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Transcript

"ABOLITION OF JURY TRIALS IN PATENT CASES"

MR. YOUNG: Good morning. As was said, the first topic for discussion this morning is the abolition of jury trials in patent cases. Professor Shaw, the Director of the PTC Research Foundation at Franklin Pierce, originally asked me to begin the research on this topic. By way of introductory remarks, I will outline some of the issues and questions that have arisen during the course of my research. These issues may be approached from several different directions, the first of which is a historical inquiry and speculation regarding the original intent of the authors of the Seventh Amendment. A question related to the intent issue is whether a complexity exemption may be read into the language of the Seventh Amendment. Incidentally, Federal Courts have shown a remarkable reluctance to find such an exception in the language of the Seventh Amendment. To begin such a historical inquiry there are a few avenues of approach that may be taken. The first of which is an analysis of the practices of the English Chancellor in Eighteen Century England vis-a-vis jury trial in patent cases. Another is an analysis of the jury trial practices in the colonies prior to the adoption of the Seventh Amendment. Many scholarly papers were published on the topic in the 1980's. My research thus far has led me to believe that this historical approach, which consists in attempts to divine what the English Chancellor would have done with a contemporary patent trial in 1791, is necessarily a highly speculative and dubious process. Other questions that bear on the topic of the abolition of jury trials in patent cases is whether the juries are actually able to understand the complex technical, business, and legal questions that are posed to them during the course of today's litigations. This is a difficult determination. The readings I have made tend to suggest that the arguments pro and con on this topic are mostly supported by anecdotal evidence as can be seen on page 1 of your handout, the Wall Street Journal article. A related question is: Should we consider, or even attempt to quantify the "practical limitations and abilities" of today's juries with respect to their ability to decide complex issues? Another topic that I have found during the course of my research is whether in fact trying complex cases before a jury constitutes a denial of due process under the Fifth Amendment, and whether a decision made by a jury with only superficial, or actually no understanding of the underlying issues is in fact a valid decision, one that has been reached after the right process. Other issues include whether actually having jury trials in patent cases is a cost effective method of resolving disputes. Of direct relevance to the cost effectiveness issue is the length of time needed *78 to educate the jury regarding the engineering, business and legal issues particular to each case. Protracted trials create the danger that the jury finally assembled through the jury

selection process will not actually represent a fair cross-section of the community. The make-up of the jury obviously has a profound effect on whether they are able to understand the issues presented to them and make a fair decision thereon. Assuming that attempts to restrict the use of jury trials in patent cases fail, that they are in fact here to stay, what can be done to improve them? Many proposals have been advanced, such as for example, allowing the jurors to question the expert witnesses and ask the judge questions, and, generally allowing jurors to take a more active part in the litigation process. Another is to precharge the jury, thus delineating and familiarizing them beforehand with the complex technical and legal issues. Other strategies include splitting up cases that have become large and unwieldy due to the liberal joinder procedures of the Federal Rules, and trying each issue separately before proceeding to the next. Still other strategies include employing masters to explain complex technology to the jurors and the use of specialized juries. The answer to many of these questions depends upon whether we believe that jury trials in patent cases are actually an effective method of deciding complex issues, and one that is in fact worth preserving. Thank you very much.

MR. JORDA: I had a call from Bill Keefauver, as well as from Dave Lowin who is on the Advisory Council for Intellectual Property. They attended a program in California a couple of weeks ago. At the program, a presentation was made on patents and the Seventh Amendment by Martin Adelman of Wayne State University Law School and they asked me to be sure to invite Professor Adelman to our Conference. Unfortunately, Professor Adelman was not able to come, but he sent me, and I received it only yesterday, the paper you have in front of you. It was copied yesterday. I asked one of our very recent graduates, Charles Gregg since obviously you haven't had a chance to read it yet, he read it last night, abstracted it, and he's prepared to give us a very short synopsis of what Professor Adelman has to say on this subject and which he will also cover at the Federal Circuit Conference on June 18. He entitles his paper, Tentative Draft, but it's pretty final. Charlie.

MR. GREGG: Thank you, Professor Jorda. My name is Charlie Gregg. This is on, as Professor Jorda said, patents and the Seventh Amendment by Professor Adelman. As an introduction, Professor Adelman's paper is in response to the Advisory Commission on patent laws, the recommendation of public debate concerning the appropriate use of *79 juries in patent litigation. He believes judges are better trained and have better tools for the decision making than do juries. Judges do not have the time pressure that comes from being locked in a jury room until they reach a decision. He agrees with the Advisory Commission that if the current trend of decisions being a "little more than a throw of the dice, interest in using the patent system will rapidly wane." The focus of his paper is on damage control.

He traces use of common law (and use of courts of law) to settle patent matters to the statute of monopoly, section 2, although by the middle of the 19th Century, courts of equity became the predominant courts for enforcement of patents.

In the United States, he concludes the Supreme Court has preserved only the core of the Seventh Amendment, as well as jury control devices, such as directed verdicts and new trials. The jury should decide historical facts but not apply law to those facts.

In patent validity trials, the most important issue is your anticipation and obviousness. The common law tried novelty courts... cases before juries in 1791, but not obviousness. In Newell Companies v. Kennery Manufacturing, the majority of the CAFC argued that obviousness was a matter of law and therefore subject to the full and independent review of the court. He dismisses Judge Newman's dissent based on the Seventh Amendment by stating, that there is no right to a jury trial on issues of law in 1791. Obviousness is a standard and there is no basis to assume judges allowing juries to decide what standards met in 1791 in the common law courts. He mentions having Congress pass a law having the PTO, the Patent Trademark Office, decide complex questions of fact. This is not ideal, but a great improvement over having juries make those type of decisions.

Claims construction in literal entrenchment cases is as important as anticipation and obviousness is in patent validity cases. Using the argument that claims construction is analogous to legal determinations in 1791, juries can be used to determine literal infringement. However, in determining literal infringement, the claims must be interpreted, as well as the specifications. Giving all this responsibility to a jury would add a further element of rationality to the administration of the patent systems. Judges with their training are far more competent than juries to make these determinations.

Equitable determinations are for the court and the CAFC has agreed. There isn't any disagreement on that.

Professor Adelman presents the detailed argument that reasonable royalties is an equitable remedy and therefore it should be determined by the court.

*80 Penalty damage decisions were clearly per the court of the law in 1791. However, in line with the Seventh Amendment, the amount can be decided by the court. The jury will still decide willfulness.

There is a "complexity exception", as was explained earlier, for deciding that an issue is too complex. In 1791, equity courts could intervene and enjoin an action at law that was too complicated to be decided by the jury. However, the Supreme Court hasn't made any comment on this as yet.

To quote from his conclusion, "To sum up, all is not lost for those who believe that both the public and the Bar in the long run would benefit from a rational method for resolving patent disputes. In this endeavor, the civil jury probably has no role. Nevertheless, we are left with the dead hand of the drafters of the Seventh Amendment. Where the case is equitable, it is because a cause of action for infringement is equitable or because a patentee did not request a legal remedy, the problem of a civil jury goes away. Where the case is legal, many defenses are classified properly as equitable and at least to them there is no role for the jury".

