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The Jury in the EDTX: Unsophisticated American Peers or Idealists of Property Rights in Patents

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The Jury in the EDTX: Unsophisticated American Peers or Idealists of Property Rights in Patents?

Moderator:

Professor Beth Thornburg, SMU Dedman School of Law

Panelists:

Michael Smith, Siebman, Burg, Phillips & Smith, LLP

Robert Conklin, Starr Litigation Services, Inc.

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

PROFESSOR NGUYEN: Good morning, my name is Xuan-Thao Nguyen. I am a professor of law at SMU Dedman School of Law. I would like to welcome all of you to the law school for this symposium. Before I begin, I would like to recognize some of our distinguished speakers and guests sitting in the audience. I would like to recognize Judge Higginbotham from the United States Court of Appeals for the Fifth Circuit. We will hear from Judge Higginbotham this afternoon as the keynote speaker.

One of the brainchildren behind this symposium is a major donor and supporter of SMU—Mr. Les Ware from The Ware Firm. Thank you, The Ware Firm.

Why this symposium? Why have we decided to gather here today to discuss the Eastern District of Texas? About five years ago, I encountered many negative comments about the Eastern District at conferences. One of the conferences was an AIPLA conference in Washington, DC. I remember David Wille—a partner at Baker Botts—and I were on a panel. We found ourselves defending what our judges and our lawyers in Texas do. So, like a typical law professor, I decided that I was going to do something about it.

I thought I would try to set the record straight about the Eastern District of Texas, so I wrote a law review article. Specifically, I wanted to inform everyone: "Yes, the Eastern District is Justice Scalia's renegade jurisdiction, but there is something special about the Eastern District of Texas. Do not blame the Eastern District of Texas for the ills going on, but rather look at the lessons we can learn from it on patent law reform." Well, some law professors at the Tulane intellectual property conference remarked on my law review article and asserted that I was biased to support the Eastern District of Texas, the forum for all the patent litigations in the nation. Their comments came down to how this particular district could take patent cases away from sophisticated forums like those in Silicon Valley, New York, and Delaware. With those kinds of comments, I thought law reviews were not good enough to handle this problem. I thought that we should have a forum—a symposium—on the Eastern District of Texas. That is why I decided to organize this particular symposium.

The Eastern District of Texas is very special to me. I have a nickname for the district: "The Little Engine That Could." It is the little train that made it to the top of the mountain with its innovation. The Eastern District's transformation has been remarkable.

I am very fortunate to have the SMU Dedman School of Law and The Ware Firm supporting me in this endeavor. I am fortunate to have wonderful moderators and speakers here today to address some of the fascinating questions relating to the Eastern District of Texas. We are delighted to have you here. I will turn to the first panel. The first panel will focus on the Eastern District's juries. Who are the jurors in the Eastern District of Texas? Let's face it, there are some comments out there stating that the jurors in the Eastern District are unsophisticated or that they are big defenders of property rights. Do we trust juries? Do we want jury trials in patent cases? If you remember the 1996 decision in *Markman v. Westview Instruments, Inc.*, this is how we have the *Markman* hearings.[1] After 200 some years, the Supreme Court decided to eliminate the right to jury in claim construction. Because the jury is not sophisticated enough, the judge should make the decision. Now what? Are we afraid of juries? The Eastern District juries? We do not want juries to decide on infringement and invalidity issues?

I want to introduce my colleague, Professor Beth Thornburg as the moderator of the first panel. For those alumni who are here, welcome back. If you took classes with Professor Thornburg, you know that she is "The Queen of Civil Procedure." That nickname is in recognition of her expertise in complex litigation, civil procedure and jury issues. Professor Thornburg is one of the leading authors and leading scholars in her field. If you look at her bio, she has written numerous books and law review articles, and spoken at national and international conferences. Without further ado, please welcome Professor Thornburg. She will introduce the panelists.

PROFESSOR THORNBURG: Thank you very much, Xuan-Thao. I wanted to join Xuan-Thao to welcome you all here. I think this is going to be a really interesting panel. I have learned a lot just talking to the panelists. You have their full bios, so I will not tell you a lot about each of them, but I wanted to hit some highlights. On my immediate right is Michael Smith, who is a partner in the law firm of Siebman, Burg, Phillips, & Smith in Marshall, Texas. He has appeared as counsel in over 400 civil cases in the Eastern District and has also argued a number of Fifth Circuit appeals. He was the chair of the local rules advisory committee from 2000-2009, so as you can imagine, he had a lot of input into the rules. One fun fact about him is that when he was a baby lawyer, he clerked for Judge Sam Hall in the Eastern District of Texas in the Marshall and Texarkana divisions. He goes back a long time in that area. Next on the right is Rob Conklin, who is the Director of Research for Starr Litigation Services. He graduated from Boston University and he has done a lot of different kinds of research. At Starr, he has moved from Researcher to Analyst to Director of Research. He has

1. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

worked on a lot of cases both in trial and pretrial research work. In particular, he has done a lot of work in the patent area and he has also helped with jury selection. He is great source of demographic information for us. Finally, Andrei Iancu is a partner at Irell & Manella in Los Angeles. He is a member of the litigation and IP practice groups. He focuses on IP litigation and is also involved in patent and trademark prosecution, due diligence, and licensing. Many of his clients are in the technology arena, such as medical devices, internet, telephony, television, video games, and computer peripherals. He also has an aerospace engineering background. Here is how we plan to structure our panel presentation: rather than having talking heads, we want to have a conversation with each other about these issues.

Nationwide, juries decide less than 3% of patent cases. And even in the Eastern District, which is comparatively higher, only around 8% of patent cases go to trial. Even if the patent cases do not go to trial, ideas about juries cast a long shadow over litigation decisions. Where do you file? Do you file a motion to transfer? When do you settle, and for how much? And as Xuan-Thao mentioned, people have developed strong opinions about juries in the Eastern District of Texas. I did a little bit of Googling and Lexis news searching about some of the cases that have been tried. The headline almost always says: "Texas jury blah blah blah." Clearly, that sentiment is out there. But what are the bases for those opinions? The panel is going to explore the myths and realities of juries in the Eastern District and also lawyers' reactions to them.

We are going to start with Rob presenting some demographic information about the Eastern District jury pool and compare it to statewide and nationwide data. We are going to look in more detail at some of the divisions of the Eastern District. People tend to talk about it as if it was one monolithic thing, but there are actually different divisions with different demographic characteristics. Then, all of the panelists will discuss the effects those traits may have on the way cases are presented and compare the Eastern District to other hot patent venues. Then Rob is going to present some fascinating attitudinal survey data. So instead of inferring what people might think from their level of education or where they live, Rob actually has surveys with questions relevant to patent litigation. He has surveys for the Northern District and the Delaware District as well as the Eastern District of Texas, so we will be able to compare the data. And all of that leads us to the question: Does the data support the myths? And if not, why do these myths persist? Moreover, are the complaints about juries masking other kinds of factors that are leading people to choose to file their cases in the Eastern District?

At the end of the presentation, we would be happy to take some questions from the audience. Let us start with Rob giving us some basic information about what Eastern District jury pools are like.

MR. CONKLIN: Good morning everybody, my name is Rob Conklin, and I am a director of research at Starr Litigation. Thank you for being here. I want to start off by giving you a little background information about gener-

alized juries and some Eastern District jury profiles. We have collected this information through our extensive research in the area. The research on the Eastern District is not much different than what we would do in Delaware or anywhere else—just general patent profiles.

One thing you will notice is that there is no demographic information used in the profiling because demographic profiling is the least effective of any type of profiling you can use. Anytime a demographic statistically profiles, it is only a correlating factor, not a causing factor. Things that do profile are experiences and attitudes. These experiences and attitudes are shared characteristics, like ways you grow up, things that you feel, and things you strongly believe.

What are some characteristics of plaintiffs in the EDTX?
Little or no business experience
Favorable opinion of large corporations
Naïve or obtuse views of corporations and patent infringement
Open to arguments that reverse or invalidate their preconceptions (naiveté)

What are some characteristics of defendants in the EDTX?
Has (or thinks they have) some knowledge of the business world
Negative views of large corporations
Believes patent owners are greedy, anti-competition, & use patents for their own gain.
"Realist" in views of the world, corporations, and patents

Generally, on the plaintiff side we have folks with little or no business experience, or who self-report as having favorable or naïve opinions of the business world or corporations. On the defense side, we generally have people who have or think they have information on how the business world works. Again, this is all self-reported. This is reflected in a spectrum from naïve to realist or cynical. Now this does not hold in every case or every faction. But across the entirety of our work, this is what we find. This spectrum is not linear; it is actually circular. People can be bad for both sides. They cannot necessarily be good for both sides, but they certainly can be bad for both sides. Since people walk in with these views of corporations or the corporate world and their own opinions on how it works, one important thing to remember is working against these expectations. Jurors will have expectations. And when you violate those expectations—whether good for your case or bad—it is a very powerful force in swaying juror opinion.

