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Transcript

"NEW SPECIALIZED PATENT COURT IN ENGLAND"

MR. PEGRAM: There are materials in the handout, which you should all have, which include the User Guide of the Patents County Court. Material published at pages 67 through 78 of your book includes the remarks that Judge Ford of the Patents County Court made in January of this year at the AIPLA meeting and a proposal that I made for a patent jurisdiction in the Court of International Trade.

My disclaimer today is that all that I know on the subject of the Patents County Court is based on what I've read and what I've heard. In England and Wales, there has been a traditional Patents Court which is a part of the High Court. Designated judges of that court spend all or part of their time on patent cases. They are barristers drawn from the patent bar. In the High Court, you are represented by a barrister, frequently by a senior and a junior barrister who do the speaking, a solicitor who does all the legal papers and you usually have a patent agent as well, who handles the technical matters. One of my colleagues, an American house counsel for a company, says that the problem with that is "pointing around the triangle" where each one says oh, this is the other one's responsibility.

In the High Court and the Patents Court, there is discovery in the sense of arequest prepared by the solicitors that essentially says, "please provide all documents relevant to the subject to the issues raised by the pleadings." There also is a little used Patent Office tribunal, but nobody uses it.

The Patents County Court was recently established, as Judge Ford describes it, as a small claimants' court, not a small claims court. It is administratively attached to a County Court. However, the Patents County Court is not a court of limited jurisdiction either as to the amount of money or as to the region of jurisdiction. It covers all of England and Wales. There are four principal features of that court. First of all, the right of audience is given to barristers, solicitors, patent agents or any combination. Second, there are particularized pleadings. You do not have the same kind of notice pleadings that we would expect in the United States, but rather you have to get very particular. This thing infringes and this is how it infringes. Third, there is a session with the judge fairly early on called the "Preliminary Consideration" which really zeroes in what you're

going to do. Fourth, discovery in the Patents County Court is only by permission on a showing of need.

The Patents County Court is designed to have a fast track and a fast trial. The direct testimony at trial is usually in writing, with oral cross- examination. Almost all the trials are completed in less than three days. The court has no criminal docket, so that it does not have the problems that are engendered in our country's district courts, by the Speedy Trial Act. There is inability to transfer cases to and from the High Court patent division. However, the use of a patent agent or solicitor without a barrister is a generally accepted reason for transfer of a case to the Patents County Court and that has been approved by the High Court. In theory at least, complex cases would be transferred to the High Court.

There is one full time judge, Peter Ford, a barrister. He's an ex- founding member of the EPO Boards of Appeal. There are provisions for assistant judges of the court and various procedures for other persons either judges or appointed barristers, for example may handle accounting as the other might right in the British system.

I want to give a highly qualitative and incomplete comment on some of the results of the Patents County Court. I won't cover everything. Ron Myrick has mentioned some earlier. Not everyone's happy. Half the people lose, half the people win just as in other cases and, therefore, I guess you might expect not everyone's happy. There appear to have been considerable savings but not as much as some people had hoped. Mainly the savings probably are through the reduction in duplication of efforts and simply the fact that it's all over sooner. However, the time savings are not quite so great as might be expected. The criticisms that I have heard are that the court has a tendency to be pro-patent, that perhaps it has been a bit hesitant and not as quick to rule as might have been hoped. I have the impression that the criticisms are mainly from solicitors. Perhaps they are more sensitive to the reduction in their traditional work that has occurred in the new court. I don't have the exact statistics but I have the impression that the Charted Patent Agents are perhaps handling forty or fifty % of the cases and doing the work that the solicitors might have expected to do before. Defendants, I believe, are coming closer to having the old full teams, but I haven't really pursued that.

