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RESPONSIBLE ADVOCACY AND RESPONSIBLE OPINIONS AT THE FEDERAL CIRCUIT

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"Appellate . . . judges are whores who became madams." [n.2] In other words, beneath every judicial robe lurks a lawyer. [n.3]

Despite, or perhaps because of, their common membership in the world's second-oldest profession, [n.4] judges and lawyers do not always get on well. Judges at times criticize the lawyers that appear before them. And lawyers routinely criticize the judges before whom they appear.

Because of the different roles of bench and bar, their criticism finds different outlets. Lawyers tend to gripe about judges to their colleagues and clients. Judges, on the other hand, tend to gripe about lawyers to their law clerks, to other judges or - and herein lies the rub - in opinions. [n.5]

Judges, particularly federal judges, are largely immune to criticism from the bar. Article III's guarantee of lifetime tenure tends to insulate the bench from the vicissitudes of public opinion.

Lawyers, however, are not so lucky. A judge's criticism of a lawyer in a published opinion is the legal equivalent of a nuclear strike. One stroke of the pen can irreparably harm a lawyer's reputation, both among colleagues *332 and clients. Prudence would counsel, therefore, that judicial attacks on lawyers be reserved for the rare egregious case. Unfortunately, just as displays of animus between lawyers have led to much public hand-wringing over the "lack of civility in litigation," [n.6] criticism of lawyers in published opinions is increasing, both in frequency and harshness.

Perhaps nowhere is this "judicial lawyer-bashing" more apparent than the United States Court of Appeals for the Federal Circuit. In recent years, the Federal Circuit has lambasted lawyers for all kinds of conduct. Common examples of attorney conduct that have incurred the wrath of the court are quote cropping, arguing against a straw man, ignoring facts and misrepresenting precedent. Sanctions have ranged from snide comments in footnotes to acrimonious tongue lashings accompanied by the award of attorney fees and double costs. [n.7]

Of course the courts, including the Federal Circuit, have an obligation to police the conduct of the members of their bars. This article will not suggest otherwise. Nevertheless, courts should be careful to discipline attorneys only when discipline is warranted. It may be difficult for an appellate court to appreciate the big picture of what went on below or what is being presented by way of argument. Swayed by the silver-tongued advocacy of one of the advocates, a court may leap to conclusions about the other. An advocate's sloppy or otherwise poor work easily may be mistaken by an appellate court for attempted deceit.

The bottom line is that a lawyer's mistake or perfectly innocent act may appear through the judicial lens to be the picture of malice. Before attacking *333 a lawyer, therefore, the court should consider whether the attack is truly warranted. Because the consequences to the lawyer's reputation are so great, that consideration should be very careful.

And before it attacks a lawyer, the court -- and this applies particularly to the Federal Circuit -- should pause to consider one more thing. The court should examine its own conscience.

This article will examine some Federal Circuit opinions in an effort to determine whether the court is guilty of any of the sins for which it castigates members of its bar. After reviewing an admittedly unrepresentative sample, the article will conclude that the Federal Circuit is guilty of all these sins and more. The Federal Circuit's tendency to cast aspersions on the members of its bar appears, not to put too fine a point on the matter, to be a case of the pot calling the kettle black. Perhaps if it recognized the effect a judicial attack would have on the lawyer's reputation, carefully considered whether a judicial attack would be warranted by the facts and checked its own conscience, the Federal Circuit would be much less likely to castigate a lawyer, particularly for conduct that it engages in itself.

I. CROPPING QUOTES

One of the lowest forms of deceit in legal argument is the use of misleading ellipses in a quotation, otherwise known as "quote cropping." Replacing part of a quotation with ellipses can completely change the meaning of the original passage. This form of deceit is particularly reprehensible because it assumes that the reader is too trusting or lazy to look up the original quote. Whether this is true of any appellate judges, or Federal Circuit judges in particular, is subject to debate. What is not subject to debate is that each Federal Circuit judge has three law clerks who make their living looking up quotations. [n.8] Quote cropping never fools a court.

