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The History and Development of the EDTX as a Court with Patent Expertise:

From TI Filing, to the First *Markman* Hearing, to the Present

Moderator:

*Professor Xuan-Thao Nguyen,
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Panelists:

*The Honorable David Folsom, Chief Judge,
U.S. District Court, Eastern District of Texas*

*The Honorable T. John Ward, District Judge,
U.S. District Court, Eastern District of Texas*

*The Honorable Leonard Davis, District Judge,
U.S. District Court, Eastern District of Texas*

Mike McKool, McKool Smith

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

PROFESSOR NGUYEN: I have attended summits and met with Justices from the U.S. Supreme Court and the European Court of Justice, but nothing can compare with today. A few years ago, I read a very extensive article in the *New York Times* and saw a large picture of Judge T. John Ward—I was so thrilled. I still have the copy of the newspaper, and I showed it to my young son and said: “Look—here is a famous judge, and I hope that I will have a chance to meet him.” My dream came true today. We are so privileged to have Judge David Folsom, who is currently Chief Judge for the Eastern District of Texas. Judge Folsom was nominated to the bench by President Clinton in 1995. Judge Folsom has been the Chief Judge for the district since 2009. The Chief Judge graduated from the University of Arkansas, with both his bachelor’s degree and his J.D degree. Judge T. John Ward was nominated to the bench by President Clinton in 1999. He received his bachelor’s degree from Texas Tech University and LL.B. from Baylor University School of Law. We also have Judge Leonard Davis, who was nominated by President Bush in 2002. He graduated from Baylor Law School, and Judge Davis received his bachelor’s degree in mathematics from the University of Texas at Arlington and his Masters of Management Science from Texas Christian University. Further, we have Mr. Mike McKool. He is the founder of McKool Smith. If you look at the law firm’s website, you will see an impressive and long list of awards and recognitions Mr. McKool has received for his trial expertise. Mr. McKool received his bachelor’s degree from Notre Dame and his J.D. degree from the University of Texas.

The way we will proceed is that I am going to ask the judges and Mr. McKool some questions. The title of the panel is, “*The History and Development of the Eastern District of Texas.*” It is important that we know history.

And it is important for my law students to understand history so we can learn from it—not only at the local level, but at the national level and the international level. For me, this is a historical moment, to have a chance to learn the unfolding history from distinguished panelists. And so, with that, the first question is: “How did the Eastern District of Texas become one of the most important jurisdictions for patent cases in the United States, from your perspectives as jurists and also from your perspective as one of the leading trial attorneys in the country?”

MIKE MCKOOL: I began practicing there with Judge Sam Hall, who preceded all these judges out there in the Eastern District, and I think I can give you some insight into how it all started. I would really credit one man with the foundation of the Eastern District of practice, and that man’s name is Dick Thurston. If you do not know who Dick Thurston is, he was the general counsel of Texas Instruments (TI). In the late 1980s, TI was having problems pricing its semiconductors in a competitive way with its Asian competition, and he came up with a plan of monetizing a patent portfolio—which had not been done very often in the past. It was generally broad licenses, and you did not see very many people throwing out money on these patents. So he looked for a place where he could go to trial quickly. He went to his law firm—which is still his law firm—Jones Day, which has done and continues to do a very fine job in representing TI and its other clients in the patent area. They decided that in Marshall, Texas—even though it had no set patent rules—a case could go to trial very fast because it did not have a very big docket. And so it started. I can hand off here. I can just tell you, though, that the three judges sitting here to my left made this into the patent docket that every good patent lawyer in the country would like to try cases in, because they are knowledgeable and they are absolutely fair. And if anybody thinks that you can get a wink and a nod from any of these judges or that there is any favoritism that comes out of the Eastern District, ask anybody who has practiced there. They came in with a set of patent rules. I will credit Judge Ward most of all for this—a set of patent rules that were modeled on the Northern District of California, but with much shorter time schedules, which gave predictability to results. The reason that East Texas became such a popular district so quickly was because you could go to trial quickly, and you had great judges who could give you predictable results.

