent reform happens and maybe we will not try patent cases anymore.

I see Roy Harden sitting here. Roy's partner of years ago, an older gentleman named Bill Harris, was one of the early patent lawyers in this state. Bill Harris came to Tyler about thirty years ago and hired me on a patent case, and I had never even heard of a patent case. We were in front of Judge Justice, who was Judge Davis's predecessor on the bench. Judge Justice called me aside and said: "Why are you in this patent case?" I said: "Well, Judge, I got hired." He said: "Well, is your practice that bad? I can give you some criminal appointments." So I guess everything has a season and a time. But I hope that whether you call it tribalism or our way of doing business or anything else, those of you who come over will come back. And we have a bar in the Eastern District of Texas that is welcoming.

We have an annual district meeting, which in the last few years has been held in the Collin County area. Judge Hanna and Judge Heartfield used to have it down in Galveston, which was always kind of curious, because Galveston is not in our district. But I would encourage you to come to our district meeting. It is great fun. It happens in October and a lot of folks speak. All the judges come, we have all kinds of good seminars, and it is a good way to get to know the people you will be dealing with if you come into our tribal area.

I want to leave you with this anecdote I was thinking about last night. Mike Jones's partner, John Henry Minton, who is one of the great lawyers in East Texas, gave me a book called *Two Centuries in East Texas*, and it was written by a professor down in San Augustine—which is deep in the Piney Woods—about a hundred years ago.<sup>1</sup> And there is a chapter entitled "Bench and Bar," and I want to read this and leave it with you. It says:

In those days, not only the Judge and the district attorney, but the entire bar would stuff their law books into their saddle pockets, mount their horses, and ride together from county to county to hold the successive terms of court throughout the year. This annual migration of lawyers from courthouse to courthouse was the occasion of much lively conversation and often very undignified pranks plagued by waggish members of the company upon the

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1. G. L. CROCKET, *TWO CENTURIES IN EAST TEXAS* 1932.

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more serious and solemn, and many ludicrous anecdotes are told of their mad doings.

So come to the bar meeting and hear about the mad doings and come to our district. We would be glad to have you. Thank you.

PROFESSOR BASSETT: Thank you, Mr. Carroll. Our second panelist is Mr. Mike Jones. Mr. Jones is a board-certified civil-trial specialist, and he has been named a Texas Super Lawyer by the *Texas Monthly, Law & Politics*, and *Texas Lawyer* publications. He has served as lead counsel in numerous significant cases, such as successfully resolving—on behalf of a target defendant—one of the largest trust cases ever filed in East Texas. Throughout his thirty-three years of experience as a trial lawyer, Mr. Jones has handled a diverse array of complex litigation, involving intellectual property, personal injury, product liability, professional liability, environmental liability, media liability, class actions, and business controversies. He has represented both plaintiffs and defendants. Mr. Jones received both his bachelor's degree and his law degree from Baylor University. He is licensed to practice in both the Northern and Eastern districts of Texas.

MR. JONES: You know, Mr. Carroll tells us that he and Mr. Baxter are paid an immense amount of money to tell everybody when judges are about to blow up. I have spent my life trying to stay on the right side of judges and I do not know that I have learned how to do it yet. As hard as you try, you may still get in trouble. That is true in the Eastern District, and I bet it is true everywhere else if you practice law.

But having said that, I think all of us on this panel, when we saw the title "Tribalism," were really struggling to determine what it meant. To me what it meant was: What are the characteristics? What goes on over there that makes the Eastern District of Texas what it is? And I do not think you can take away enough from the first panel to really understand the Eastern District of Texas.

I think the essence of the Eastern District of Texas is our jury pool. That is the reason why, back when there were asbestos cases, so many of them were filed in the Eastern District of Texas. That is why there was so much tobacco litigation in the Eastern District of Texas, and I really think that is one of the great reasons why we have so much patent litigation today. I think in order to understand what the Eastern District of Texas is, you also need to understand a little bit about what you touched on: the cultural divide in our nation.