The Federal Circuit caught an attorney cropping a quote in Paulik v. Rizkalla. [n.9] The language omitted from the quoted portion of the party's request for reconsideration completely changed the meaning of the quote. The court observed that the argument and quote were "false and involve a *334 blatant distortion of the record." [n.10] After disposing of the argument, the court turned to the attorney:

This conduct by [appellee's] counsel, involving flagrant misrepresentations of the record, was a gross violation of the high standards of professional conduct that we expect and demand of the members of our bar. There is no possible excuse for a lawyer distorting the record in the way that [[appellee's] counsel has done. [n.11]

From the sound of this tongue lashing, which shot straight to the heart of counsel's reputation for honesty, it would seem that the appellee's counsel committed a mortal sin rarely seen in the hallowed halls of 717 Madison Place. [n.12]

But the Federal Circuit has shown that it is not above quote cropping upon occasion. In Alco Standard Corp. v. Tennessee Valley Authority, [n.13] the court was faced with a long-standing and unresolved conflict in its own precedent. That conflict was between the view that anticipation requires a single piece of prior art to meet each limitation of the claim exactly and the view that anticipation may be established by a piece of prior art that meets one or more claim limitations by equivalents. [n.14]

The Alco Standard district court had cited a pre-Federal Circuit case, American Seating Co. v. Tennessee Valley Authority, [n.15] for the standard allowing for anticipation by equivalents: "Anticipation requires that 'all the elements of a patented device or their equivalents be found in a single pre-existing structure or description.'" [n.16] On appeal, the patentee attacked the district court's use of that standard. The Federal Circuit rejected this argument, and neatly sidestepped the conflict in its precedent, by ellipsing out of the district court's standard the phrase "or their equivalents":

We have held that "[a]nticipation requires the disclosure in a single prior art reference of each element of the claim under consideration." This is essentially the same standard the district court applied when it cited American Seating, which stated that "all the elements of a patented device . . . be found in a single pre-existing structure or description" (citations omitted). [n.17]

*335 Hardly the picture of candor, this creative application of ellipses blatantly misrepresented one of the principal issues on appeal. Moreover, since the district court's opinion was published, the quote cropping suggested a certain disregard for the intelligence of the bar, not to mention the parties. [n.18]

II. ARGUING THE STRAW MAN

On appeal or in any other criticism of a court opinion, one of the weakest argument techniques, and certainly the most disrespectful toward the court that wrote the opinion, is to mischaracterize the contents of the opinion and then attack that mischaracterization. This technique is known in logic as a "straw man argument" and is universally recognized as a fallacy.

A straw man argument led to what is perhaps the high-water mark of the Federal Circuit's lawyer-bashing, the opinion in Pac-Tec, Inc. v. Amerace Corp. [n.19] Although the Pac-Tec court catalogued a host of misdeeds, it zeroed in on counsel's misstatement

of what the district court had said regarding an alleged extrajudicial contact. [n.20] After quoting an embarrassingly inept passage from the oral argument, the Federal Circuit attacked counsel's conduct as "a shockingly shabby performance" [n.21] and a "pestiferous pestilence," [n.22] that "infects the judicial process with a disabling disease of deceit," [n.23] having "fouled the judicial nest." [n.24] This tongue lashing undoubtedly devastated the attorney, whom the Federal Circuit named in the opinion as jointly and severally liable for attorney fees and double costs. [n.25] The Pac-Tec opinion was the judicial equivalent of a stoning.

*336 If the court would take time out from throwing stones at attorneys, however, it might notice that the Federal Courts Building has an awful lot of glass. A classic example of a straw man argument is Judge Newman's dissent in DuBost v. United States Patent and Trademark Office. [n.26] In DuBost, the Patent and Trademark Office had refused to accord an applicant a filing date because it had no authority under the patent statute to accept the unsigned check the applicant's attorney had submitted for the filing fee. [n.27] The district court affirmed, agreeing that the PTO had no authority to accept the check. [n.28] The DuBost majority held that the Patent and Trademark Office did have authority under the statute to accept the check, vacated the judgment and remanded the case to the Patent and Trademark Office for consideration of whether to exercise its discretion to accept the check. [n.29]

In her DuBost dissent, Judge Newman created a straw man by blatantly misrepresenting the holding of both the PTO and the majority: "The majority appears to instruct the Commissioner both to exercise his discretion (which he has already done) and to accept unsigned checks as payment as of the date received." [n.30] Not content with a double misrepresentation in one sentence, Judge Newman went on to misrepresent the holding of the district court as well: "The district court found that the PTO's practice of returning unsigned checks was a valid exercise of administrative discretion . . . . " [n.31] Had this triple misrepresentation been attempted by a mere attorney, there is no doubt that the Federal Circuit would have lowered the boom at the expense of his or her reputation. [n.32]