I would like to talk for a moment or two if I may, about the Court of International Trade proposal. It flows from four ideas: one is a desire, that I believe is fairly broadly shared in this country, to have patent cases decided by Article III judges. The Court of International Trade is made up of Article III judges. Most of the judges, if not all of them in that court have experience in district courts, because they can get switched in and out of there, and they have jury experience. That court has a national jurisdiction. It may sit anywhere in the country. The second source of this proposal is the Patent County Court example as a specialized court and the idea that, if desired, the Court of International Trade might develop some specialized rules for patent cases. It has no criminal jurisdiction to interfere with a fast track arrangement. As I noted in my paper, district judges on average have too little experience in patent cases. There's a very high cost of instruction. Roughly 100 patent cases, roughly 600 district judges, therefore, an average one case per district judge in the United States gets to trial in patent cases in five years. I

suggest that means that all of the clients are spending a great deal of money in educating these judges as to current patent law. The third source of the CIT proposal was a proposal made by trade representative Carla Hill some time back in attempting to deal with the Section 337 issues under GATT. She proposed a division of the Court of International Trade in the District of Columbia. Under my proposal, that is not necessary. The CIT can sit anywhere and I have, going on the fourth point, no intention of suggesting either a new court or new costs. I think in our present environment, for us to suggest a new court or a new division of a court, or anything that would increase the costs, would be unwise and unacceptable. Everything now is in place in the Court of International Trade. Under my proposal it would be an option and, therefore, an experiment. If it is successful and there is a need to expand the Court of International Trade, there would be an offset, because the increased capacity is that court would take work away from the district courts and presumably handle it in a more efficient manner. Finally, if it works, people will use it. If it doesn't work, it won't be used and there's no loss.

MR. BENSON: Thank you, John. Larry, you wanted to say something.

MR. EVANS: Right. Larry Evans. I want to start off by saying that I generally support John's suggestion of a specialized court in the ITC. The purpose of my remarks is not to oppose John's proposal, but rather to put into a more accurate context the record and the attitude toward the Patents County Court in England. In my previous incarnation, I was with a corporation and we had a mother corporation in England. The head of the patent group in our mother corporation was certainly not a solicitor nor a barrister. He was interested in timely and cost efficient administration of justice in patent cases, and I can recall at several meetings that we had of our patent groups that he was an enthusiastic supporter of the concept of the Patents County Court. Norm Balmer and Gary Griswold mentioned in our previous discussion about timely administration of justice. We want to know the answer quickly rather than after four or five years. But now my counterpart describes the Patents County Court as a "worthwhile experiment that has failed." We heard Ron Myrick mention that the scoreboard on appeals from the Patents County Court is nine to zero. I didn't know there was as many as nine, but I do know of three appeals all of which were reversed on different grounds. One was reversed because the Patents County Court had allowed only one expert, and the Court of Appeals says this was error because the case was very complex. To limit each side to only one expert was inappropriate. They also said (in dictum) that perhaps the Patent County Court is not equipped to handle complex cases; in fact, the decision of whether or not to shift cases from the high court to Patents County Court or vice versa tends to have complexity built into the reasons. Another decision concerned an obviousness holding by the Patents County Court which was reversed. It was said by the high court that the Patent County Court had relied on embodiments, not claims. It's been said by commentators on that decision that the Patents County Court was "too European." I don't know what that means. Unfortunately, Heinz Bardehle is not in the room. He could describe what "too European" means. The third appeal was one in which a finding of infringement was

reversed. The point I'm making is that, in those three cases there is no trend represented that the court is pro-patent or anti-patent. All were reversed on different grounds. Some reversed a finding of patentability and some reversed a finding of infringement. Another reason behind the establishment of the Patents County Court was speed, efficiency, ability of a small claimant to have ... to fight a giant on equal grounds. The case of Pavel v. Sony involved an individual inventor who had invented and had a patent on a small hand-held radio device with earphones. The inventor decided to take on Sony thinking the Patents County Court provided an opportunity to take on a giant. He had a competent patent attorney (not a solicitor or barrister). Sony decided to fight his case with a team of solicitors, barristers and patent attorneys. The trial lasted 95 hours (that is, about a month). Sony spent more than $4 million. Pavel spent more than $1 million, and Pavel lost. A lot of commentators on that case say that Pavel wouldn't have spent any more had he gone to High Court. The barrister might have charged more, but the barrister might have been a little more efficient in handling the case. In any event, it seems that, on all grounds, this worthwhile experiment in England hasn't been successful. It's going to be very difficult for corporations such as those whom we represent to go into Patents County Court when there's such an uncertainty about how their case will be handled on appeal.