Even as to the legal issues, the role of juries can be minimized by only giving the juries the responsibilities for determining historical facts by preserving unto themselves law application. Moreover, unless the jury's feeling for community standards would be helpful, courts should classify standards at issues of law. Where the federal circuit receives problems of juries on any particular issue, the court is free to label the appropriate standard as one of law. Finally, the federal circuit can act to ensure that general critics add into the death span of history by insisting on detailed instructions on specific questions or verdicts. Hence, damage control is possible."

MR. BENSON: Thank you. Okay. The floor is open. Who wants to start? Okay, Bob Armitage first.

MR. ARMITAGE: First of all, it seems to me we're not going to change the Constitution. So, whatever we do, we will be obliged to do it in the existing constitutional framework. Second, it seems to me that this would be a much easier question to solve if we could say that juries could never understand patent cases and judges could always understand patent cases. With all due deference to the member of the judiciary with us, that proposition ain't necessarily so. We're dealing in an area where sometimes juries can understand complex cases and sometimes judges can't. No one can make an absolute statement, therefore, about where patent cases must go all the time to assure they will be comprehended. Because of the constitutional requirement that there be a jury trial where there can be a jury trial, the most *81 we can hope for with a complexity exception is an argument every time a jury trial is denied, as to whether or not the constitutional mandate is being met. So, it seems to me that the complexity exception in and of itself is not too helpful. I also read with interest the due process argument. It seems to me that the due process argument doesn't go to whether the jury can handle the trial if it's complex, but rather how a complex case should be tried to a jury. In other words, what is it that needs to be done to that case if the Constitution requires it to be tried before a jury that it can be? Does it need to be broken into pieces? Do the jurors need extra audiovisual or other tools to help them decide the case? Should they decide it in small pieces, one issue at a time, et cetera, et cetera? One thing that wasn't mentioned that intrigued me greatly about Mr. Young's paper, was that perhaps the patent right has elements of a public right, such that we could assign patent validity and infringement issues to an administrative or quasi- administrative forum. Perhaps, for example, rather than assigning these issues to the Patent Office, where some of us may have our doubts as to whether that's a suitable role for the Patent Office to play, we could assign themto the ITC. This would have a couple of advantages. It might solve some of the objections in the GATT panel report. The ITC could decide under its 18-month rule all patent cases, presumably without injury to the Seventh Amendment. Otherwise, I have scratched my head a lot and thought a lot about this and decided that it's too late to call another constitutional convention. It's probably too difficult to get two-thirds or three quarters of anybody in this country to agree on anything anymore.

MR. FIELD: I've spent some time thinking about this, too. The biggest problem I have is the common law limitation in the Seventh Amendment. It strikes me that a statutory right is not a common law right. I'm not sure there is a Seventh Amendment right in patent cases, but we have it in the statute, 35 U.S.C. § 284 par. 2, and I don't foresee that it's going to come out of the statute. I'm convinced to a moral certainty that any patentee with a weak case is not going to be willing to give it up.

MR. GHOLZ: My name is Chico Gholz. If we break complicated cases up into itty bitty little fragments that conceivably a jury might understand, number one, I don't think the jury will understand even itty bitty little fragments and, number two, we will be bound to get inconsistent results, which are enraging to the parties and make the whole judicial system look idiotic. A major reason for our current rules about joinder is to avoid that kind of inconsistent results, and more or less those rules work. Whether you like the overall results or not, *82 they are less likely to be inconsistent, internally inconsistent at least, if you do try the fragments all together.

I disagree with Bob Armitage about starting with the premise that there's no way that the Constitution can be amended or at least it is impossible to get the Constitution amended. I think we ought to think about that. We're not the only branch of the Bar that has this problem. Every branch of the Bar that has complicated cases, which is probably every branch of the Bar, has the same problem. It is possible to get fundamentally reform. The Brits did it. Other people have done it. I think we ought to be aiming in that direction, because all the other solutions that we've talked about are exceedingly unlikely to work. In fact, they are even less likely to work than getting the Constitution amended.

To begin with, the thought of trying to do away with jury verdicts that are, he wins and he loses, I think is a loser. The federal rules provide that the judges have the opportunity to call for such verdicts, a lot of judges like them, and I don't see that the Federal Circuit is going to be able to tell judges that they can't use general verdicts. They can certainly say, as they've been saying for ten years now, that they wish the judges wouldn't use general verdicts. Well, I wish I were richer than I am, I wish I could fly to the moon, and I wish a lot of things, but they're not going to happen. It seems to me that if we're going to make any progress in this area, that ultimately it has to require Constitutional amendment.

MR. DUNNER: Don Dunner. I would like to start by just dealing with the issue of whether or not jury trials in patent cases are a good thing to have, the point that Bob mentioned just briefly. I read an article last night by Judge Bownes in the workbook that we have. His thesis is that it's a little presumptuous for us to say that juries can't find the facts as well as judges. In his experience that's not true: they're quite capable of doing that deed and doing it well. I must admit that I think that having jury trials in patent cases in an invitation to disaster. I have been involved as an expert witness in at least five jury cases. I've tried two jury cases myself, one of which lasted three and a half months. I am

privy, as other of you may be, to some statistics in Delaware. The last fourteen patent jury cases tried in the District of Delaware, all resulted in holdings in favor of the patent owner except for one, which was a hung jury, and that does not bode well for the system. I don't think jurors by and large are capable doing the job nearly as well as judges. While the quality of district court judges is spotty, there are a lot of very good judges at that level. I, therefore, think we're a lot better off having judges decide the issues. *83 Moreover, the standpoint of appeal, it's much easier to correct mistakes when you have a bench trial, not only because of the lighter appellate burden but because bench trials typically generate comprehensive opinions which can be analyzed by an appellate court. I think that the goal of eliminating jury trials in patent cases is in my view very laudable. I also note in Judge Bownes' article that we are the only nation that still uses a jury system in civil cases, including the old mother country from which our system came which no longer uses it except in, I believe, libel cases. But I agree with Bob, I disagree with Chico, that it is not likely that we're going to be able to change the Constitution, and it is problematical as to whether or not we're going to succeed in getting a complexity exception engrafted onto the Seventh Amendment. So, what do we do? Aside from all the little things that we've mentioned, I would be interested at some point in hearing Judge Lourie's comments on this to the extent he can comment on it. I think the Federal Circuit can play a vital role in this whole process. There were some early cases, one of which was the Structural Rubber case, in which Judge Nies opined at some great length as to what the district courts should do. And, in fact, that case sounded like the court was mandating that the district courts require that juries provide answers to special interrogatories and not make the ultimate decision on obviousness, and a lot of other things. Judge Michel recently gave a speech, which has gotten wide circulation, in which he sort of crystal-balled what might happen in the future and he talked about the Federal Circuit mandating that the district court do a number of these things in patent cases. When Judge Markey was Chief Judge on the court, he was a leader of the thought that patents should not be out of the mainstream of what happens in the district courts. But I'm not sure that patent cases don't require some special treatment that the Federal Circuit is in a position to give them. And if the Federal Circuit mandated that the district court do certain things, perhaps take the ultimate obviousness question away from the jury, which is the biggest problem in jury cases, and leave that for the judge, we would be infinitely better off. There are tons of things we can do in that area short of trying to amend the Constitution, which I would be in favor of if I thought it could happen. Perhaps, we could do these things on parallel paths. But I certainly don't think that should be our primary effort. I think the Federal Circuit may well be the answer to the problem.