So with that as our bedrock or baseline, we can look at a little bit of the demographic information for the Eastern District. To start, we look at the racial composition because this is the one that gets a lot of airtime.

How is EDTX Different?	Racial Composition (% Caucasian)
EDTX	76.4%
Texas	82.1%
Nation	75.1%

You will see that there is a significant but slight decrease in percentage of Caucasians. The Eastern District does have a higher minority population than the rest of the State of Texas. It is in line with nationwide data, but nationwide racial data is nearly inconsequential because racial distribution tends to be pocketed rather than homogeneous. When we look at the Eastern District the only interesting thing to take away from this—because, again, demographic profiling and race-based profiling is nearly worthless—is that the major increase is in the African-American population. There is about a 20% African-American population versus about 15% for the rest of the state of Texas. This creates a cohort group—a group of people who have shared experiences. Because there is a relatively limited population, that is what you should consider going forward. It can deal with leadership on a jury panel more than how people will work one way or another. There may be shared experiences in that cohort group that are important to you, but they won't actually have to do with the color of their skin.

How is EDTX Different?	High School Education
EDTX	74.1%
Texas	75.7%
Nation	80.4%

Education is really the reason why we are here. There is this idea that Eastern District juries are yokels who are uneducated and unable to handle a patent case. While we look at high school education data, they graduate high school at a rate approximately equal to the rest of the State of Texas. They will have the baseline understanding that a high school education brings. They are capable of learning the things you need to teach them in court.

How is EDTX Different?	College Education
EDTX	15.3%
Texas	23.2%
Nation	24.4%

The difference, though, is in college education. The Eastern District lags way behind in percentage of college graduates. Specifically, professionals lag way behind, as you will see going forward. There will be that baseline understanding and the ability to learn and do these things that you will find in the rest of Texas and across the country. However, post-secondary education or that second level of understanding—including logic-building

skills, experience with technology, or higher-level learning—will be there in much lower quantities than it would in other districts.

How is EDTX Different?	Household Income
EDTX	$32,700
Texas	$50,000
Nation	$49,800

Perhaps as a consequence, household income drops precipitously. Even when you adjust for cost of living, this is still a low-income part of the country. That has a variety of different effects. If you are walking in with a patent for a bleeding-edge technology or a high-end television, these are not the people you will be marketing it to on the whole. These are not people who are buying your products if you are a high-end electronics retailer. When you are dealing with bleeding-edge technology or high-end or luxury products, these are not people who are going to have a particular amount of discretionary income to purchase those things.

How is EDTX Different?	Unemployment
EDTX	8.2%
Texas	8.0%
Nation	9.8%

Unemployment is a significant factor—not in the Eastern District as a whole, but within individual divisions. That 0.2% is actually significant. It comes out to an increase of about five to six thousand jobs in a pool of 1.6 million people. That means there is a good chance that someone will know that person. Unemployment numbers are lower than the rest of the country, but remember that national number includes Detroit and places like that. This unemployment rate is actually fairly high for areas where patent data is coming from.

What does this mean for us? The education level will have an effect on their ability to make these secondary, or higher-order, leaps in logic. Why is this problematic? The reason you all went to law school is to learn higher-order logic. You have been trained out of these illogical modes of thinking and trained in a pattern of hyper-logical, to-the-point thinking. That is a way of thinking that the rest of the world does not share. Particularly, the Eastern District will not share that hyper-logical sense. While you may go from step A to step B, the average layperson in the Eastern District will go through steps C, D, E, F, and G between steps A and B. Skipping those steps is the surest way to lose your jury.

Lower income means lower access to products. It also means a different life-experience set than you may see in other places. This is not going to be a suburban group. This group may not watch the same television shows or

have the same cultural touchstones. Things along those lines have an influence when you are coming up with case themes.

There also are some non-demographic differences between the Eastern District and other parts of Texas. They have the highest saturation of legal "experience." What that means is a person who self-reports that either they or someone close to them works in the legal field. The Eastern District is higher by a considerable amount—nearly two to one. Nearly a quarter of the people in the Eastern District report to know someone in the legal field, or they work in the legal field. This is not surprising—and it is why we are all here—because there are a large number of patent cases. This leads to people feeling they have a familiarity with the law even if what they do is run copies for lawyers who are in town. That can give them an experience with how large law firms work. We had one mock trial group say: "This is how law firms work—they come in and buy out a whole hotel." You can see how this perception of what is happening is just as important as the reality.

The Eastern District has the lowest saturation of self-employed or professional individuals other than in the legal profession—which primarily means doctors, accountants, and things like that. People do not own businesses. They will not have the experience with the business world that comes from owning a business, being a professional, or dealing with the higher order of how a business works.

They have the highest saturation of self-reported conservatives. This is important because self-reporting is not indicative of how a conservative nature actually works. They want to be identified as conservative. This even happened during 2007-2008, when being conservative was not exactly the hip thing to do during the Obama run. We saw people bleed towards Moderate all across the country—but not in the Eastern District of Texas, where there is a proud sense of conservatism. Now this does not mean they will be conservative with dollar values necessarily, as I am sure many of you have experienced. But it is important to note that value set skews that way strongly—much more strongly than in the rest of Texas.

Finally, and most interestingly, we ask every mock trial jury panel we run: "Do you think juries should follow the spirit of the law or the letter of the law?" Across the country, it is nearly fifty-fifty. In the Eastern District of Texas, 75% report they should follow the letter of the law. This is much higher than anywhere else in the country, not to mention Texas as a whole. We know from tapes of their deliberations that they do not necessarily follow the letter of the law, but they think they do and they want to. That desire to get it right or to do the right thing is a very powerful force for jurors in general and something that really stands out in the Eastern District of Texas.

The Differing Divisions	College Education
Marshall	12.8%
Tyler	16.4%
Texarkana	15.5%
Lufkin	14.5%

One of the biggest problems with the Eastern District is that the divisions within it are not all that similar. In fact, they can be just as dissimilar from each other as they are from the rest of Texas. When we look at college education numbers, they are all fairly low. But the lowest by far is in the Marshall division, which is followed by Lufkin. This fits with the general impressions that Marshall juries do not have as much secondary education, nor do they have the highest level of education possible. The data backs up these impressions. When you are dealing with a Marshall jury panel, you are even less likely to be dealing with a person whose education level matches yours. Because communication needs a sender and a receiver, an education gap increases the distance between the sender and the receiver. You may be speaking a language that they do not really understand and do not have a desire to understand. The more you can close that gap, the better you will be. In Tyler, that extra four percent may not seem like much, but the way it manifests itself is actually quite powerful in a jury. You are looking at an extra two people per jury panel that has a college education.

The Differing Divisions	Income
Marshall	$31,500
Tyler	$34,200
Texarkana	$32,800
Lufkin	$30,200

Income shows a pretty big gap as well. This will back up a lot of anecdotal feelings. Lufkin and Marshall trail behind Tyler. Texarkana is kind of in the middle. Tyler will have a higher percentage of affluent individuals—upper-middle class and above. They drag the percentages higher. Again, when you are dealing with high technology and you are in the Marshall Division, you are going to have a lower number of those affluent individuals that may be able to recognize your product. What does that mean? If your client is a retailer that sells high-end televisions or high-end computers, you may be dealing with a group that only knows their products by reputation or commercial appeal. That can be good, but it also can be quite problematic. For instance, if they walk in and think that LG stands for "Life's Good," which is what the marketing branding has done, that's decidedly a positive. If they walk in and think that Zenith is made in America and then find out otherwise, that can come across as bad. So you are looking at a group of individuals whose experiences may not be direct. And direct experience is the most

important—but this indirect experience is also very hard to change. You are looking at the weight of thousands of opinions versus you—the paid attorney—with a biased interest in trying to reverse it.