CHIEF JUDGE FOLSOM: Well, first I would like to express my appreciation for being invited here today. It is good to see so many faces in the crowd that have appeared in my court before. I do not know what more I can add after hearing the judges and the attorneys earlier today. It has been an honor serving the Eastern District of Texas, particularly with these two gentlemen to my right. I am the Chief Judge and there is not such an honor about that. It is simply because you have been around longer than anyone else. I am often asked: “What is it like to be the Chief Judge of the District?” I have said: “Well, it is like being the overseer of a cemetery—there are a lot of people underneath you, but when you speak, not many people listen.” So, I am happy to pass that baton to my good friend Leonard Davis on January

1st, and let him be the overseer for a while. However, I am fond to say that I do not take any particular credit for what has happened in the Eastern District. If you would like to give the credit, it goes primarily to the judge to my right—John Ward—and the rules, and Leonard has tweaked them a lot. I just happened to have part of the Texarkana and Marshall docket and have had these cases over the years. I had a few of these cases before John came to the bench and developed the rules. I am sort of old fashioned, as a lot of you know. I am not much of a rules person. I sort of think everyone should follow the “do-right” rules, so to speak. For about a year I did not adopt the rules. Mike Smith, who was the chairperson of our rules committee, came to me one day and said he thought it would be helpful for uniformity’s sake to adopt the rules. And I did. Let me assure you, I agree with Judge Ward’s words, and the rules have been quite a help. So that is it. I do not take a lot of the credit, but if you do not like what is going on, I also will not take a lot of the blame.

JUDGE WARD: I do not know from a historical standpoint. I know I was on the losing side of the first case that went to verdict in Marshall. It was the *Texas Instruments v. Hyundai* case.¹ And when I got into that case, we had our scheduling conference on August 30, 1998 and on the first Monday of February, 1999 we were selecting the jury for trial. So you can prepare these cases in less than a year if you have to. But as a result of that, I heard lawyers that I know on the west coast—in the Northern District of California—say that it was sort of a bloodletting on both sides. There were things that happened in discovery on both sides that should not have happened, in my view as a judge. During the course of this, I heard a lot of things about the origin of district rules. But Judge Heartfield—as the presiding judge—had never tried such a case, so he assigned a special master to do the claim instruction origin. We had a *Markman* hearing in a conference room at that time in a Houston office. During the hearing, I made a couple of statements. As we left that, I said: “Well, I will tell you one thing—I was trying to get the job done. If I can get this job done, I will assign every one of these *Markman* hearings to a special master. This was the most boring thing I’ve ever done.” Also, at that time President Clinton was under fire, to say the least. I said: “Well, I’ve been wondering why President Clinton said what he did when he said: ‘Well, it depends on what the word ‘is’ means.’” I knew for sure he had been advised on that point.

I came on the bench in 1999, and in early 2000 I had my first *Markman* hearing. A law clerk from South Africa and I each spent easily forty hours getting ready for this *Markman* hearing. We went into the hearing, and I started out. I said, “Well, we will just take turns.” We let the plaintiff’s lawyer go first and he talked for less than two minutes, and then the defense lawyer stood up and spoke briefly. This happened three times, and I said, “Time out, folks. I’ll be back at 11:15 or 11:30,” because counsel obviously

1. *Texas Instruments, Inc. v. Hyundai Semiconductor Am., Inc.*, 49 F. Supp. 2d 893 (E.D. Tex. 1999).

had not talked. I came back in when they had agreed on everything except a few little terms, and I had already made up my mind in there. So I had wasted all that time when the lawyers had not talked. When I went back off the bench, I said: "Get me a copy of those rules from the Northern District of California," and that is where the rules came from. Then Judge Davis came on the bench, and he proofed the rules and Chief Judge Folsom has told all of you about that. So that is how the rules came about. I have been asked many times: "How did you figure out how to build this patent docket?" That thought, unfortunately, never crossed my mind. I have said a lot that this is the law of unintended consequences. I hope that is not too much history.

JUDGE DAVIS: I do not really know that I have that much to add. It has already been well covered. I guess I could pick up with when I came on the bench—Judge Ward and I started sharing chambers, which at the time was in Marshall. We were having lunch one day, and he commented to me that we had several of these patent cases. He suggested that if I wanted some interesting cases to work on, I might consider adopting these patent rules. I said I would rather handle interesting cases than uninteresting cases, but I had never tried a patent case and I did not know what they were about. And so I adopted the patent rules in standing order and started handling them. I, like Judge Ward and everybody else, thought we may have a few of these and it will be sort of an interesting thing. It has just been absolutely amazing, and at times very overwhelming—the number of cases that we have gotten, and the complexity of it, and the magnitude of it. It is a whole lot of work, but it is very rewarding work. It is interesting. It is challenging. It is stimulating. I think I speak for myself and the other judges, that one of the greatest things about it is you have some of the very best lawyers in the United States of America that appear before you. They are professional, they are well prepared, and you really get to see the masters of our profession day in and day out. That has been a real privilege.

