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Inside

On the Cover:

Judge Richard A. Jones and some of our Youth Law Day participants. Article can be found on page 8.

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President's Message

By Floyd G. Short

As I look forward to a hot and sunny family vacation in Lake Chelan, I am reminded how summertime gives us the chance to take a step back and assess our lives—how we are doing and where we go from here. The Board of the Federal Bar Association of the Western District of Washington (FBA) met in April to do a similar assessment and evaluate the FBA's performance of its mission.

What is the FBA's mission? It is set out in detail in the FBA's Articles of Incorporation, but in simple terms our mission is to improve the administration of justice in our district, train lawyers to perform their best in federal courts, and foster cordial relations and communications between the federal bench and bar.

The FBA is succeeding with much of that mission, but we can do better by offering more tangible benefits for our members and a stronger answer to the question that members may ask: "What's in it for me?"

The lofty answer to that question is that FBA members enjoy the opportunity and the rewards of serving the FBA's mission in a variety of ways. FBA members improve the administration of justice by facilitating alternative dispute resolution through the District Court and Bankruptcy Court mediation programs and by working closely with the Court on amendments to the local rules. FBA members staff a strong pro bono program and federal civil rights clinics in Seattle and Tacoma. And FBA members present a number of civics programs such as Youth Law Day and Constitution Day.

FBA members and committees train lawyers in trial and appellate skills, ethics, and a variety of federal practice issues through myriad CLE seminars, brown bag lunches, and our annual year-end CLE. Our committees sponsor and present CLEs in the fields of Admiralty, Alternative Dispute Resolution, Appellate Practice, Bankruptcy, Criminal Law, and Intellectual Property. Every December the FBA's CLE Committee produces our Annual CLE to address timely topics of broad interest to the legal community that go beyond the nuts and bolts of federal practice.

Through all of these programs and other efforts, FBA members work to foster strong bench-bar relations, culminating with our highest profile event of the year, the FBA Annual Dinner and reception at the Fairmont Olympic Hotel.

While offering all of these lofty opportunities to our members, the FBA must also provide its members with more basic and tangible answers to the question, "What's in it for me?" One clear benefit of FBA membership is a discounted price for our CLE programs. But we can do more to enhance the value and benefits of membership in the FBA.

One consensus the FBA Board reached in our April meeting was to explore with the Court a system to disseminate via email Court news and perhaps even noteworthy opinions decided by our judges. The Bankruptcy Court already has an ECF notice system for notable bankruptcy opinions that can serve as a model. For the District Court we envision a similar system to distribute information to FBA members about Court news, FBA news, and upcoming CLEs and other events. We are also updating the FBA's membership database to not only improve FBA internal administration but also offer better information and accessibility to members through the FBA website.

I would like to hear from you about these plans or any ideas you may have about the FBA's mission and how we can offer more value to members. Please email me at *fshort@susmangodfrey.com*.

Thank you.

Floyd Short is the President of the Federal Bar Association of the Western District of Washington and a partner at Susman Godfrey LLP. He can be reached through email at ***fshort@susmangodfrey.com*** *or by telephone at 206.373.7381.*

By Chief Judge Marsha J. Pechman

The Rise of Social Security Disability Appeals

An explosion in Social Security disability appeals has sent the Western District of Washington scrambling for resources and efficiencies. In 2013, the Court had 807 Social Security appeals, the highest figure among district courts across the nation. The Court's Social Security filings have increased 171 percent over the past four years (from 298 in 2010 to 807 in 2013). Last year, Social Security cases—fact-intensive matters that require a great deal of time and effort from magistrate and district judges and their clerks—made up 22.7% of the Western District's civil caseload. And filings show little sign of slowing down in 2014.

Last year, Social Security cases made up 22.7% of the Western District's civil caseload.

Untangling causation is a difficult task, and many factors could be contributing to the trend. Some are internal to the federal system. Because the Equal Access to Justice Act permits fee shifting upon a successful Social Security appeal, the practice area does not want for experienced and zealous counsel. And these attorneys are rewarded for their tenacity: Social Security decisions by administrative law judges are reversed with some frequency in this District. Wider social trends, meanwhile, may be affecting the demand for Social Security benefits. As outside observers have noted, states have some financial incentive to shift residents from state welfare rolls to federal benefit programs.[1] Here in Washington, for example, applicants for the state's "aged, blind, or disabled" cash benefits must apply for Social Security first and must pay back any state benefits they receive after being approved for federal benefits.[2]

The Court has taken several steps to address the ballooning Social Security caseload. The Court has been working to increase the number of consents by both the government and the claimant to have the entire appeal heard by a magistrate judge. As a result, the total number of such consents has increased from 56 in 2010 to 267 in 2013. Thanks to their regular exposure to this area of law, magistrate judges are able to assess the appeals with expertise and efficiency. The Court also hired additional temporary law clerks and recalled Magistrate Judge John Weinberg, and has diverted resources and help from senior status judges.