The Differing Divisions	Unemployment
Marshall	9.1%
Tyler	7.8%
Texarkana	7.8%
Lufkin	8.8%

Here is the really impressive portion—this huge gap in unemployment numbers. Again, Marshall and Lufkin lead the way here. Some of the counties within the Lufkin and Marshall divisions have unemployment of up to 20%. In some of these places, unemployment has gone up 10% the last few years. Between 2009 and 2010, Texas as a whole has developed 300,000 new jobs. So there are jobs being created in Texas, but not in these divisions, and certainly not in the counties where one out of five people are unemployed. This is not seasonal unemployment or a rural community version of unemployment. These numbers are adjusted for seasonal workers. In this unemployment situation, you run into quite a dangerous spot.

That is where someone like Michael Smith is invaluable in your trial preparation. Being able to look at where someone lives and know if they have been affected by rampant unemployment, industrial exodus, or something like that can be gigantic because unemployment is a wild card. We do not know how people take it. We do not know how it has affected their lives and families. And when we get in voir dire, particularly in federal court, they are not going to tell us. You are essentially dealing with someone who could be more wildly in despair than any other juror you have ever experienced. And then you are going to talk to them about huge dollar figures; talk to them about royalty rates; talk to them about taking from someone else, or giving to someone else. When you have someone with a volatile personal situation, you have no idea how they will react to those things. You are essentially walking on coals the entire case. All of these issues come into play when you are looking at a juror's background, before you ever get into court.

PROFESSOR THORNBURG: Thanks for giving us that information, Rob. What I would like to do now is get our panelists to reflect on the implications of the demographic and other information. What do juries demand of lawyers trying patent cases in the Eastern District of Texas? How does this compare to experiences in other patent venues you may have had? A good place to start may be with the question of presenting complicated and complex technical information to a panel that personally may not have a high level of education or a lot of business experience. Michael, since you are from Marshall, would you like to start?

MR. SMITH: I would be glad to. Rob hit on a lot of really good points there. The point about African Americans on jury panels is one I could talk

about all day, as it goes back to the Civil War around Marshall. You have to know that in seventh grade in Marshall, we get several weeks of schooling on the history of Marshall. So anyone from Marshall can give you the chapter and verse on the demographic history of the country from before and during the Civil War. But one little thing you need to know is that the African-American population is technically higher, but they do not show up. Our experience has been that you get a lower turn out, so on paper there are more African Americans, but they do not turn out.

Let me give you an interesting fact. Rob talked about the dangers of drawing too many conclusions based on demographic data. In August 1993 in Marshall, there was a railroad case in the Eastern District where it turned out that all eight jurors were African American. It was an injured railroad worker case. Guess who won the verdict? The railroad. It was Jack Baldwin from Marshall trying it against Judge Don Bush—who is now a magistrate judge in Plano—and the railroad won. So you have to be really careful about generalizing things.

Let me talk about education because that is an important point. There is a significantly lower education level because if you grow up in a small town in East Texas and you go to college, you cannot come back to the area to live. Unless there is a family business, there is not a job for you to come back to. Generally speaking, you educate your kids, they go away from home, and then come back for holidays. That is what happened in my family, except for me. That is probably what is going to happen with my kids. So what you are looking at is a community where the best and brightest go off to college. It is not that the community does not have experience with college education. It is just that if they receive a college education, they leave permanently and they do not come back.

So you are dealing with a population where the strike zone is different. If you are trying cases in Dallas or even Sherman—which, remembering everything Rob just told you, is consistent with the divisions that have a lot of patent cases—it is totally not right for Sherman. Sherman is different. The education level is higher; the earnings are higher; it is a completely different world. But we are not worrying about that. When you are trying a case in front of a rural jury panel like that, it helps a lot if you interact with those people other than during the trial. It is helpful if you know their speed or how they think. I have noticed what lawyers do—and patent lawyers have the most to worry about on this—is if you have a double degree in engineering and you know all about the technical issues in the case, you want to come in a explain all the details and the defenses quickly to the jury. The jury may appear confused because you are throwing nouns and concepts at them at a speed they are not used to.

Let me give you an example. I watched a closing argument a few years ago by Sam Baxter at McKool Smith. Now, I had the misfortune of growing up across the street from Sam in Marshall. I say that because he was the district attorney at the time, and I really did not want to be around him too much. And I ended up working for him later. But I watched him argue a

case, and it was like watching my dad talk. It just hit me right here. I knew exactly what he thought, exactly what he wanted me to do, and exactly why I ought to do it. It was pitched perfectly to me. So I thought: "This is great, I can learn from this. I can copy this."

So I got a copy of the transcript, and when I started flipping through it I was horrified—because it looked like a half-wit sixth-grader had written it. It was awful. But that is when I learned that you have to know which division you are in. You have to know who to pitch it to, and you have to go at the speed where they can pick up the information. They do not have the technical background. They are not in a graduate class in engineering. You have to give them the important facts simplified and at the speed where they can hold on to it. It is not that they are dumb. It is not that they are not intelligent. They just did not go to college. But what that tends to mean is that they communicate more slowly. They are wise, but they think about things and they have to talk through it, so you have to give the information to them at that speed. That, I think, is why Marshall is the biggest challenge for a lot of lawyers. The strike zone is significantly different from other areas, and you have to know that when you come in. There is a little more room for error in Tyler than Marshall, in particular. I appreciated the comment about the jobs. I know in a case I am involved with now that one of our jurors is working two of those new jobs. So you have to be sensitive to that. I think those are the points that I had.

MR. CONKLIN: Just to back up what Michael just said—when you are in a hotel room and you open the door in the morning to get your breakfast, sometimes you will have the *Wall Street Journal* outside, and sometimes you will have *USA Today*. There is obviously a significant difference in the way those two papers are written. Lawyers like to speak in the manner of the *Wall Street Journal*, but jurors want to hear the *USA Today* version. That is one thing to keep in mind when you get to Marshall—there is a reason why *USA Today* is written at a sixth-grade reading level, and there is a reason why you need to get to that point as well. From a story telling perspective, I think that is the important thing. We know that jurors will take all the information, integrate it into a proper story form, and then select the best version of the story that fits the law and how they understand it. Really, in a place like Marshall—where you have a lower education level—it comes down to your ability to tell a story, and to create a story that covers all the facts and coheres with all the elements that you need.

PROFESSOR THORNBURG: Andrei, you have tried cases both in the Eastern District and other places, so will you comment both on your impression of the Eastern District and how it compares with some of your other experiences?

MR. IANCU: Right—I have tried cases in Marshall, in Texarkana, in California, and all over the country, and I think we need to keep things in perspective. There is a lot of focus on the Eastern District of Texas. And I really do wonder if law schools in the Northern District of California, like Boalt, are having a panel on the juries in the Northern District of Califor-

nia—in Silicon Valley—and their racial composition, income levels, and so forth. In fact, even the title of our panel today should rub people the wrong way. "Unsophisticated American Peers"—that's option one. That does not sound good. But even better, option two: "Idealists of Property Rights in Patents." Either way, it does not sound good.

The fact is that when you look at the overall demographics of juries across the country, in the end, people are people. We can talk all we want about generalizing the overall statistics of a district, or of a geographical area, but what matters in a case are the six or eight people in that box deciding that case for you. In every case, every jury, everywhere in the country, there is going to be a distribution of income. There is going to be a distribution of education level. And in patent cases, like other civil cases in federal court, you need unanimous verdicts. What that means is that you need to convince every juror, in every case, in every district. So when you are speaking about how you teach and how you convince jurors in the Eastern District, my experience—and our experience—is that it really is not all that different. And in fact it should not be all that different teaching jurors in the Northern District of California, or Delaware, and other hot patent venues because you do need to convince everybody. Rob speaks about the fact that you do not want to skip steps B, C, and D and jump directly from A to D with a jury in the Eastern District. That is definitely true, but that is true with any jury in the Northern District, Delaware, or anywhere else.

Now, in a few minutes I will show you some statistics—and the question that everybody should keep in mind is that although there are all kinds of anecdotes, what do the actual numbers show? Is there a significant difference in cases from the Eastern District versus everywhere else? Look at those statistics, and I think people will find some of that quite surprising.

MR. CONKLIN: I do think that is the most important take-away. The techniques that you are using to improve your case in Marshall will improve your case everywhere. Whether it is in Wilmington, Delaware or Trenton, New Jersey—it does not matter. I think that is a very important thing to keep in mind.

PROFESSOR THORNBURG: For those of you who have picked juries in the Eastern District—does the overall demographic that we saw get reflected in the panels or are the seated jurors somewhat different from the big pool of potential jurors?