MR. SHAW: I don't disagree with that - anything that has been said so far. I would like to throw out just another little issue here. We're *84 dealing in 1993, after we have had the Court of Appeals for the Federal Circuit since 1982, but some of us go back a little bit beyond 1982. And one can ask: Why did these jury trials come into existence in the first place? The fact of the matter is they came into existence because plaintiff/patentee didn't get a Fifth Amendment proper trial prior to 1982 and a patentee had practically zero likelihood of ever prevailing in some of the courts at that time. I think that some could

look back now and say that as of that time period that there was no equal protection under the law - that the Fifth Amendment right was not accorded by the courts - and the likelihood that we can slip back into that situation is still there. So, I think that we should be very wary. Jury cases, of course, are clumsy. At the very least, they're clumsy. Patent cases in any situation are clumsy. Jury cases are worse than the others, probably. But the fact of the matter is that a patentee did not have his rights protected in the United States court system in 1952, in 1962 and in 1972. We didn't have jury trials back in the 50's or the 60's. We have them now because that was the only way that a patentee could get a favorable decision. I think that we should not be too fast to change things without understanding where we came from. Thank you.

MR. PRAVEL: Bill Pravel. I come biased and in favor of jury trials, having been involved in quite a few, both as the attorney and as the expert. I know where Don Dunner is coming from, from the standpoint of being concerned about the jury verdicts being more favorable to the patentee than to the accused or the defendant. But on the other hand, in my view, a jury quite often is just as capable of understanding the fact issues as the judge. Obviously, a judge is more skilled in analytical analysis and in handling the legal issues, which he does through jury instructions and rulings during the trial. But most of the fact issues are not within the expertise of the judge anyway. And quite often, if you're lucky at least, you get some people on the jury who have some technical background. And in my experience, and I think a lot of the judges that I've talked to say they find that the jury comes up with the right decision. Maybe you could say, "Well, because there's so many cases that come up with the validity issue in favor of the patentee, that that indicates there's something wrong with the system." But I think when you analyze it with the presumption of validity, that the jury is instructed on and the situation, which naturally favors the patentee anyway, having come from an issue of patent that's been through the prosecution and has all the history, I don't think it's a lack of understanding on the part of the jury, I think that the deck in some way is stacked in favor of the patentee *85 and probably rightly so. I think there are some areas where we could improve the system in terms of letting the jury ask questions to be sure that they do understand with the opportunity of the judge to respond. I was in one trial where the judge allowed the jury to ask questions. And one of the questions that came up was: Does the defendant have a patent? Obviously, the implication being that if the defendant had a patent, he couldn't be infringing, which had to be clarified by the judge and also the attorneys of course worked hard to make sure that that jury understood the law. But from the standpoint of that part, I think it can be improved with some control obviously by the judge and with instructions by the court. Also, I think that one of the main problems we have in jury trials is with judges who do not manage the case - they just let the case kind of float along until they get to the jury instructions at the end. And the time to control the case is during the pretrial. That's the part of the case where the judge can eliminate issues that should not be before the jury and make sure that the case is ready for trial. So, I think that we have a better system with juries. We have a cross section of the country. They understand a lot more than we give them credit for in my opinion. Thank you.

MR. WEGNER: Hal Wegner. A couple years ago I was agreeing with Chico and now I find that I disagree with you, Chico. With respect to the Constitution, we'll have a constitutional amendment about the same time we solve the Bosnia crises. With respect to a mandate from the Federal Circuit, of course the Federal Circuit can and should give a mandate to the district courts. On validity, I would agree with Bob Armitage's idea that we should consider the International Trade Commission as one possible forum for taking validity out of the general courts. There could also be some administrative body born out of the Board of Appeals. I'm not saying that is correct. But it is clear first that we need an administrative body to deal with the public interest of the patent validity. And what that administrative body is, let's be creative and find the best administrative body. Second, it is clearly constitutional to do so as said in several cases by the Federal Circuit, including the Joy technology case that Marty Adelman wrote about. Fourth, equity area, the Tarragon case that many of us read with interest earlier this year that Marty Adelman cites extensively, makes it clear that equity issues can be decided by the court without a jury, particularly with the doctrine of equivalence. I think if we can take the novelty and obviousness determinations into an administrative body, we've solved a major problem; and then in the infringement area, if we can take the doctrine of equivalents away *86 from the jury, we've solved an equally big problem. Finally, I think in a Conference such as this, we can only scratch the surface. I would hope that people would go home with renewed vigor to think of ways to solve the various problems. I encourage everyone to attend the Federal Judicial Conference which will be the second go-around of a conference, repeating a conference that featured not only Marty Adelman, but also Judge Mayer of the Federal Circuit, or Shell Cooper Dreyfus and Professor Herb Schwartz that we had at George Washington last year. I also invite you all on September 29th to another round of this same equity topic at George Washington. There's room for everyone to attend. Thank you.

MR. GOLDSTEIN: Steve Goldstein. I'm a firm believer, like Judge Markey, that patents should not be separated out of the legal mainstream. Patents are just one aspect of the civil law and juries decide plenty of complex civil matters right now. So, the issue isn't patent, versus non-patent, it's complex versus non-complex litigation. And it seems to me that if you're going to try to come up with a jury rule on that basis, then you have the inevitable problem of where you're going to draw the line - what's complex and what's not complex. You'll end up with the problem Bob spoke of - every patent case ends up focusing on the complex/non-complex issue, to the detriment of the real substantive issues. This doesn't seem to me to be a terribly constructive way of dealing with the problem.

We've all seen some strange jury verdicts in patent cases, but we've seen some strange bench verdicts as well. I'm thinking of a very recent case, which happened to be a Canadian case, on fairly simple technology, where the judge literally threw up his hands and in the published decision said, "I'm going to give you a decision, but I'll tell you right now, I don't understand the technology." If you're looking at patents versus non-patent cases, complex versus non-complex, the key difference between the two is that patent cases tend to have technological issues. And it doesn't strike me that judges are

inherently more qualified to deal with those issues than are jurors. I would generally rather have a juror who tinkers with their car on the weekends decide my mechanical patent case than a judge who has a Ph.D. in philosophy and no mechanical aptitude.

What it really comes down to, I think, is the role of the patent attorney as a teacher. The patent attorney must explain the invention in a way that a judge or a jury can understand. It seems to me that what the Canadian judge I just described was really saying is, "Well, the patent attorneys didn't do as good a job as they could have done in explaining the key technology."

