

June 28, 2010

The 12th Annual Bench and Bar - The Broadmoor

The Fund has a host of outreaches to the Circuit community, conversations with and among all the practice areas within that community, legal education programs, scholarly journals, periodic newsletters, law student scholarships, and others. As these outreaches have expanded the Fund's service, the Bench and Bar, now in its 12th year, continues to be an important part of the Fund's annual educational programming for the Circuit's national bar.

The 12th Annual Bench and Bar explored two key inquiries - one, the current Circuit jurisprudence and areas which might benefit from further focus and, the other, the challenges arising before the government and corporate sectors and how those may affect the demands on the economy and the justice system itself. In addition, panels of judges reached into topics of how the trial and appellate levels operate and into opportunities for efficiencies. In turn, practitioners examined how to aid both the appellate and trial levels in the service of justice and to minimize or avoid waste in the litigation process. Along the way, the conference celebrated Bench and Bar leaders as well as a special focus on pro bono outreach. We express our appreciation to all who planned, spoke, participated in, attended as individuals, and supported as sponsors the Fund's activities here and elsewhere.

THE SUBSTANTIVE PROGRAM

THE SUPREME COURT REVIEW

The panel discussed the Federal Circuit, the Supreme Court, and their relationship over the past 27 years. The participants enjoyed extraordinary expertise in this subject; combined they had argued more than 170 cases before the Supreme Court, including several coming from the Federal Circuit. Based on their broad experience with the Supreme Court and with the Office of the Solicitor General, they shared their insights into the important patent law and other legal issues that the Federal Circuit has decided during its relatively brief history and the response of both the Supreme Court and the Department of Justice to some of the decisions.

The panel focused on several of the most important Federal Circuit cases since the Circuit's creation reviewed by the Supreme Court. Panelists covered both patent and non-patent cases. They also addressed the role of the Solicitor General in briefing and arguing the various cases, including how the Office decided which cases warranted intervention by the federal government. The panelists also analyzed why the Supreme Court might have granted certiorari in the various cases and why each is of particular importance.

State of the Court

Chief Judge Randall Rader focused on the interests of the Bench and the Bar of the Circuit community, highlighting how both - in their respective roles - can contribute to the justice process.

THE CIRCUIT JURISPRUDENCE

The panel explored developments in Government Contracts, Intellectual Property ("IP"), International Trade, and United States Merit Systems Protection Board ("MSPB") case law issued by the Federal Circuit and the Supreme Court -- reaching across all key practice jurisdictions.

For example, the IP discussion included patent damages and venue. The panel identified areas of the jurisprudence which might benefit from further clarification if the Court were so inclined. The varied backgrounds of the panelists, which include senior private practitioners and senior government officials, provided for an informative panel.

THE TOWNHALLS

Continuing a tradition of involving those who attend the conference in helping shape its discussions, the Townhalls invited the entire Federal Circuit community to a group discussion of issues of importance to the bench, bar, and other Court community members. The three focused on, respectively, effective complex case management (exploring such areas as motion practice, Markman hearings, summary judgment, jury trials, efficiency, avoidance of waste in the litigation process), damages in the various practice areas (including trends in methods for calculating damages in IP litigation), and international implications (including the role of IP in the international economy and also 337 and dumping practice)) in the various subject matter areas. The audiences were encouraged to participate in an open conversation.

THE CIRCUIT AND TRIAL COURT DIALOGUE

How can we improve the dialogue between the Federal Circuit Judges and Judges from courts whose decisions the Federal Circuit reviews? The distinguished panel of judges focused on answering this question. Among the topics which the panel explored were (1) Was there a perception that the Federal Circuit engages in or refrains from fact finding; (2) Was the deference by the Federal Circuit to trial judges on claim construction increasing, decreasing or about the same and why; (3) How could the courts help provide greater guidance on damages, such as the "entire market value" rule and when it is appropriate to apply; (4) Interlocutory appeals-when and under what circumstances were issues certified by the trial judge and accepted by the Federal Circuit; (5) Were there particular issues ripe for *en banc* review; (6) Were the standards being used by trial courts and the Federal Circuit for preliminary injunctions perceived as being consistently applied and how might the courts improve; and (7) In view of KSR, how might procedures be clarified on how the issues for the jury and for the trial court are to be handled. The panel explored these issues, sharing ideas on how judges from different judicial levels could assist each other in improving decision-making and dialogue among the courts.