MR. SMITH: I will not admit to doing this myself, but I think generally people "cut for stupid." Especially in a highly technical, complex case, when you are scared to death of a juror that has a great deal of technical expertise, because you do not know if he is going to come down on your side or the other side. The pattern I generally see is that both sides will take off people with a lot of technical expertise, so you tend to get a panel that actually has a lower educational background than the voir dire that came in that morning.

MR. CONKLIN: From a strategic standpoint, that is really the way it should be for the majority of our cases. Leadership represents risk. We want to lower our volatility as much as possible—lower the risk. Let's face it—as

much as we have a lot of high-powered, high-flying attorneys in here—when you get to court on game day, you are going to be as risk-averse as possible, assuming that you feel strongly about your case.

AUDIENCE QUESTION: Are there some instances in which a leader would be a good thing to have in a jury, and do you think it matters whether the case is criminal or civil?

MR. CONKLIN: I think that the burden gap helps there. The other thing is that there are some civil cases in which you will want to have a leader. For instance, if you are not sure about your case—if you think the other side has an edge in a significant area, and you think that you need to rely on a highly technical argument, and there is only one juror that you are comfortable with—then it is sort of a Hail Mary attempt because you are turning it into a one-man panel. In a criminal case, you have emotion at your side. Essentially, you have the presumption of guilt, rather than the presumption of innocence that people have. So a one-man panel is easier to sway, since you start ahead on the meter. In civil litigation, we generally do not want to take the risk of having a one-man panel because we cannot rely on those same societal forces to push them our way.

PROFESSOR THORNBURG: So, Andrei, would that also mean that even in districts where perhaps the pool has more technically expert people on it they are not going to be on the jury anyway?

MR. IANCU: Yeah, I think that is absolutely right. Mike's and Rob's comments are right on point, and I think that is true everywhere. You only have three strikes, so chances are in some districts—for example in Silicon Valley—you might have a higher incidence on the jury itself of highly educated people. But that still does not mean that you are not going to have the distribution, and the same issues apply. You will pick a jury in a very similar way because you do want to avoid the same concerns. With a highly educated engineer in your case, for example, you do not know how he is going to go. In the ten minutes—or few hours—he has in the jury room deliberating, he might want to read the source code. And God forbid that happens.

MR. SMITH: The risk-averse comment is a good one, too. We had a case recently where the person was double-struck—struck by both sides. The most qualified person to be on that panel—the engineer, who had patents—was struck by both sides. So sometimes you know the other side is probably going to strike the individual, but you do not want to take a chance. Maybe a great lawyer would gamble that the other side was going to strike, and use it on somebody else. But you get too risky when you are doing that.

AUDIENCE QUESTION: Have any of the judges or other lawyers that you are in contact with ever talked to you about the possibility of using only experts to resolve the fact issues?

MR. CONKLIN: I have never had that come up on our cases. Generally, if you had a more specialized jury, it essentially changes the entire path of the case up to that point. Usually, we are not brought in on the winning cases, anyway, where people would make that push. Usually, you bring in someone like us to run research when you feel like you are a step behind, or

you do not know where you are. That is really not something I have any experience with.

MR. SMITH: I have not seen that, but something that would be comparable is agreeing to a bench trial or agreeing to have the judge resolve fact disputes. One thing Judge Davis has done in a number of cases—if you have competing motions for summary judgment—is to ask the parties: "Well, you both say there aren't fact issues. If I happen to find any fact issues, will you agree that I can resolve them?" Both sides are kind of "bowed up" and they will say: "Well, yeah." As a result, they have essentially agreed to a bench trial when they have done that. But that is the closest analogy I can think of.

PROFESSOR THORNBURG: Yes, Judge Higginbotham?

AUDIENCE QUESTION (JUDGE HIGGINBOTHAM): One thing that strikes me about all those differences with other districts is that the sizes of the panels differ, and that does seem to make a difference. The lawyers get a certain amount of strikes, though, so the first thing they are going to do is dissipate some of those differences by striking out those jurors that have certain strong leanings. But the bottom line is that it is true that the size of the panel matters some, and I do see those differences.

MR. SMITH: Judge Higginbotham makes a good point about the different sizes of juries. Another difference between Marshall and Tyler is that in Tyler you have an eight-person panel and in Marshall you have a ten-person panel, because Judge Ward sees it that way. That does make a difference.

AUDIENCE QUESTION (JUDGE HIGGINBOTHAM): And, generally, all you need is a six-person jury.

PROFESSOR THORNBURG: They actually have six-person juries? I would like an "Amen" to bring back the twelve-member jury, across the board, in civil cases.

AUDIENCE QUESTION (JUDGE HIGGINBOTHAM): Do not mistake defects—that are inherently standard—to be more important than they are. The panel can be as big as you want, but lawyers are going to strike out the differences and take you right back where you would have started.

MR. CONKLIN: The other thing, to agree with that, is that since it is not homogeneous anyway—and you are drawing six from a huge pool—the real thing that it does is change the very far ends of the scale. Those are not ones that you see most of the time. So for a median jury, I agree with you. Especially because, when you have experienced groups that are using research and things of that nature, it is not going to be hard to identify the worst juror for each side. So you will often cut those anyway, as well.

PROFESSOR THORNBURG: Are there differences in how much the judges in the Eastern District allow the lawyers to participate in voir dire?

MR. SMITH: Not with respect to the patent judges. Generally, you get half an hour per side to voir dire your panel. Which is unusual in federal court, but standard in all the civil cases I have ever been involved with—we were given the ability to voir dire the court. There are differences between, say, Judge Ward and Judge Davis in what you can do during voir dire. But basically you get to ask the questions you want.

PROFESSOR THORNBURG: One thing that I learned from Rob that I think is kind of interesting is, because there have been so many cases tried in Marshall, does that affect your ability to do mock jury panels for future cases and find untainted potential jurors?

MR. CONKLIN: Well, it is not so much the research, it is actually the edict of the court that makes it difficult. You are actually not allowed to do research in the Marshall district itself, and because Marshall is so unique in terms of the composition and some of the attitudinal issues, it makes it very difficult. You have to essentially cull a similar group to run your research.

The most important thing about pretrial research is not juror profiling, for all the reasons that Andrei and the Judge have given. It is theme development, and it is seeing where you are failing when you are explaining this and then improving your case. That is where the attitudinal and experiential differences come in. Since you cannot actually operate in Marshall, it becomes sort of an affair to cull a similar group. You cannot go to Tyler—it is completely different. Even Longview is significantly different. So now you are drawing from some of the areas around there, and partial areas. It becomes more expensive, more time-consuming, and a more difficult process.

It is better than the alternative, though, where because it was such a small group you would often have both sides of the case running research on the same weekend, in the same hotel. Or, you have individuals who made it a cottage industry and would go to one every other week, or every three weeks, to get a couple of extra bucks in their pocket.

MR. SMITH: What Rob is referring to is that one time during jury selection Judge Ward was asking the panel some questions, and a couple of people raised their hands and said: "Oh, I was on a focus group for this case." My paralegal was there—that actually was not a true statement by those panel members. They thought they had been, but it was a different patent case that was doing a focus group. Judge Ward came up with an order that very strongly suggested that people not do their stuff.

AUDIENCE QUESTION: It did happen. It was a focus group that I did. It actually did happen—we did have them in our group.

MR. CONKLIN: Other people have nightmares about falling or showing up to class in their underwear, but that is my nightmare—that is the worst-case scenario.

MR. SMITH: Well no, worse than that is the time that the juror stands up and says: "Oh, I know about this case. So-and-so's investigator came and talked to me about it last week." That was bad. But anyway, getting back to the point—you can do focus groups, but you have to understand that the divisions are different.

You cannot just go over to Longview and do a focus group and think it applies to Marshall. You have to kind of assemble a Frankenstein's monster of people for your panel that approximates the counties of the Marshall division. Or, if you have a trial in Tyler, you go someplace else and find something that approximates that. It can be done.

AUDIENCE QUESTION: Where do you do mock trials since the judge has prohibited you from doing them in Marshall?

MR. CONKLIN: I do not want to get too much into that, since we think we have a better way than the other people that run it. Thus, I do not want to give away too much of the store while I am here. But essentially we have moved it around quite a bit to try to get the best feel for it. It is kind of a trial-and-error process, but generally we will actually hold the research in Longview—or just outside of Longview—and cull from around there, not from Longview proper, to try to get to the closest approximation we can.

PROFESSOR THORNBURG: Let's look at some of the data on the outputs of the jurors—as opposed to their characteristics—to see how results from Eastern District juries compare to other ones across the country.

