Summary of Statement of
The Honorable T. S. Ellis, III
on
"Improving Federal Court Adjudication of Patent Cases"

Before the
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives

October 6, 2005

Judge Ellis is honored to have the opportunity to testify at this hearing as a member of the judiciary. Before becoming a member of the judiciary he practiced law, and litigated patent cases, for over 17 years. He has now served as a United States District Judge for approximately 18 years. His comments are his own, and are based upon his experience as a lawyer and as a judge.

Judge Ellis takes issue with the statistics that are in literature about the reversal rates of patent cases. He also takes issue with the statistics in literature on reversal rates of claim construction after Markman. It is necessary to count accurately before the statistics can serve as the basis for a conclusion. Not only do most available statistics fail to take into account the cases that are not appealed, but within each case that may be appealed, not all claims in issue are reversed; many are affirmed. There can be numerous claims within one case. One example is a case in which Judge Ellis construed various claims of 24 different transistor circuitry patents. The number of claim terms in issue in this case numbered in the tens. It would be surprising to find a judge, even on the CAFC, who could get every single claim right.

Judges are still learning to accept the discipline required by Markman. Judges must engage the patent technology involved and apply the CAFC rules of claim construction. It is not that district court judges cannot do this. They can. When individuals accept an appointment on the bench as district court judges, it is their obligation to do their jobs, and this will include learning the discipline of claim construction in patent cases.

In addition, the true view from the bench, which includes the CAFC, is that Markman is working and that district court judges are making progress in engaging the various technologies. The view from the bench is that there is not a serious problem with Markman hearings, rulings or their reversal rates — not a problem warranting fundamental restructuring of patent infringement litigation.

With regard to forum shopping, Judge Ellis believes the existing venue and jurisdiction statutes work well and provide litigants with ample opportunity to file their cases in courts with patent litigation expertise.

Judge Ellis does not think a specialized patent trial court will be of any benefit. Though patent cases are complex, so are toxic tort cases, environmental law matters, product liabilities, medical malpractice and many other types of cases litigated in federal court. If a special trial court is created for patents, the same rationale would call for specialized trial courts for other types of cases. It is difficult to draw a principled line that cordons off only patent cases.

"Complexity" should not be the reason for creating a specialized trial court. In addition, although judges, like patent examiners, are not "persons having ordinary skill in the art," it would be impossible to find judges who would have the right technical or scientific background that would make them the perfect "person having ordinary skill in the art" for each patent case that might be filed. Application of the "person having ordinary skill in the art" standard is not any more difficult for federal district court judges than for a patent examiner when determining whether to grant a patent.

In addition, the CAFC is a good model. Not all CAFC judges have science or technical backgrounds. Nor are there CAFC procedures to ensure that cases are assigned to judges with a technical background that matches the patent in suit. The CAFC has rejected this approach.

In Judge Ellis' opinion, there are a number of far more pressing patent system reforms with far sounder bases that call on Congress' attention.

In sum, the final question that must be answered with respect to any system of adjudication is whether the final result is fair and consistent with the applicable law. On this standard, America's general federal trial and appellate judges do very well indeed and no fundamental reform creating a new bureaucracy or a new set of Article I or Article III judges is either needed or prudent.