CHIEF JUDGE FOLSOM: Professor, may I add one more thought? We were talking last night about the docket and the development. I said: "I believe we have to give credit to the earlier judges in the district." Judge Davis, Judge Ward, and I as young lawyers had a practice in the Eastern District of Texas, although not on this type of case. But we had Judge Fisher, Judge Steger, and Judge Justice, who all believed—as Judge Higginbotham said today—in a trial date, a scheduling order, and the necessity to have your case ready and try it as necessary. I think it is important that we all have that tradition and background. It is important that we have a common background of trusting juries and being willing to try cases if they do not settle.

JUDGE WARD: I had no background. I was hired because I received a call from lawyers in California. I got on a telephone conference for a couple days about this case. And one lawyer asked me: "How does he handle *Markman*? When does he do *Markman*?" My answer was: "I do not know, but I will find out." The first call I made was to Sam Baxter, who handled that case over there. I said, "Sam, what is a *Markman* hearing?" So that is what I knew about it at that point in early 1998. It is exactly correct that Judge Robert Parker is the one who developed these arguments—for exam-

ple the idea of adopting a plan that is put into the Federal Rules—and he did not opt out of the mandatory disclosure law of relevant information. To say I thought that was a bad idea is an understatement. I just thought that was the worst idea I had heard of as a lawyer, to produce some relevant documents that might hurt us without being asked. But I became a big fan of that law before I went to the bench. Let's face it, we have good lawyers on our side, but some others were difficult and became angry at us. I always told my clients that if they produce those bad documents and let me be the one that turns them over, I can put a better spin on them. But if I get to trial with something we did not have, I do not have much of a chance to put a spin on it. With the former judges, you just tried the cases. You had to be professional—you did not say “yeah, yeah” in the court room, but rather you showed respect for the court.

PROFESSOR NGUYEN: Many judges across the nation honestly do not want to try cases. I remember when I was in practice, and had a case before Judge King in the Central District of California. We had this case, and he wanted us to go away when we first arrived in his courtroom. He wanted us to go settle the case. As a young lawyer I said to myself: “Wow, judges out there do not want to hear patent cases.” How did you and why did you want to hear patent cases? In the Southern District of New York, many judges do not want to hear patent cases and they are very open about this.

JUDGE WARD: I find those cases intellectually challenging. Nothing would be worse than trying nothing but FELA cases. Products liability dockets are gone and have started to change. I found these cases intellectually challenging.

JUDGE DAVIS: Also, I think that for judges—just like lawyers and people in general—there is a fear of the unknown. And very often I think that reaction by a lot of judges is just because they have never tried one. This type of case is unknown; it is unfamiliar; it is uncharted territory—and judges are actually a little bit intimidated by it. I think that is where the patent rules help a whole lot. And I think for those other districts or other judges where that may occur, if they could ever adopt something like that, it brings a framework to it where you are not having to reinvent the wheel. There has been a lot of work in the Northern District, in addition to Judge Ward's work, that has gone on before and provides a foundation to build upon. We had judges in the Eastern District that are not fond of such cases, and I keep encouraging them to take a few and work through them. They are unique, but yet they are still just another lawsuit, and it is not that difficult to manage one.

PROFESSOR NGUYEN: In some other districts they have adopted the local rules but they are not as successful. Are they missing something?

MR. MCKOOL: My firm practices quite a bit in the Eastern District, but I have a number of patent cases from coast to coast—in California, Delaware, New York, and Chicago. I will say that there is something happening in the Eastern District that you do not have in the big commercial areas—lawyers generally know who their judge is going to be in the Eastern District

of Texas. If you file in Chicago or the Southern District of New York or Los Angeles—which actually have the biggest patent offices in the country—you have no idea what judge will hear the case. They do not have uniform rules in those places. The courts that have uniform rules have many judges that the computer could assign you to that have never applied to them, so it is a first time for them. Many in this field are very excited about this new proposal for these districts, where judges in these very large districts commit to have patent cases. I know Judge Lynn is very interested in that here in Dallas. I guarantee that if that happens we will be filing patent cases in Dallas as well. I think that there has never been such a district where all of the judges are onboard with knowledge, with experience, a track record of showing they do a great job handling the cases. They will put you to trial, and they believe in juries making the decisions in the case. I do have a hope that we will have other districts as good as the Eastern District in these new districts that have been proposed. New districts where the judges will get together and decide which of them would handle patent cases and follow jury-circumscribed rules.

PROFESSOR NGUYEN: Judge Davis, last night you mentioned at the dinner that there is something really special that you did with the juries after they finish their duty. You gave them certificates. Will you share that with us?

