

UNITED STATES

INTERNATIONAL TRADE COMMISSION

2016 ITC TRIAL LAWYERS ASSOCIATION ANNUAL MEETING

MAJOR DEVELOPMENTS IN SECTION 337 FROM 1922 TO TODAY

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TRADE COMMISSION

2016 ITC TRIAL LAWYERS ASSOCIATION
ANNUAL MEETING

MAJOR DEVELOPMENTS IN SECTION 337 FROM 1922 TO TODAY

500 E. STREET S.W.
WASHINGTON, DC 20436

NOVEMBER 15, 2016
1:00 P.M.

1 PARTICIPANTS:

2

3 CHAIRMAN IRVING WILLIAMSON, U.S. INTERNATIONAL TRADE

4 COMMISSION

5 SARAH HAMBLIN, PARTNER, ADDUCI, MASTRIANI & SCHAUMBERG, LLP

6

7

8 CENTENNIAL PANEL:

9

10 MODERATOR: BERT REISER, PARTNER, LATHAM & WATKINS LLP

11 SMITH BRITTINGHAM, PARTNER, FINNEGAN, HENDERSON, FARABOW,

12 GARRETT & DUNNER, LLP

13 TOM JARVIS, PARTNER, WINSTON & STRAWN LLP

14 STURGIS SOBIN, PARTNER, COVINGTON & BURLING LLP

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1 P R O C E E D I N G S

2 (1:46 P.M.)

3 MS. HAMBLIN: Could I have the first panel come
4 forward please? So the first panel today is the history
5 panel I mentioned, the Evolution of Section 337 Litigation
6 at the ITC, Discovery, Briefing, Hearings, Opinions and
7 Other Investigating Procedures. The moderator is Bert
8 Reiser and I will ask him to introduce the rest of the
9 panelists.

10 MR. REISER: Good afternoon my name is Bert
11 Reiser. I'm going to be the moderator on this panel on the
12 evolution of Section 337 Litigation at the ITC. I want to
13 begin by introducing these practitioners who really don't
14 you know, three guys who don't exactly need an introduction
15 but that doesn't get me off the hook of having to do that so
16 I am going to introduce them anyway.

17 Starting at my far left is Tom Jarvis. Tom is a
18 partner at Winston & Strawn here in Washington, D.C. He is
19 the Chair of the ITC practice group there. He also serves
20 on the Executive Committee and Compensation Committee at
21 that firm. He has litigated more than 50 ITC cases, he is
22 ranked in the Major Directories Chambers Legal 500 I.M.
23 Patent 1000 and he served for 10 years as a staff attorney
24 in the Office of Unfair Import Investigations.

25 Tom reminded me that during his tenure at OUII he

1 had two tasks that were assigned to him in particular --
2 that it touched on all of our lives in a really sort of
3 fundamental way. First in 1993 he created the online 337
4 Investigational History that provides a great deal of
5 institutional knowledge about 337 cases going back I think
6 to the beginning. Right, Tom?

7 MR. JARVIS: Well I wasn't there at the
8 beginning.

9 MR. REISER: But the database does. And then in
10 1996 he created the Commissions electronic document
11 information system known to all of us as EDIS and that has
12 truly been -- if we are going to talk about the evolution of
13 337 litigations was a profound change and a big step and an
14 important part of our practice now.

15 To Tom's right is Smith Brittingham. Smith is a
16 partner in the D.C. office of Finnegan, Henderson -- he
17 co-chairs Finnegan's ITC practice, he was also an OUII
18 investigative attorney prior to entering private practice at
19 Finnegan. He has also appeared more than 50 investigations
20 including more than 20 ITC hearings.

21 To my immediate left is Sturgis Sobin. Sturgis
22 is a partner to the D.C. office of Covington. His career is
23 focused on litigation in the ITC and at the District Court
24 of Intellectual Property Disputes. He has also appeared in
25 more than 50 ITC investigations -- including more than 20

1 ITC hearings.

2 I have known these gentlemen my entire career. I
3 have been in cases against them, I have been in cases with
4 them when we have represented co-Respondents. I served at
5 the same time in the ITC as Smith and Tom -- they are
6 outstanding attorneys, very fierce competitors and very
7 interested and insightful observers of the ITC practice and
8 the bar and I am very proud to be here today with you guys,
9 thank you.

10 Before we start and really jump in I just want to
11 say a couple of sort of opening remarks, introductory
12 remarks. The panel is about the evolution of Section 337
13 litigation which is truly immensely broad subject matter.
14 There has been a lot of changes in our profession in this
15 particular practice over the years -- legal changes specific
16 to 337 and general to the law generally and patent law in
17 particular.

18 Huge economic changes, both in the practice of
19 law and I guess specifically with respect to the value and
20 significance of patents in our economy. There have been
21 huge -- very fundamental cultural changes, again in the
22 practice of law and in our bar in particular. We are going
23 to talk about all of those things and how they have affected
24 the evolution of ITC practice and what they mean to our
25 profession and what we do every day.

1 But before we get there we all thought it would
2 be worthwhile to take a step back and look at how the
3 statute has changed over the years and it has changed really
4 quite profoundly. Now this has been the subject matter of a
5 great deal of lectures over the last year, this being the
6 Centennial of the Commission and we are not going to take
7 anything like the deep dive that some of the lectures have
8 taken over the last year -- we are going to sort of hit
9 across the top and just make sure that people who may not be
10 familiar with the vast changes in the statute have a little
11 bit of understanding about that and then we will work into
12 these other issues.

13 So having said all of that Sturgis if you
14 wouldn't mind reminding us a little bit of what the practice
15 and the statute were like before 1974 and how it changed
16 with the 74 amendment.

17 MR. SOBIN: Oh sure and let me say thank you to
18 the Trial Lawyers Association and to the fellow members on
19 the panel here for the opportunity to be here. I am just
20 going to observe a couple of things about the pre-'74 and
21 the post-'74 worlds such as they are and I think I'll begin
22 by saying that the fact that I was assigned the pre-'74 a
23 part of the panel certainly should not suggest anything
24 about how long I have been at this.

25 By whatever I know I learned at the foot of the

1 true elders in this practice and I know that there are
2 several here who have really you know, made some very
3 fundamental contributions. So with that let me jump in and
4 I guess I'll first say a few words about the period that ran
5 from essentially 1930 when we first had what I think many
6 people view as a modern version of 337 up to '74.