*337 III. IGNORING FACT

A statement of facts in a party's appellate brief should identify the relevant findings in the light most favorable to that party. [n.33] But permissible "slanting" of the facts does not include ignoring district court findings that contradict or conflict with the arguments made. [n.34] A myopic view of the facts that ignores harmful findings will rarely convince anyone because the opposing attorney will undoubtedly identify those findings that the advocate has ignored. [n.35]

Ignoring a relevant district court finding will cause the Federal Circuit extreme displeasure, and likely subject the lawyer who ignored the finding to the penalty of paying her opponent's attorney fees on appeal and other less than pleasant sanctions. For example, in Mathis v. Spears, [n.36] the court pointed out how the appellant Mathis

[n.37] had ignored the district court's findings. [n.38] Not content with rejecting Mathis' arguments, the court set about ridiculing them. "In an attempt at creative nonsense . . . . " [n.39] "Continuing its reckless disregard for the truth . . . . " [n.40] "Continuing to fantasize . . . . " [n.41] "Substituting insinuation and conjecture for evidence..." [n.42] "Continuing to ignore facts . . . . " [n.43] Because of what the court called "record distortions," it imposed a sanction of costs and attorney fees. "That Mathis found it necessary to distort the record and actions of the district court . . . should have told it that its appeal was frivolous." [n.44]

*338 But surprise, surprise. The Federal Circuit's opinion in Scripps Clinic & Research Foundation v. Genentech, Inc. [n.45] demonstrates that the court is not above ignoring district court findings. [n.46]

The Scripps district court had held a number of claims of a patent, which was directed to using monoclonal antibodies to produce "purified Factor VIII:C," invalid because of the patentee's failure to disclose the best mode of the invention. [n.47] That best mode was the use of a specific monoclonal antibody, the "2.2.9 antibody." [n.48] The patentee had argued that the patent's description of the process for obtaining the 2.2.9 antibody satisfied the best mode requirement. The district court rejected that argument because of failed attempts by both parties' scientists to obtain an antibody that would work in the process, the finding that the process described in the patent resulted in antibodies that would not work, and the finding that those skilled in the art would not know that the process described in the patent resulted in antibodies that would not work. [n.49] The district court distinguished the situation where the best mode could be obtained by "the droning use of clerical skill" on the ground that the only characteristic of the 2.2.9 antibody that was disclosed in the patent was that it should work in the process. [n.50]

The Federal Circuit ignored all these findings in order to force the case into the mold of its earlier decision in Hybritech, Inc. v. Monoclonal Antibodies, Inc. [n.51] The court referred to only two "findings" (those of its own):

> It was not disputed that the inventors obtained the 2.2.9 antibody by following the procedures in the patent specification, and that these were the inventors' preferred procedures.
>
> There was no evidence by Genentech that the antibodies used by [the inventors] differed from those obtainable according to the process described in the specification.

In the context of best mode, on facts similar to those at bar, this court's holding in Hybritech settled the issue:

> *339 The only evidence even colorably relating to concealment is testimony by various Hybritech employees that sophisticated, competent people perform the screening and that the screening process is labor- intensive and time-consuming. It is not plausible that this evidence amounts to proof of concealment of a best mode for screening or producing monoclonal antibodies for use in the claimed '110 process . . . .

Applying Hybritech to the undisputed facts, a finding of concealment can not be supported. [n.52]

While the state of the evidence in the Hybritech case may well have been as the court stated, it was clearly different in Scripps, as the district court findings demonstrate. Indeed, the district belabored the point, using its findings to distinguish the sort of case represented by Hybritech. Yet the Federal Circuit reversed the district court without any mention of those findings or the clearly erroneous standard of review. [n.53]

IV. MISREPRESENTING AUTHORITY

Unless an authority clearly and directly states the proposition for which it is cited, one should introduce a citation with a signal that explains the relevance of the authority to the proposition, or otherwise indicate that the authority does not clearly and directly state the proposition. [n.54] Obviously, where an authority does not even support the proposition, it should not be cited.

