

2023 EDTX Bench Bar Conference

Let's Give a Big Texas HOWDY to our Visiting Federal Circuit Judges!¹

Panelists:

Honorable William “Bill” Bryson, *United States Court of Appeals for the Federal Circuit*

Honorable Raymond C. Clevenger III, *United States Court of Appeals for the Federal Circuit*

Moderators:

Jeannie Heffernan, *Kirkland and Ellis LLP*

Matt Powers, *Tensegrity Law Group LLP*

Supporters:

Michael Dinnella, *Kirkland and Ellis LLP*

Connor Donaldson, *Kirkland and Ellis LLP*

I. INTRODUCTIONS

- A. Transition from Kevin Costner presentation.

II. GETTING TO KNOW JUDGE BRYSON AND JUDGE CLEVINGER

A. Judge Bryson

- 1. Lessons learned from arguing organized crime appeals.
- 2. Lessons learned from hearing appeals.

B. Judge Clevenger

- 1. Lessons learned from private practice.
- 2. Mentorship and how it affected your career.

III. FEDERAL CIRCUIT HISTORY AND FUTURE

- A. Court establishment and early years.

Written materials: Judge Robert Mayer, *Reflections on the Twentieth Anniversary of the Court of Appeals for the Federal Circuit*, 52 AM U. L.

¹ Disclaimer: The views and opinions expressed in this program, or in accompanying written materials, are those of the speakers or authors and do not necessarily reflect the views of any affiliated entity.

REV. 761 (2003); Judge Daniel Friedman, *In His Own Words*, 5 J. FED. CIR. HIST. SOC'Y 23 (2011).

- B.** How access to digital records has affected appellate review.

Written materials: U.S. CT. APP. FED. CIR. R. PRAC.

- C.** How the Federal Circuit's docket has changed over time.

Written materials: *Historical Caseload*, U.S. CT. OF APPEALS FOR THE FED. CIR. (2022).

- D.** The rise in the number of Patent Trial and Appeal Board appeals and impact on the development of patent law at the Federal Circuit.

Written materials: *Appeals Filed, by Category, FY 2022*, U.S. CT. OF APPEALS FOR THE FED. CIR. (2022); *Appeals Filed in Major Origins, FY 2022*, U.S. CT. OF APPEALS FOR THE FED. CIR. (2022); Michael Loney, *The Surprising Rise of the PTAB*, 242 MANAGING INTELL. PROP. 22 (2014).

IV. SITTING BY DESIGNATION

- A.** Benefits of sitting by designation.

Written materials: Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67 (2019).

- B.** Lessons learned by working with district courts.

- C.** Effects on future appellate rulings.

V. DISSENTING OPINIONS

- A.** The role of the dissent.

1. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333 (Fed. Cir. 2019) (denying rehearing en banc).

Written materials: Justice Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010); Daryl Lim, *I Dissent: The Federal Circuit's Great Dissenter, Her Influence on the Patent Dialogue, and Why it Matters*, 19 VAND. J. ENT. & TECH. L. 873 (2017).

- B.** Dissent writing process and how it can influence the majority.

VI. AUDIENCE POLL

- A.** What is the most vexing legal issue you confront in your practice today?

1. Section 101 – 43%

- a. Clarifying § 101 based on technology type.

Written materials: Director Kathi Vidal, *Providing Clear Guidance on Patent Subject Matter Eligibility*, USPTO (July 25, 2022); Patent Eligibility Restoration Act of 2023, EHF23592 HNH, S. --, 118th Cong. § 1 (2023).

2. Damages Law – 27%

- a. The need for “independent” experts.
- b. Improving and simplifying jury instructions.

Written materials: *WhitServe, LLC v. Comput. Packages, Inc.*, 694 F.3d 10 (Fed. Cir. 2012); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201 (Fed. Cir. 2014).

3. Discovery Issues – 16%

4. Venue – 14%

Written materials: *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017); *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017).