JURY DEMANDS

District	Jury Demanded
E.D. Texas	*96.2%*
C.D. California	86.7%
N.D. California	89.0%
D. Delaware	74.7%
M.D. Florida	81.1%
N.D. Illinois	85.7%
D. Minnesota	39.5%
D. New Jersey	57.8%
S.D. New York	68.4%
E.D. Virginia	85.0%
W.D. Wisconsin	39.1%

MR. IANCU: There is a slide on the screen that shows the percentage of cases in which a jury was demanded in the various districts. I have compiled here mostly districts that are known as patent havens. I have always listed the Eastern District first, highlighted it, and then the rest of them are in alphabetical order. But certainly there is an obvious perception that people want to get to juries in the Eastern District, more so than in the other districts. You can see—by a far margin—that the Eastern District has a higher incidence of a jury being demanded. So the perception, the anecdote, actually matches what lawyers do. They think they want to get to the jury. So the question is: Why?

JURY TRIAL WIN RATE FOR PATENTEE

District	Jury Trial Win Rate
E.D. Texas	*73%*
C.D. California	73%
N.D. California	66%
D. Delaware	61%
M.D. Florida	77%
N.D. Illinois	74%
D. Minnesota	65%
D. New Jersey	64%
S.D. New York	53%
E.D. Virginia	79%
W.D. Wisconsin	71%

Here is the jury trial win rate in the Eastern District versus the other districts. Now, you see that it is fairly healthy—over 70%. But it is not out of the ordinary when you compare it to other patent havens. Look at the Eastern District of Virginia—it has a higher jury trial win rate. The Western District of Wisconsin—which for the past couple of years has been the new "rocket docket"—is also at a seventy-plus percentage win rate. The Central District of California—that is in the Los Angeles area—which actually has more patent cases, surprisingly, than the Eastern District of Texas, is the same. Certainly, it is a healthy jury trial win rate—especially when compared to Delaware and the Northern District of California, two other popular areas for patents. But again, it is not out of the ordinary.

I should say that these are all statistics, and we all know what people say about statistics. There are lies, damn lies, and statistics—three types of lies. But anyway, that is what it shows.

PATENT APPEALS—COMPLETE AFFIRMANCE

District	Complete Affirmance
E.D. Texas	*61.0%*
C.D. California	52.2%
N.D. California	65.3%
D. Delaware	52.2%
M.D. Florida	46.4%
N.D. Illinois	56.0%
D. Minnesota	60.6%
D. New Jersey	64.8%
S.D. New York	64.4%
E.D. Virginia	51.7%
W.D. Wisconsin	65.1%

So let me ask the audience the following question: considering the reputation about the Eastern District of Texas and what people perceive the results to be from "Texas juries" and so forth, which district do you think gets affirmed more often by the Federal Circuit—the Eastern District of Texas or the Eastern District of Virginia? Virginia is a long-standing, well-respected patent district in D.C., right next to the Federal Circuit. Which has a higher affirmance rate? For complete affirmances, you see that the Eastern District of Texas has one of the highest complete affirmance rates on patent cases in the Federal Circuit. Certainly, other districts that are popular have a healthy affirmance rate as well—such as the Northern District of California and Wisconsin. But look at Delaware, where a lot of the patent cases are tried. Look at Virginia—it is 50%. And look at the rest of the districts as well. Now, these are the complete affirmances.

PATENT APPEAL—AFFIRMED AT LEAST IN PART

District	Affirmed At Least In Part
E.D. Texas	*84.7%*
C.D. California	73.0%
N.D. California	84.0%
D. Delaware	82.6%
M.D. Florida	71.4%
N.D. Illinois	76.7%
D. Minnesota	85.9%
D. New Jersey	77.5%
S.D. New York	77.8%
E.D. Virginia	85.0%
W.D. Wisconsin	88.4%

If you look at affirmances at least in part, you see a bit more uniformity. But the Eastern District is very high nevertheless. So when people judge and go around whipping out this anecdotal evidence about the Eastern District of Texas and "Texas juries," we really need to be careful and take it with a grain of salt.

Let me go back to the trial win rate, which is healthy—although not out of the ordinary. The question then becomes: If it is not very different from Virginia, Wisconsin, and so on—why is it that plaintiffs and plaintiffs' lawyers in patent cases have come to the Eastern District? Is it really the juries? Is it the fact that people have a lower education and you can fool them or pull the wool over their eyes? I do not believe that it is.

PATENTEE CONTESTED WIN RATE

District	Contested Win Rate
E.D. Texas	*43.0%*
C.D. California	20.7%
N.D. California	18.0%
D. Delaware	39.7%
M.D. Florida	42.9%
N.D. Illinois	23.4%
D. Minnesota	29.3%
D. New Jersey	34.8%
S.D. New York	23.1%
E.D. Virginia	31.1%
W.D. Wisconsin	33.3%

There are a variety of reasons and factors that have combined over the years to get us here. This slide shows the contested win rate. So first we looked at the jury win rate, and now this is the overall contested win rate—which excludes consent and default judgments. You see that the Eastern District certainly is high. But it is not because the jury win rates are so much higher than the other districts. You saw that in the previous slide. What explains this?

SUMMARY JUDGMENT WIN RATE

District	MSJ Win Rate
E.D. Texas	*26.2%*
C.D. California	48.2%
N.D. California	45.0%
D. Delaware	32.0%
M.D. Florida	28.4%
N.D. Illinois	38.1%
D. Minnesota	39.4%
D. New Jersey	39.8%
S.D. New York	44.5%
E.D. Virginia	36.3%
W.D. Wisconsin	55.3%

CASE TERMINATION

District	By MSJ	By Jury Trial	Voluntary Dismissal
E.D. Texas	*2.4%*	*3.9%*	*62.1%*
C.D. California	6.1%	1.3%	50.4%
N.D. California	6.2%	1.3%	58.1%
D. Delaware	2.7%	5.0%	58.6%
M.D. Florida	2.0%	2.8%	46.3%
N.D. Illinois	5.2%	1.5%	54.6%
D. Minnesota	5.4%	2.8%	61.3%
D. New Jersey	3.6%	0.8%	41.4%
S.D. New York	5.2%	1.2%	48.2%
E.D. Virginia	6.1%	3.1%	45.8%
W.D. Wisconsin	8.3%	7.1%	53.4%

Well, one thing that is clear is that—in the Eastern District—judges historically have not granted summary judgment as often as in the other dis-

tricts. You see that the statistics show a materially lower win rate on summary judgment. And in a patent case, as in many other cases, summary judgment is brought primarily by the defendant. It is very hard to get summary judgment on infringement if you are the plaintiff. There are too many variables. It is very hard to get summary judgment of invalidity, although it happens. But it is mostly a defense judgment when we get summary judgment. And you see that in the Eastern District the rates are much lower. So plaintiffs say to themselves: "The jury win rate is pretty good in the Eastern District compared to the other districts. It is not out of the ordinary—certainly Virginia and Wisconsin are also good. But here, at least we can get to the jury."

AVERAGE TIME TO TERMINATION

District	Time To Termination
E.D. Texas	*13.8* months
C.D. California	10.9 months
N.D. California	14.8 months
D. Delaware	16.0 months
M.D. Florida	12.2 months
N.D. Illinois	12.6 months
D. Minnesota	14.6 months
D. New Jersey	14.5 months
S.D. New York	13.6 months
E.D. Virginia	5.9 months
W.D. Wisconsin	6.8 months

Now, historically, there have been other factors. This data is over the past ten years. Regarding time to termination, the Eastern District was fairly fast. Not tremendously faster, overall, than other districts—but pretty fast. Not as fast as Virginia or Wisconsin, but pretty fast.

AVERAGE TIME TO JURY VERDICT

District	Time To Jury Verdict
E.D. Texas	*28.9* months
C.D. California	35.3 months
N.D. California	37.3 months
D. Delaware	37.8 months
M.D. Florida	24.7 months
N.D. Illinois	32.3 months
D. Minnesota	33.5 months
D. New Jersey	56.1 months
S.D. New York	49.8 months
E.D. Virginia	12.0 months
W.D. Wisconsin	13.0 months

More importantly, let us take a look at time to jury verdict. You see the Eastern District is somewhere in the middle. This again is an aggregate over the past ten years. It is not as fast as Wisconsin and Virginia, which are still "rocket dockets," but significantly faster historically than the Northern District of California. Again, this is for the past ten years. So people come here, or have come here, and they can get to a jury pretty fast and they are not going to be dismissed on summary judgment. This has swelled the filings in the Eastern District and the time to trial has slowed down dramatically. This number is higher now.