I work with lawyers from all across the country, but one thing I have noticed is that when I go to the West Coast and when I go to the East Coast, I do not feel nearly as comfortable as I feel in Tyler, Texas. Things are different. The food is different. People do not speak to each other like we speak to each other in East Texas. It is a different world. By the same token, when the same lawyers that I work with come to Tyler and visit us and work with us in Tyler, I think they note the same differences. That cultural divide is something that you have to understand if you are going to be part of the "tribe" of East Texas that is successful in trying lawsuits there.

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One of the big things about this cultural divide that I think we have skirted on, but we really have not talked about today, is the fact that the Eastern District of Texas is in the middle of the “Bible Belt.” If you want to understand the Eastern District of Texas you need to understand that when you send out a questionnaire to prospective jurors and you ask them what they read—what is the favorite book that you read—the response you are going to get the most is the Bible. That is what you are going to see, and you need to understand that. Because what that tells you is that most of these people have grown up in church environments that have given them a worldview of life that tells them a couple of things. One of the things it tells them is that there is such a thing as right and wrong; there is good and evil in this world. They view life in that manner. And when they are charged with the responsibility of judging others—which from their background they take very, very seriously—they look at it as a decision of who is right and who is wrong. You must approach your trial in the Eastern District of Texas in that manner. It is a morality play. Your story is very important, and you must couch it in the terms of the fact that somebody is right and somebody is wrong. Because our judges do a great job—when they empanel a jury and when they sit them in the box—of telling them: “You are here to do important work.” They tell them: “You are serving your country right now in the highest way you can do it, next to only military service. Next to only military service, you are doing the highest duty to your country you will ever do when you make the decisions between these parties.” And these jurors take it very seriously. They use their background of morality to make the decisions that they make in these cases.

Let me tell you another thing that grows out of that. You need to be really careful who you choose to be your jury consultant. This is a true story: I was with a jury consultant and we were going through the prospective jurors and questionnaires. And that question—“What do you like to read most?”—was in it. The majority of people had written “The Bible.” And she was shocked at that. This jury consultant could not believe that. She said: “Well, this is just really unusual, isn’t it?” And I was thinking, “you see it every time.” Then with regard to one question—it had something to do with your view of life—somebody had just written in “John 3:16.” She looked over at me and said: “What is John 3:16?” I said: “It is a Bible verse.” She said: “Well, we need to go get a Bible and find out what it says.” And I said: “Ma’am, everybody in this state knows what that says.” So you have to approach it from that aspect—that these people have a deep sense of right and wrong. And they are going to try to their dead-level best to make sure that the right wins in a particular case and not the wrong. And you must approach it from that way.

I think another correlation out of this is that plaintiffs generally do better appealing to this in juror’s natures than defendants do. I have been on both sides, but most of the time I am on the defense side. I think one of the things we really do wrong as defendants is that we generally do not do discovery on the “story side” or the “right-or-wrong side.” In patent cases, we defendants get hung up in the technicalities. A lot of times we have a lot of story to tell



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on our own side, from our own employees. We have a lot of story to tell about our own products. That would really help us show that we are in the right, and that this person is really trying to steal from us. But we do not really get into that, because during discovery our biggest goal was to make sure we gave the other side as little as we could give them, and we fought like sin so that they would not get even what would help us in the case. So when we are sitting down a month before trial and getting ready to decide how we are going to present our story so that our jury is really going to see that we are in the right and they are in the wrong, we cannot even put the evidence on because we have not even given it to the other side. We have not let the other side discover it.

There is another correlation to this morality play that is inherent to the tribalism, if you want to call it that, of the Eastern District of Texas. That is the issue of redemption. And I think this is an issue that plays very, very well for defendants, if you use it right. Probably most of you have seen the movie *Charlie Wilson's War*. If you have seen the movie, you have a little bit of backdrop. But if you read the book, you would learn a little more about Charlie Wilson. And for those of you who do not know Charlie Wilson, or "Good Time" Charlie, he was a famous congressman from Lufkin. He was probably the last liberal Democrat in East Texas left standing. We do not have any Democrats anymore—they got wiped out.

[AUDIENCE: There are a couple of them.]