JUDGE DAVIS: Well, the certificate has just been a very minor thing that I decided to start doing for all my jurors after they completed a case, because it is very hard work being on a jury—especially a patent jury. It is a real bonding experience among the jurors, and I felt that they needed some recognition. We cannot pay them; it is voluntary. And I always praise them in the voir dire examination and compare it to a patriotic duty that they really are participating in—at one of the highest levels and highest callings that there is in our country—a right that we see daily on television that people in other countries do not have. The certificates try to make them feel important and appreciated.

I will say this, I think it is broader than just a certificate. It is the recognition that I think the Eastern District has because of our heritage. Judge Higginbotham really touched on it well—an appreciation of the right to trial by jury, and the belief in the inherent ability of the collective mind of the jury to do the right thing. I think that in some jurisdictions in this country there is a mistrust; that they do not believe that a jury of common, ordinary people, in well-presented and well-educated cases, has a collective wisdom as good as a judge's. There is a tendency for judges to decide issues that are really fact issues as questions of law. I think that is one thing we do in the Eastern District that is part of our heritage and I think it is one reason why the Eastern District docket has grown.

CHIEF JUDGE FOLSOM: I like the certificate letter, and while I have not done that, routinely after every case I invite my jury back in chambers—not to talk about the details of their service, but as an opportunity to ask the judge questions. I want you to tell me how I could make this service more

pleasant for those that follow and those of you that have me on another panel two years later. I am always amazed by their dedication to reach the right result. I may not always agree with that result, but the one constant I see is how dedicated they are to reaching the right result. I tell them what an important role they play and how important their service is. I have been told on many occasions by jurors: "Other than my marriage and the birth of my child, this is my proudest moment—my service on a jury." I think they feel the importance and responsibility.

JUDGE WARD: The first thing I tell the jury panel is that the United States is the only country in the world that guarantees the right to trial by jury. I talk about the Constitution, and I tell them that they are doing nothing less than preserving the protections within it, and that it is the highest honor, second only to the service in the armed services in this country. I do that as a sort of precursor. I want them to know how important it is before any questions are asked so they have that backdrop. It is important to give complete answers. I try to do that. Judge Steger—who I guess had more influence on me—did not talk to jurors. He did not encourage me to do that when I was out on the bench. I did whatever he told me, like I did with the lawyers. He did not do it. To hear these judges talk about it, maybe I should have—but I have not done it.

JUDGE DAVIS: I will also add in something that may be of interest. When jurors are first selected in a lot of complex patent cases, they have a glazed over look like, "I cannot believe I am here. I do not know if I can do this." I try to reassure them at the outset that, "I know you may be sitting there thinking: 'What am I doing here? I could not decide this case.' Let me tell you, we have some great lawyers here who will do a very good job of educating you, and of simplifying this. There will be well-qualified experts on both sides." I try a lot of these cases, and I visit with the juries after they have reached a verdict. And I go back and visit with them like Judge Folsom does, not to discuss the merits, but to just thank them and ask them for suggestions. And I started asking them: "How do you all feel now about your competence level in what you have done and what you understood about what was going on?" Invariably, 100% of them all nod their heads. And I mean they understand it. They understand it during the course of that unique process of jury trial—of the lawyer and adversary process. It is like magic. And they walk out of there 99.9% of the time very confident in the decisions they have made, and they felt like they were very qualified to make them. Which is a drastic change in the course of a week as they have finished the trial.

PROFESSOR NGYUEN: I know that some of us out there believe that we train students to be lawyers that can fight on discovery, and somehow that many lawyers are very good at fighting over discovery. I remember back when I was researching for my law review article on the Eastern District, I saw the hotline that you have. I was pleasantly surprised: "Hotline? A judge's hotline for discovery dispute?" There is no hotline in the Southern District of New York, or in Delaware. Would you elaborate on that? Should

judges in other districts adopt your hotline method, if the judges in the districts with the desire to have more patent cases filed in their districts?

JUDGE WARD: Well, with respect to the hotline, Judge Robert Parker is the one who introduced that back in 1982 or 1985. When I came on the bench in 1999—at the first judges' meeting I went to—all of the hotlines were being tackled by magistrates. One of the magistrate judges posed a question to all of us: would the district judges be willing to take a turn as a hotline duty judge? Being the dumb, new kid on the block, I raised my hand and said: "I would be happy to do that." I received a look from Judge Steger that said, "that is stupid." He did not have to say anything—I got the look. I will tell you what was funny, though—I thought that over and said I wanted to change that answer. I will tell you what I will do—I will just put in all my scheduled hours. You cannot call the hotline and speak to a me as a judge and see if I will label them. That cuts down on them quite a bit. They have to have a legitimate dispute. They do not call up with the same type of thing they would call with a magistrate judge. I started out from the very beginning trying to handle all of my own discovery disputes. And that decreases a little bit of my attitude about a lot of discovery disputes. Unless it is privileged or something difficult is involved, we will have too big of an issue. Unless it is particularly relevant, I am not sure what I am doing there. I guess I would have to come across that dispute.