7 And in that period I would imagine the most you
8 know, significant things that we might observe relative to
9 the world that we are in now is that the investigations were
10 largely informal adjudication. In many instances they never
11 proceeded beyond a preliminary investigation. Those that
12 actually made it to hearing you would have a Commission who
13 usually would preside at the hearing.

14 They were made up of a team of economists,
15 lawyers, et cetera, et cetera and did not have anything that
16 would resemble the procedural elements of the 337 practice
17 that we have now. I did find a report online from 1968 that
18 summarized 337 outcomes -- roughly from the period 1949
19 through 1968.

20 And they totaled some 34 separate investigations.
21 As I went through and read the outcomes I failed to see a
22 single one that actually resulted in a remedy. So for
23 various reasons you know whatever people were doing in that
24 period didn't actually manage to make a difference when it
25 came to remedy.

1 There was one instance -- one thing significant
2 about that period was that the remedy element was somewhat
3 inversed of what we see now and that is it was only the
4 President who had authority to ultimately impose a remedy --
5 the Commission could recommend one. It was the President
6 who actually had to make the final decision on that.

7 And there was one violation finding that was
8 reported in the summary and the President proceeded not to
9 issue a remedy for that. So we didn't see a lot of -- I
10 think significant violation findings and remedies in that
11 period. When I looked at the issue of how long the
12 investigations were running back then I was surprised to see
13 that it is very similar to what we have now.

14 That is the Commission on average for those that
15 went to hearing and resulted in a decision it ran about a
16 year and a half. So in that sense the world hasn't changed
17 a whole lot. I think the only other thing I would have
18 observed is that those of us who are familiar with the
19 200-300 page ID's we see now in the Commission opinions
20 which add on to that would be surprised and maybe pleasantly
21 surprised to see how abbreviated the Commission actions were
22 in that prior period.

23 There was one patent case that I looked up in
24 that period -- the entire patent's determination was a very
25 crude claim chart. And that was all that one could observe

1 with respect to the patent findings. They did spend a lot
2 more time on the injury elements of the statute in that
3 early period.

4 So moving forward to '74 I think the most you
5 know significant thing for you know those of us who were
6 practicing in that period was that the law was amended to
7 move 337 from informal adjudication to formal adjudication,
8 on the record under the APA. And I'll just say from my
9 perspective as a baby lawyer at that point in time I was
10 working on the Title 7 and other trade investigations as
11 well as you know 337 and the fact that you had formal
12 adjudication -- where you could get discovery, there was an
13 ALJ who had developed experience and expertise in the patent
14 law would essentially referee the process and you had a
15 trial where there was actually cross-examination.

16 These were huge when I just opposed that with
17 what I was seeing in the Title 7 cases which have some of
18 those attributes but it wasn't anything like what you would
19 find with formal adjudication.

20 So first and foremost in my mind was the adoption
21 of this as a formal adjudicatory proceeding that included
22 discovery and other elements that I mentioned. At that
23 point in time too I think in part, as a reaction to the fact
24 that there weren't many investigations that were actually
25 making it across the finish line in terms of violation

1 findings and issuance of a remedy, the Congress decided to
2 give that remedy authority to the Commission with the
3 President only having a veto in that 60 day period,
4 essentially the paradigm that we all live under right now.

5 I think the third most significant or significant
6 aspect of that was the adoption of a firm 12 month period to
7 the investigations. You will hear in a minute what happened
8 with that but it did cease to solidify the fact that these
9 were proceedings that were intended to move fast and as I
10 look back and think about what has made this practice what
11 it is now and as successful as it is -- is the fact that
12 that you know, time period was hard baked into the law at
13 that point in time I think was very significant.

14 So I think I will leave it at that -- that's
15 probably enough on ancient history.

16 MR. REISER: Now that I know that the Commission
17 wasn't issuing remedies before 1974 I understand better was
18 the '74 Act happened. Smith 1988, some pretty fundamental
19 amendments, can you take us through those?

20 MR. BRITTINGHAM: Sure. So the 1988 amendments
21 have been discussed in a great deal of detail, almost
22 everybody has a presentation on it somewhere -- I have
23 three. But it really is I think the moment the ITC kind of
24 -- the ITC became sort of a teenager in the '74 Act and it
25 was full-grown with the '88 Act. And now since then it is

1 refinements and modifications but the '88 Act probably did
2 as much as anything to turn the process into what we know
3 today.

4 Now the background you know economically and in
5 the late '70's after the '74 Act, the early '80's there was
6 still you know -- concerns about loss of American industry,
7 particularly on the technology sector, a slightly unrelated
8 tangent.

9 I did a mass work case when I was in the ITC as
10 the OUII lawyer. That was a Semi-Conductor Chip Act of 1984
11 -- everybody thought that the foreign companies were just
12 copying our chips and taking away our industry. That turned
13 out not to really be true which is why there is only 2 mass
14 court cases ever in history.

15 But that was the kind of -- you know thinking
16 that was going on. The technology was just leading the way
17 over the border. And so that was kind of the mindset of
18 what led to ultimately the '88 Act. And to remember the '88
19 Act was actually the Omnibus Trading Competitiveness Act of
20 1988 so you know if titles tell you anything it gives you a
21 sense of what they were really trying to go for.

22 So the amendments are pretty clear. First they
23 eliminated the former requirement in the '74 Act that the
24 domestic industry be efficiently and economically operated.
25 That was an added problem but it turned out some people were

1 unable to meet or people weren't sure how to meet it.
2 Instead you just have to have a domestic industry and nobody
3 cares if you are really lousy at it.

4 You also have the statute eliminates the need to
5 prove injury. And if you are relying on a patent,
6 registered trademark, copyright, mass court, I think there's
7 a boat design -- I'm waiting for the first boat design case
8 -- so again that eliminated a lot of the uncertainty and
9 also some of the need for there to be sort of a competitor
10 versus competitor-type of economic situation that would
11 allow you to show harm from the infringing imports. That
12 would be presumed for most of the cases and it is not a
13 coincidence I think that you see if you go back into the
14 pre-'88 cases you will see a lot of passing off and unfair
15 competition and trademark and things like that.

16 Common law marks -- once you get past '88 it
17 starts going heavy duty into patents and now we are at 97%
18 of whatever Juliana said it was a little bit ago. Strength
19 and temporary exclusion orders which weren't really used but
20 now you had a very short amount of time that needed to be
21 done.

22 It increased civil penalties -- if you violated
23 Cease and Desist Order it gave the Commission the ability to
24 sanction parties if they enacted a Rule 11-style rule which
25 they eventually did. And then the big one -- Prong C to the

1 domestic industry -- so what used to be considered by the
2 Commission as a -- domestic industry was production related
3 activity.