VENUE TRANSFER WIN RATE

District	Venue Transfer Win Rate
E.D. Texas	*34.5%*
C.D. California	53.0%
N.D. California	48.8%
D. Delaware	35.8%
M.D. Florida	42.7%
N.D. Illinois	56.2%
D. Minnesota	32.4%
D. New Jersey	57.4%
S.D. New York	69.1%
E.D. Virginia	56.1%
W.D. Wisconsin	47.1%

Historically, another factor is—this again is an aggregate over the past ten years—that the transfer win rate was quite low. Thus, if a party came to the Eastern District of Texas, the case would be heard by a jury—because there is a lower incidence of summary judgment—and a case was not as likely to be transferred to Virginia or Wisconsin.

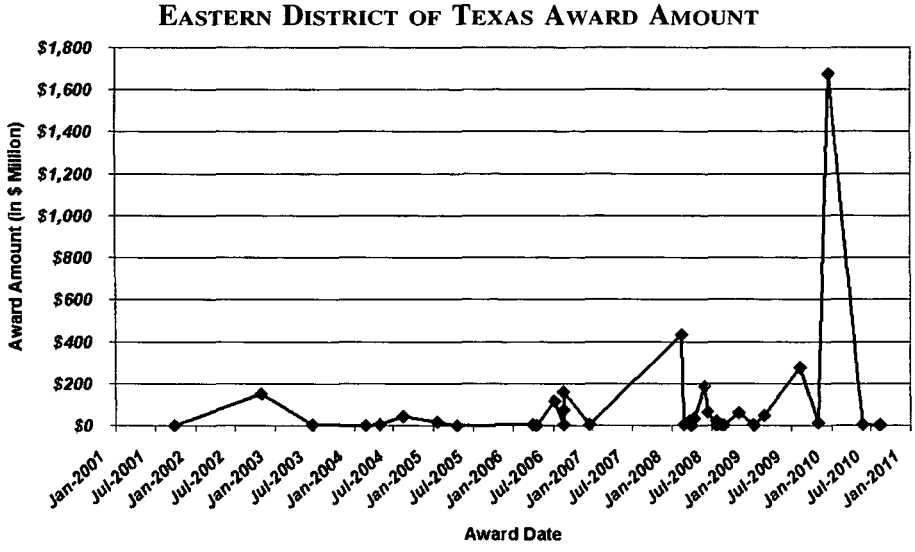
MEDIAN AWARDS

District	Median Awards
E.D. Texas	*$6.24M*
C.D. California	$0.15M
N.D. California	$0.45M
D. Delaware	$17.27M
M.D. Florida	$0.14M
N.D. Illinois	$0.14M
D. Minnesota	$0.13M
D. New Jersey	$0.49M
S.D. New York	$0.20M
E.D. Virginia	$1.00M
W.D. Wisconsin	$0.63M

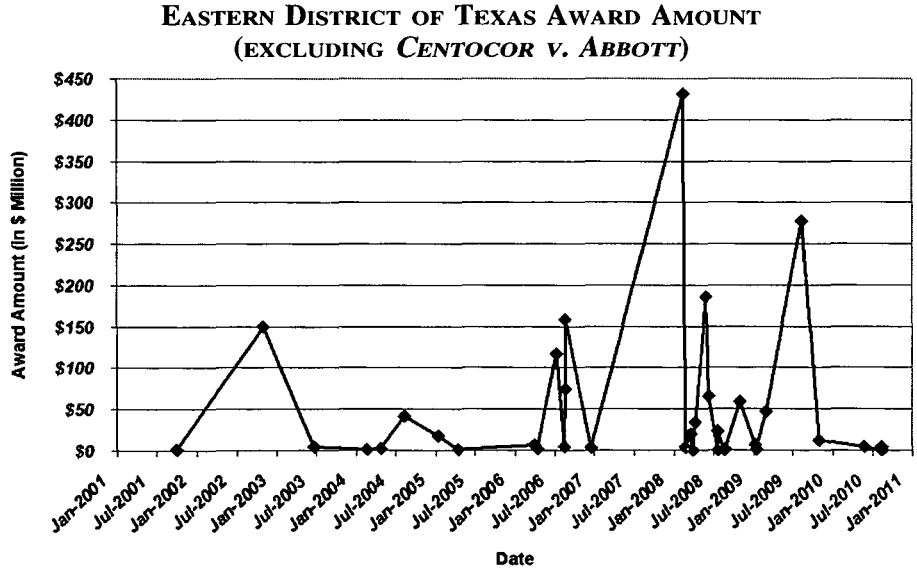
And finally, you see that overall the median award in the Eastern District—when you compile the statistics over the past ten years—is fairly healthy. What this basically shows—keeping in mind that this is a statistic and it is a median number—is that, in the Eastern District of Texas, courts, juries, and judges are not afraid of healthy verdicts.

PROFESSOR THORNBURG: Thank you. I always wonder about the damages numbers, particularly since it varies so much and reflects what the particular cases are. Do you think those numbers fairly reflect what happened?

MR. IANCU: They vary a lot from case to case. This is a median number so it could be just representative of the types of cases that get here and manage to make it through judgment. Let me show you this slide, which shows the variation in judgments and awards over the years in the Eastern District of Texas. And you see how it varies dramatically over the years.



And one judgment can take it out. Here are the numbers without the *Centocor v. Abbott* case,[2] which was out of the ordinary.



Still you see quite a bit of variation from very low numbers all the way into the hundreds of millions. There are more patent cases here in general

2. Centocor Ortho Biotech, Inc. v. Abbot Labs., 669 F.Supp.2d 756 (E.D. Tex. 2009), *rev'd*, No. 2010-1144, 2011 WL 635291 (Fed. Cir. Feb. 23, 2011) (reversal occurred five days after symposium was held).

that make it all the way through and get judgments, and that can affect the ultimate rate of the median and averages.

MR. CONKLIN: From a statistical standpoint, too, the valuation is certainly subject to higher amounts of selection bias because you cannot control the types of cases. The "yes-no" data that Andrei has given—the actual finding for the patentee or not—is less subject to that selection bias, so that supports his findings overall.

MR. SMITH: The problem that I run into with trying to come up with a win rate is: When is it a win? Because—as we all know—sometimes it is really a win for the defense because you kept the damages low. That is why, frankly, I find damages analysis based on verdicts in patent cases to be useless, because it does not reflect the underlying facts of the case. If you are looking at a personal-injury case where you have the death of a minimum-wage worker, and the intangibles on that are $500,000 in this district and $2 million in this district and $20 million in this district, then you are comparing apples to apples. But in patent cases, every case has different damages. We are all familiar with plaintiffs that have gotten lowballed in verdicts; it happens commonly. It happened to me last year; it happened to somebody else a few months ago; it happens all the time. To me the more useful thing—and the thing I always ask when I hear about a verdict—is: "What was the plaintiff asking for? What was the defendant saying?" Because if you know the plaintiff came in asking for $40 million and the defendant was saying it ought to be $2 million, and the jury gives $2 million, then that is more useful. Then I really know who won. And on those I kind of score that as half a win. The plaintiff won on infringement; the defendant won on damages.

MR. IANCU: My favorite personal story on that is the following: I had a trial against my friend, Doug Lumish, and the plaintiff—our side—asked for $300 million. The jury, in the end, came out with $80 million or so. And we thought we won, and we advertised that we won. And then we look at Doug's website, which says that he won!

MR. SMITH: Oh, absolutely. I saw a guy put out a press release saying that he forced my client to take $1.1 billion. He just made him take it. I thought: "Well, okay, if that is what you want to say."

(*to Andrei Iancu*) You made a point about judges that I think is a good one. We know that the Eastern District judges characteristically grant fewer summary judgments and motions to transfer. I want to give a little explanation of why that may be. What I was told by my predecessors that trained me was that there was a tradition among the Eastern District judges—going back to Judge Steger and Judge Sheehy—that they just felt very strongly that what hit their desk was their work and it was there for them to do. And when you come before an Eastern District judge, I have seen a lot of people that say: "We just want to let him know that he can kind of push this off on somebody else. He can get rid of some of these cases." I have never seen that be effective—and in fact it kind of goes the opposite way—because they just are not receptive to the idea of "let me get rid of this work." Another characteristic that they have is that they have a lot of respect for the jury's role.