*87 To me, there is no real basis for saying the judge is better able to decide patent issues than a jury. I agree with Hal Wegner that the key here is to very carefully control the jury process. The judge needs to take careful control of it, defining the factual issues that need to be dealt with and separating them from the legal issues. The CAFC needs to continue to draw very clear distinctions which patent issues are factual and which are legal. Through that, I think, you'll minimize problems as best as you can with patent jury verdicts.

MR. EVANS: Larry Evans. At the risk of repeating what some of my colleagues at the table have said I'd like to go on record as seeing nothing wrong with jury trials in patent cases in an inherent way. I think that juries are as well equipped as judges, if the cases are well presented by the attorneys on either side to decide a case. I suppose I was guilty of looking through the materials to finally find a paper written by someone whose opinion was the same as mine, but I was impressed by Judge Bownes' paper, which has been referred to earlier. One section was particularly impressive to me; that was at the end of the paper, when he said, "By what criteria shall a judge decide that a case is too complex for a jury to understand? If the judge can understand the issues, he should, with the help of the attorneys, be able to explain them to a jury. If he can't understand the issues, does it necessarily follow that the jurors are as stupid as he is?" I think a lot is said in that statement. I know he was trying to end the paper with some humor, but I think a lot is said there. The fact that a jury applies the presumption of validity standard more strictly than a judge is not a problem for me. I think that some of our litigators are used to the experience that they had prior to 1982 in which the presumption of validity was not applied by the courts; in fact, it was almost a presumption of invalidity. Juries have turned that around. A patent is now presumed valid. And whenever you're trying to defeat a patent in court, you have a rather large hurdle to overcome. I see nothing wrong with that.

MR. WITTE: Dick Witte. I would just like to state that I am opposed to jury trials. I would like to add my own view of another aspect of this. It comes from a little jury experience. We've had two jury trials. We won one and we lost one. We've had other cases where we almost went to a jury trial. We've gone through the exercise of using surrogate juries or the focus group interviews, where you get a chance to preview how your case is going to be understood by a surrogate jury. Post-trial interviews revealed

what went on in the jury room. In addition to the complexity factor, which is technically oriented, I think that juries are much more susceptible than our judges to being *88 influenced by irrelevant issues. These are issues not directed toward the merits of infringement or validity, such as the large corporation and the small corporation syndrome, just as an example. Juries are also more susceptible to being influenced by demagoguery by lawyers, particularly that dwell on such issues as the horrors of injunctive relief or the bad aspects of patent as a monopoly. These are the kind of things that I think a judge is much less susceptible to be influenced by than are juries. Also, desperate infringers' lawyers commonly misstate the law. Using Bill Pravel's example, what if that juror hadn't asked about the defendant's patent question and the decision had gone off on a misunderstanding of law. In patent cases where the law is intertwined with the facts, it is much more settled. And I agree with Don Dunner's comment that the written decision of the judge is a great leveler; whereas with the jury decision, you may not know how it was arrived at or if you do find out from post-trial interviews, it's too late.

MR. THOMPSON: Bill Thompson. The main issue, it seems to me, on the trials that we've been experienced with, is the lack of ability of the court, be it jury or bench, to understand hard complex technology. We have in our own shop certain areas that we describe as hard technology and we describe other areas as not so hard. For example, our hydraulic circuitry area is considered hard technology. We have a machine with a bucket and a stick and hydraulic drives on different tracks and a backhoe on the other end and that sort of thing. We program all this with various software. We have circuitry that in a hydraulic sense probably makes some TV circuits look mild in comparison. There really is no way for most average juries, whether they be garage tinkerers or not, or judges that we normally draw, to really understand that with comprehension. We also describe transmission as hard technology. We have transmissions that have ten speeds, forward, six in reverse and gear, then in and out under all sorts of exotic conditions. Somebody has to be able to cut through that technology. We have a lot of easy technology that I think judges and average juries can understand. But when we get to the hard ones, and even when we get to some borderline ones, it seems to me the people who are pressing the patents on us, are engaging in a lottery game. They are bringing very, very poorly conceived suits with the thought that it is somehow going to make it through the system or breed a very large settlement award because of the complexity factor. In fact, they're right. We do settle at amounts that blow my mind in the historical sense. I think the key or the important thing to me is to bring the level of the judicial system up to be able to comprehensibly *89 understand the subject matter that's involved, whether that be in a jury context or the bench trial context. Now, perhaps, and I throw this question back to those who might have done more research than I on the Seventh Amendment and the due process clause, but it seems to me in the absence of this, we do have a real serious due process question. But the question is, it seems to me: Can we enhance the jury system by ensuring that qualified people are sitting on that, maybe an expert jury system, if you will, that people on that jury are capable of understanding the subject matter on which they have to make a decision or if we're going to the bench trial, can we have the judge be able to augment his deficiencies in that subject matter by a court appointed expert or

somebody that can supply that missing link. It seems to me that failure to do this under either mechanism is simply to allow the system to be discredited. Thank you.

MR. SAMUELS: Gary Samuels. I agree with Bill that we do have a severe due process problem, but I don't believe that education of the jury is the answer, so, I am not in favor of jury trials in patent cases. People have talked today, virtually everyone has talked, about the complexity of patent cases. Some have talked about equitable considerations. So, I think the question is: How do we apply these two items to exempt patent cases from jury trials? It seems to me we have a choice of doing it on a case-by-case basis, which will lead to many varying decisions and certainly appeals in almost every instance, or we can do it by a per se rule, which does not entirely appeal to me under the present system that involves using the district courts. I'm in favor of Bob Armitage's statement that we should consider a specialized court for patent cases such as the CIT as outlined in the pamphlet materials.

MR. MACKEY: To me, the jury provides as good an opportunity for a fair decision as a judge. This is based on anecdotal evidence and anecdotal experience. I have not ever tried a case, but I've certainly been a customer for those that were trying cases, and I've been rather happily surprised that the jury has provided as good a result as a judge and often is no more difficult to educate than a judge. I do feel, however, that for a jury system to work well, it needs to be well controlled by the judge and probably some of the practices and procedures with respect to juries could be improved to assure that the jurors have before them all of the pertinent parts of the trial transcript and the evidence that has been introduced. Sometimes courts tend to limit the amount of information that the jury can take into the jury room with them. That certainly doesn't help at arriving at a well-reasoned decision. Thank you.