4 There are some lines in the '74 Act history --
5 legislative history, in cases involving the claims of U.S.
6 patents -- the patent must be exploited by production in the
7 United States. That was in the Congressional record 1973.
8 So from that point on everybody said, "Okay you have to
9 produce in the United States."

10 Prong C eliminated that requirement essentially
11 put production into Prongs A and B and instead added this
12 new section Research and Development, Engineering and
13 Licensing. And most people point out that that was in
14 response to the Gremlin's case. The Gremlin's case is also
15 kind of a fun little case but the bottom line of the
16 Gremlin's case was that there was a domestic industry by
17 licensees of the company that owned the copyright to the
18 Gremlin's characters in the United States.

19 But they were making different things. They were
20 making -- I forget, lunch boxes and they were trying to keep
21 out shirts or something like that so there was no harm. And
22 so the requirement to show harm to the domestic industry was
23 one of the reasons why they lost that case and then the
24 Commission tried to do them a favor by saying, "Well the
25 licensing could be a domestic industry and you do license,"

1 but that didn't survive.

2 So Congress decides to re-write or add a new
3 statute that clearly does not require production in the
4 United States, is designed to cover things like
5 universities, people who license their technology. You know
6 30 years later we think that's maybe not as good of an idea
7 as it was at the time, depending on your point of view.

8 But at the time it was designed to help sort of
9 what was becoming the American economy -- which was a
10 technology development economy not a manufacturing economy.
11 So I think in terms of effect the Prong C addition clearly
12 added a whole slew of new potential complainants.

13 It added probably a number of foreign
14 complainants which would not have been able to meet the
15 pre-1988 domestic industry requirement because that would
16 have expected U.S. production. So we know now that
17 complainants are probably across the board from every --
18 from Europe, Asia, the United States, and it is in large
19 part due to the addition of Prong C.

20 People -- you know there has been more
21 controversy about the licensing arm of Prong C which you
22 know had a kind of a heyday and right now as I think just
23 from whatever the opposite of a heyday is but the research
24 and development side of Prong C has been really kind of the
25 life blood of the 2000's and 2010's era of 337 practice. So

1 I will leave it at that.

2 You know procedure-wise actually not that much
3 changed. You still had ALJ's, you still had discovery you
4 know, so those things you know, they modified over time but
5 I think in this particular amendment it was really the
6 substance and the additional jurisdiction that basically was
7 created, that changed things.

8 MR. REISER: Tom and I don't remember what year
9 it was we had the Uruguay Round in '90-something, '93, I
10 don't know but what happened there?

11 MR. JARVIS: Well the Uruguay Round was an
12 interesting exercise in sort of sovereign objections to what
13 was going on in extra territorial activity. So how many
14 people actually were -- how many people were out of law
15 school by 1990? I was -- maybe 20% okay so most of you this
16 pre-dates you, it may pre-date some of your graduation from
17 high school or even birth.

18 But back in the old and dangerous days basically
19 Judge Luckern found that aeroman fibers imported by a
20 company in the Netherlands were in violation of some patent
21 rights and ultimately the Commission excluded those
22 products.

23 The Netherlands took exception to this on a
24 number of grounds and got some international support of our
25 Japan, South Korea and others who really didn't much like

1 337 and they went to the GATT which is the predecessor of
2 WTO. And they complained that this 337 procedure was in
3 violation of the GATT requirement for national level
4 treatment. National level treatment is just short-hand for
5 saying that all companies, all entities will be treated
6 equally by member nations.

7 So they said it is a violation of GATT that the
8 U.S. has this funny 337 proceeding and they ultimately
9 convened a panel. The panel finds violations on six
10 different grounds and the General Assembly, General Counsel
11 of the GATT affirmed on those and by 1999 the U.S. had been
12 found in violation of its treaty obligations.

13 The U.S. interestingly did not use its veto power
14 to stop that finding. And so what ends up occurring is that
15 instead of battling out of GATT the Congress made some
16 statutory changes. Those changes addressed most of the six
17 grounds -- I'll go through them in just a second. My
18 personal involvement of this was when I first arrived at the
19 Commission in 1989, Lynn Levine assigned to me -- being a
20 part of the technical review team for this.

21 It sounds like a great job but what it basically
22 meant was proofreading the draft statutory changes. So
23 proofreading never being my strongest suit I really
24 struggled with this my first few days on the job. Here's
25 what the GATT panel had found. That the complainants had a

1 choice before them between a U.S. District Court and the
2 Commission on most theories of a violation and that was
3 inequitable.

4 Now this sounds kind of archaic now because we
5 are very accustomed to having a complainants whose
6 headquarters are based outside of the United States -- it's
7 kind of hard to say they are foreign companies because most
8 of these big companies are global now, but at that time
9 there was a perception that 337 was a protectionist statute,
10 used against foreign companies, or what we think of them now
11 is foreign headquartered companies.

12 Ultimately the Congress made no adjustment for
13 this because there was no bar to foreign headquartered
14 companies filing 337 complaints so long as they could meet
15 the domestic industry and importation requirements. They
16 were free to file a complaint as well as a U.S. based
17 entity.

18 The second grounds adopted by the GATT were that
19 the expedited procedures which were statutory then of
20 completion of investigation in 12 months -- 18 months in
21 exceptional cases, was an unfair advantage. This was
22 particularly read in light of other grounds where there
23 might be dual procedures.

24 And so in this instance the Congress did make a
25 change. The statutory requirement of 12 or 18 months was

1 replaced with a requirement that the ITC decide cases at the
2 "earliest practical time" and set target dates within 45
3 days of institutional investigation, a target date for final
4 completion of the investigation.

5 I think Juliana's PowerPoint earlier showed that
6 in most instances the Commission is still able to meet those
7 earliest practical time points and most investigations are
8 terminated within about 16 months. So although there was a
9 change in the statutory language the actual effective
10 implementation by the Commission never suffered and never
11 really slowed down.

12 The GATT panel had also complained that there
13 were no counterclaims available at the Commission. Now this
14 sounds funny to us now because we do know that there was a
15 change made, that if someone wanted to file a counterclaim
16 with the Commission that was permissible and it would be
17 immediately removed from the U.S. District Court and the ITC
18 investigation would not be adversely affected.

19 But in reality what happened of course is people
20 didn't involve so many counterclaims, I think I have been
21 involved in one in the last 30 years, instead they filed
22 counter cases. So now we see pairs of cases rolling out and
23 many of these companies have been in negotiations for
24 prolonged periods of time before a complaint is first filed
25 and that second filed complaint is often in the can and

1 ready to go just in case it is needed.