In large part due to the increase in Social Security appeals, the Court has applied and been recommended for an additional magistrate judge to sit in Tacoma. Even taking into account the steps the Court has already taken, the Judicial Services Office of the Administrative Office of the United States Court reported that "there is ample work to support authorization of a sixth full-time magistrate judge position in the district." The request was endorsed by the Judicial Conference Committee in early June, and will be considered by the Judicial Conference of the United States in September.

Finally, the Court has convened a Bench-Bar Social Security Committee to discuss issues involved in Social Security cases in the District. Composed of district court and magistrate judges, a law clerk, the district court executive/clerk, and three members of the bar, the full Committee will meet for the first time in September. The Committee will explore ways to make the Court's internal case management system more efficient, discuss factors that may be contributing to the disproportionate increase in Social Security cases filed here compared to other districts, and consider any other issues that may assist litigants in reaching the just, speedy, and inexpensive determination of each Social Security appeal.

[1] *Chana Joffe-Walt, "Unfit for Work: The Startling Rise of Disability in America," This American Life, March 23, 2013.*

[2] *WAC 388-472-0005; WAC 388-449-0210.*

Effective Legal Writing Before Appellate Courts

"Judges Are Not Like Pigs Hunting For Truffles"

By Cynthia B. Jones

"Laboring in the vineyards produces a lot of whining"—so said Justice Steven Gonzalez in response to Judge Richard Tallman. The setting was the 19th floor of the federal courthouse, where the two sat next to each other as panelists for a CLE, along with Justice Sheryl Gordon McCloud. Justice Gonzalez in his usual suit and tie. Judge Tallman in the customary blazer and slacks, but for the Seahawk jersey under his jacket. It was January 10, 2014 and Seattleites hoped but did not yet know the team's destiny.

This particular jurist/football fan had just told an audience of seventy-five CLE participants what Sandra Day O'Connor had told him: sometimes petitions for certiorari are denied because the issues need to "labor in the vineyards" and percolate for a while. That prompted the retort from Justice Gonzalez, leaving the audience to draw its own conclusion, perhaps that the high court ought not to let issues "percolate."

The panel in question was entitled "Effective Legal Writing: A View from the Ninth Circuit and Washington Supreme Court." The CLE, followed by a wine and cheese reception in the courthouse lobby, was organized by the Federal Bar Association of the Western District of Washington (FBA).

Judge Tallman shared his experience surrounding a recent case where Justice O'Connor sat with him on the Ninth Circuit. In mid-argument, she cut in and asked, "What do you want us to do?" because, Judge Tallman said, "It wasn't clear in the briefs." And with that, the topic dominated the next hour.

"Judges are not like pigs hunting for truffles," said Judge Tallman, advising the audience that one of the challenges as an appellate lawyer is ordering key pieces of the record. "If you didn't cite to it in the record we're just going to assume you're making it up or it doesn't exist," he said. "Designate parts of the record that inform the decision."

Judge Tallman said he will ask parties to submit missing pieces of the record and if they can't find it, he said the court will try to. He cited examples like recordings of interrogations—did the officer give your client the third degree? Or are you taking license with the transcript? "We don't just take your word for it."

Justice McCloud, who in addition to her busy private practice also taught appellate advocacy at Seattle University School of Law before becoming a Washington Supreme Court justice, added her view, "We need to know if other Circuits or other divisions in the Court of Appeals are in conflict *up front*," when submitting briefing.

And, she added, "You have to anticipate the hard questions." If there's an adverse fact or case, you must deal with it, focus on the weakest argument. "We *know* what your strongest argument is—you'll lose because of your weakest argument."

Judge Tallman expanded on this point, "You may not have a strong argument but ignore [the weak argument] at your peril." He also emphasized the standard of review is absolutely critical. "If you have a written decision, you better be thoroughly familiar with the court or agency [that wrote the decision] and if the briefing doesn't tell me where the court went off track, depending on the standard of review it will heavily influence my decision."

Justice McCloud also advised attorneys to be ready to answer the policy questions in your briefing. While lawyers cite cases in response to arguments, she counseled that they need to answer *why* the lines were put in those cases.

Judge Tallman stressed the need to brief how the court below erred in applying the law because factual findings are difficult to overturn. Justice Gonzalez agreed. "What I find most helpful is a good story in a statement of facts. Use it as a chance to have your own unique voice," he said. And he drew laughter from the audience when he quickly added, "But don't make up a story."