MR. SAMUELS: Gary Samuels. I think all this points out perhaps is that the losers are going to appeal. There's an excellent chance they will be reversed. Now why is this? I think because in this instance it is that the sole judge, the sitting judge, really has no one of equal experience or expertise to confer with and while I came out earlier in favor of a specialized court, I do think there should be several sitting judges on the same case simply so they can get the broader range of experience by kicking around the issues in private before they make their decision and in my view the fact that the county court has one sole judge is probably the biggest failing.

MR. DUNNER: Don Dunner. I'd like to talk a little about the Court of International Trade proposal about which I have the gravest of reservations. My inclination is very strongly against it. I would like to think I have an open mind, but I think it has real problems. For starters, there is in the United States an enormous hostility to specialized courts. It took over 100 years to get a Court of Appeals for the Federal Circuit and the only reason that we have a Court of Appeals for the Federal Circuit is that there was a confluence of problems coming from fifteen different directions. We were having an innovation crisis and there was great concern about the situation in the United States. Somebody came up with the absolutely imaginative proposal, which the CIT proposal parallels in some respects, of taking two existing courts, so we wouldn't have to have new courts, in an existing courthouse, so we wouldn't have to have a new courthouse and merging them in a single court. They eliminated the specialized court problem by having this new court assigned other types of jurisdiction, and we also had the right people in leadership positions in the Bar Associations at the right time who were favorable to it. Everything came together at the right time and the Federal Circuit resulted. So the question you might ask is: well, why shouldn't the same things happen for this proposed new Court of International Trade? Well, the answer is I don't think the need is the same.

The need at the time of the Federal Circuit's formation was that we had terrible disarray in the Circuit Courts. We had no single court at the apex providing uniformity to the other courts and we had disparate approaches in different circuits to patent problems. We hadsome circuits which didn't recognize the validity of patents such as the 8th Circuit and we had other circuits which were much more hospitable. The end result was we had the need and we had the solution to overcome this tremendous hostility. We don't have the same situation at the lower court level. We have a court which is, in fact, providing uniformity. By every standard, the Federal Circuit has been successful in creating uniformity in what's happening below. And so I don't think the need is there. While there are some bad judges at the lower level, there are a lot of terrific judges at the lower level, and they can get corrected if they go awry. Using the Court of International Trade concerns me, since I don't think that that court will get the variety of cases which I think is important to most people who are concerned about parochialism, who are concerned about a court going in one direction or another. And, I just don't think the need is there. I think the district courts by and large are doing pretty well and I don't think we have a need for that kind of approach. As a result, I think it is doomed to failure because I think the bar in general is going to be hostile to it.

MR. BALMER: Norm Balmer. I just want to add two more comments here. First, any alternative jurisdiction is going to raise some forum shopping which is always a problem and second the parties do, in fact, have to agree that they want to have a more expeditious resolution of dispute for the alternative system to work well. I think Mr. Rines has an excellent idea. There are private organizations, there are ways disputes can be resolved. I really don't see that mandatory ADR is necessary. To the extent that the courts in New Hampshire as well as in other states are forcing the parties to look at mediation and other alternative dispute resolution techniques, that's perhaps a much more effective route. Thank you.

MR. GOLDSTEIN: Steve Goldstein. I assume that the key focus of this portion of discussion is on what, if any, learnings from the Patent County Court model we can apply to the American patent/legal system. In that regard, the Patent County Court raises two issues. One we spoke about a little bit earlier this morning; that is, the use of judges having expertise in the patent area, and the other is the use of a streamlined procedure in patent cases. The expertise issue is interesting to consider. I personally have a bit of a problem in taking patents out of the legal mainstream, but perhaps an experimental court, as John was describing, is worth a look to see in real terms how important the expertise factor is. I think it would be very difficult for a judge to develop broad ranging technical expertise, but patent legal expertise could be a plus.

The procedural aspects of the Patent County Court seem to me to be very critical and that goes back to a comment Gary Griswold made earlier this morning. Our clients all want to win, but if they're going to lose they want to know that sooner rather than later. Prompt resolution of all civil disputes, including patent litigation, is critical. The procedural aspects used in the Patent County Court, such as the specific pleadings, early

involvement of the judge to define issues, early trial date, and close control of discovery are the kinds of things that ought to be looked at to see what we can utilize in our trial court procedure to help speed up the resolution of cases. In fact, similar measures were considered by the Presidential Advisory Commission last year.