2 So that was the practical resolution of that
3 problem. The GATT panel report found general exclusion
4 orders were not available in District Court proceedings and
5 that that was inequitable. But again this pre-supposes that
6 foreign headquartered entities were not able to file a 337
7 complaint. We have already dispatched that notion.

8 But there was a statutory fix which said that a
9 General Exclusion Order would be appropriate only if one --
10 it was necessary to prevent circumvention of a Limited
11 Exclusion Order or alternatively whether there is a pattern
12 of violation and a General Exclusion Order is necessary for
13 an effective remedy. So those are the two alternatives.

14 As Juliana mentioned earlier I keep referring
15 back to her statistics, there have been relatively few
16 General Exclusion Orders over the years, but they have been
17 very effective in dealing with situations where the source
18 of original of products are not really well-known.

19 The GATT panel report complained that Limited
20 Exclusion Orders and General Exclusion Orders enforced by
21 Customs, whereas injunctions required private enforcement.
22 Congress didn't seem to take too great a note of that and no
23 statutory changes resulted.

24 And then there were the final grounds which are
25 the possibility of dual track proceedings in the ITC and the

1 District Courts. Of course as you all know Congress amended
2 the statute to permit or to entitle 337 Respondents to
3 unilaterally obtain a stay of District Court proceedings on
4 the same claims which generally meant the same patents as
5 has been interpreted.

6 So those are the major issues that arose from the
7 GATT panel report and were reflected in the Uruguay Round
8 amendments. There were two other amendments in somewhat
9 independent of the GATT panel report and one was to modify
10 the bond provisions. Previously if there was an Exclusion
11 Order and importation was permitted under bond, then the
12 bond would ultimately be released to the Treasury and I
13 think it was more appropriately modified to release it to
14 the complainant in the case.

15 And in terminations of investigations you know
16 there was a time when there were only I think three
17 enumerating grounds for terminating the investigation and an
18 arbitration investigation was not one of them and so there
19 were unfortunately some cases which floundered on that issue
20 and Congress made a fix, perhaps instigated by the
21 Commission itself to address this so now there is statutory
22 authority to terminate on grounds such as an arbitration
23 obligation.

24 So those were the major changes that came about
25 with the Uruguay Round which we still operate under today.

1 MR. REISER: Thank you Tom. Now as you mentioned
2 this and I don't mean to put you guys on the spot but I
3 can't -- certainly not in my own personal experience anyone
4 filed a counterclaim that was removed to a District Court,
5 have you had that experience? I can't recall --

6 MR. JARVIS: I had one.

7 MR. REISER: One, okay, interesting.

8 MR. BRITTINGHAM: If I did I forgot about it, it
9 worked so well.

10 MR. REISER: There are 100 places I suppose to
11 jump in but when I come to these events one of the things
12 that always comes to mind is just how much our bar has
13 changed over the course of my career. When I started in
14 this business a very long time ago I was working for Judge
15 Luckern here at the Commission and I was being tutored by a
16 young David Shaw figuring out what this was all about. It
17 was a very, very different practice -- and a very different
18 bar.

19 I wonder Sturgis if you could talk a little bit
20 about how the bar has changed and what that has meant for
21 you and how you see it going in the future?

22 MR. SOBIN: Sure. Thank you. I think Bert's
23 right there have been some very significant you know changes
24 in the bar. I'll sort of refer to that as really the
25 business model of how we do the cases and who does the

1 cases. And it begins -- let's go back to the '74 Act and
2 the period moving forward from there. The world at that
3 point was essentially one in which these 337 investigations
4 were -- at least the larger IP related investigations were
5 almost always handled by a combination of a boutique
6 practice -- a trade boutique practice here in D.C. along
7 with a patent firm with the trade boutique supplying
8 expertise with respect to the forum and often handling -- at
9 least until the amendments, the injury requirements under
10 the statute.

11 And they would partner with large patent firms, a
12 number of them up in say New York, some here in the D.C.
13 area and that was a model that really prevailed for a number
14 of years. Over time that model began to evolve and has
15 changed in some really fundamental ways.

16 And the change that has occurred has you know
17 occurred alongside some of the changes that we have observed
18 with respect to the statute and the cases that were being
19 brought. And I have seen it from multiple sides -- having
20 the good fortune to be you know associated with I think each
21 of the business models along the way from there to here.

22 And eventually over time what we saw was that a
23 number of the major trade boutiques were absorbed or
24 acquired by larger you know, general practice firms here. I
25 say most certainly not all, we still have some you know

1 wonderful trade boutiques out here. But there were a lot
2 more back then and that world has changed.

3 What we also saw along the way was some of the
4 general practice firms absorbing either patent firms, or
5 patent practices within a firm. What that led to over time
6 was a larger amount of the 337 work -- at least in the
7 larger cases and certainly in the patent cases being handled
8 by -- you know general practice firms.

9 And if I think back about the time period there
10 -- certainly a major case like the TI, the D-RAM case in
11 '86-'87 I think of as a really significant you know, event
12 that I think accelerated the practice. I remember back to
13 the ceremonial hall at the ICC where Judge Saxton sat in
14 front of their. I mean they had to have been like 150
15 lawyers in there in that room for the D-RAM case.

16 Obviously people paid attention. There was a lot
17 of money associated with you know, working on these
18 significant 337 cases. So I think from that point into the
19 '90's we saw the trend continue to the point where it is now
20 where I think -- I just look at my own career where I have
21 ended up in a large general practice firm and I think a lot
22 of the you know, a lot of the firms that we see day-to-day
23 have a similar model.

24 It is important for me to say that there remains
25 a very vibrant role still being played by the boutique and

1 that role to me the fact that it has you know, survived
2 perhaps not the number that we had back in the early '80's
3 or '70's indicates that there continues to be a very
4 important need and role for you know, a different -- if you
5 will animal within the broader practice to be able to do the
6 work.

7 If I'm asked to look into the crystal ball and
8 see if there are any changes --

9 MR. REISER: That's what we are asking you to do.

10 MR. SOBIN: I'm not certain I see a lot of change
11 in the underlying you know, business model. It certainly is
12 not of the magnitude that we saw through the '80's and the
13 '90's. I do think, and this is just my personal
14 observation, we did see a number of firms either you know
15 enter or attempt to enter the practice during the height of
16 the smart phone wars. I think that's dropped back a little
17 bit and I think we may see a little bit of movement up and
18 down you know in terms of who's out there and what resources
19 they wish to focus on the ITC practice.