As the CLE drew to a close, Judge Tallman gave his final thoughts: "And if you're going to use brief banks," his voice trailing down in tone, "please check to change the names of the parties."

The FBA Membership and Appellate Committees and the King County Bar Association sponsored the sold-out CLE and the wine and cheese reception that followed. Next January 23, 2015, we will have another exciting judicial panel lined up to kick off the year with a discussion about effective oral advocacy. See the CLE announcement page in this newsletter for more details.

Cynthia B. Jones of Jones Legal Group is the Co-Chair of the Membership Committee of the Federal Bar Association of the Western District of Washington.

Beware the Irritated Jurist

By Cynthia B. Jones

A Report from the Legal Writing CLE at the Tacoma Federal Courthouse

In his signature bow tie, Justice Charles Wiggins stood in front of a sold-out CLE crowd and fired off a warning to lawyers: he wants organized sections in briefs that walk him logically through the issues. "If I don't have that, I get irritated. And if I get irritated, I lose interest."

"The law is here to the follow the facts, not the other way around," said Magistrate Judge J. Richard Creatura, quoting his colleague, Judge Robert J. Bryan. In the photo, panelists pose with the Co-Chairs of the FBA Membership Committee. From the left: Judge Creatura, Cynthia Jones, Karen Orehoski, and Justice Wiggins.

It was a sunny day on April 11, 2014. Unfortunately, the cooling unit had failed in the jury assembly room of the Tacoma federal courthouse, where Justice Wiggins partnered up with Magistrate Judge J. Richard Creatura to present "Effective Legal Writing: A View from the Washington State Supreme Court and the U.S. District Court." Organized by the Federal Bar Association of the Western District of Washington (FBA), the CLE was at full capacity—complete with a waiting list. While the crowd initially complained about the heat, it was soon forgotten, as Justice Wiggins and Judge Creatura began to engage the audience.

Justice Wiggins wasted no time zeroing in on the truth of what matters most: get to the point in your brief. If he reads a brief that isn't clear and there are "a bunch of issues" he may stop reading and pick up opposing counsel's brief to find out what's going on in the case. "A triage goes on to prepare and it's crunch time," he said. Justice Wiggins hears oral arguments, six to eight in a given week, and reads court of appeals briefs, petitions for review, answers, supplemental briefs and amici. "We don't have extra time."

Then Justice Wiggins put theory into fact. He taught the audience pithy pointers on how to accomplish drafting an organized brief. He started from the "cosmic, generic view down to the micro-view to tighten up [brief] writing." He used his own draft opinion to make his point. For example, "Whenever you see 'there is,' ask and rewrite the subject." Justice Wiggins likes "an actor, with an action and the result of that action."

Visual aids in the brief can also be helpful. If you have an issue with property, provide a map. In criminal cases, use charts or drawings of where people stood or where actions took place. Judge Creatura agreed, calling visual aids "gifts for the reader—visuals give judges the gift in the middle of the brief."

Judge Creatura offered up a personal technique to draft the clear, logical brief. He calls it the "silver bullet." "Give me your case in a capsule," he said. "Tell a story because judges, like juries, are coming to the case cold." The silver bullet—or case in a capsule—is not changed by the argument you make, "The silver bullet remains the same: it tells me what the case is about and why you should win."

And he served up advice on methods of emphasis in briefing. Judge Creatura doesn't like *italicizing*, **bolding**, or underlining parts of a brief. "It's distracting…the words should be the strength, use active voice and short sentences—for punctuation a period is the most powerful emphasis."

"Think about briefing as marketing, said Justice Wiggins, "You're selling your argument." And think about your audience. "In appellate briefing, you know you're writing for a law clerk as well as the judges."

And be mindful of issue selection. Judge Creatura pleaded with the lawyers who would listen: "*Please* try to keep the organization that has been given to you [if you're the respondent]." And respond to issues as presented. If you're submitting the opening brief, "lead with your strengths, but embrace your weaknesses—make sure it's part of your brief up front and face it."

Justice Wiggins ended the afternoon by addressing the editor's role: rather than starting with line-by-line editing, "don't do anything" in the first pass through. Ask the big questions first. Does it come together? Is the argument well-organized? Is all the research done?

Then he entertained questions from the audience, joined by Judge Creatura. With over seventy people in the room, despite the broken cooling system, more questions were asked than time allowed. The judges stayed anyway and answered questions from an appreciative crowd.

The CLE was organized by the FBA and co-sponsored by the Seattle University School of Law. Due to popular demand, the FBA Membership Committee Co-Chairs Karen Orehoski and Cynthia Jones are planning another CLE for the Tacoma area soon. A special thank you to Karen Orehoski for managing the invitation and RSVPs for this sold-out CLE.