*90 MR. BARDEHLE: Heinz Bardehle. Ladies and gentlemen, I do not dare to give you any advice to the serious problem to handle your cases before the judgeon a bench trial or before a jury. My intervention was initiated by Mr. Goldstein's opinion about the capability of judges to appreciate very quickly the technical problems which are automatically always involved in any patent case. I may give you to that an experience from Europe, and in particular, from my own country, from Germany. You may know that in Germany we have courts in the level of the district courts, which are related only to patents, they handle exclusively patent cases, sometimes also trademark cases, and in the appeal level we have also courts which exclusively handle patent cases. And even in the Supreme Court, we have one special senate which handles only patent cases. In this court, judges from the lower courts are elected. They are selected from the lower courts. And the result is that particularly in the Supreme Court, there are extremely well experienced judges with a long time of experience. It is for me, as a technician very impressive how quickly experienced judges, pure jurists are in the position to catch very quickly the technical core of a patent in relation to the prior part. It seems to me difficult to give all that necessary teaching to a jury. I admit that it is possible. I have learned in a

mock trial of AIPLA in Florida which was really brilliant that it is possible with, of course, great effort and time to convince the jury and to teach a jury, bring them to a good decision, but the time factor has also to be taken into consideration. It may require weeks to teach a jury and to convince the jury. And this time factor I think plays also an important role. You can do the same with experienced judges in one morning, in one day or in a few days in the trial. So, I think one should also take into consideration the time factor on this aspect. I agree with Mr. Goldstein that we should not underestimate the capability of judges. Thank you.

MR. GRISWOLD: By the way, thank you Chico, for reminding me that most business people think that the system we have for resolving these disputes is terrible. Terrible in the sense that you never get the answer. It takes too long. So, coming from that proposition, I think we should spend our energy on figuring out a way to get the answer within a short time frame, like one year. If the answer is negative, then you get on with business and do it a different way if you're the defendant. So, I think people should spend their energy on taking care of the time factor. And as far as juries are concerned, I don't think the Intellectual Property Bar is strong enough to get rid of jury trials. It gets into the heart of the law in many other areas. We're just not *91 going to be able to do that. So, I don't think we ought to spend a lot of energy trying to do that. I think we ought to spend our energy on compressing the time to get to a jury and get the answer. On the other hand, I think it's kind of crazy with the amount of money and time that is spent on dealing with juries and the attitudes that some have relative to juries. The question that is put to us by others frequently is... Can I get to a jury? Not whether they have a good case or not, but can they get to a jury? This means that they don't really care whether they have a good case or not. It's a question of whether they can get to the jury and be persuasive there. Another thing that bothers me is what Dick Witte mentioned. If you were from some other planet and watched people spending thousands of dollars working on jury research, trying to figure out how to convince non-technical people that they have the best case, you would say does this make a lot of sense? That's troublesome to me. On the other hand, I just don't think practically we're going to get rid of jury trials, so I wouldn't spend my energy there. I think we ought to spend our energy on figuring out a way to get an answer within a year using some kind of court system that does allow for jury trials, and this CIT possibility is one.

MR. BALMER: Norm Balmer. Gary, you just said mostly what I was going to say. From a corporate perspective, getting a decision quickly is almost as important, sometimes more important than what the ultimate decision is. People would not go into jury trials if there were not a strategic advantage. They're not going to spend the money. There's a case that is in a book recently published about Clarence Darrow. He was on trial for tampering with a jury. He paid off a few jurors. He went to the jury in his trial and admitted it. He said, "Yeah, I did it, but the other side did too." They acquitted him. The point is, perhaps, legally that was not the right answer, but perhaps from a public policy standpoint, the correct answer was derived. When we talk about jury trials, we talk about imperfections in the system. Yes, there will be imperfections. But on the

other hand, if we take a look at the broader picture, maybe there are some policy benefits that our jury trial system does provide. What we do have.... I'm picking up on what Bill Pravel said earlier. We do have a system where there are checks and balances within the jury trial system. There are things that the judge can do to render jury trials viable. In my view, any system no matter how well intended, unless it is administered and implemented correctly, is going to produce erratic, unintended and undesirable results. And I think within the hands of the judicial branch we have the tools that are necessary to handle patent trials in with juries. Thank you.

*92 MR. WAMSLEY: I don't think the Seventh Amendment can be changed, but I do think there are big problems with jury trials and with judges. The problem with juries is that we don't have jury members who have scientific and technological backgrounds. And at the trial level, we don't have judges with scientific and technological backgrounds. We shouldn't be too cautious in our thinking about what kinds of new statutory schemes are within the Constitution. Some of the earlier speakers endorsed the idea of a specialized court. We ought to develop a specialized court with exclusive jurisdiction over all patent cases at the trial level. That court ought to be set up in a way that would encourage the President to appoint judges who have a scientific or technical background. Let's also look at the constitutionality of a statute that would require juries in patent cases to have scientific or technical backgrounds. I'm sure it is difficult to empanel juries made up of people who have degrees in science or technology, but I believe it could be done in a large metropolitan area.

MR. PEGRAM: Comments on the jury coming up with the right answer remind me of the story of the dancing dog. Remember that story? What we remark about is the fact that the dog is capable of dancing. We did not say that the dog is the best dancer in the world. Our surprise that the dog dances or our surprise that the jury can come up with more or less the same results as a non-specialist judge is what we remark upon.

The real issue that we have to confront is one that I have fought myself for more than 20 years, and that is of the possibility of going to using some form of specialist court rather than non-specialist decision makers. The issue of the costs that we get into in the present non-specialist system is something that we'll be talking about in connection with the Patents County Court segment of today's program.

I personally have been very satisfied with the results as an attorney for both plaintiffs and defendants in jury trials and I want to leap to the defense of the Delaware Federal Court and the Delaware juries. I think that they are pretty good and fair. I think the Delaware federal judges, because of their frequent experience with patent cases, do a very fine job. If you flip a coin a 100 times, it is quite easy to have it come up the same way 14 times in a row. At trials, attorneys often drop the ball. In patent litigation, they fail to make and preserve objections. And I think that is a particular problem for defense attorneys and that leads to a bad result sometimes for their clients.

Since most cases are settled and not tried, I suggest one of the key issues is predictability. Because jury trial results are less predictable, and perhaps jury trials that lead to more pro-patentee decisions, the *93 availability of jury trials may lead to more litigation on weak claims. I certainly have seen a number of cases that I refer to as "visions of sugar plums" cases.

I believe there is a problem particularly with our jury system and I'm not sure how to address it. Some of the papers have suggested that we can divide issues and separately present them. I find that is very difficult in the jury context and I believe that the availability of a jury trial may prevent us from doing that. For example, I have been in two litigations where the parties are able to judge themselves what the likelihood of success is and probably aren't that far apart, but the big difference is the damages questions. Is it going to go on the value of the component or the value of the whole system? It would be nice if we could find some way to get that kind of issue decided. But I believe with a jury system, we can't isolate that out. We also have a lack of practical way to take interlocutory appeals, to have legal questions definitively decided. That's something that the Judicial Conference is now addressing.

Finally, I would like to say something on a subject that you've heard me speak and wrote about before. I differ with Professor Adelman's conclusion in the paper that was handed out this morning - that a jury trial of the fact of willfulness is required because of an analogy to punitive damages in tort cases. In the case of punitive damages in tort cases, the jury is given the issue of determining should there by punitive damages and how much. In the patent context, the issue of increased damages is by statute given to the judge and I submit that places it outside of the common law area of the Seventh Amendment. I raise the specter that giving the jury the issue of willfulness raises terrible problems with the privilege of attorney opinions and work product which were noted but not resolved in the Quantum against Tandom case.