20 I don't see a fundamental change likely so long
21 as the law itself remains the way it does you know right
22 now.

23 MR. REISER: Tom on some superficial level I
24 usually think of the ITC 337 practices as kind of a D.C.
25 centric practice but that's not necessarily true is it?

1 MR. JARVIS: Well I started off in '85 in New
2 York in the Kenyon firm. At that time Kenyon and Fish &
3 Neave were the two largest patent firms in the world at 50
4 lawyers. You have departments in firms now that are larger
5 than that. I remember something that was pointed about the
6 early days which was there was no easy way to research 337
7 cases.

8 There was no treatise. West law was still brand
9 new. 337 cases were only working into the West law and
10 Lexis systems. And at Kenyon we had something called the
11 compendia -- which was something the associates wrote for
12 internal references. What are the cases and what do they
13 mean -- that eventually became Don Duvall, you know Judge
14 Duvall retired, went to Kenyon published a book based on
15 that.

16 There was institutional knowledge in the D.C.
17 trade bar. So particularly firms that had been established
18 by people coming out of the Commission -- and I think drove
19 a lot of these combinations between the patent firms and the
20 trade bar, and of course it was the effect of injury
21 determinations early on as well.

22 So I think that evolved quite a bit and so it --
23 as a result it enabled some firms from around the country to
24 participate that might not otherwise have really had the
25 footing to do that. Jones Day I think was the Plaintiff for

1 Texas Instruments in the D-RAMS case and that case if I
2 recall correctly had maybe 10 patents, about 10 Respondents,
3 150 issued orders, 3 trials and a Final Determination issued
4 in 18 months.

5 So that was kind of the break through. Suddenly
6 it is a nationwide practice that a lot of resources
7 available to solve some of these global disputes.

8 MR. REISER: It's funny you should mention the
9 inability to do research. I remember when I left the
10 Commission I went to Howrey. Juliana took me down to the --
11 I mean it was B-3 it was so far underground and there was a
12 collection of 337 materials that were -- just an enormous
13 number of orders and decisions of the Commission and the
14 ALJ's in order books and that was like the place you went
15 when everything else failed, when you had to find something.

16 And somebody said, "Look I know this happened in
17 1985," that's where we went. Thank God we are not doing
18 that anymore.

19 MR. SOBIN: So Bert there is one thing that I
20 should have mentioned in terms of evolving of the bar.
21 Somewhere along the way to what we saw was the appearance of
22 more what I would call, you know, nationally recognized you
23 know trial lawyers. You know sometimes they would be in the
24 case from early points, sometimes you would see people
25 inter-shoot in but some of the most experienced and

1 well-recognized names out there.

2 And I think that also put pressure on a lot of
3 the rest of us to up the game if you will in terms of the --
4 you know trial part of our practice. It was -- I think an
5 important you know change that occurred. Again probably
6 somewhere in the mid '90's into the early 2000's we you
7 know, we just began to see a lot more than what we had seen
8 in the past.

9 MR. BRITTINGHAM: I think to your question Bert
10 about getting outside of D.C. -- when I applied to work at
11 the ITC I was living in Cleveland and I was just moving
12 because ex-wife you know, we'll share -- wanted to move to
13 Cleveland, that's where she was from or I mean D.C. So she
14 wanted me to look for a job and so back then they didn't
15 have the internet so much and you subscribed to a newsletter
16 that came every month and had all the lists of federal jobs.

17 And the first one I saw was for the ITC. So I
18 couldn't Google the ITC, I actually had to read a Federal
19 Register or something like that to figure out what it was
20 and applied for the job eventually got it. And I told a
21 friend of mine who was working at Jones Day in Cleveland and
22 I said I'm moving to Washington and he said, "Really, what
23 for?" And I said I'm going to go work for the ITC.

24 He's like, "I think I know about the ITC, I think
25 we had a case there." And I think he's probably the only

1 other guy in Cleveland who knew about the ITC besides me.
2 So those days are way over. There are firms in San
3 Francisco, Los Angeles, Chicago, certainly the old school
4 firms that were in New York, you know even we have had firms
5 that have been involved in many ITC cases coming from all
6 sorts of places.

7 And I think it you know, ultimately it
8 contributes to the success of the Commission because it does
9 kind of expand the opportunity out, it gives more clients a
10 shot of actually talking with a lawyer who knows something
11 about the ITC as a potential remedy. So I think it's all a
12 great thing and --

13 MR. REISER: Just by a show of hands -- how many
14 of you here today are from offices of your law firm that are
15 outside of D.C.? That's quite a number, that's quite a
16 number. It wasn't that was in 1991 when I started in this
17 business.

18 MR. BRITTINGHAM: I think in '91 there might have
19 been 10 people at this meeting.

20 MR. REISER: That's right you said that. Earlier
21 I asked the question I said I didn't mean to put you on the
22 spot but now I do. Who as you look back over the course of
23 your career some of the people that you think contributed to
24 the most to the bar, to the practice that we enjoy in 337?
25 Tom, who comes to mind?

1 MR. JARVIS: Well someone that might not be
2 immediately apparent but would be the judges have been so
3 generous in their time to essentially teach what 337 is
4 about, how it is executed, create you know sort of public
5 awareness and reliability. The sense that this is a
6 reasoned procedure, it is not some inside the beltway
7 political fix -- I think that has probably had a very
8 profound effect.

9 MR. REISER: Smith?

10 MR. BRITTINGHAM: I think for me in the era that
11 I was starting at OUII which was in '94, coming out in 2000
12 and practicing and well since then -- but for me the person
13 that just seems to have it all together and was really kind
14 of showing everybody to do things was Cecilia Gonzales at
15 Howrey.

16 You know we had a period of time at OUII where it
17 seemed like 50% of the complaints were Howrey complaints.
18 As far as I can tell they kind of standardized what we all
19 now file with the Table of Contents the way it is and just
20 you know it just became you know, a bit of a factory and it
21 really did solidify the practice at a time when I think -- I
22 mean I agree that D-RAMS was a huge case and the 88 Act was
23 important but it took a while for things to kind of ramp up.

24 Because when we were at the OUII in the '90's
25 there were 11 or 12 cases a year for a number of years. And

1 it wasn't really until 2000 that things started to almost
2 double and then we got to 2011. So she was somebody that I
3 just thought had sort of a vision of what the Commission
4 could be for her clients and she used it aggressively and
5 extremely competently and she was a great person to have on
6 the case whether she was on your side or on the other side,
7 so I really respected her and I really kind of valued what
8 she was able to do for the practice in kind of a key period.