Cynthia B. Jones of Jones Legal Group is the Co-Chair of the Membership Committee of the Federal Bar Association of the Western District of Washington.

Youth Law Day 2014

Education, Inspiration and Fun

By Steven T. Masada

On Friday, March 7, 2014, thirty-five high school students entered the United States Courthouse in Seattle for a unique educational opportunity. Their day's assignment involved exploring various career opportunities in the legal profession and the criminal justice arena, all as part of Youth Law Day 2014. This interactive event was hosted by the Federal Bar Association of the Western District of Washington (FBA), in partnership with the College Success Foundation (CSF), a Washington-based nonprofit organization.

Youth Law Day was designed to expose these aspiring students to a variety of law-related careers and, above all, to provide them with encouragement in their pursuit of success.

This year's attendees were no ordinary young adults. Rather, these aspiring men and women, all from underserved, low-income neighborhoods in the Seattle and Tacoma areas, share a common goal: to improve their situation through education, to graduate from college, and to succeed in life. To assist in their journey, they participate in CSF's Achievers Scholars program. Since 2000, CSF has worked to identify and mentor thousands of underserved, yet high-potential students from low-income communities, inspiring them to finish high school and providing a comprehensive system of programming and scholarships that enable participants to pursue a college degree and beyond.

As in years past, Youth Law Day was designed to expose these aspiring students to a variety of law-related careers and, above all, to provide them with encouragement in their pursuit of success. The day was filled with a wide array of distinguished speakers, each with their own perspective and words of encouragement to share. The Honorable Richard A. Jones, District Court Judge, graciously offered his courtroom as the primary venue and served as the moderator for the day's various activities. FBA President Floyd Short welcomed the students on behalf of the organization and relayed his experience as a private practitioner and civil litigator. First Assistant United States Attorney Annette Hayes provided insight into the Department of Justice and the types of civil and criminal matters that the United States Attorney's Office handles on behalf of the United States of America. Federal Public Defender Michael Filipovic educated the students about his Office and the crucial role of the public defenders in the criminal justice system. Investigator Debra Malcolm of the Federal Public Defender's Office followed with a tutorial on defense investigations in criminal cases. Court-certified language interpreters and court reporters also described their professions and demonstrated their respective crafts.

Once again, state and federal agencies also contributed to the success of Youth Law Day and provided some of the day's highlights. Representatives from FBI, DEA, U.S. Secret Service, ATF, U.S. Marshal Service, Department of Fish and Wildlife, Washington State Patrol, and the U.S. Pretrial and Probation Office provided a glimpse into their respective agencies through an interactive exposition. In addition to mingling with agents and officers, students had the chance to observe firsthand a bomb robot in action,

The Honorable Richard A. Jones, District Court Judge, graciously offered his courtroom as the primary venue and served as the moderator for the day's various activities.

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By Melissa Muir

This article, concerning Judge Robart's ruling in *Microsoft v. Motorola,*[1] is not intended to offer a legal perspective on a highly technical area of intellectual property and contract law. Its purpose is merely to offer a glimpse into a fascinating case in our own district that those outside of IP law might have missed.

Microsoft v. Motorola: Why This Case Matters

As a federal trial court in a region spanning national forests, our national border, and a joint military base, the United States District Court for the Western District of Washington gets a variety of cases. Historically, it has dealt with weighty issues of immigration, drug wars, and terrorism, as well as smaller ones that affect only those seeking justice in a particular matter. We are on a first-name basis with some cases: the Fish Case, the Sonics Case. And recently, we have had a game-changing case. The case of *Microsoft v. Motorola* has been described by intellectual property watchers as landmark, far-reaching, even ground-breaking;[2] by the losing side as raising novel legal issues; and by Judge Robart as, simply, common sense.

Judge James Robart's 2013 ruling in *Microsoft v. Motorola* has shaken up the obscure world of standard-essential patents, or SEPs. No judge had calculated a reasonable and non-discriminatory (RAND) rate for SEPs before (FRAND, which stands for fair, reasonable, and non-discriminatory, has the same meaning as RAND). Laying out the first framework for setting RAND royalties, the court used an old-school formula straight out of New York, circa 1970, in *Georgia-Pacific Corp. v. United States Plywood Corp.*[3] Four decades later, these same 15 *Georgia-Pacific* factors have been adapted to slightly fewer RAND royalty factors. Whether or not this framework stands up on appeal, it is attracting a lot of attention in certain circles.

Why should the non-IP world care about complex decisions filled with numbers, acronyms, and video encoding? Because courts in our circuit, in other circuits, and throughout the world have taken notice. New citations appear daily. Patent holders, manufacturers, and sellers have taken notice as well. Companies negotiating licenses to determine whether their patents are potentially subject to a RAND decision, they too are watching.[4] Industry watchers suggest that companies who make, buy, or use complex electronic devices "would be well advised to keep an eye on this issue."[5]

Why should the non-IP world care about complex decisions filled with numbers, acronyms, and video encoding? Because courts in our circuit, in other circuits, and throughout the world have taken notice.