Judge Parker, the hotline dispute judge, receives dozens of disputes. In most of the hotline disputes that I have talked to, the magistrate judges handle the disputes. Every judge still takes a turn across the district. He said that most of the problems occur during the deposition process. Something is going on that should not be going on. They generally revolve around placing the depositions, objections, and speaking objections—when you are telling the witness how to answer. These are the kind of disputes that, when they get to my level, there is no doubt it is going to be a bad day.

JUDGE FOLSOM: I have never met a judge that said: "I love a good, old-fashioned discovery dispute." I do not believe Judge Lynn does. I would be surprised if you enjoyed discovery disputes. If you want to win the good will of a district judge, do not bring a lot of unnecessary discovery disputes. We all know that occasionally, in good faith, you simply cannot work from subissues and it is our responsibility to work those out. But to simply fuss for fussing's sake does you no good in a case. At least tell that to your client.

JUDGE DAVIS: I would say do exactly what he has done. I was on a panel with two district judges when this same question was posed to us about discovery disputes. The first judge said: "Discovery disputes are just terrible. We have so many of them that I send all of them to my magistrate judge. About all my magistrate judge does is these discovery disputes." And the next one said: "I don't really know what to do with them. I know I spend a lot of time on them." They came to me, and I said: "I handle all my own discovery disputes. I take the hotline phone calls, and I don't have very many discovery disputes at all." And I think it is just that difference. I think lawyers will feel like they can game a magistrate judge. They will take

greater liberties with a magistrate judge than they will with a district judge. I think while it is more work on the front end, if you set a precedent, you encourage compromise and reasonableness and professionalism among the lawyers that practice in your court. It gets to the point where you just do not have that many.

PROFESSOR NGUYEN: Mr. McKool, do you want to add something to the discovery disputes topic?

MR. MCKOOL: I will say that, of all of the things that have been written about my law firm, the one that I am most proud of is the article that came out a couple years ago that characterized our firm as a bunch of nice people. Those of us who have been practicing for a long time have recognized that judges do not like lawyers who fuss with each other. We all know what is not fair. You do have disputes sometimes that you cannot resolve. But I would say 80% of the ones I see, if you just sat down and said, "What's the real fair thing?" you could come up with it. When our young lawyers come to me saying, "we're fighting on this," I find myself asking, "Why?" Sometimes it takes them a little while to figure out why. I think they come out of law school thinking that their job is to fuss and fight and withhold. It does not take very long for them to learn that that is not the way we do it. The best lawyers that I try cases against discuss it. When we pick up the phone and talk with each other, we almost never end up hanging up while still fussing at each other. These judges are the best role models we have because when you have been there a few times and you see how they feel about it, you recognize that you are doing your client a great disservice to fight over things that are unreasonable.

JUDGE DAVIS: I would also add that—I think this was Judge Folsom's idea, that I think the rest of us have followed now—when you have a discovery dispute and you have to have a hearing on it, we require lead trial counsel to be there to meet and confer prior to trial to try to work it out. Prior to that, you would have low-level associates show up who are acting like it is "game on." These associates are ready to fight all day like this, as if it were life or death. But you get the guy now with experience that is used to sitting back and looking at the big picture, and he says: "No, we'll work this out." I think Judge Folsom had a great idea, because it gets the top-tier people talking and meeting.

JUDGE FOLSOM: What I have found all too often, I believe, is that it is really easy over the phone to say "no" and hang up, and then that is the end of the discussion. I know there were a lot of complaints that came to my attention when I initiated this rule that you have to meet and confer. But I believe, like Mike said, that when you are actually facing each other, it is just harder to be unreasonable. As a result, I see a lot fewer discovery disputes.

JUDGE WARD: When you have these discovery disputes and you start writing these nasty emails, it gets before the judge. I read these emails, and I am reminded of what somebody told me early on: "Do not ever put something in writing that you do not want your mother to see." And some of the nasty comments that some of the lawyers write make my ears red, and I am

in there by myself. It is not good for me, and it is not good for whoever I have. I just think it is so unprofessional. I recommend to you not to do that. I think any judge who has those kinds of experiences will not like it.