MS. SHAPER: Sue Shaper. I support specialized patent trial court. I believe contrary to Don Dunner's comments that it would be well received. I think the proper analogy, however, is not the Court of International Trade, the CIT, but the bankruptcy court system. These are magistrate judges. I think it is a specialized court system. I think it has been well received. It is criticized. There is a desire to improve it. I don't see anyone saying do away with the bankruptcy court system, send it back to the district court judges. Bankruptcy law is highly specialized like patent law, it's a good analogy, the judges sit in each district, it is mandatory. There is no alternative, so it does not involve forum shopping, other than the usual venue shopping. The judges know the law, the judges will say in court, "counselor don't tell me the law". They become highly proficient in managing the case, managing discovery and managing the attorneys in bringing the issues to a timely conclusion to the extent that they can. I think it's been a successful system and it could be tried in the patent situation.

MR. BENSON: Francis, I'm going to put you on the spot. I know that WIPO advises developing countries on legal systems, statutes, etc, etc. Have you drawn any conclusion about this country court experiment in Great Britain? Are you recommending it in any way?

MR. GURRY: Thank you, Bob. Perhaps if I may make two comments. The first comment is a purely formal one and it is that, if a decision is taken to have a specialized court, is it a good idea to call it a Court of International Trade? Now, I know it doesn't deal with the substance of the issue, but we all know that in recent years executive policy has, in the area of intellectual property and in the patent area, has increasingly been enforced as a matter of international trade. We are not dealing here with executive policy and in the area of executive policy, of course, it's recognized by everyone that each government has the right to promote the interests of its own enterprises and its own industry as much as possible. Here we are dealing with the question of the administration of patent justice, and is it a good perception to create that the administration of the laws that are established for patent justice is effected-the umbrella of a court of international trade. Now as far as the substance of the issue is concerned, I think that I would tend to agree with the point that's been made by a number of the observers this morning which is that a specialized court has the advantage of creating amongst its members a specialization in intellectual property law or in patent law. But I'm not sure that it has the advantage, which is sometimes put forward, of creating a specialty in or offering specialized services in the technology concerned because, as Ron Myrick said earlier this morning, technology is not monolithic. When most patent examiners in the mechanical area wouldn't be at all comfortable with examining in the biotechnology area, one can't

expect to have a great advantage in technology by putting technically trained judges on a specialized court. As far as the developing countries are concerned and our policy, what the policy of WIPO might be in that area, it's a little early for many of them and, of course, one covers a broad spectrum of different social and economical systems in the developing countries of which there are some 150 in the world. It's a little early in many of them to be thinking of a specialized court in the intellectual property area. In order to promote that what we have been trying to promote is training in intellectual property law amongst the members of the judiciary who haven't had a great deal of access to intellectual property law, either as a matter of theory or as a matter of practice.

MR. GHOLZ: Chico Gholz. I am generally very favorably disposed to John's proposal, at least to the extent that I am in favor of a specialized judiciary. The question though that arises immediately is how specialized it needs to be. I don't think simply giving patent jurisdiction to the current judiciary at the CIT would be very helpful. I think for the idea to work, we would need judges that have a technical background.

I agree that it is totally unrealistic to think that one could get enough judges on such a court to have a decent match between a specific judge's specific technical background and the specific issue being decided by that judge. But the analogy at the Board of Patent Appeals and Interferences, I think, is a fair one. You get a rough correspondence between the technical background of the board members and the case you're trying to the board members. In the interference context, there are nine examiners-in-chief who do interferences, and they break them up broadly into chemical, biotech, electrical, and mechanical. You don't get any very detailed correspondence. The chemical guys - that includes a lady actually - currently all have backgrounds in photographic chemistry, so if you're doing a chemical case that's far afield from there, they're not going to have a specific background that's on point, but at least they're chemists and at least they're people who are trained in dealing with technical issues. That kind of rough correspondence I think is an enormous leg up in comparison to trying a case to a district court judge whose undergraduate degree is in Medieval English Literature or Political Science or the like.