9 MR. REISER: Sturgis who comes to mind?

10 MR. SOBIN: I'll mention a couple names and I'll
11 certainly begin with the first AJL I was in front of which
12 was Paul Lukern who as many of you know he had some -- two
13 cities for sure but he brought I think an attention to the
14 detail of the work we do at an intellectual you know rigor.
15 Not to mention the 300 page ID's and the proposed findings
16 of fact. But I think he really played an instrumental role
17 over a long period of time in the practice.

18 I think I would also point to what I consider to
19 be some of the lifetime achievers among our bar in terms of
20 you know nurturing and investing in this practice along
21 many, many years. You know people like Tom Schaumburg and
22 Dave Foster, Jim Adduci, you know Cecilia for sure. There
23 were a lot of years where there weren't a lot of cases and
24 it did require people to come to the meetings, to care about
25 what was happening up on the hill, to invest the time to

1 make all of this you know, possible that we have now.

2 And I certainly think I have you know
3 appreciation for the -- you know stewardship that was
4 invested.

5 MR. REISER: I think everyone who knows me knows
6 you know, I just am reminded how fortunate that I have been
7 in my career, the two great mentors in my career where Judge
8 Luckern and Cecilia so there isn't a day that goes by that I
9 don't see something in myself or the people who work with me
10 or in our practice frankly, and in our bar that doesn't
11 remind me of them. So yeah those two were remarkable.

12 When I was a clerk here I worked for Judge
13 Luckern and the judges then were Judge Saxton, Judge Luckern
14 and Judge Harris. And I have to tell you they were really,
15 really interesting people. They were very dedicated, they
16 worked very hard and I remember very fondly that the time I
17 spent here then because getting to know those people was
18 really fascinating and that was a period I think of immense
19 change and 337.

20 And a lot of things that we have been talking
21 about sort of went through those three people. I think we
22 owe them quite a lot of gratitude and they were really fun
23 and interesting people to work with.

24 I would like to turn to some dryer things -- a
25 little bit of sort of the legal trends in our business. No

1 doubt as I eluded to earlier that patent rights and the
2 growth of patent rights have been a powerful influence in
3 the evolution of 337 practice. And I wondered Smith, if you
4 could talk about some of the external trends -- and by that
5 I guess I mean you know Supreme Court juris prudence --
6 things that have happened in patent law external to 337
7 impacted what's going on.

8 MR. BRITTINGHAM: Sure I think the first obvious
9 thing is that there's just a lot of patent litigation out
10 there. And to a certain extent a rising tide lifts all
11 boats so if you can file a patent case in the ITC then
12 that's one opportunity and there are more patent cases being
13 filed so I think to a certain extent you know our increase
14 over the past 10 years is partly a factor of this external
15 factor of just patent litigation being much more extensive.

16 I mean the statistics for District Court filings
17 show a pretty steady increase than you know a kind of crazy
18 statistical blimp because of the joinder rules but now maybe
19 a slight decrease in the last two years which you know, in
20 some respects actually coincides a little bit with the case
21 load of the ITC.

22 So I think those things do go hand in hand. In
23 terms of like legal development obviously the Commission has
24 to follow substantive patent law so if you get a substantive
25 patent law decision you have to do it. Markman was probably

1 the biggest one and I think in some respects it may have had
2 the least effect on the ITC of probably any of the laws.

3 Partly because there's no jury so the risk of
4 having some construction dispute decided by an uninformed
5 jury is not as big a deal. For years the judges kind of
6 struggled about whether we should have a Markman -- where do
7 you fit it in, what kind of order is it. So I think even
8 today there's been a kind of a half-hearted embrace of
9 Markman but not really the same effect that you have seen in
10 District Court patent litigation.

11 Another one I would point out is the Alice
12 decision. The Alice decision on patent eligibility has had
13 a huge effect on District Court litigation over the past two
14 years, to the point where I think some of the decrease in
15 patent litigation is partly a result of people not really
16 thinking they can survive that initial motion to dismiss.

17 And the Commission is not as prone to really
18 quick dismissals of cases as District Court cases are.
19 However, I think we have seen and Juliana had a nice little
20 slide on this -- the
21 Alice decision is starting now to take effect in the ITC and
22 of course the probably most notable one is the hundred day
23 case where the judge and the Commission just affirmed it a
24 little while ago -- did find that that patent was invalid
25 under 101, within one hundred days.

1 So that's a development outside the ITC that is
2 now starting to affect ITC practice. It will be interesting
3 to see if that affects it more going forward in the sense of
4 the choice of patents or the types of technologies that are
5 brought before the ITC because you know a lot of computer
6 related patents are more prone to that kind of effect.

7 I think the other one big development in the
8 outside world that again hasn't really affected the ITC but
9 we are kind of waiting to see and that's the IPRs. So in
10 many District Courts you get a stay of a case as soon as you
11 file an IPR. The IPR has been very successful. Patents
12 sometimes never come out so that case disappears from the
13 face of the earth.

14 In the ITC however, we have consistently seen the
15 ALJ's denying stays for pending IPRs -- even IPRs that are
16 going, even IPRs that will end before the case is going to
17 be over but they just want to wait and see what happens.
18 And certainly it is consistent with the Commission's prior
19 practice with re-exams and stays in general and schedules
20 and trying to get things out.

21 But it will be interesting to see if that changes
22 a little more over time, particularly in cases like the one
23 case, the 939 case where the decision did come down before
24 the remedy was issued so the Commission went ahead and
25 issued the remedy but then suspended its enforcement because

1 of the adverse ruling in the PTAP.

2 So I think that's going to be -- maybe more of an
3 effect but the speed of the Commission cases make it maybe
4 that it just will kind of miss that wave, it's kind of hard
5 to say.

6 MR. SOBIN: I think we've -- at least from what
7 I've seen in the clients that I have you know spoken to and
8 you know complainant side work, it's already had an effect.
9 It's amazing to me how many clients we have gone in front of
10 that have almost ruled out you know, filing in the District
11 Courts because the prospects of IPR you know losing a lot of
12 the claims, the whole process you know lasting three to five
13 years isn't very appealing.

14 And I think we are already seeing perhaps that's
15 you know, some of the explanation for the jump in the new
16 investigations in the past fiscal year. I thought we would
17 see it sooner but I think now that those IPRs and the
18 practices working its way through the courts and system I
19 think we are going to -- we are absolutely going to see some
20 impact on the practice here.