JUDGE FOLSOM: In that regard, I have had several lawyers who brought to the case a very hotly contested and very hard-to-follow motion to disqualify regarding one of the trial counsel on the case. The papers on both sides were full of poison, so to speak. I set the hearing in the courtroom. It was a large case with a lot of people involved. The courtroom was packed, and everyone wanted to see the bloodletting. I brought to chambers the lawyers that were going to present the motion, and I said: "I have read the papers, and I am very disappointed. Now, you can go out and make your comments on the record if you feel it is necessary for your client, but you are going to lose my good will. What is more important—pleasing your client or me?" As a result, it was much more civil, we got down to the law, and that poison just evaporated from the room.

PROFESSOR NGUYEN: The Eastern District of Texas is very large geographically, and is also diverse. When we compare the Eastern District of Texas to, say, the Eastern District of Virginia, some of the divisions are drastically different than the other divisions. Are there any differences among the divisions: Texarkana, Marshall, Sherman, and Tyler?

JUDGE FOLSOM: Well, I only have cases in Texarkana and Marshall, and I have part of the Sherman criminal district. There is a much different makeup of the jury panel in Sherman versus the Marshall and Texarkana districts. As for the actual managing of the case, I manage it in the same fashion. Mr. McKool can probably speak more to whether lawyers feel like there is a difference between the jury panels than the three judges here. I do not see that much difference.

MR. MCKOOL: I do not see the size of the district as really having that much of an impact. I think that the traditional notion of what you want on a jury in a casualty case is very different because a plaintiff in a patent case is enforcing a property right. A more conservative mentality is not necessarily a negative to a plaintiff in a patent case. You are enforcing government laws, and there are government agencies that will probably declare that this invention is entitled to a monopoly. So I do not see a difference between the juries and the different places in which judges sit in the Eastern District as being that important to lawyers.

JUDGE DAVIS: I would add that in my practice, the last place I would want to be as a defendant in a personal injury case would be Marshall. But Tyler would be a place that I would love to be in as a defendant. A defendant might transfer the case there. I agree with Mr. McKool that, in a property rights case, I do not think there is any difference, as far as the jury and the issues that are being decided. I would think it is somewhat similar in the plaintiff's area, but I do not think I have even had a patent case for plaintiffs.

JUDGE WARD: I agree with what Judge Davis said. You just love to get transferred to Tyler or Sherman. I was never very successful in getting

cases transferred. But I sure did file the motions for transfer. I always filed them but I can only remember one being granted.

PROFESSOR NGUYEN: Retirement, senior status, new judges—do you think these will change the Eastern District of Texas?

JUDGE DAVIS: There is going to be a big void. I have the utmost respect for both of these judges, and unfortunately they are both leaving within the next year. Judge Ward, especially, has been at the heartbeat of the patent docket in the Eastern District. It creates a big question with some great fear and trepidation, but I look forward to what is going to happen. I keep getting after Judge Ward, saying: “You got me into all this, and now that we have this huge docket you are bailing out on me.” I will say this—there is nothing that remarkable about the three of us, and we all view the job as United States District Judge as a situation where the honor is not in the individual, it is in the position. And honor is what is recognized. We have a history in the Eastern District, and the culture of the lawyers from the Eastern District supports the same things the three of us do. We believe in trial by jury, the no-nonsense expectations of lawyers to act in a professional way, getting cases to trial quickly, firm trial settings, and not deviating from them. Whoever the President and Senators come up with as the nominees, we have one working his way through the process now—Rodney Gilstrap—whom I understand is in the process of being approved by the Senate. These nominees that come out of the Eastern District will have largely the same belief system in the characteristics that make a docket move, whether it is a patent docket, a slant-oil-well docket, or an asbestos docket. I am cautiously optimistic, with some fear as to what the future holds.

JUDGE FOLSOM: I am confident that our new chief judge will work it all out. For those of you who might not know this, the docket did not force me or make me want to retire. This has been my plan since day one of going on the bench. I agree with Judge Davis that it is not the person, it is the position. And I felt all along I would pass along that position.

MR. MCKOOL: This is the lawyer’s perspective: I feel that good jurisprudence has a lot to do with the rules, precedent, and most importantly the judges. What makes the Eastern District the most popular patent district in the whole country are lawyers deciding where to file the cases. It is the lawyers who have selected where these judges sit as the most popular place to take a patent case. I am not at all saying that I doubt we are going to get great judges here to replace two of the judges who are sitting here, but I am saying that we are going to *have* to have great judges for lawyers to continue to have faith in the predictability, the impartiality, the speed, and the respect for the jury system which makes us file here. If we get that same quality of judges, lawyers will continue to file here. And if we do not, we will not.