But to get good judges with solid technical backgrounds to go on to the CIT, I think ultimately we are going to have to face another very difficult political problem, and that is paying judges enough. The current pay rate for judges is a disgrace, and it has fallen over the decades - I see agreement down there from one of the members of the judiciary - the ratio of what judges make to what lawyers practicing before them make has changed enormously over the last two generations, to the detriment of the judges.

We also have to take into account that patent attorneys by and large are very well remunerated. We make more money than most specialists, certainly more money than the bankruptcy judges do on the average. It's going to be exceedingly tough to get good judges on that court given that we, and I assume Don Dunner's firm and other law firms represented around the table here, pay good associates more than judges make. You can perhaps get good junior people to be judges for a few years because it's a good thing to

have on their resume. Jim Davis comes to mind. But it's tough to get people to make a career - the people that we would want - to make a career on that court at the pay scales that are currently available for any Article III judges, let alone a magistrate judge such as the bankruptcy judges are. Thank you.

MR. THOMPSON: Bill Thompson. I start with the premise that we do have this very serious problem which I think borders on denial of due process, certainly in the complex technological case, and while I see some perhaps problems and limitations in John's suggestion of a CIT, I'm all for giving it a whirl because I think we do need to do something. We can't simply reject every proposal that comes along because we're liable to wait a long time to hear the perfect one, probably forever. The idea of setting it up as having concurrent or optional jurisdiction overcomes a lot of procedural difficulties that we discussed in being able to set it up. On the other hand, I also see in that aspect a weakness. The weakness is, and it's the same one incidentally that I see in mediation and alternative dispute, and that is that we really have to have two willing parties to go into these optional methods of resolving disputes and that's not the kind of cases that we're seeing, quite frankly. We're seeing cases where people are playing the lottery, they're bringing poor cases, supported by contingent fee arrangements so they have no financial investment in the litigation and they have some remote possibility of hitting the jackpot. Those people are not interested in the right result. They're not interested in going to mediation if that means that we can get a sensible solution. They're not interested in going to, in this case, to a more expert court where the possibility of fogging one through is going to be reduced, so we're still going to have what I think is being bred by the very high damage award environment that we're in today and that is this lottery aspect. This court I think could contribute to that area. To the extent the judges would build up expertise and let's assume that part of the proposal would be that they would be available to sit with district courts, if so invited, they might be able to pass around the processing expertise that they develop in keeping these cases from wandering into the irrelevant and dawdling over a long period of time. If they are not able to effectively do that because the case is spread over a long period of time, perhaps they could at least be teaching judges, somewhat like Judge Ford who goes out and talks about the methodology used. So at least there could be a core of expert knowledge that could be looked to. Finally I think that while an optional court would present some difficulties in getting some of the people who are asserting patents before that court, it would help a bit because at least it would not be viewed quite as suspiciously as mediation. The other side would not think I'm trying to move it into some environment favorable to me. It would be viewed more as an objective body and I think I would have an easier time talking some of the opposing parties into that kind of a mechanism. I wouldn't always succeed certainly, but it would be an angle. Thank you.

MR. MYRICK: Ron Myrick. Just a couple of points. Not totally to dismiss the Patents County Court issues that may have already passed of this discussion, but I would like to say something more since I brought it up originally. I did have a chance to interview a

person about a week and a half ago who's used it a lot and it was from him that I learned this nine-zero number. He believed it was correct. He's brought four cases there himself.

Just quickly summarizing what I just said then. I talked with a chap who uses the court a lot, Patents County Court, and he's used it four times. In every instance, he was satisfied with the result. Whether he won or lost, he thought it was a proper result. It was from him that I learned the nine-zero number, so I don't know that it's totally accurate, but he's a reliable source. I asked him whether or not he would still recommend the Patents County Court to his clients and he said, yes. He said in a case that is not terribly complex, he would, but on a terribly complex case he would not, so I just throw that out to set the record a little bit straighter since I brought the question.