MR. JONES: There are a couple of them? Well, he withstood the test of the conservative revolution much longer than anyone thought a Democratic politician could. The interesting thing about the book is there is one chapter in the book devoted to why he was able to do it. And the author of the book says that really the reason why he was able to do it was because the Eastern District of Texas is in the Bible Belt. Lufkin is in the Bible Belt. And what have these people learned? Well, these people have learned there is right, and there is wrong. And these people have learned that we all do wrong. These people have also learned about forgiveness and about redemption. And they have learned that they are willing to treat people who are honest and forthright when they have done things wrong with forgiveness and with redemption. They have learned that all their lives, because they have gone to church. And because of that, Charlie Wilson was everybody's favorite sinner, because Charlie Wilson would go out there and sin, but he would confess his sins and the voters would always forgive him for it because of his confession. I think defendants need to remember that. Be forthright with these people. Come in and tell them what you have done. If your product really infringes, but the patent is invalid, tell them it infringes. Tell them: "Yes, that is right. It happened. Our product infringed. But oh, by the way, the Patent Office made a mistake about this, because people were doing this way before the patent was ever issued." And a jury will buy that. And Mr. Carroll is living proof of that, because he, in fact, has done it in the *Fortune* case. It can be done.

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So I think that is a little bit about tribalism, and we see that can guide us as lawyers and help us develop our cases. There is one other thing I would say about the tribe in East Texas. There has been a lot of talk here today about the education of our jurors. I am sure the statistics are right. It amazes me. Every time I see these statistics, I get different figures. The Tyler newspaper tells us that in Smith County 25% of our citizens have at least some years of college. The Tyler newspaper also tells me that we are 3% ahead of the national average. I am sure that the rest of the counties in the district may be behind that. But I think you make a mistake if you decide that these jurors just cannot get it. You make a huge mistake if you decide, "Well, you know, the technology here is too complex for them, and we are just going to blow past that and beat them with smoke and mirrors." You have got to teach the jurors something in these cases to win. I say that from having watched literally hundreds of focus groups do deliberations. What happens with your local counsel is that they hire you and then do not do anything with you until about three months before trial. Then they call you up and say: "We want to do a focus group, and you get to play the plaintiff because you do not need to know anything about the case. Just come wave the patent—because that is all that the plaintiff ever does—and say, 'This is a gold certificate and I'm owed lots of money because this is a big bad corporation.' Because you know that is all anyone ever does in the Eastern District of Texas." Let me tell you, I have done that—it does not work; you get beat like a drum. But then they go try the case and they are going to lose. You cannot wave the patent at the jury and expect to win. What you have to do is teach them something, whether you are the plaintiff or whether you are the defendant. Watch deliberations. Many times in focus groups I have been the plaintiff, and I have won the focus group—even up to 70% of the people are finding for the plaintiff when they write things out. Then watch deliberations, and if you have three panels, the defendant will win all three panels. Why? Because one or two of the people on each of those panels will really understand something about the technology. They will be able to explain why they hold the position that they hold. And those people will control the outcome. Do not underestimate your jurors; you have to be able to teach them something.

I will close with three points, not about the trial practice, but about the discovery and preparation practice in the Eastern District, which I think have become kind of tribal policies there. First, if you are the defendant, always file a motion for transfer. That is being done all the time. But you know, I do not think that the outcomes are as biased as people seem to think they are. As of October of last year, there had been ninety-three motions to transfer due to 1404(a) since the ruling in *Volkswagen*, and 36% of them had been granted. 57% had been denied, and there had been mandamuses filed on some of those that had been denied, and five of those had been granted. In particular, I went back and looked at my own history. We have gotten, in our own firm, seventeen cases transferred. So this idea that the judges will never transfer the case is just not true. I also have people call me all the time and say: "Well, if we file a motion to transfer and it does not get transferred, the judge is going to be mad at us." I think these judges filed motions to transfer

in the Eastern District of Texas when they practiced law, so I do not think that is true.