21 MR. REISER: What about some of the -- what I'll
22 call internal changes in the law and events such as you know
23 Kyocera, USTR, things like that -- how have those things
24 impacted the practice recently?

25 MR. BRITTINGHAM: Well Kyocera's obviously in

1 Kyocera the Federal Circuit reversed the kind of
2 long-standing practice of allowing a Limited Exclusion Order
3 to apply to products that contained some other infringing
4 component. The net effect of that is to force people to
5 name all of the importers.

6 I mean we have literally had a case we were about
7 to file the day we heard about the Kyocera decision and had
8 to pull it back, re-write the whole complaint, add 13
9 Respondents, so it's had an obvious effect just on the
10 practice side. But it also has kind of a business effect
11 because in some of those situations you find yourself
12 saying, "I don't know if I want to sue all of those people
13 because I sell to them too."

14 So it has created one area where the Commission's
15 remedies are going to be applied against people you really
16 would rather not drag into court, so that creates a tension
17 in some cases.

18 MR. REISER: What's interesting about that
19 dilemma is that it is different in every single case and
20 every single business situation.

21 MR. BRITTINGHAM: Yeah I don't think you can
22 generalize very easily. I mean you see some of the
23 statistics about oh well we have all this increase in the
24 number of Respondents and sort of the anti-MPE crowd says
25 that's because of MPEs and the Commission says, "No, it's

1 because of Kyocera." Well you know it is a little bit of
2 everything, really.

3 I mean we had some of these multi-Respondent
4 cases with 20 Respondents and just old-fashioned knock-off
5 cases so it really is very hard. It's not a lot of data
6 when you only have 50 or 60 cases.

7 I think the other one that I would say -- well
8 there are two. I think USTR disapproval and Samsung Apple
9 case has probably made it very scary for anybody with a
10 standard essential patent to come to the ITC as a
11 complainant and that is what a lot of people in the
12 telecommunications field have is standard essential patents.

13 So I think that one is an effect that came out of
14 an ITC case even though the external agency action that's
15 probably had a pretty clear effect. And then I'm going to
16 go with Clear Correct and say the jury is out because
17 there's kind of a narrow view of Clear Correct and then
18 there's kind of a you know, doomsday broad view of Clear
19 Correct and right now I don't think we know where this thing
20 -- where it is going.

21 And particularly because in the modern era,
22 particularly of electronic devices, it is very, very typical
23 for you to import a completely dumb but essentially fully
24 manufactured device. And then once it gets in the country
25 you do things to it, you download software you program it a

1 particular way and now it works marvels and infringes the
2 patent.

3 And I think we are still not sure what either the
4 Commission or more importantly the Federal Circuit will say
5 about that. Because when they said you have no jurisdiction
6 over articles that aren't real things -- you know that
7 creates a potential for mischief. So I'll say that one in
8 the future could be a real battleground in what kind of
9 cases end up being able to be brought here.

10 MR. REISER: I think I speak for everyone in this
11 room and I say ambiguities in the law are really a wonderful
12 thing. What else comes to mind in terms of internal
13 developments in the law that we think will have sort of
14 far-reaching impact in the future, anything?

15 MR. SOBIN: I think the ones that we had are most
16 significant. I tend to agree that there were certainly a
17 lot of big spills on the Clear Correct issue. It seems to
18 be a wonderful topic for law reviews and you know commentary
19 and doomsday but I am not certain how much of a practical
20 impact it will have on the practice.

21 MR. REISER: I feel the same way about the USTR
22 disapproval in 794. It's not clear to me how much real
23 impact -- I mean I think on some level commercially speaking
24 it is kind of a one off but certainly has caused us to do a
25 great deal more work on the public interest factors than we

1 might have before.

2 But we are talking about the public interest
3 factors -- MPEs are an important part of that debate and
4 have been an important part of the Commission's juris
5 prudence over the last decade and I guess I am addressing
6 this to both Tom and Smith. Tell us about the MPE story and
7 sort of what that story has been and where you think it is
8 going to take us.

9 MR. BRITTINGHAM: Well I mean I think it's a
10 story that extends beyond the ITC in a way because it has
11 been a policy argument on the patent side for some number of
12 years. But certainly the ITC was particularly vulnerable to
13 the aggressive argument that MPE should not be able to take
14 certain types of -- bring certain kinds of cases or hover
15 above people and threaten them into settlements or what not
16 because of the injunctive remedy.

17 It was sort of the Blackberry case in every case
18 and so that meant that the ITC was pretty vulnerable to some
19 of the responsive positions and you know the statistics --
20 this was one of the earlier ones and the next one was the
21 one that Juliana just showed earlier. The statistics do
22 show that at least for a couple of years there MPEs started
23 to be about 10% -- maybe it depends on what you counted as
24 an MPE. Juliana said we all know which one is category 1
25 and which one is category 2 -- I always forget and have to

1 look.

2 But the category 1 -- I did my own research, I
3 have invented something now I'm licensing it and the
4 category 2 is the more I bought you know, something at Ocean
5 Tomo and look it's a patent, let's go sue somebody.

6 So depending on whether you add those two columns
7 together or you leave them separate. There was a point in
8 time when the docket of the ITC -- not unlike the docket of
9 the Eastern District of Texas or many other important
10 jurisdictions was starting to look at little heavily MPE but
11 I think to the Commission's credit there was sort of a look
12 at you know, well okay fine you can bring a case here but
13 you do have to satisfy you know, certain requirements so
14 let's make sure our requirements are articulated in a way
15 that allows the judges to make a decision.

16 And you will see -- you know you look at the
17 statistics on victories and there are not that many for an
18 MPE in the ITC. So I think it was an issue a bit -- it
19 certainly generated a lot of discussion. We have got at
20 least twice the trade protection Not Trolled Protection Act
21 has been introduced in Committee in Congress.

22 But it hasn't passed and I haven't read very much
23 about the new administration's view on MPEs yet but I am
24 told that it is not going to be high on the list of things
25 that they are going to want to take care of so I'm not sure

1 where patent reform is going to go.

2 MR. REISER: Okay.

3 MR. SOBIN: There is one thing and that is I have
4 also heard if you will out in the marketplace that as a
5 result of some of these you know, changes, which I think
6 fairly can be said to raise the bar for non you know,
7 practicing entity -- there was a view that the ITC was shut
8 you know entirely to that business. And I have heard it
9 from a number of entities out there and -- so in that sense
10 it has been important when we are asked the question, it has
11 been important to try and educate you know, clients in terms
12 of exactly what has been done and what practice effect does
13 that have in terms of who can reasonably you know, turn to
14 the ITC and who can't.