JUDGE WARD: I think most people know that I did not plan to take senior status October 1st, until last spring my son, Johnny, said: “Why don’t you come spend your last years with me?” I said I did not know how long my last years would be, but after some reflection I felt that it was an opportu-

nity I could not pass up. It was not the thought of the patent docket. I mean, he might make me go to work with him.

PROFESSOR NGUYEN: Judge Ward, you are such a pillar in this area. Do you want to say something about your retirement?

JUDGE WARD: I will say this—I have greatly enjoyed the job. Someone said: “You are going to make some money.” And I said that if I had been interested in money, I would not have tried so hard to get this job. It has been a lot of fun. I like lawyers. I heard Sam Baxter say something about how important that was, and I agree with that. I wrote a piece about William Wayne Justice from the perspective of a lawyer in the last *Texas Law Review*, and that was the great thing about Judge Justice—that he liked lawyers. I really enjoy patent lawyers. I want to echo what Judge Davis said. I have never had a patent lawyer come to court and not be prepared. They work very hard. They are just too contentious sometimes and fight about things that really are not important. My only advice would be to pick your fights. Because if you go in front of a judge and he thinks you are fighting over something you should not be, as Judge Folsom said, you are beginning to lose his goodwill. What I have really enjoyed is that we did not come here to defend our honor, but Professor Nguyen, you have defended our honor in having this symposium. It has been a great honor to be here, and it is a great honor to be a United States District Judge. I will certainly miss a great part of it. I know there are those out there who say: “I just cannot wait to get him on the other side.”

PROFESSOR NGUYEN: I promised my law students that I would ask questions for their benefit. What would you want all the law students to know? Or what do you want to tell them, to prepare them to be good lawyers here in the Eastern District of Texas, or elsewhere?

JUDGE WARD: Be candid with the court. Be prepared. Be brief. Be professional. I do not know if those are good rules, but if you do that in my court, you will get a long way down the road.

PROFESSOR NGUYEN: Anything further?

JUDGE FOLSOM: I agree.

JUDGE DAVIS: We both agree, and I think that pretty well says it all.

MR. MCKOOL: I would just add that the practice of law should not be any different than any other human activity. But because there is a winner and loser, and because there is contention involved, I think it gets treated differently. But it does not have to be. I would say—particularly in the Eastern District where the judges are very sensitive to following the correct kinds of rules—be courteous, and be polite to your opposing counsel and to the witnesses that you depose. You can get the information you need without being rude. So what I say to law students is: the aspects of good character that you put in the rest of your life should be in your life as a lawyer as well. These judges appreciate that.

PROFESSOR NGUYEN: Judge Ward, what would you advise judges across the nation if they want to do what you did—where one person started these rules and before there was predictability?

JUDGE WARD: I think lawyers appreciate the fact that we do try to be predictable. I think predictability matters as a lawyer, and I try to do that on the bench. I am going to do the same thing with the same set of what I perceive as facts regardless of who is involved. The parties know that I will set a trial date and that, absent some very unusual circumstances, we will go to trial. I think that is very important. You have to set a schedule that allows a lawyer to move the case along and get it to a place where the lawyer can get the case resolved by agreement or go to trial. If the lawyer perceives that is what you are trying to do, then I think you did more than you think. Mr. McKool, you probably know as much as I do.

MR. MCKOOL: Predictability is more important in a patent case than any other type of case that I have ever tried, because of the special rules of customs—with claim construction being number one. A plaintiff going to trial wants to know that he is going to get his claims construed before the attorney says, “May it please the court” in front of the jury. There are courts all over this country where that does not happen; where you go in and you find out how your patent is being construed when the judge writes the charge that he gives to the jury. That is one aspect of predictability that is very, very important to patent lawyers.

Another important aspect is that discovery in a patent case is at a different level than it is in other cases I have been involved in, because it often involves very technical information and source code. Source code is proprietary and defendants have a great—and real—interest in not having anybody, particularly their competitors, looking into their proprietary information. But plaintiffs cannot prove their case without it. So the rules that have been adopted with regard to the requirements, to give it all at the beginning without asking for it, make a lot of sense. I would say that we all love predictability in everything we do. We love predictability in the cases that we try, but patent cases are the cases where predictability is the most important.