The second point I will make, besides the fact we see a whole lot of motions to transfer, is the fact that you need to understand the impact of the Civil Justice Delay and Expense Reduction Program that was promoted by Judge Parker. In the conferences, he went around and spoke the truth about how we were going to change the practice of law in the Eastern District of Texas. I remember going to such a conference where Judge Parker, in front of Jack Flock (who at the time was the premier defense attorney) and in front of Blake Erskine (who was one of the premier plaintiffs' attorneys), said in front of the whole group when he talked about disclosure in the Eastern District of Texas: "Jack, what that means is if there is anything in your file that you think Blake would like to see, you let him see it. And Blake, that means the same thing to you." So disclosure really is important in the Eastern District of Texas. I think it is a tribal custom. If you have something your client has, and you know the other side would see its relevance to the case, you better show it to them. Do not wait for them to ask for it. And if you do not show it to them, bad things can happen to you. The other thing Judge Parker told us when this Civil Justice Delay and Expense Reduction Program came about was that it was going to change the way we did depositions. We were going to have fewer depositions, but he said: "Attorneys, you stop arguing about things during depositions. It does no good at all and it just lengthens the process." Judge Parker described it as the "potted plant rule." He said, "An attorney defending a deposition should talk approximately as much as a potted plant." Your witness is there to answer the questions; let him answer the questions. In practicing with lawyers from other parts of the country, I still see that this is something that we do very differently from other people. I took a deposition recently, and I could not ask the person, "What is your name?" without an objection as to form. I promise you, about 99% of my questions were objected to. And I am bad, but I do not think that I am that bad. That is something we just do not do in the Eastern District of Texas.

The final thing I will say about the Eastern District of Texas—and I know the judges here are listening, so I will be careful how I say it. Let me be honest, I have been there when Judge Davis or Judge Ward has ruled in my favor, and I thought they were geniuses. I have also been there when they ruled against me, and I have gone home and I could not understand how on earth that could have happened. But the truth of the matter is that our judges have always called balls, "balls" and strikes, "strikes" the way they saw it to be. I have not always agreed with them, but you know, I am getting paid by somebody to sometimes not agree with them. These judges have a lot better chance at being fair and impartial than I do. And they have always done that. When you look at the fact that their affirmation rate is 66.6%—the last one I have seen before the Federal Circuit—it is much better than the national average of 62.5%. I think that is certainly borne out. I think it is a tribal aspect, a characteristic of our district, that the judges are fair. They call those balls and strikes as they see them, and that is all litigants should ask for.

Thank you so much.

PROFESSOR BASSETT: Thank you, Mr. Jones. Our third panelist is Mr. Samuel Baxter. Mr. Baxter is a principal in the Marshall office of McKool Smith. He is a former Texas State District Judge and District Attorney for Harrison County. Two of Mr. Baxter's many trial victories are included in the National Law Journal's listing of the top 100 jury verdicts. Mr. Baxter is consistently recognized among the top lawyers in his field by many of the country's leading legal publications and rankings, including *Chambers USA*, *The Legal 500*, and *Lawdragon*. Last year, Mr. Baxter was named by *Law 360* as one of the Ten Most Admired Intellectual Property Attorneys. Most recently, he was named the 2011 Dallas Intellectual Property Lawyer of the Year by the publication entitled *The Best Lawyers in America*.

Mr. Baxter's professional activities include the American College of Trial Lawyers, Texas Trial Lawyers Association, Association of Trial Lawyers of America, and East Texas Trial Lawyers Association. Mr. Baxter received his bachelor's degree and his law degree from the University of Texas. He is admitted to practice before the Northern, Southern, Eastern, and Western Districts of Texas, the First and Fifth Circuits, and the U.S. Supreme Court.

MR. BAXTER: It seems that I have already been introduced by Mr. Michael Smith as the idiot who speaks like a really slow sixth grader. I thought it was one of my better arguments.

Professor Bassett, in honor of you being from Alabama, I have to tell one Alabama story that my old mentor and law partner Franklin Jones told about Senator Heflin when he was the chief justice of the Alabama Supreme Court. There had been a case in Alabama tried by a lawyer whose nickname was "No-Tie Johnson." He had that name because he refused to wear a tie to court. He had won a big victory in Birmingham, and it was on appeal to the Alabama Supreme Court, where it was summarily reversed and rendered. Mr. Heflin saw Mr. Johnson at a political function some time later, and he said to him: "Mr. Johnson, I am tired of you going around the state of Alabama saying that the Alabama Supreme Court reversed your case because you did not wear a tie to argument." Mr. Johnson looked at him and said: "Mr. Chief Justice, it is untrue that I have said that. But that is a far better reason than the one given by your goddamned court!"