Background

As consumers, we give little thought to the standards that must be in place to connect us to our devices, and to connect seamlessly with those around us. These connections can often involve hundreds of patents made by many different companies. These standards are critical to both interoperability and lower costs: according to some, the real issue in this case was not money, but protecting these standards.[6] As The Economist explained in its overview of the case:

> Once a standard is set, companies making products that meet it have little choice but to use the technology essential to it, which may be covered by patents. In theory, owners of standard-essential patents (SEPs) are thus in a powerful position ... In practice, standard-setters are wise to this. They expect companies that claim SEPs to license their technology on terms that are 'reasonable and non-discriminatory' (RAND, or FRAND, with an otiose F for 'fair') ... Most of the time this works pretty well ... However, standard-setters do not define RAND, and in the heat of the information-technology industry's patent wars the number of disputes over what it means has been rising.[7]

Enter, *Microsoft v. Motorola*. After years of litigation and a complex procedural history, our court examined these standards and determined a RAND royalty rate. More importantly,

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Photo Gallery

On December 4, 2013, the Federal Bar Association of the Western District of Washington held its 30th Annual Federal Practice CLE and Dinner at the Fairmont Olympic Hotel in Seattle. Justice Sandra Day O'Connor was our honored speaker. Join us again this year in December 2014. Event details and registration will be available soon on our website: ***www.fba-wdwash.org***

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however, the court set out a methodology for estimating this rate.

The Case, Briefly

In the fall of 2010, Motorola sends Microsoft two letters offering licenses to two SEPs involved in standards H.264 and 802.11. Spoiler alert: Motorola offered them for 2.25% of the net selling price of certain products, or an estimated $4 billion per year. In the end, these licenses were instead valued at less than $2 million, or 1/20th of 1% of the initial offer.

Shortly after receiving the letters, Microsoft sues Motorola in the Western District of Washington and files a complaint with the International Trade Commission. Microsoft accuses Motorola of patent infringement and breach of contract, alleging that Motorola's offers breached its agreement to offer licenses on reasonable and nondiscriminatory (RAND) terms. The next day, Motorola files patent infringement cases against Microsoft in the Western District of Wisconsin and Southern District of Florida.

By early 2011, a case in Chicago is dismissed, the ones in Western Wisconsin and Southern Florida are transferred, and somewhere there is talk of Eastern Texas. Suits, pleadings, and accusations are flying, even from the bench. Describing the parties' conduct as "driven by an attempt to secure commercial advantage," Judge Robart tells the parties that "[t]he court is well aware it is being used as a pawn in a global, industrywide business negotiation" and that their conduct, "[t]o an outsider looking at it, it has been arbitrary, it has been arrogant and, frankly, it has been based on hubris."[8]

Amid this flurry of legal activity, a German distribution center moves in the night. Motorola files a patent infringement action against Microsoft in Germany, and in 2012, the Mannheim Regional Court enjoins the sale of Microsoft's Xbox (hello again, H.264). Microsoft, anticipating such an injunction, files a motion for preliminary injunctive relief in the U.S. case, seeking to restrain Motorola from enforcing any German injunction. With the very real risk of an immediate German injunction, Microsoft chooses to move its German distribution center to the Netherlands before the ruling. Moving in an unheard-of four months, the distribution center remains in the Netherlands.[9]

With little case law for guidance, our court reasons that the U.S. and German actions both involve the same issues, and that a German injunction would eliminate the ability of the court to render relief on the pending breach of contract action. Judge Robart enjoins Motorola from enforcing the German court's judgment. Noting the unique circumstances of the case, the Ninth Circuit Court of Appeals affirms.[10] Now the whole world is watching.

With numerous claims and counterclaims pending, motions are denied in part and granted in part. By June of 2011, the cases are consolidated, the issues are narrowed, and the case is ready for trial. Somewhere in between, Google acquires Motorola.

The court divides the consolidated case into two parts in 2012: a bench trial followed by a jury trial if necessary. The bench trial will determine the RAND royalty rate and range, a "heavily disputed, fact-sensitive issue that must be resolved by a finder of fact."[11] The jury trial will use this RAND rate and range to determine whether or not Motorola has breached its RAND commitments, and breached its duty of good faith and fair dealing.[12]

The bench trial begins on November 13, 2012, and ends just five days later. The two parties take very different approaches to determining the RAND rate for Motorola's patents. Microsoft argues for "multilateral ex ante simulation" involving multiple parties. Motorola argues instead for a "simulated hypothetical bilateral negotiation" between the two parties using the *Georgia-Pacific* factors. Royalty stacking, hold-ups, and H.264 and 802.11 all play prominent roles.