MR. RINES: Looking around, I don't know if I'm a dinosaur here. I do remember when Alexander Holtzoff, who became a federal judge in the District of Columbia as a result of his sterling work in creating the Federal Rules of Civil Procedure, which allegedly abolished the distinction between equity and law, and whom I knew when I was a student at Georgetown, swore me in. He said, "I know you're going to be practicing patent law. So, I'm going to assign you two criminal cases, to defend two people here. It may be the only experience you get but I think it will be good experience for you. And don't forget, you're going to ask for a jury, not like patents." And that's the era I was brought up in. I am an experienced trial lawyer, though not of recent years, in the patent field. I never even thought of a jury. *94 I have been brought up to think that patent cases were primarily on the equity side. When I went up from Washington to take the Massachusetts Bar, we had separate courts, equity courts and law courts in the state courts. And, so, in my early patent litigation practice, under my father's tutelage, it was always our job to educate the judge. But as Bob Shaw says, being a plaintiff's attorney and being primarily in the electronics field, and suffering from the image that patents in the hands of large corporations apparently evidenced in the minds of judges, be they Republican or

Democratic appointees, it was almost impossible to sustain a patent in that era - the 50's, 60's, 70's and up to the early 80's. When Judge Markey did his tour, I know we talked about what should be done and what we were going to do to try to help him and not an idea of a technical trial court. Nothing was wrong with these trial judges. They're no worse in patent cases than anywhere else, if they want to stretch their minds, if they're not hostile, and if they're not biased. And our judiciary was hostile and biased against the patent system from the 50's to the 80's. And that frustration gave rise to many a plaintiff's patent lawyers at least, going to the jury as the only way of possibly sustaining the patent. I remember in the Southern District of New York, when I was a Houdini and sustained the first patent in about 15 years. What a great job this was, as if every patent tried for years in the Southern District was really invalid. The Court of Appeals, however, promptly did away with it. So, I think we have to do what Bob Shaw says. You've got to look at where we've come from, and why we relatively recently went to juries in patent cases in the United States. And point number two, who are we to decide what a jury's going to do? Hey, we patent lawyers didn't invent juries. Juries are being used every day. The litigation we do is paltry compared to what general trial lawyers are doing with juries every single day, and what do they want? They want just what came from this side of the room. I just want to get something in the record and then I'll take care of persuading the jury. They're not looking for answers. Is the patent valid? Is it infringed? They're looking at the whole picture of what they would like to have sensible people say. Hey, this guy should win and he's going to win. This has even happened to me before judges in equity without a jury. I remember Judge Ford here in the Federal District Court of Massachusetts when we were trying the basic quartz crystal oscillator patents. He indicated he knew how he was going to call it. He said to me, "What's the difference? What's the claim language difference between this piece of prior art and yours? What is there in the claim that makes it different?" And I gave him a couple of *95 words, "aha"; that's all he needed for the whole trial. He made up his mind what he was going to do. So, we're not going to have a special patent game before juries. If you want juries, play the game; that is, you're going to have to persuade juries. I remember several years ago a junior law student of mine, later became a law partner, who was eight months pregnant and she was supposed to handle a contract trial before a jury in Massachusetts. She was leery about doing it in her condition, so I went down and handled the case before the jury. No patents - a contract. And when I summed up to the jury, I didn't even talk about the case. Of course, we won it. And, Heinz, I want to take you aside later on and tell you about my experiences with these specialized courts of yours in Germany, and your worrying about a trial before a jury that takes six months. I'm worried about your specialized courts getting through the darn thing in six years. But everybody's saying court, court, court, court. For goodness sake, listen to what I told you when I welcomed you. Mediation. Solve your own darn problems. No more litigation except in extreme cases. No more constitutional amendments. The name of the game is business. Represent your clients and find a way of solving the problems and try to do it in a way that doesn't run rough shod over the legal rights of people. And there's more than legal rights involved in the real world. There's all kinds of equitable considerations, and practical considerations, and maybe mediation is not suited for everything. Perhaps that last ditch patent of yours, if you don't want any competition on it and you want to use it for exclusive purposes, maybe mediation isn't right for it. The whole world is trying to

say to us lawyers, look at mediation; and there you can have the real competent people you can trust; you make your own rules; you make your own deals; there's still a lot of room for creative lawyers. No, we won't get one-third of a $100 million verdict, but maybe that's the contribution we should make to society.

DR. JUDA: Bob said almost all that I was going to say. I want to emphasize one element: He stressed psychology. Judges are human, so are juries. My own experience has been at the hand of a politically prejudiced judge. He decided the case (in South Africa) against me, facts be damned. The easiest part, I think, is to get a competent jury on a technical subject matter and it is not easy to find a competent judge. I think it is crucial that, as a patentee and not as a lawyer, that you have the feeling psychologically that the system is fair and, especially, that you are not there for the benefit of the legal system, but that the system is there for your benefit. I think that if you eliminate the jury trial, you put yet another nail in the coffin against *96 the little inventor.

MR. WEBSTER: Webster. I think we make our conclusions about these things from specific experiences. I should mention that I'm from Kodak and about ten years ago I followed with more than passing interest a bench trial that took place here in Boston involving a few patents. What I would do is challenge you,... if you're convinced that you're going to get a better shake on the facts in a bench trial than in a jury trial... to take a look at the patents and some of the findings of fact by the judge. See if you think that's very much better than a jury would have done. I think the facts were mauled much worse than a jury probably would have done. So think long and hard before you just say you're going to get a much better decision on technical facts in a bench trial than in a jury trial. That case was tried in '82 and the decision came out in 1985.

MS. SHAPER: Sue Shaper. I wanted to suggest from my standpoint that the... what seems to be the practical, doable and constitutional solution that would improve the system today would have two points - one, using Don Dunner's comments earlier to remove from the jury the right to render general verdicts and limit them to special interrogatories on the facts. I say this not because I think the jury renders a poor equitable decision but because I support a nation ruled by law. Otherwise, you're going to... you have a system where you're ruled by general equitable decision of your peers under whatever specialized equitable facts and circumstances exist in each situation. I support a nation ruled by law. Secondarily, I believe that the jury should be presided over by a specialized trial court, qualified to preside over jury trials.