And that is why they are not looking at the case and thinking: "Well, this is a strong argument so I will grant summary judgment." If there is a genuine issue of material fact, the law says they are supposed to deny it, so they deny it. So you have that characteristic combined with the fact that they are not looking for an excuse to get rid of a case.

I don't think people file really because of the juries. I think they file because the judges—as you said—give them a chance at getting to the juries. And if you can get to the jury, you are in a different world because different skills are required at trial. Where I really think the success of plaintiffs lies—although now I think it has kind of fallen back to the normal ratio—is that trial rewards a certain set of skills. People like Mr. Baxter and Mr. Carroll have those skills. If you go up against them and you do not have those skills, you will get eaten alive and facts will only help you so far. For a long time we had really good "lawyering" taking place, and it was a while before people got used to figuring out how to respond to someone like Sam Baxter. How do you put on a defense? I know that Otis Carroll was recognized in *American Lawyer* because, in a case we had against him a few years back, they came up with new ways of defending a case. They took chances, they figured out a better strategy, and they got a big defense win.

But trial rewards different skills. If you come in with people that may be the most brilliant EE lawyers in the world, they will understand the issues well. But if you do not know how to communicate that to the jury, you need to know how to respond when Mr. Carroll draws an elephant up on the board and says: "This is the plaintiff's case, and here's what's wrong with it." If you do not and you just stand there looking confused, then the jury comes back against you in forty-five minutes with a "yes" for the defendant on everything. This actually happened, and I still think about it.

That is what I think people are looking at. They have a court where you can get to trial when you are supposed to go to trial, and then they might outlawyer you at trial. So you have to be prepared if you go that far.

PROFESSOR THORNBURG: I would like to look at that while we still have a little bit of time left. Let's look at this comparative attitude research, which I think is really interesting. Why don't you show us about that, Rob?

MR. CONKLIN: That is one way we can get to the point that Michael is talking about—where we can tailor our thematic information to really fit to the way that our venue wants to look at it. That is not something we can make conjecture about. It is usually necessary to go in and put boots on the ground and do some research or ask some of the right questions.

First, I want to give a brief comparison. This is a small sample of forty or fifty people in mock-trial exercises. Do not take this as predictive, but it is indicative. These are stratified, selected panels, so they do represent to a high standard of consistency the actual pool to be found. We want to compare a trial in Delaware, a trial in Dallas, and a trial in Marshall. The Delaware and the Dallas cases were the exact same case. It was a little bit of forum shopping, and we ran them with both elements. The Eastern District case was a similar case with similar parties and similar technology at stake.

First, we will start with how we are all similar. We all think patents are important. This is the percent that answered they have a favorable view of the patent system.

Research Sample Similarities
What is your opinion of the patent system? (Percent Answering Favorable)
o **Delaware - 78%**
o **Northern District of Texas - 81%**
o **Eastern District of Texas (Marshall) - 77%**

Even when we do not like the government, even during periods of recession, we recognize that patents are useful and important. This is a vague feeling. Most people do not have a strongly held belief about patents at all.

How easy is it to get a patent? We do not think it is very easy. About a quarter of us think it is easy.

Research Sample Similarities
How easy is it to get a patent? (Percent Answering Easy)
o **Delaware - 20%**
o **Northern District of Texas - 25%**
o **Eastern District of Texas (Marshall) - 23%**

Is your opinion of lawyers positive? Not really.

Research Sample Similarities
Is your opinion of lawyers positive? (Percent Answering Yes)
o **Delaware - 33%**
o **Northern District of Texas - 32%**
o **Eastern District of Texas (Marshall) - 39%**

PROFESSOR THORNBURG: But it is much higher in Marshall.

MR. CONKLIN: Well, that is not a significant number. We should not view 5% as significant. With a small sample size, we want to get to 10% or higher before we worry about it since the error bars are fairly large. My favorite anecdote is that every year Gallup does a poll where they ask 1,003 Americans to rate the credibility of various professions. Nurses are at the top with 81% credibility. Doctors are close to 75%. Lawyers rate between stock brokers and politicians in the lower teens. This is funny because no one reports negative experiences. About 60% of people have neutral views. So we make lawyer jokes and we think they are liars, but we don't actually have negative experiences with them. So it really does not come into court at all.

Is it legally wrong to use another company's patent idea? We know it is. We all understand it on some base level.

Research Sample Similarities
Is it legally wrong to use another company's patent idea without a license? (Percent Answering Yes)
o **Delaware - 93%**
o **Northern District of Texas - 92%**
o **Eastern District of Texas (Marshall) - 95%**

Now we start to get into how we are different. We asked this question nationwide, and the nationwide average is about 80% of respondents think the most important reason to be in business is to make a profit.

Comparisons: Corporate Views
Is the most important reason to be in business to make a profit? (Percent Answering Yes)
o **Delaware - 70%**
o **Northern District of Texas - 76%**
o **Eastern District of Texas (Marshall) - 82%**

In Delaware you see we start just a little bit lower, and in Marshall we are a little bit higher. So those East Coast liberals and those East Texas conservatives are "duking it out" over why we are in business.

We asked if large businesses in America are honest and you see that we start to flip it. You see that honesty is rated the lowest in Marshall.

Comparisons: Corporate Views
Are large businesses in America honest? (Percent Answering Yes)
o **Delaware - 44%**
o **Northern District of Texas - 45%**
o **Eastern District of Texas (Marshall) - 30%**

Are large businesses greedy? Well, Marshall thinks so and so does Delaware. Now these are probably for completely different reasons, but Dallas—which we figured would have an equal if not slightly lower incidence of actual experience with corporations—comes out the lowest.

Comparisons: Corporate Views
Are large businesses in America greedy? (Percent Answering Yes)
o **Delaware - 89%**
o **Northern District of Texas - 68%**
o **Eastern District of Texas (Marshall) - 88%**

Are they fair competitors? Again, Marshall does not think much of competition. They do not think that businesses are competing fairly.

Comparisons: Corporate Views
Are large businesses in America fair competitors? (Percent Answering Yes)
o **Delaware - 33%**
o **Northern District of Texas - 55%**
o **Eastern District of Texas (Marshall) - 30%**

Comparisons: Corporate Views
Are large businesses in America based on the philosophy that anything goes? (Percent Answering Yes)
o **Delaware - 48%**
o **Northern District of Texas - 39%**
o **Eastern District of Texas (Marshall) - 72%**

Of course they are. That is the big one for Marshall. Are businesses in America based on the philosophy that anything goes? So you have a group of people who think companies are greedy, who think they will do whatever it takes to get ahead, and that they are not particularly honest. It is not a very rosy picture. The good news is that all of these beliefs tend to skew toward the defense side rather than the plaintiff's side. But it is certainly an opening for the plaintiff to get in.

One of the more interesting questions is: Have you—or has anyone close to you—ever been a member of a union? The difference between Delaware and Marshall is staggering. That means they do not even know someone who is in a union that is close to them.

Comparisons: Corporate Views
Have you, or has anyone close to you, been a member of a union? (Percent Answering Yes)
o **Delaware - 78%**
o **Northern District of Texas - 36%**
o **Eastern District of Texas (Marshall) - 28%**

MR. IANCU: Rob, what difference would that make?

MR. CONKLIN: We do not want to generalize about a specific plaintiff-defense mold there, but unionization usually comes with a mentality of collective bargaining, of coming to an agreement, and of workers standing together. If you do not have any experience with that, your mentality may be more that workers are expected to work. They are expected to not take on the large corporation, and that there is sort of a hierarchy that the rank and file falls into. It sort of flips it on its head rather than going from top to bottom. They will be more likely to look at it as the workers are more important than the top.

Is it common practice to use a company's patent idea without a license? The difference between Delaware and Marshall reflects an understanding that, it does happen. Marshall does not think that it happens as often. Only about a third thinks that it is a common practice.

Comparisons: Patent Views
Is it a common practice to use another company's patented idea without a license? (Percent Answering Yes)
o **Delaware - 59%**
o **Northern District of Texas - 46%**
o **Eastern District of Texas (Marshall) - 33%**

Is it an accepted practice? That is even more striking. Very few in Marshall think it is accepted.

Comparisons: Patent Views
Is it an accepted practice to use another company's patented idea without a license? (Percent Answering Yes)
o **Delaware - 37%**
o **Northern District of Texas - 23%**
o **Eastern District of Texas (Marshall) - 11%**

When we talk about Andrei's well-pointed-out false dichotomy we represented with our panel here, the impression that they may be idealists for property rights comes from ideas like this—that it is not an accepted practice, or that it should not be an accepted practice.

