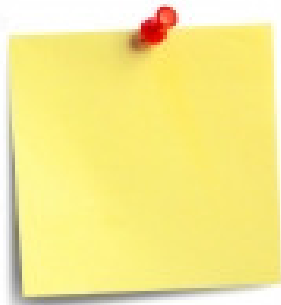
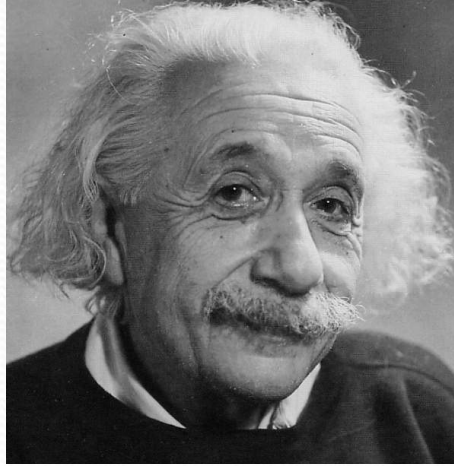


Controlling IP Litigation Expense – What Can Be Done?

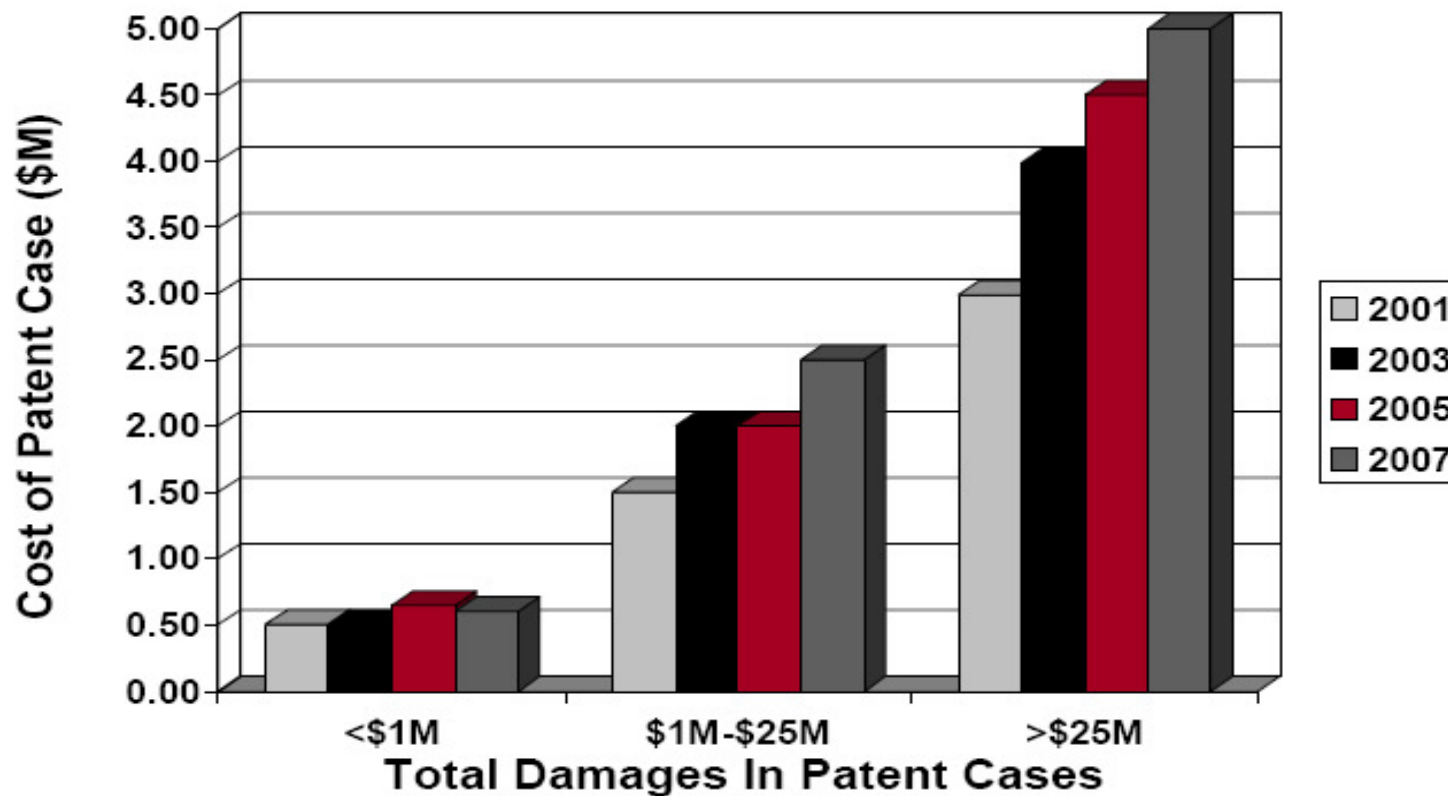
Judge Matthew F. Kennelly
November 3, 2009



The Obligatory Disclaimer



The Cost of a Patent Case (created by Bart Showalter from AIPLA data)



*AIPLA Report of the Economic Survey 2001 - 2007

Trends

Calculating Costs

Budget Busters

BAKER BOTTS  LLP

Is this a problem?