The "citation of inapplicable authorities" was one of a number of reasons the Federal Circuit fined every attorney that signed a brief in the appeal, on both sides, in Laitram Corp. v. Cambridge Cloth Co. [n.55] Likewise, in State Industries, Inc. v. Mor-Flo Industries, Inc. [n.56] the court imposed sanctions for arguments "based on half-truths and illogical deductions from misused legal authority." Similarly, in Devices For Medicine, Inc. v. Boehl, [n.57] the court imposed sanctions for "spurious and specious arguments" and "distortion and disregard of the record and opposing authorities" that amounted to what the court characterized as "an unequivocal exhibition of bad faith abuse of the *340 judicial process." Clearly, the Federal Circuit neither condones misrepresenting legal authority nor hesitates to attack lawyers for doing so. [n.58]

But the Federal Circuit itself displays little reluctance to cite its own precedent for propositions neither stated nor supported by that precedent. One of many such cases is RCA Corp. v. Data General Corp. [n.59] where the court wrestled with a complex case involving the experimental use exception to the "on-sale bar." [n.60] In rejecting the patent owner's reliance on the experimental use exception, the Federal Circuit held:

> [U]nder our precedent, experimental use . . . ends with an actual reduction to practice. [Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd. 731 F.2d 834, 837-38 (Fed. Cir. 1984)]; see also Pennwalt Corp. v. Akzona, Inc. 740 F.2d 1573, 1580-81 (Fed. Cir. 1984); Gould, Inc. v. United States, 579 F.2d 571, 572, 583 (Ct. Cl. 1978); Ushakoff v. United States, 327 F.2d 669, 672 (Ct. Cl. 1964). [n.61]

None of the four string-cited cases states or directly supports the holding. [n.62] Nor does any other Supreme Court, Federal Circuit, Court of Claims or Court of Customs and Patent Appeals case state or directly support the holding. In fact, in the leading case on point, the Federal Circuit's then- Chief Judge Markey had held just the contrary. [n.63] It is unlikely that an attorney could escape sanctions for such a citation of inapplicable authorities.

*341 V. CONCLUSION

The United States Court of Appeals for the Federal Circuit has grown increasingly strict with the members of its bar. In published opinions, the court has pilloried attorneys for a wide variety of misdeeds. In garden-variety cases, the court snipes at counsel in footnotes, using words like "disingenuous," "misrepresent" and "mislead" with increasing frequency. In egregious cases, the court slaps attorneys with fines and acrimonious tongue lashings. These sanctions can be, and experience shows often are, devastating to an attorney's most prized possession, her reputation.

But the Federal Circuit itself is not innocent of the sins for which it stones attorneys. The examples examined in this article suggest that the court can be as disingenuous as, and can misrepresent and mislead with, the worst of its bar.

This article does not suggest that either the bar or the court should ever engage in any of the sins catalogued here. Rather, this article merely suggests that the Federal Circuit should think long and hard before it attacks an attorney in a published opinion. After carefully considering whether the attorney really engaged in misconduct and checking its own collective conscience, the court should be reluctant to ruin an attorney's reputation.

[n.1]. These pseudonyms, which fans of W.C. Fields and Groucho Marx will no doubt appreciate, are necessitated by the authors' status as former law clerks at the Federal Circuit and their present, and hopefully future, practice before that court. It should be appreciated that this paper is intended as criticism of only the most constructive kind.

[n.2]. Jon Winokur, The Portable Curmudgeon Redux, 189 (1992), identifies the source of this wry observation as one Martin Erdmann.

[n.3]. Or, as a cynic might suggest, "una volta furfante e sempre furfante."

[n.4]. As Horace Rumpole observed "Lawyers and tarts . . . are the two oldest professions in the world. And we always aim to please." John Mortimer, Rumpole and the Married Lady in The First Rumpole Omnibus, 105, 121 (1983).

[n.5]. On occasion, judges get the opportunity to criticize entire groups of lawyers. See, e.g., "Judges Judge the Bar," The Eleventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 153 F.R.D. 177, 189 (June 18, 1993).

[n.6]. The Federal Circuit devoted a session of its 1992 Judicial Conference to incivility among lawyers, in a program entitled "The Rambo Litigator." The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D.

205, 216-32 (April 30, 1992) (hereinafter "The Rambo Litigator"). See also Restani, J., Civility in Judges Judge the Bar, supra note 5, at 192-95.

The rancor among judges of the Federal Circuit, however, leaves little room for them to criticize members of the bar for incivility. Cf. Remarks of Aspen, J., The Rambo Litigator, supra, at 223 ("some of the opinions, both of the United States Supreme Court and our circuit courts, the caustic language, the abrasive way the judges treat each other is really unprecedented"). A mild, but entertaining example of Federal Circuit judges propensity for what Nat Hentoff describes as "exercising their inalienable right to behave like schmucks in public," Nat Hentoff, Free Speech For Me -- But Not For Thee, 56 (1992), is Judge Rich's dissent from the denial of rehearing en banc in Atlantic Thermoplastics Co. v. Faytex Corp., 974 F.2d 1279, 1281 (Fed. Cir. 1992), in which Judge Rich described the panel opinion as "insulting," "mutiny," "heresy" and "illegal."