> ***Footnote 23 of the ruling, spanning three pages, shows how the court "performs simple algebra to calculate the RAND rate….": 2x(P+ - P. - OC) + E = A+ - A. – OC.***

On April 25, 2013, Judge Robart issues the Findings of Fact and Conclusions of Law: 207 pages, more than a dozen of Motorola's suggested *Georgia-Pacific* factors, six parts of analysis, and one amazing algebraic footnote. Footnote 23 of the ruling, spanning three pages, shows how the court "performs simple algebra to calculate the RAND rate….": 2x(P+ - P. - OC) + E = A+ - A. – OC.[13]

By the fall of 2013, a jury finds Motorola in breach of its contractual

obligation to license on RAND terms, and awards Microsoft $14.5 million in damages; more than $11 million of them for the distribution center relocation costs.

Since then, Motorola has appealed to the Federal Circuit Court of Appeals, responsible for cases arising under patent law. Microsoft moved to transfer the case to the Ninth Circuit based on contract. Judge Robart calls it a breach of contract case; the Ninth Circuit notes "the contractual umbrella over the patent claims."[14] And in May of this year, the Federal Circuit agreed and granted Microsoft's requested transfer, ruling it "plausibly supports the Ninth Circuit's conclusion that this matter does not arise under the patent laws."[15]

The Impact: Within Our District

Around the time the *Georgia-Pacific* court was laying out its factors in 1970, attorneys Ralph Palumbo, Arthur Harrigan, and then-attorney Judge Robart were beginning their legal careers at Lane Powell. This history, and such collegiality, plays an important part in our district, and in this case. Though they view the case from very different perspectives, the mutual respect they hold for each other is evident. As Microsoft trial counsel Mr. Harrigan pointed out, the extra pressure in the courtroom when the parties know each other provides an extra incentive to do your best.[16]

The result is a good, clean, succinct case. The parties requested three months for trial; Judge Robart gave them one week. As Motorola counsel Mr. Palumbo noted about the process, the tight management of the case forced the parties to focus on what is most critical, and conserve scarce judicial resources. Such judicial economy "is a service to our justice system, and this trial was illustrative of that."[17]

The Impact: Beyond Western Washington

People had points of view on this case even before the decision, and will continue to debate until the issue is fully settled. While little was reported in local media, IP watchers around the world immediately predicted that it would be "influential in other jurisdictions, throughout and beyond the United States."[18] Indeed, late last year, the Northern District of Illinois applied a modified version of the court's methodology to determine a RAND rate.[19] Just this summer, Japan acknowledged the case when it calculated its own RAND damages for the first time. *Microsoft v. Motorola*, whatever the eventual outcome, has introduced a methodology that appears to be taking hold.

Countries transitioning from making things to creating them, like China, are watching this area of the law closely. Countries with many patents, like Germany, want to ensure that patent holders are treated fairly. Countries with well-developed patent law, like Japan, want to keep up with the dizzying pace of changes in IP. Whether securing patents or manufacturing products that use them, countries with different legal frameworks and different procedures are grappling with the same questions.

The court was recently visited by four current and former members of Japan's IP High Court. A Japanese Grand Panel case is one that is heard by a panel consisting of the Chief Judge and Presiding Judges from each of the IP High Court's divisions.

In the year since his decision, Judge Robart has spoken to our own IP Bar, to groups within our circuit, and to audiences in four different countries. He is on a first name basis with people with long pedigrees and longer bios: members of the IP Hall of Fame, members of the IP Tribunal of the Supreme People's Court of China, Chief Justices, even one Right Honourable Professor Sir, former Lord Justice of Appeal. All share an interest in international "harmonization."

As one Japanese law professor observed, it appears that Judge Robart's opinion is also having an impact on case law development in Japan. The court was recently visited by four current and former members of Japan's IP High

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Court. A Japanese Grand Panel case is one that is heard by a panel consisting of the Chief Judge and Presiding Judges from each of the IP High Court's divisions. Grand Panels are called in order to achieve a unified decision early on because these decisions have the effect of setting up new rules and frameworks for business.

In a visit described by Judge Robart as "humbling," Chief Judge Shitara and recently-retired Chief Judge Iimura discussed their groundbreaking May 2014 Grand Panel decision in *Apple v. Samsung*. Their case is the first time they have examined FRAND damages. As Chief Judge Shitara outlines the key issues and the court's approach, there is just a hint of Judge Robart's smile. The underlying policy for their FRAND royalty calculation is in line with that applied in *Microsoft v. Motorola*.