MR. KLITZMAN: Yes. I want to address the question as to whether decisions by jurors are as good as those by judges. I'm aware of a number of judges that clearly have demonstrated not only an understanding of the technology but the patent law as well as compared to jurors who have demonstrated a lack of capability to understand the technology and patent law. Explaining to jurors is one thing. Whether they understand is

an entirely different matter. For example, I am aware of decisions by Judge Wolin in New Jersey, Judge Murray Schwartz in the Third Circuit, Judge Cohen in the Eastern District of Michigan, Judge Shadur of the Northern District of Illinois, where they have demonstrated an understanding of the technology and law involved. I'm not aware of any juror that can come close to that kind of in-depth knowledge and capability. So I don't agree that you can equate the decisions of judges with jurors, mostly jurors are subject to cosmetic factors and don't understand the technology. You can't *97 go behind jurors' yes or no answers. Jurors don't ask questions during the trial like judges are prone to do. Attorneys don't know if their explanations were understood by the jurors. I'll give you an experience, I sat in on one case in the Federal Circuit and the judges were asking the attorneys the question, what did the jury have in mind when they answered yes or no? Nobody could answer the question. Now if a defendant is going to be put out of business, they ought to know why, and it really is terrible to come away with a jury decision that puts you out of business and you don't know why, and you can't explain it to your client. I think one of the worse things is that a yes/no decision from a jury is not much help. When you get a decision from a judge at least he must give reasons for his conclusion. You can address the issues and can understand what's going on. With regard to jury verdicts, and if a judge makes a mistake, it can be corrected. You know what you're appealing. That can't be readily done with a jury. I think it's terrible when you get into the Federal Circuit and everybody is asking the question well, what did the jury have in mind when they answered yes or no. Nobody knows. I think there has to be some improvement in the jury verdict to make sure they didn't make a mistake.

Now, I'm in favor of the Federal Circuit doing more. They can do more. They can eliminate dichotomies in the law. For example, there's a recent case, In Re Klein, I believe where Judge Rich found that an appeal from the patent office is a question of law and, therefore, the court can address the issue of obviousness de novo. I don't understand why an appeal from a jury verdict is not de novo, and its verdict must be overcome by the substantial evidence rule. When you impose that on 103 defendants, you don't have much of a chance of the court looking at the obviousness question at all as a question of law. I think it was Judge Michel who said that the most difficult burden of proof to overcome is a jury verdict because of the substantial evidence rule. On appeal, the substantial evidence rule pretty much wipes out 103. In most instances, you don't get to 103. So I think there's something that can be done by the Federal Circuit by correcting some of the dichotomies in the law. I don't see why an appeal on obviousness is de novo from the patent office, but it is not de novo on appeal from a jury trial. In my opinion, both appeals should be de novo because obviousness is a question of law.

MR. MYRICK: Ron Myrick. Just a few things We haven't talked for a moment about the constitutionality issue. I want to concur that I don't believe the constitutional change approach is going to work at all. I think the political capital cost would be huge and I don't believe *98 the effort capable of being successfully mounted. But I also don't inherently ... distrust the jury system. Don, Sue and various others have talked about better ways to manage the jury process and I think that's a significant area that we should very much more explore before we even consider a constitutional amendment to get rid

of it. Some have mentioned the specialized court and I like that idea, however, I have a concern that the specialized court is still very much something that's being experimented with. We've seen a specialized court in the UK, the high court there that has specialized judges at least for patents and they have done a pretty good job, but there is a new experiment we'll be talking about here later today, the Patents County Court. The jury's very much out on that one even to this day. If you look at the appellate record of the Patents County Court, it's been relatively questionable. Why that's happening, we don't know. Perhaps we'll talk about that later on, but it may be that while the speed element is something we all want, at the same time, it's causing some issues in that Patents County Court which are perhaps resulting in this large number of reversals. I heard it's like nine to zero in sustaining the judge when it's gone to the Court of Appeal.

I heard someone say something about court-appointed experts. In a recent U.S. copyright case, a very complex case re technology, a court-appointed expert was used extensively, so much so that the case has been roundly criticized as having had the court-appointed expert take over the responsibilities of the district judge. In fact, "captured" was the term that's been used in regard to this particular case. The expert is said to have "captured" the district judge and made all the decisions effectively. If that's true, and I don't know whether it is or not true, I just report it, it is concerning because clearly most technical experts come to a case with a certain flavor of their own. Technical people also have biases and it's conceivable that those biases could come out.

In regard to the issue of selecting a technical jury, I just had the privilege of sitting as a juryman two weeks ago and the interesting part of the process which came home to me was that we went through sixty people in trying to find just enough people to sit on one panel. Of course, I sat down for about thirty seconds and they ran me off, but we went through at least sixty people. Now those people were drawn broadly from the whole area of Middlesex County in Massachusetts, but can you imagine how difficult it would be to get technical people filtered out of that whole group of folks and then select just technical people. Also, technology is not monolithic. It's not monopolar. It's not colorless. It's got as many colors and flavors *99 as you can imagine and you would have to go the next step and pick not only technical people, but technical people with relevant technology. That's just not the solution that I think has a great deal of likelihood of happening. Thank you very much.

MR. BRUNET: Judging by the amount of votes each way in this room, I don't think there could ever be the necessary two-thirds majority in the Government to change the constitution, so I would imagine that the Seventh Amendment is not going to be changed. I was thinking about the desire of several people for a quick and definite verdict. I think that if you want a quick verdict, the thing you must do is to consider alternative dispute resolution, whether it's arbitration or mediation. The court system is the last resort and is inherently a slow means of dispute resolution. It certainly will not be speeded up with a jury. It seems to me that what we have to do is to see what can be done about improving the jury system. I think that preferably guidelines should come from the Federal Circuit as to what the district court judges should do in instructing their juries and in requiring

special verdicts. If you can't get a satisfactory resolution in that way, then it seems to me that we ought to consider amending the Federal Rules. In any event we're going to have to get by under the Seventh Amendment and somehow improve the jury system.

MR. JORDA: We would have loved to have Paul Janicke here from the Intellectual Property law Institute of the University of Houston Law Center. Unfortunately, he couldn't make it. He's somewhere in Greece or on vacation, but he sent us a letter and I think we should get it into the record because it's quite relevant and quite interesting. This is what he wrote. [QUOTE.] I do have something to say about the topic of abolition of jury trials in patent cases. Perhaps you would find a time to state my views to the conference.

They are as follows: "It is very unwielding, and perhaps unnecessary to approach the perceived problem of bad results from juries in patent cases, by seeking in effect to amend the Constitution. That is really what would have to be done to "abolish" patent jury trials. The case law, and many years of practice, are too ingrained to now say that the Seventh Amendment does not provide for jury trial in patent cases where damages are sought.

A better approach, in my view, is to sort out which factual issues are properly for the jury, and which factual issues are for the judge in equity. The courts have unfortunately spent nearly all their energies in the last ten years delineating "law" from "facts", and have virtually ignored the more potent dichotomy: law versus equity. The very explicit dictum in the Federal Circuit's recent Paragon *100 Podiatry decision, that the facts underlying in - equitable conduct are to be found in by the judge, has already been followed by at least one district court. (See Gentex Corporation versus Donnelly Corporation, 45 PTCJ 478-79 (W.D. Mich. (1993).

I believe the law-equity distinction will be paramount in future analysis of the jury trial "problem". For example, the next fact-finding committed to the judge is likely to be on the equitable doctrine of equivalents and its analogous claim-interpretation doctrine the so-called "112(6) equivalents".