The point though is that the Court is an experiment and it's an experiment we can watch and I hope learn something from, but we're doing a lot of experimenting in this country right now. This is a time of judicial experimentation that's relatively unparalleled for at least quite a long time. We've got the Civil Justice Reform Act going on right now which more than 34 courts have implemented. All of them will implement before the end of '94. They're experimenting with many of the things we've talked about, many of the things that are being employed in the Patents County Court, such as control of discovery. Discovery in the U.K. is limited and the Patents County Court is even more limited. Many of the district courts, particularly the Northern District of Ohio, Judge Lambrose, are imposing ADR upon the persons who come before them under the authority, they believe - whether it's correct or not, I don't know - but under the authority of the Civil Justice Reform Act and some of us saw at the AIPLA mid-winter meeting, Judge Lambrose had no concern at all about imposing what was a summary jury trial upon the parties in front of him saying that he had that authority. Certainly if he can do that, he can, I suspect, do mediation as well.

Also the early involvement of the judiciary is a specific element of many of the plans of the CJRA. Tracking is another one where the courts specify, tracks down which various cases go based upon their complexity and in some instances they limit the number of days of trial and so on based upon the track used. In most instances, I suspect patent cases are on the heavy duty track, but nevertheless that experiment is going on. Most importantly, I think, there is a program already in place and funded, in which the Rand Corporation is studying the results of what comes from the CJRA and in five years they'll write a report and say whether or not it was worth doing.

At the same time the Federal Rules of Civil Procedure are being changed in a rather substantial way and that has already passed the Supreme Court, and it goes into law unless the Congress does something before December.

So we've got a lot of experiments going on right now. I think that cuts two ways. It could be an easy thing, then, to get another experiment going re the Court of International Trade which by the way, I'd like to see. I don't see any problem, if it is indeed considered an experiment and it has an appropriate evaluation program at the end of it, very much the way that the CJRA does with a given time frame say five years, and if it works fine, if

it doesn't we'll scrap it. It seems there's little harm in that and a great deal could be learned. Thank you very much.

MR. BROOK: I like John's proposal very much because I like creative thinking in this area and although I'm generally in favor of keeping juries and jury trials and continuing litigation in our district courts, it does bother me quite a bit when judges show clearly in decisions that they don't understand technology. There was one case - I do a lot of work in biotechnology and there was one case in which the judge was referring to a monocolonial antibodies rather than monoclonal. That bothers me quite a bit. It also bothers me quite a bit when I hear stories that a litigant can't really present his best defenses to a patent infringement suit because the jury isn't capable of understanding it. I did take Don Dunner's comments about the biased against specialized courts seriously and I think so seriously that it's probably not realistic to think that we can get such a proposal passed. It seems to me in listening to a lot of the comments around the table today, particularly starting with Bob Armitage, that one of the big problems in patent litigation is that you can't get a decision quickly and that, for sure, is true. It seems to be getting worse from what Bob Benson said about under funding of district courts and judges are now saying that there won't be any jury trials for the next period of time, whatever it is. I think we can't hope to compete in the patent area with criminal defendants who have the Sixth Amendment in their favor as they rightly should have and also the Speedy Trials Act, but it seems to me that there's no reason why we couldn't work towards encouraging Congress to amend the patent law and add a speedy patents adjudication act and maybe, in fact, expand that beyond patents to all civil cases. I don't think it's out of the question to feel that if you can't get a timely decision that, in fact, justice delayed is justice denied and if the U.S. Government grants you a patent, but there's no effective way to enforce it in a timely fashion, that's an abridgement of the Fifth Amendment. It also sounds like patentees are about to lose their Seventh Amendment right to a jury trial from what Bob Benson has said and I think we all know the ITC, it's been alluded to today, can decide a case in eighteen months. In fact, the statute says a year unless it's made a more complicated case and I think that actually forces on judges, although there's no juries there, but it does force on judges the implementation of procedures that would cure a lot of the ills people have talked about today. Judges really have to take control of district court trials, particularly jury trials, and if it were mandated that they had to decide these things within a year or within eighteen months or whatever the period would be, I think you'd find that they just would have to do it and they would automatically do it and a lot of the discovery abuses would be more properly controlled and a lot of the questions that were put to the jury would be more properly controlled. I think a simple amendment to the patent law, in terms of the time in which we were entitled to a decision, could go a long way here.