The thing about coming to East Texas and trying a case, is that you are going to find judges that want you to do the right thing, and that expect you to do it, and jurors that feel exactly the same way the judges do. They expect you to do the right thing, and they are going to see to it that you do it—or they are going to fix you. So let's talk about the jury panels just a moment, and talk about the "tribe" that you are going to have in the box. We spend a lot of time on focus groups. I hire jury consultants. I have a shadow jury for every trial. I spend an amount of money that approaches the national debt trying to research the jurors' background in the few pitiful hours the judges give us to look at the jury list. Then we put the jury in the box, and we forget about them. That is, we forget who we put in there. Who is sitting in the

box, what did they do, and why did we pick them? The truth is we did not pick them. We cut people. That is what we do. We got rid of folks we did not want. We forget about the people that are actually sitting in the box. We forget about what their backgrounds are, what their prejudices are, and we forget about what it is that made them eligible to sit in that box, and why we took them. I have to keep reminding myself as I try these cases, that I ought to think about the jury every once in a while. Do they like what you are doing? Do they have the sort of backgrounds that you are appealing to now? We forget about them. So the first thing you ought to do is to think about that jury in the box.

Here is the primary question, or two, that you are going to get from the tribe out in Marshall, and the tribes out in Lufkin, Tyler, and Texarkana. East Texas is viewed from the outside as having a high minority population, and therefore you are going to end up with a lot of minorities on your jury. But this is untrue. Here is one of the reasons: despite my begging, we cannot get the rule that changed in the Eastern District that we only pick juries from voter lists. Even in Dallas, liberal Dallas, they pick juries from driver's licenses, for God's sake. But we cannot get that changed out in the Eastern District. Therefore, you are going to have a vastly different panel sitting in Marshall than you have sitting in Dallas. If you come to Dallas, it looks like the United Nations. You come to Marshall and it looks like a Ku Klux Klan meeting, because you do not get the same people on the venire. One of the reasons for this is that the federal government, for reasons unknown to me, sends you a questionnaire if the computer picks you as a possible juror. You do not go on the list, you get a four-page questionnaire. And it turns out there is no penalty for throwing it in the trash. So a lot of folks get that four-page questionnaire, and it is fairly intrusive. The questionnaire asks them a bunch of questions that they do not want to answer, so they throw it in the trash. And if that happens, they are never going to be on the list. A lot of folks that might get those questionnaires are not going to return them, and therefore they are never going to make it to your panel. When you look at that panel, you are going to see generally an all-white jury panel. I have tried numerous cases with an all-white jury.

Here is what those jurors are going to look like. They are going to look like this young lady right here. Eighty percent of them are going to be women. Women are trying these cases. In the last five years, I have not picked a jury in which a predominant number of the jurors were not women. Now that is kind of a problem for me. What do you do now, from a trial team standpoint, to appeal to those women? Should it be me and Otis Carroll? All right, Michael Jones looks a little better than we do, but he is not much of an improvement. What are you going to do about the women? Now here is the dichotomy you face—we know from practical experience, because we have women working in our law firms, that women dislike a particular group of people. Who would that be? Women! Women really do not like women. Women do not like each other very well, for whatever reason. Men do not understand that. Men form football teams, and women form catfights. Now what are we to do about that? Now we have the cats on the jury! The an-

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swer that I have come up with, or tried to come up with, is that I need women lawyers at the trial table that actually do something; who can get up there and cross-examine somebody or put a witness on.

I tried a case a number of years ago against Juanita Brooks from Fish & Richardson. I was the defendant, and I do not like being the defendant, but there I sat. We went in there and cut that jury. Apparently everybody in the room on my side went brain dead, because when I looked up at the panel that was sitting in the box, out of the panel that Judge Ward threw in that box—he put ten of them in there—nine of them were wearing dresses, and one little boy was on that jury. Ms. Brooks was on the other side, and she beat us like a drum. It was horrible. It was terrible. I had friends on the jury, and it made no difference. And we were right! At the end of the day, Judge Ward overturned the verdict and we won on most of it. But it did not make any difference to that jury, we were toast. Now how I could cut a jury, with a woman lawyer on the other side that was in the lead, and get nine women on the jury panel—I still do not understand. But the solution that I have come up with is, despite the fact that I think women do not like women, I think they do like to see women at the podium asking questions at a jury trial. Because it shows that women have sort of overcome that glass ceiling and now they are playing in the big time. So the first thing I suggest, if you come out and see that tribe of women sitting in the jury box, is that you better have yourself a women lawyer that can do something sitting at the table. You will be better off because they are smarter than you are anyway, and they are going to work harder, and they are going to do a better job than Otis [Carroll] and I are going to do, and [Michael] Jones too. So you ought to get you one woman, or two, or three. Throw them at the table, and let them try those cases.