As much of Seattle planned for a warm Seafair weekend, this small group of judges joined others at the University of Washington to discuss hot topics in IP law.[20] Stepping into the elevator of the courthouse, the judges smiled when we headed toward the 17th floor. It is the same floor as the IP Court in Tokyo. Before they left, they posed for a picture under the watchful eye of the Space Needle and the construction cranes that reflect the high-tech environment our district encompasses. From elevators to analytical frameworks, we have much in common.

Melissa Muir is the Administrative Services Director for the United States District Court for the Western District of Washington.

[1] *Microsoft Corp. v. Motorola, Inc., No. C10-1823, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013).*

[2] *Ryan Davis, Landmark Motorola FRAND Ruling May Serve as Roadmap, Law 360 (Apr. 26, 2013),* http://www.law360.com/articles/436295/landmark-motorola-frand-ruling-may-serve-as-roadmap; *US District Court Issues First Decision Calculating a FRAND Royalty for Standard-Essential Patents, Skadden, Arps, Slate, Meagher & Flom LLP Insights (Apr. 29, 2013),* https://www.skadden.com/insights/us-district-court-issues-first-decision-calculating-frand-royalty-standard-essential-patent; *Catching up on… Microsoft v. Motorola, Essential Patent Blog (Jan. 2, 2013),* http://www.essentialpatentblog.com/2013/01/catching-up-on-microsoft-v-motorola/; *Florian Mueller, Microsoft wants Google to pay for relocation of European logistics center due to FRAND breach, FOSS Patents (May 2, 2013)("This continues to be the most interesting FRAND case ever"),* http://www.fosspatents.com/2013/05/microsoft-wants-google-to-pay-for.html.

[3] *Georgia-Pacific Corp. v. United States Plywood Corp., 318 F.Supp. 1116 (S.D.N.Y. 1970).*

[4] *Skadden, Arps, Slate, Meagher & Flom LLP Insights, supra note 2.*

[5] *Brinks, Gilson & Lione Client Alert (Oct. 7, 2013), District Court Sets RAND Rate for Portfolio of Standard Essential Patents,* http://www.brinksgilson.com/news_events/3701-district-court-sets-rand-rate-portfolio-standard-essential-patents.

[6] *Telephone interview with Arthur W. Harrigan Jr. and Shane P. Cramer, Partners, Calfo, Harrigan, Leyh & Eakes, counsel to Microsoft (July 29, 2014).*

[7] *If companies cannot agree on 'reasonable' patent royalties, courts must decide. How?, Economist, May 11, 2013, at 83, available at* http://www.economist.com/news/finance-and-economics/21577360-if-companies-cannot-agree-reasonable-patent-royalties-courts-must-decide.

[8] *Janet I. Tu, Judge Scolds Microsoft, Motorola in latest court feud, Seattle Times, May 7, 2012, available at* http://seattletimes.com/html/businesstechnology/2018162163_microsoftmoto08.html.

[9] *Interview with Arthur W. Harrigan and Shane P. Cramer, supra note 6.*

[10] *Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 889 (9th Cir. 2012).*

[11] *Microsoft Corp. v. Motorola, Inc., No. C10-1823, 2013 WL 2111217, 3 (W.D. Wash. Apr. 25, 2013).*

[12] *Microsoft Corp. v. Motorola, Inc., WL 5373179, slip op. at 1 (W.D. Wash. Sep. 24, 2013).*

[13] *Microsoft Corp. v. Motorola, Inc., No. C10-1823, 2013 WL 2111217, 85 (W.D. Wash. Apr. 25, 2013).*

[14] *See Microsoft Corp. v. Motorola, Inc., 696 F.3d 872 at 883.*

[15] *Microsoft Corp. v. Motorola, Inc., WL 1760369, 3 (Fed. Cir. 2014).*

[16] *Interview with Arthur W. Harrigan and Shane P. Cramer, supra note 6.*

[17] *Telephone interview with Ralph H. Palumbo, Founding Member, Summit Law Group, counsel to Motorola (July 25, 2014).*

[18] *Florian Mueller, A closer look at the 207-page, landmark FRAND rate-setting decision in Microsoft v. Motorola, FOSS Patents (Apr. 28, 2013),* http://www.fosspatents.com/2013/04/a-closer-look-at-207-page-landmark.html.

[19] *PUBLIC version of Judge Holderman's RAND determination in Innovatio WiFi SEP litigation, Essential Patent Blog (October 3, 2013),* http://www.essentialpatentblog.com/2013/10/public-version-of-judge-holdermans-rand-determination-in-innovatio-wifi-sep-litigation/.