A third area for the judge, in my view, although less likely to be perceived soon is obviousness. The "factual inquiries" mandated by Graham are really not the kinds of historical facts traditionally found by juries, although there is some arguable similarity to negligence and other conclusory-type jury "findings". The factual inquiries are far closer, historically, to the factual analyses done in Chancery, in support of the Chancellor's use of judicial discretion. In other words, there is more of a weighed discretion going on than fact-finding in the traditional sense. Hence, this too should be given to the judge, because the function is so akin to equitable discretion and judgment. (The law - fact distinction doesn't help at all here!)

Finally, I predict that once the jury's function is properly circumscribed under established and traditional principles of law and equity, there will be no further need to

worry about "abolishing" jury trials in patent cases. The typical patent case involves few, if any, "fact" issues of the historical event type. Once the claims are properly interpreted and the interpretation expressed in words by the judge - usually there won't be much left to the "question" of infringement. Similarly, in the course of determining obviousness the judge will seldom encounter a question of historical fact on which he needs the jury's help. Likewise, once the judge announces the chosen methodology of assessing reasonable totality, there won't be much for the jury to do in most cases. For example, if the methodology is to set the royalty at one-third of the profit, or one-half of the cost savings, the role for jurors to then complete the calculation by finding what was the saving or profit - a proper historical fact-finding function - will be real, but hardly critical.

Sorry I can't be with you to debate these points further. [END QUOTE]

MR. BENSON: Okay, thank you, Karl. I'm going to let Alan Lourie wrap this up, but also I'm going to ask him to make a comment about a recent report that some district courts are going to defer all jury trials in civil cases for a period of one year.

*101 JUDGE LOURIE: Alan Lourie. I will wrap up only in the sense of apparently being the last speaker, not in the sense of summarizing everything that has been said. I've been listening, observing, counting and it's a tie. I have to tell Steve Goldstein that I majored in chemistry at Harvard and I knew some physics majors. Question one, why are we talking about this? We've heard lots of anecdotal comments. Don Dunner reported on an informal survey in Delaware. I'd like to see someone do a serious study to determine whether the results of jury trials in patents are truly different over a long period of time, ten years, five years, compared with bench trials, and secondly, I'd like to know whether our rate of reversal versus affirmance is different historically between jury and bench trials. Certainly our standard of review is more difficult, and especially if we don't have special verdicts and interrogatories, we don't know what the jury really did consider. So I think it would be interesting to have some data. If there were data, there might be more basis for change. The other point I'd like to make is that I've heard lots of suggestions about what our courts should do. Well, you know, we're not a legislature. We decide cases and we review decisions from trial courts based on issues decided below and issues raised before us on appeal. We really can't rove around, although sometimes we're tempted to, to speak about issues not raised in a particular case, and when one of us tries to do it, others object, so I think you should raise these issues. If you don't think you should have a jury, move to strike the jury. If you want special verdicts and interrogatories and you don't get them, object. Raise them as issues on appeal before us. I can't tell you what the results will be. As you know, we have a fair amount of precedent from the early days of the court and panels are supposed to follow the precedents of prior panels. So panels these days don't necessarily have a lot of freedom with respect to the issues that we're talking about, which means going en banc. Right now we need six votes to do that. If when we have a full court, we will need seven votes to go en banc. We do it two or three times a year roughly and it's hard to do, to get a majority of the court to

consider an issue to be sufficiently important and resolve to go en banc. But sometimes it happens and even if we don't, as we have learned this week, sometimes the Supreme Court will take an issue and reverse us. So I think it's important that the Bar raise issues, raise them at the trial level and raise them at the appellate level. I can tell you that there are a variety of views on our court just as there are here and I wouldn't try to predict what the answer would be when a particular issue arises. I do like Bob Rines' idea of mediation. I really think a lot of *102 cases can be settled. Of course, a lot of cases shouldn't even be brought. Concerning Bob Benson's question, yes, the federal judiciary has had its funds cut back, we're worried about funds for our third law clerk. Perhaps it's more important to fund jurors and defense counse1, and the judiciary ran out of money and the word went out that district courts should not schedule jury trials after May. There's a supplemental appropriation in the works and Congress, I think, will act on it, but when, I'm not sure. Let me point out a couple of more things. I think a lot of district judges like jury trials and Maury mentioned several names and pointed out that some of them do an outstanding job. I've talked to a number of district judges who've said you have to take charge, you have to get the right jury. All these suggestions that I'm hearing around the table are used by the judges who claim that the system works well. So I think maybe that's the most ready area for progress. But raise issues before us in the right case and we'll have a look at them.

MR. BENSON: Okay, thanks, Alan. Just as a matter of curiosity, I'd like to take a vote. If you had your choice would you do away with jury trials in patent cases or not? How many would do away with them? And how many would keep it? Okay, it's close. Its 17 yes and 14 no.

MR. GRISWOLD: I voted in favor of doing away with jury trials, but that was hypothetical, you see. The question is, how many people really think we can get rid of them. That's the real question .... If you asked how many would keep them or think you can't get rid of them, then I'd have to vote that way. I just wanted to clarify my vote.

MR. BENSON: Well, I was going to take a bunch of votes. One of the things that I would ask is how many here think that there ought to be some modifications in the jury system in patent cases? How many would vote in favor of that?

SPEAKER: What was the number on the first vote?

MR. BENSON: The vote was 17 to keep juries and 14 to do away with them. What I was thinking of, Gary, some people say we can't do away with jury trials in patent cases, but there ought to be some changes. We ought to be more specific with questions to the jury, we ought... carefully limit what the jury can do which I throw into the big category of modification of the system. The reason I brought this business up about the funding of

the courts is the jury system is a tremendous economic burden on society. Not only does it cost a lot of money, but people have to give up their jobs for three weeks or in some cases three months. Is it really good for society to have that kind of a system for civil cases. How many people think the system *103 ought to be modified? How many like the system the way it is?

MR. RINES: How many of you would actually consider trying mediation in some cases that come before you?

MR. GRISWOLD: And Bob, one other question. I would wonder how many people really think that we could get rid of juries in patent cases.

MR. BENSON: Completely?

MR. GRISWOLD: Yeah. Considered to be too technical or too complex or something like that. How many people really believe that we can in some manner or another get rid of juries in patent cases?

MR. BENSON: And you want to segregate that from the complex technology type of things that apply to cases other than patent cases. Is that what you want? Ask your question the way you want it asked and we'll take a vote on it.

MR. GRISWOLD: Here is a better way to say it. How many people believe that we can remove juries from patent cases constitutionally?

SPEAKER: Before you do that, you know, you can say that about any question, nothing ventured, nothing gained. If you've got a ten percent chance of doing it, is it worthwhile trying? I mean... so I don't know if you can answer the question completely.

MR. GRISWOLD: I'd like to modify it. Those who feel competent to answer the constitutional question, or constitutional scholars, how many of you feel that juries can be deleted in patent cases?

MR. PEGRAM: Let's go back. How many people think that we can do away with juries in patent cases? How many think we can do it?

SPEAKER: Practically or legally?

MR. BENSON: Either.

SPEAKER: Legally.

SPEAKER: I'll go for legal.