Here is the next thing that you need to understand: What is it that the guy in the black robe sitting at the front of the room wants you to do? Well, he really wants you to settle. That is what he really wants you to do. One time in the middle of the trial, as I was passing Judge Ward in the hall, he said: “Can’t you get this thing settled?” And I said: “I am happy to settle it Judge, but it takes two to tango, and I cannot find anybody to dance with.” He said: “Stand right here, I will get you a dance partner.” When you cannot get it settled, and you have to go in there and try the case, here is what the guy in the black robe wants you to do: he wants you to tell the truth, particularly to him. That turns out to be important. I can remember one occasion when I was at the podium in Marshall, Texas, and I had made some comments to the Court, and then I had the good sense to sit down before I got into trouble. The other side got up, and the Judge just beat them up unmercifully. A really smart lawyer says: “No more comments, your Honor.” I, on the other hand, said: “Just a few, your Honor.” And Judge Ward then asked me the one question I did not want him to ask, because I had no good answer. So then I had to back up and try to find a way out of that situation. I finally heard these words coming from the bench: “Mr. Baxter, I know you think I came to this courthouse on a load of turnips, but, by God, it was not last night.” They really do want you to tell the truth.

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The second thing the Judges want you to do is to be prepared. They do not want you floundering around. And the third thing they want you to do is to be professional. That may be more important than telling the truth and being prepared. Because it turns out that the folks in the box do not want to see a catfight in the courtroom. It makes them uncomfortable. It makes them nervous. They do not like it. It also makes the judge edgy. And so unless there is a picture of Mr. McKool [of McKool Smith] with a goat—a boy goat at that—we do not object to anything. You let everything in. You do not get into fights with the other side in front of the jury. You just do not let that happen. The judges will then let you try your case. They will get out of your way and let you do it. But if you do not follow those rules, then I think you are going to end up being in a lot of trouble.

The last thing is that I have not tried a case lately without a focus group. How many people out there have used a focus group in the courtroom, or a shadow jury? I cannot figure out if they are any good or not. What I really want that shadow jury every night to tell me is: “Boy, you sure did good today. Golly, that was great. You killed that witness.” But that does not do you any good. If you are winning or losing, it does not do you any good. The practice is to have a shadow jury, and the judges have been pretty lenient about letting us get them in and out of the courtroom. But I think they can do a world of good, because you can have some of the tribe sit in there—just like the tribe in the box—and tell you at least what impression they have about whether your witnesses are telling the truth, which is really all you want to know. When you think about it, whether the jury is in Marshall, Tyler, New York City, or San Francisco, when it gets down to how the bus works in the computer, not too many jurors are going to understand it. They really are not. So when the witness is saying: “Well, if you put the coils on this side, and wrap them around the other side, you can turn the AC into DC,” nobody really gets that. So what is a jury to do? The jury has to make a decision, based upon the same things we do every day when we are out buying a car. Is that guy telling me the truth about how many miles are on the car? They have to make a decision about your expert based upon his body language, how he talks, how he answers questions, and how they feel about him. That is why you spend a lot of time working with your experts. So that if you walk in the courtroom and it is a stranger, you cannot tell by the way he acts, whether he is on cross or direct. Jurors do the same thing. They form impressions about whether he is telling the truth. If your witness is educating the jury, and appears to have told the truth, then the tribe says: “Okay, you get to go take the money home.”

Thank you, Professor Bassett, for your time. I appreciate being here.

PROFESSOR BASSETT: Thank you, Mr. Baxter, and all of our panelists.