Fed. R. Civ. P. 1: “These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

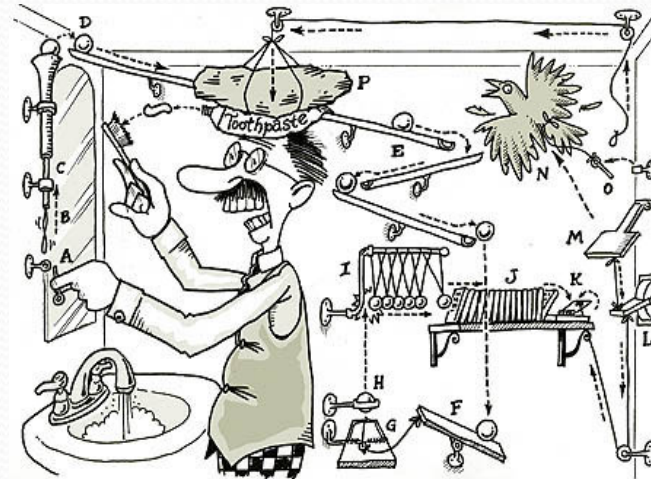


Why so expensive?

- Value of asset / possible recovery
- Factual complexity?
- Legal complexity?
- Lawyer incentives / overstaffing
- Poor judicial case management
- Uncertainty about what is at issue
- Fighting about small things
- Protraction of litigation
- The discovery process

Things I'm not going to address

- Value of asset
- Legal complexity
- Factual complexity



Lawyer incentives / overstaffing

- Billing by the hour / armies of lawyers
- It's very profitable for law firms
- Lack of good oversight by clients



Typical patent complaint / counterclaim

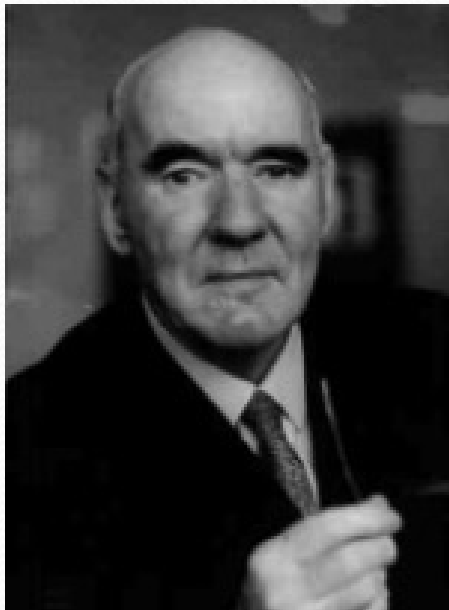
- **COMPLAINT**

- 1. Plaintiff owns U.S. Patent No. 1,xxx,xxx.
- 2. Defendant has infringed plaintiff's patent.
- 3. Award plaintiff damages and grant an injunction.

- **COUNTERCLAIM**

- 1. Defendant has not infringed plaintiff's patent.
- 2. Plaintiff's patent is invalid.
- 3. Plaintiff's patent is unenforceable.
- 4. Enter a declaratory judgment in defendant's favor.

“Parkinson’s Law”



“Work expands so as to fill the time available for its completion.”

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

LOCAL PATENT RULES

2. PATENT INITIAL DISCLOSURES

LPR 2.1 Initial Disclosures

LPR 2.2 Initial Infringement Contentions

LPR 2.3 Initial Non-Infringement, Unenforceability and Invalidity Contentions

LPR 2.4 Document Production Accompanying Initial Invalidity Contentions

LPR 2.5 Initial Response to Invalidity Contentions

**LPR 2.6 Disclosure Requirement in Patent Cases Initiated
by Complaint for Declaratory Judgment**

3. FINAL CONTENTIONS

LPR 3.1 Final Infringement, Unenforceability and Invalidity Contentions

LPR 3.2 Final Non-infringement, Enforceability and Validity Contentions

LPR 3.3 Document Production Accompanying Final Invalidity Contentions

LPR 3.4 Amendment of Final Contentions

LPR 3.5 Final Date to Seek Stay Pending Reexamination

LPR 3.6 Discovery Concerning Opinions of Counsel



United States District Court
NORTHERN DISTRICT OF ILLINOIS

Celebrates **190th**
1819-2009
Anniversary →

Better case management (by courts/ judges)

- Default structure
 - Don't reinvent wheel
 - Promotes predictability
 - Solves recurring issues
- Early meaningful disclosures
 - Identify actual disputed issues
 - Focus discovery
- Final + binding position statements before close of discovery
- Narrowing / focusing of claim construction
 - Only dispositive claim terms / limit on # of terms
- Shorten time to summary judgment / trial

Better judicial case management

- The big hurdle is :
UNLIMITED DISCOVERY
!!
 - (hourly billing incentivizes this)
- How to get case to a point where it can be resolved / be disposed of
- Keeping things moving (a rolling stone gathers no moss)



Better case management – what's next?



- “Expert” patent judges?



111TH CONGRESS
1ST SESSION

H. R. 628

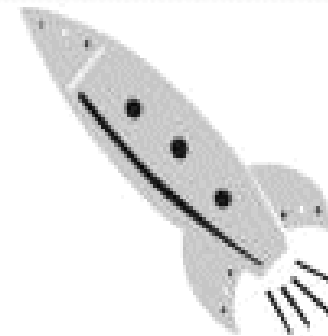
AN ACT

To establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*



Early Neutral Evaluation



Rocket docket??

Better case management – what's next?

- Requiring more meaningful initial disclosures (FRCP 26(a)(1))
- Imposing stricter limits on number / duration of depositions (FRCP 30(a) & (d))
- Better enforcement of letter / spirit of FRCP 26(a)(2) (disclosures as equivalent of direct exam, maybe make the default *no deposition* of experts)