[20] *University of Washington School of Law's Center for Advanced Study & Research on Intellectual Property (CASRIP), 2014 High Technology Protection Summit, July 25-26, 2014,* http://www.law.washington.edu/Casrip/Summit/Default.aspx.

Continued from page 8

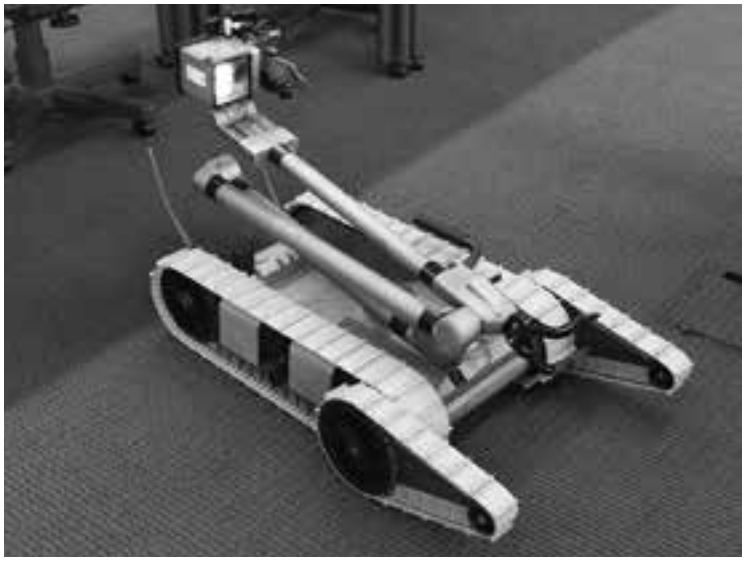
to meet specially trained K9s, and to handle, among other things, law enforcement equipment and gear, counterfeit cash, and illegally trafficked animal pelts.

In the afternoon, the students themselves participated in a mock trial – a criminal case involving the timely topic of texting while driving. In short, a hypothetical defendant was on trial for causing a car accident that injured his passenger. Students assumed the roles of attorneys, witnesses, and jury. One lucky student even served as the judge, fully armed with a gavel, robe, and Judge Jones's mentorship. Volunteer coaches, former FBA President Jennifer Wellman, Roscoe Jones, and Robert Flennaugh, offered tips on technique and strategy. As a testament to the skill of the student-attorneys involved, after much deliberation, the jury was gridlocked and hung on all counts.

In addition to mingling with agents and officers, students had the chance to observe firsthand a bomb robot in action, to meet specially trained K9s, and to handle, among other things, law enforcement equipment and gear, counterfeit cash, and illegally trafficked animal pelts.

In all, Youth Law Day offered a preview of many future opportunities for these 35 college-bound high school students. The event exposed them to a variety of potential careers. It fostered curiosity and provided access to people, information, and new experiences. The event also encouraged the students to chase their goals through education, persistence, and grit. But, above all, it was fun for all who participated. A special thanks is owed to those who volunteered.

Steven T. Masada is an Assistant United States Attorney and serves as Co-Chair of the Criminal Law Committee



The Federal Bar Association of the
Western District of Washington invites you to

SAVE-THE-DATE(s)

September 26, 2014
October 17, 2014
November 3, 2014

Free three-part CLE

FRIDAY, SEPTEMBER 26
PART I: The Honorable Robert S. Lasnik, Case Management and Discovery

FRIDAY, OCTOBER 17
PART II: The Honorable Richard A. Jones, Motion Practice/TRO

MONDAY, NOVEMBER 3
PART III: The Honorable James L. Robart, Trial/Technology

All times are 12:00 PM to 1:30 PM (check-in for participants at 11:30 AM).

LOCATION: United States Courthouse,
700 Stewart Street, 19th Floor, Seattle

More information to follow from the FBA
Co-Chairs of Local Rules Committee:

Michelle Peterson ***michelle.peterson@dlapiper.com***
Miles Yanick ***myanick@sbwllp.com***

The Federal Bar Association of the Western District of Washington invites you to

SAVE-THE-DATE

Friday, January 23, 2015

Free CLE

Effective Oral Advocacy: A View from the Bench

Distinguished Panel Members:

Presiding Judge Susan J. Craighead
King County Superior Court

Chief Justice Barbara Madsen
Washington Supreme Court

Chief Judge Marsha J. Pechman
United States District Court for the Western District of Washington

Chief Magistrate Judge Mary Alice Theiler
United States District Court for the Western District of Washington

Moderated By:

United States Attorney Jenny Durkan

WHEN: January 23, 2015, *Tentative start time at 3:00 p.m.*

LOCATION: United States Courthouse,
700 Stewart Street, 19th Floor, Seattle

More information to follow from the FBA Co-Chairs of membership:
Cynthia Jones & Karen Orehoski

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