MR. WEGNER: Two general areas. Again, I think it's fine to look around this room and we can get a fair consensus of what patent attorneys in industry think, but I think we have to look broader in two respects. First, internationally. It's very fine to see the isolated instance of the community patents ... the British courts experiment, but this is a

new experiment. What's happened in Germany? What's happened in France? What's happened in Japan? These are major countries, very pro- industry countries. There are specialized chambers. There's one model that should be looked at. The staffing of those courts by patent office officials that are rotated in and out should be looked at, not necessarily followed. The Dusseldorf solution in Germany, the fact that there are limited numbers of courts in Germany that have patent jurisdiction. You have a court of general jurisdiction that has a heavy enough docket of patent cases that I consider the Dusseldorf Court, the best patent trial court in the world. I'm not saying we should adopt the German or French or Japanese or British or other solutions, but we should look at these experiments and we're not doing that. Secondly, what about Schricker, Beier, Moufang, Cornish, Merges, Rebecca Eisenberg and the other leading scholars in the pure academic world? We don't hear about them here. What do they have to say? We will never, never change the Constitution in any event, but we will never, ever change the U.S. law without getting a broader participation. What do the Wall Street lawyers think, what do the corporate presidents think, those who are not involved in patents? So I think we have to take a broader perspective of these points. Now, with respect to Bob Armitage's proposal on the International Trade Court, I think what we're looking at here is a court that we may want to phase out of existence, it's got a budget and we're looking at a mode that we've had from the Federal Circuit peeking over existing court structures. Before we get to taking over a court structure, we should look at all the different models and I think Sue Shaper had a very good point about looking at the Bankruptcy Court model. We should look at that model, look at all the various models and then look at what we can do. Indeed we must look at what we can do from a budgetary standpoint. We have the ITC. They have a budget. There's also the Court of Federal Trade sitting on the part of the second and the whole third, the fifth, sixth and seventh floors in a very beautiful building on Madison Place. Why can't we then create an administrative court in that structure, either combined with or somehow using the combined budgets of these various courts, but I think we're still at the beginning of looking at things and I think before we try to focus on specific solutions, we should first investigate all the various options that are open. Thank you.

MR. BENSON: Thanks, Hal. I'm going to let Judge Lourie sum up. John, unless you have some specific things that you would like to comment on.

MR. PEGRAM: No. I just appreciate everybody's comments. I believe that we've moved it forward by opening it up in this way. The proposal that I put forward was intended to have taken into account some of these experiences in other countries and it was intended as something that would be very pragmatic and doable. It was not necessarily the best idea that I, or others whom I've talked with have come up with; but it was something that we could do in a short time frame if the government were inclined to do it. As Ron Myrick said, try it out for several years and it either works or it doesn't.

JUDGE LOURIE: Of course, I have no opinion on the question. It's interesting. I appreciate Chico's solicitation about salaries, about which I won't disagree, but I will disagree to the point of saying that it is such a privilege to sit on the Federal Circuit that the salary issue disappears and I would think if there were such a trial court with a selection of patent people, the same thing might occur. Don Dunner's no doubt correct that the prevailing view in this country is very much opposed to specialized courts and judges. There obviously was a crisis and need for the creation of our court and it probably wouldn't have happened unless we were able to encompass a wide variety of subject matter. You sort of split on the question of jury trials this morning. I don't believe bankruptcy judges conduct jury trials.

MS. SHAPER: I think they probably can.

JUDGE LOURIE: They can? Okay, that's interesting. I doubt, but I'm not sure that the Court of International Trade conducts jury trials. Maybe I'm wrong on that, but in any event you're really biting off two things there. Until Mr. Murphy's comment I hadn't heard anyone mention what would have seemed to me to be perhaps the biggest reason to look for an alternative and that is the primacy of criminal trials in the district courts and I wonder - obviously you're about to close this and so you don't want a lot of comments - I'd be interested in informal comments on whether there really is a difficulty in getting trial time in the district courts. Short of a real documented problem though, I would think you'd have a tough time in changing the system. Thank you.