[n.7]. Terms such as "disingenuous," "misrepresent" and "mislead" appear with amazing frequency as the Federal Circuit jabs counsel, often in footnotes. Sometimes the court increases the invective intensity by stringing adjectives together, such as, for example, "his arguments range from the irrelevant through the disingenuous to the deceitful." Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1581 (Fed. Cir. 1991).

[n.8]. Judge Plager has explained that quote cropping "rarely goes unnoticed, and that's in part because our law clerks love nothing better than to point out to us that some advocate is misquoting the law or mis-citing the law to us, or misstating the facts." Plager, J., Remarks at the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 57, 88 (May 9, 1991).

[n.9]. 796 F.2d 456, 459 (Fed. Cir. 1986).

[n.10]. Id.

[n.11]. Id. at 460. The court went on to award the appellant double costs.

[n.12]. The Federal Circuit has encountered misleading ellipses in a number of other cases. See, e.g., Porter v. Farmers Supply Serv., Inc., 790 F.2d 882, 887 (Fed. Cir. 1986).

[n.13]. 808 F.2d 1490 (Fed. Cir. 1986).

[n.14]. The Federal Circuit inherited this conflict when it adopted the precedent of its predecessor courts. The Court of Customs and Patent Appeals had adhered to the strict

view, while the Court of Claims had generally followed the anticipation by equivalents view.

[n.15]. 586 F.2d 611, 618 (6th Cir. 1978), cert. denied, 441 U.S. 907 (1979).

[n.16]. Alco Standard Corp. v. Tennessee Valley Auth., 597 F. Supp. 133, 146 (W.D. Tenn. 1984).

[n.17]. 808 F.2d at 1496 (citations omitted).

[n.18]. Ironically, Alco Standard was written by Judge Friedman, who has also said: "A quotation is cropped. That's the worst thing, leaving out a few words that change the sense of it . . . . Any lawyer who does that is just hurting his own case, because as the Court sees what, they say he's done, 'Well, you can't trust this fellow.'" Friedman, J., Remarks at the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 57, 88 (May 9, 1991).

[n.19]. 903 F.2d 796 (Fed. Cir. 1990).

[n.20]. Id. at 803.

[n.21]. Id.

[n.22]. Id. at 800.

[n.23]. Id.

[n.24]. Id.

[n.25]. Id. at 804-05. The attorney withdrew from representing the appellant, then filed motions to personally intervene in the case, vacate the court's opinion and afford him notice and a hearing on the sanctions, all of which the court denied. In re Perry, 918 F.2d 931 (Fed. Cir. 1990). His plea to save his reputation fell on deaf ears: "No portion contains language aimed at Perry personally," Id. at 933, and "Nor would Perry's prior

reputation have any bearing on the quality of his sanctionable conduct in this case." Id. at 934. (If that's not a personal attack, we don't know what is!).

The attorney's motion included an "attack on the alliterative writing style of the judge who wrote for the panel." Id. at 933. Chief Judge Markey's penchant for alliteration was renowned. Since he retired, inveterate readers of Federal Circuit opinions have sorely missed his admirable affinity for alliteration, which along with analogy and allegory often alleviated the absence of artful advocacy and appetizing facts in appellate actions.

[n.26]. 777 F.2d 1561, 1566 (Fed. Cir. 1985) (Newman, J., dissenting).

[n.27]. "The opinion stated that the check was not negotiable in the form in which it was presented to the PTO, and could not have been cashed without further authorization from the firm. The Commissioner also concluded that he has no authority to waive the statutorily required filing fee." Id. at 1563.

[n.28]. Id. at 1563.

[n.29]. Id. at 1566.

[n.30]. Id. at 1567.

[n.31]. Id. at 1568.

[n.32]. As Judge Newman herself has explained: "[F]udging the facts or deliberate misstatements is not anything that can be tolerated or ought to be, whether it's driven by a sensitivity to the stakes facing the client, or perhaps to the press of work, or a careless disregard. These are the things that a Court, in fulfilling its obligation to preserve the integrity of the process, must be aware of." Newman, J., Remarks at the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 57, 87 (May 9, 1991). Judge Newman's dissent techniques are beyond the scope of this article, but will be examined in the authors' upcoming journal article "Equity," "Justice," "Fairness" and "Truth": Judge Pauline Newman in Dissent.