PROFESSOR THORNBURG: Michael, I think that you have been quoted as saying that one of the ways that people communicate with juries in East Texas is to make the connection between intellectual property and other kinds of property.

MR. SMITH: There is a strong tradition, a strong belief, that your property is your property and you have a right to do whatever with it. Let me give you an example. Last April our house was broken into, and I had a sitting judge, the County Sheriff, and the County Judge all tell me that, "well,

you know you are going to have to shoot them in order to keep them away." Two of the three—I will not tell you which two—told me: "You know if you shoot them when they are outside, you will have to pull them back into the house." There was actually a situation like that in Gregg County. There was a guy who shot somebody in the back yard as they were running away, and the D.A. would not prosecute.

If you say that to reporters in London, they just go crazy. I say: "Look, we grow up where our dads have loaded guns leaning up against the corner in the bedroom just in case someone tries to steal the lawn furniture." That does not necessarily cut one way or the other in a patent case because it is either: "I have this property, and you are trespassing," or "I am trying to run my business, and you are filing this case that does not have any merit." You just have to know that you have to reach the high ground first, whichever side you are on, because that tends to be something that I believe that they take very seriously. In the same way you see the differences here, they are a little naïve about this going on and you want to get to them first with the idea that you are here to protect property. That is your job. That is why the flag is in the courtroom—it is there in order to protect people's property.

MR. CONKLIN: And that is something that works in the Northern District of California as well. You always want to come from a righteous position rather than from a defensive position, even if you are the defendant in a patent case. Like Andrei said, this is not something that should be viewed as a way to select a jury, but it is a way to start speaking the language of the jury. This is a language that some of us may not be familiar with.

My first trip to Marshall, I could not even understand a word that was being said in certain scenarios. I grew up in the Midwest, and I just could not believe it. Then, when you see the numbers and you see it all bear out, the differences are less people to people, and more just regarding communication.

How frequently does the patent office make mistakes in issuing a patent? This is an odd one because we do not see particularly high amounts of invalidity findings in Marshall. But people walk in with some idea, or at least a middle-of-the-road median, for how often mistakes are made.

Comparisons: Patent Views
How frequently does the patent office make mistakes in issuing a patent? (Percent Answering Yes)
o **Delaware - 26%**
o **Northern District of Texas - 27%**
o **Eastern District of Texas (Marshall) - 49%**

Are the following inventions worthy of a patent? A cure for cancer?

Comparisons: Patent Views
Are the following inventions worthy of a patent? (Percent Answering Yes)
o **A cure for cancer**
• Delaware - 41%
• Northern District of Texas - 63%
• Eastern District of Texas (Marshall) - 85%

Now those folks in Delaware—the 59% that think that a cure for cancer is not worthy of a patent—they did not misread the question. Generally, they feel that it should be public domain. It should be something that is not patented and a company should not be allowed to make a profit from it. They have an intuitive understanding that this is something that should be made free to everybody. Marshall does not have that issue. They think that if you have a cure for cancer, then that is your patent. You own it.

The same occurs with the new use for glue. Marshall comes out ahead of both of the districts.

Comparisons: Patent Views
Are the following inventions worthy of a patent? (Percent Answering Yes)
o **A new use for a glue**
• Delaware - 22%
• Northern District of Texas - 30%
• Eastern District of Texas (Marshall) - 44%

There is a slight decline with a new screw head. Now that may just be something that is deeply ingrained in what they do, or that sort of a blue-collar rural mentality. We do not want to read too much into that. But it is worth noting.

Comparisons: Patent Views
Are the following inventions worthy of a patent? (Percent Answering Yes)
o **A new screw head**
• Delaware - 74%
• Northern District of Texas - 73%
• Eastern District of Texas (Marshall) - 56%

Then we actually give a brief description of the actual patent. It is worth noting that these were all essentially the same thing. In the first two cases, they were exactly the same thing. Delaware gives it the lowest worthi-

ness. Dallas is right in the middle. By almost an exact jump, Marshall is the highest.

Comparisons: Patent Views
Are the following inventions worthy of a patent? (Percent Answering Yes)
o **A brief description of actual invention**
• Delaware - 37%
• Northern District of Texas - 53%
• Eastern District of Texas (Marshall) - 77%

MR. IANCU: Was it cancer or was it the screw head?

ROBERT CONKLIN: It was the glue, actually.

AUDIENCE QUESTION: Could you collectively infer from the last three slides—including this one—that Delaware, as a general mindset, does not give a lot of validity or value to patents as a whole?

MR. CONKLIN: I am not sure that you can. We do not want to make a causation/correlation mistake. It may actually run the opposite. It may be that they are not sure, so they answer no. We do not offer them a "not sure" option because we need a yes/no differentiation there. We do not want to give them a bailout point. So it may be that all the "not sures" in Texas go to "yes," and all the "not sures" in Delaware go to "no." That is similarly informative. It shows us where their internal barometer goes. I do not think we can say that they necessarily put a lower value on patents, especially because their actual value of verdicts is significantly higher than Marshall. It may just be that they are a little bit more cynical walking in the door about something like glue. There may be more stratification within patents rather than an overall feeling about patents.

Are there too many lawsuits filed nowadays? Delaware is the highest and Marshall is the lowest. That is a low number for Marshall overall. We usually see 85% or more saying that there are too many lawsuits filed. That may be part and parcel with the largest number of people who have a vested interest because they or someone else is involved in the legal field.

Comparisons: Legal Views
Are there too many lawsuits filed today? (Percent Answering Yes)
o **Delaware - 93%**
o **Northern District of Texas - 84%**
o **Eastern District of Texas (Marshall) - 75%**

Do you agree that a lawsuit should not be filed unless the party being sued had done something wrong? This question does not result in predictive answers, but it is fascinating. In Marshall, two-thirds believe that if you are sued you did do something wrong.

Comparisons: Legal Views
Do you agree a lawsuit would not be filed unless the party being sued had done something wrong? (Percent Answering Yes)
o **Delaware - 33%**
o **Northern District of Texas - 47%**
o **Eastern District of Texas (Marshall) - 68%**

Are the courts too lenient in the treatment of large corporations? Marshall ranks the lowest. That seems to be contradictory to the one before it, and overall it is an interesting attitude.

Comparisons: Legal Views
Are the courts too lenient in their treatment of large corporations? (Percent Answering Yes)
o **Delaware - 63%**
o **Northern District of Texas - 77%**
o **Eastern District of Texas (Marshall) - 56%**

It may show that the lack of experience with large corporations in the Marshall division manifests itself in incongruous or inconsistent responses to corporate questions. Therefore, you really need to use voir dire to get to the individual's view of corporations if you are going to use that as a profiling characteristic and not rely on a stereotype or a surface-level response.

And my favorite: should we follow the letter of the law or the spirit of the law? Marshall just blows away everybody else.

Comparisons: Legal Views
In reaching a decision, should juries follow the letter of the law (versus spirit)? (Percent Answering Yes)
o **Delaware - 41%**
o **Northern District of Texas - 46%**
o **Eastern District of Texas (Marshall) - 77%**

Again, the most important pressure on a juror and on a jury panel is the pressure to get the outcome right. Jurors generally want to feel good about their answers. They want accuracy. The fact that Marshall juries walk in with a very strong emphasis on the letter of the law means that, most likely, they are coming from a righteous position themselves. That may give you an opportunity as a lawyer to state that righteous ground and come from the top down instead of from a defensive posture. You want to be on the attack rather than on the defensive.

MR. SMITH: I think that also reflects itself, and I will not go into specifics. For example, it is similar to asking the question, "How many people

drink?" and then you check to see if the same people were at the liquor store the week before. It is that sort of deal. I follow the rules—what I do after I answer your question is my own business.

MR. CONKLIN: Remember this is a stereotypically conservative response as well. That may play into that self-reported conservativeness. I know from watching mock jury panels that they do not follow the letter of the law. In fact, they follow their understanding of the law. But this is a false response. It is a self-reported one rather than an actually held belief.

AUDIENCE QUESTION: You have the Eastern District of Texas in Marshall but you have referred to the Northern District of Texas. Are you talking about the Dallas division?

MR. CONKLIN: That was in the Dallas division—I'm sorry, sir. Again, it is a small sample size of data so we do not want to draw too many conclusions. You want to use it as indicative of things we have seen, rather that predictive of anything. If we went to a completely random sample, we are not sure we would get that 46% number. Nationwide, it is about fifty-fifty.

PROFESSOR THORNBURG: Thank you all for your insight and participation.