THE CIRCUIT PERSPECTIVE

This panel explored major practice considerations within the Circuit's portfolio. These ranged from ways to improve appellate advocacy (and the persuasiveness which is at the heart of that advocacy) to relationships between the trial and appellate tribunals which may affect efficiencies. The panel blended the observations and experiences of each of its members with topics which both lawyers and judges confront in appellate litigation before the Court.

CONFLICTS AND WAIVERS: ASSURING PROPER FIT

This year's ethics panel continued the dialogue on the use and efficacy of conflict waivers. Using several hypothetical scenarios based on actual cases, the panel conducted a dynamic discussion of ways to deal with conflicts that can arise when representing clients. The panel focused on the use of advance waivers of conflicts and how they could be crafted in order to withstand challenge by an adversary. In addition to exploring the parameters of waivers of conflict through hypothetical situations, the panel also provided thoughts on the key issues to be considered before entering into an advanced waiver and on the necessary components of a well crafted conflict waiver. Along the way, the panel explored challenged arising from laterals and the differing impacts that conflict obligations were raising for large, medium, and small firms.

ROUNDTABLE ON THE CHALLENGES AHEAD

This panel of experienced practitioners exchanged ideas for increasing innovation and competition from some of the most pioneering industries in the world with the Solicitor of the USPTO and the General Counsel of the USTR. Emphasizing that fostering an environment in which United States can create, protect, and enforce intellectual property on a national and worldwide basis lies central to future United States economic success, the panel explored pressures arising in the markets and likely to be felt in litigation trends. All of these topics provided for the vibrant discussion of this panel.

THE CHALLENGES AHEAD: THE TRIAL AND FACT-FINDING PERSPECTIVE

After hearing government and industry perspectives on the challenges that lie ahead in the preceding panel, trial judges offered their perspectives on how the changing legal and economic landscape is impacting fact finding and trials in their respective tribunals. The judges discussed how the changing environment is affecting the types and/ or nature of the actions they are seeing. They explored ways in which advocates and entities before them are evolving their strategies, procedurally and substantively, and how that evolution is impacting the matters over which the Judges preside. The judges provided practical advice on changes that appear positive and those that may impact the parties, the playing field and/ or the legal landscape.

THE SESSIONS

Celebration of the Circuit Community

The Thursday, June 24, session honored the commencement of Chief Judge Rader's service as Chief Judge and included a tribute to Judge Mayer. It also included an expression of appreciation by the Circuit for the service of Scott McCaleb as president of the Association and of the Association for Scott McCaleb and Michael Schaengold for their leadership service on behalf of the Court in the Advisory Council. The Charitable and Educational Fund concluded the event by awarding law school scholarships to five of the more than 300 applicants in 2010.

Pro Bono Service

On Friday and Saturday, June 25 and 26, the Fund focused specifically on the members' pro bono service. It recognized the contributions of 100 attorneys in the service of veterans and personnel pro bono outreach. Insights from bar leaders, Chief Judge Rader, and Chief Judge William Greene of the United States Court of Appeals for Veterans Claims outlined the value to the overall justice system provided by pro bono service as the conference offered compliments to Bar leaders and members who have provided exemplary pro bono service in the veterans and government personnel pro se areas. Judge Andrew Guilford spoke to a session offered for pro bono participants, further underscoring the contributions to the justice system, firms and agencies, individual practitioners, and the community at large which arise from pro bono service.