[n.33]. The statement of facts should never, as a matter of good advocacy, be argumentative in tone, that is, "emotional, sarcastic, plaintive, or visibly one-sided." Andrew L. Frey & Roy T. Englert, Jr., How to Write a Good Appellate Brief, 20 Litigation 6, 9 (1994).

[n.34]. "Suppressio veri, suggestio falsi."

[n.35]. And any such omission that escapes opposing counsel will certainly be caught by the ever-vigilant judicial clerks. See, supra note 7.

[n.36]. 857 F.2d 749 (Fed. Cir. 1988).

[n.37]. The court had the decency to spare the attorney named in the opinion his reputation by noting that he had substituted in after the briefs had been filed and disavowed much of what was argued in the briefs. Id. at 752 n.1.

[n.38]. Id. at 755.

[n.39]. Id.

[n.40]. Id.

[n.41]. Id. at 756.

[n.42]. Id.

[n.43]. Id.

[n.44]. Id. at 762. Similarly, in State Industries, Inc. v. Mor-Flo Industries, Inc., 948 F.2d 1573 (Fed. Cir. 1991), the court awarded $5,000 in damages for ignoring district court findings.

[n.45]. 927 F.2d 1565 (Fed. Cir. 1991).

[n.46]. Ignoring district court findings and other techniques led to the Federal Circuit being widely criticized for its penchant for fact finding, an unremarkable habit but for the fact that the Federal Circuit is an appellate court. The court's overt fact finding came to a

screeching halt, however, when the Supreme Court yanked its leash in Panduit Corp. v. Dennison Mfg. Co., 475 U.S. 809 (1986).

[n.47]. Scripps Clinic & Research Found. v. Genentech, Inc., 707 F. Supp. 1547, 1552-55 (N.D. Cal. 1989).

[n.48]. Id. at 1554.

[n.49]. Id. at 1553-54.

[n.50]. Id. at 1553 n.1.

[n.51]. 802 F.2d 1367, 1369 (Fed. Cir. 1986), cert. denied, 480 U.S. 947 (1987).

[n.52]. 927 F.2d at 1579-80 (emphasis in original).

[n.53]. The Federal Circuit would have done well in Scripps to heed Judge Michel's advice to advocates to "directly [confront] the strongest case authority against [your] contentions, against [your] position, directly [[comment] on the toughest facts that have been found...." Michel, J., Trust in Judges Judge the Bar, supra note 5, 153 F.R.D. at 198.

[n.54]. The Bluebook: A Uniform System of Citation, Rule 1.2 (Fifteenth ed. 1991).

[n.55]. 919 F.2d 1579, 1583 (Fed. Cir. 1990).

[n.56]. 948 F.2d 1573, 1580 (Fed. Cir. 1991).

[n.57]. 822 F.2d 1062, 1066-68 (Fed. Cir. 1987).

[n.58]. As Horace Rumpole has explained: "We've got a few rules, old sweetheart. We don't deceive Courts, not on purpose." John Mortimer, Rumpole and the Alternative Society, in The First Rumpole Omnibus 49, 56 (1983). Or, in other words, "One of the easiest ways to lose is to lie." James W. McElhaney, Losing Arguments, 20 Litigation 55 (1994).

[n.59]. 887 F.2d 1056 (Fed. Cir. 1989).

[n.60]. See 35 U.S.C. § 102(b).

[n.61]. Id. at 1061 (parallel citations omitted).

[n.62]. Although both Barmag Barmer, 731 F.2d at 838, and Pennwalt v. Akzona, 740 F.2d at 1581, rejected an assertion of experimental use, they did so on the ground of lack of evidence of experimental purpose, not on the ground that the invention had been reduced to practice. Gould v. United States adopted a trial court opinion holding that the patent was invalid because of offers to sell made after the invention was reduced to practice, but deleted language from the trial court's opinion that would have held the proposition for which it is cited in RCA v. Data General. 579 F.2d at 583. Ushakoff v. United States held sales experimental without addressing the issue of reduction to practice. 327 F.2d at 672.

[n.63]. Poole v. Mossinghoff, 214 U.S.P.Q. 506 (D.D.C. 1982). The Poole v. Mossinghoff opinion was nonprecedential because Chief Judge Markey wrote it while sitting by designation in the District of Columbia district court.