JUDGE WARD: With respect to *Markman*, I try to explain to judges—not recently, but to people who ask me about this—that you have to realize from my perspective it is not fair to the litigants not to know all of the claims in a sufficient amount of time. To the judge, it is the *Markman* hearing that drives the trial because you can only do so many of them. I normally set aside three to four hours for a *Markman* hearing, so if you do twenty-four to twenty-five a year, you have had a great year. Some cases will settle without a *Markman* hearing; some will not. From my perspective, you have to look at every case, and you have to conduct the *Markman* hearing to see if the parties can settle. So it is a lot of hard work, but it is fun. When I sit up there and read the charge and I have given the jury a copy of the claim, I am sure those jurors are sometimes sitting there thinking, “Does he really do this every day?”

PROFESSOR NGUYEN: I would like to open it up to the audience. I am sure that many of you would like to ask questions.

AUDIENCE QUESTION: Judge Rader sat by designation, and I was wondering how that worked? And did you feel like you were being audited by the D.C. Circuit?

JUDGE FOLSOM: We welcomed him coming down.

JUDGE WARD: I was there part of the time and I was gone part of the time, but we had a great time. After that visit, he has been invited to Brussels to the Intellectual Property Owners Education Foundation. I do not think it was a bad experience for either one of us.

JUDGE DAVIS: I want to applaud him for being willing to come down. I thought it was great, and a great experience for both him and the District. I would have liked more time to spend with him, but as you know, when you are in trial you are busy. He is always welcome to come back. And we have extended, through him, the invitation to all the Federal Circuit judges and to the Fifth Circuit. Having been an appellate court judge in the state system before going on the District court, I think that it would do judges—especially appellate court judges who were not trial court judges previously—a world of good to come sit in that seat and have to call balls and strikes, without having the law clerk there to discuss the issues with at their leisure.

JUDGE FOLSOM: I was at the Federal Circuit Bench and Bar in June after Judge Rader had been down here. He said he felt so honored. I said the honor was all ours. But I think he truly enjoyed it, and he was going to encourage other judges on the Federal Circuit to come down and try cases. I told him we would be happy to make a docket available at any time for anyone that would like to come down. I do not believe I am speaking out of turn, but the Federal Circuit Bench and Bar Association will be hosting a joint meeting in September with our district and I have been told Chief Judge Rader is planning to attend.

AUDIENCE QUESTION: These gentlemen represent a lot of institutional knowledge and give large businesses an opportunity to kind of know what to expect in advance. But from your side of the bench, do you think that the innovation that you brought to the bench can teach all litigation a lesson? That is, as the speed of business picks up, does the speed of litigation need to pick up as well? One thing I respect about you judges is that we get decisions from you quickly. It just seems that the pace of your litigation is a lot faster, and you get to an end result quicker. I wonder if you think that is why you have the dockets that you have in your courtroom?

JUDGE WARD: I think that having the ability to resolve disputes in a reasonable time is important to all of the litigants. I have a patent docket that is up to almost three years now from time of filing to trial. The rest of my docket is only twelve to fourteen months. When the patent docket started growing, I started two different systems, as I think it would be unfair to have all other litigation fall in chronological order like we traditionally have done. From my perspective as a lawyer that seems to work. You will get a ruling—you might not like it, but you have your ruling and the parties can get on with their jobs. I do not know if that really answered your question.

JUDGE FOLSOM: When Judge Parker and I went on the bench, Judge Parker said: "Dave, let me tell you the best advice I can give you as a judge." He said: "They do not pay you to make the right decision; they do not pay you to make the wrong decision; they just pay you to make a decision." We all want to be right, and I am not always able to make those decisions as quickly as I would like, or as quickly as Judge Parker would like. But I have kind of followed that philosophy. And I think that what lawyers want is a decision so they can properly move the cases along.

PROFESSOR NGUYEN: Any other questions?

AUDIENCE QUESTION: I have a question about your procedures. Do you all often segregate liability from damage issues in stages, or does the client have to get ready for all of the case at once?

JUDGE WARD: I do not separate the issues.

JUDGE FOLSOM: Nor do I.

JUDGE WARD: I do not have the luxury of the time to segregate.

JUDGE DAVIS: No. I think that everybody knows that 95% of the cases are going to settle, but the thing that settles them is the definite trial date setting on the day of reckoning. I think that when that day of reckoning involves as many of the issues as feasible, the chances of the case resolving are much better because lawyers always know that if I have to lose this, then maybe I can win this.

PROFESSOR NGUYEN: Thank you so much, Judges. It has been an incredible honor having all of you here. On behalf of the SMU Dedman School of Law, we thank you.