15 But it is wrong to you know simply look at the
16 Commission as a place that is -- no longer a possible option
17 you know, particularly for category 1 MPEs, someone who has
18 done R&D, who has invested, who has real operations et
19 cetera, et cetera.

20 MR. REISER: Tom I want to talk to you about
21 trends in ITC cases. Juliana gives a really wonderful
22 presentation that shows me a lot every year about what is
23 going on and what has been going on. But I wanted to ask
24 you about cases in the ITC the size, the subject matter,
25 what trends do you see, and what do you see happening in the

1 future?

2 MR. JARVIS: So I think everybody is familiar
3 with the gross curve of the number of complaints filed but
4 if we drilled out into that a little bit, there are some
5 interesting trends that come out. We looked at the number
6 of Respondents in each of the cases that were instituted
7 each year and then aggregated those and perhaps it's not too
8 surprising that in 2011-12 timeframe we had the outbreak of
9 the smart phone wars and had the effects of Kyocera but the
10 number of Respondents went up but more recently have trended
11 down.

12 So that's an interesting change that we can read
13 in combination with the number of patents which although we
14 have got somewhat -- it looks like they have doubled in some
15 years, really it is just a change, on average from about a
16 low of about 2 to a high of about 4. So on average really
17 no significant changes there even though there are outliers.

18 Where we see big changes are in the number of
19 documents that are filed with the Commission in each of the
20 cases filed within a year. So let me break this down to
21 make it a little more clear -- if we look at cases
22 instituted within a single year and the number of documents
23 filed in that case during the year -- the number of
24 documents have fallen dramatically.

25 So this could indicate that the cases are less

1 complex. Perhaps, the technology is less complex, perhaps
2 it's a compounding of a lower number of Respondents, smaller
3 number of patents, but the -- as you can see from the trim
4 line here it is continuing downward. Similarly we look at
5 the number of orders that are filed in the same year of
6 cases instituted -- the number is falling off dramatically.

7 And so what that suggests to me is not that
8 judges have stopped issuing orders, usually I wish they
9 would issue more -- particularly my requests. They don't
10 always do that I don't know why. But I think what this does
11 tell us is that the activity in the cases is becoming back
12 loaded.

13 So what we see are cases that may be smaller in
14 scope, have lower levels of activity until the approach of
15 the close of discovery and at that point we see massive
16 upturns in the level of activity. So particularly in the
17 2015 and 2016 statistics to date relatively low number of
18 orders probably because the cases are a little less active
19 in front of the judges in the early phases of those cases.

20 Actually I'll draw a conclusion. Anecdotally as
21 we went through these cases, the number of law firms filing
22 complaints that had never filed one before is increasing
23 significantly. And the number of firms who are involved in
24 just their second or third case increasing significantly --
25 the number of parties who never have been involved in a 337

1 case before -- increasing significantly, some of them never
2 wanting to be involved in another one.

3 But what this suggests to me is a broadening of
4 the spectrum of patent disputes where the parties are
5 willing to come to the Commission or are forced to come to
6 the Commission and a broadening of the base of law firms and
7 lawyers who are comfortable coming here and practicing which
8 I think predicts great things for the future.

9 If you want to look for the most bullish side
10 about the growth of 337 I think you could find it in those
11 statistics.

12 MR. SOBIN: So Tom as I look at the data on the
13 number of orders and the documents filed and I look back
14 over the cases I have been involved in in the last few
15 years, I would also have to say that there have been I think
16 maybe two other elements that have some role in that. And
17 one of them is the recent amendments to the rules with
18 respect to discovery. And secondly, some additional you
19 know supplementation done by a number of the ALJ's to set
20 out more mandatory elements, you know such that there are
21 far fewer things to fight about.

22 And I would also say I think secondly this is a
23 bar that I really appreciate working with even in very
24 heated you know cases on the other side because in most
25 instances you are able to get on the telephone, exchange

1 some emails and avoid a Motion -- in most instances, not
2 all.

3 There is -- I think there is a reasonableness
4 there's a civility to a lot of the people that we practice
5 with. So I think those also have to have some role in that
6 drop.

7 MR. REISER: I told Bill that we would finish on
8 time but the one thing that I wanted to ask and this is
9 something I was going to ask you about is the timing of
10 these cases. By the show of hands we saw earlier a lot of
11 you don't remember the days when we did these cases in 12
12 months.

13 During that time I worked for Judge Luckern and I
14 turned out 12 month procedural case schedules without a
15 care. I never had to try in private practice a 12 month
16 case and Juliana, you may correct me, but I think that's
17 right. It's something for which I am very grateful by the
18 way.

19 But what was it like to do one of these things in
20 12 months? That meant by the way the ID was issued in 9
21 months and you were usually in trial in about 4 and or 5.

22 MR. SOBIN: It was not fun. You certainly
23 learned a lot in a very short period of time. It may have
24 been one or two where I did a TEO and a 12 month decision on
25 top of it and my wife didn't see a lot of me in that period.

1 But I would have to say that it has been amazing to me how
2 well the Commission and the ALJ and all of the folks here at
3 the Commission who make that possible -- how well they have
4 been able to keep you know, essentially us within a window
5 of roughly 12 to 16 months. I know it did go up a little
6 bit during the peak of the smart phone wars but it has been
7 amazing how well the Commission has handled swings in the
8 case load and the quality of the decision-making and the
9 procedural elements.

10 I just think that has been handled
11 extraordinarily well. And I know that takes a lot of
12 resources by the Commission, it takes a budget from the
13 Congress, and it takes a lot of things but -- and the world
14 now is not you know tremendously different even though we
15 have a couple of more months. I mean we are still going to
16 trial in 9 months so we are really only talking about you
17 know, a couple of months you know, difference.

18 That's huge but you know still.

19 MR. REISER: That extra 3 months though is a real
20 blessing.

21 MR. BRITTINGHAM: You get one of Judge Shaw's 14
22 month target dates and you are like what happened to my
23 month and a half. It could drive people off the bridge. I
24 agree I think everything that Sturgis said is right and it
25 kind of goes also into what Tom's data shows.

1 I think what has happened over time is there was
2 a time when it was documents, documents, documents and my
3 first trial was with Judge Luckern at the time -- we tried
4 it in front of him. The ID after the trial was Order No.
5 14. There were 17 boxes of documents on one side and 35
6 boxes on the other side.

7 MR. REISER: Was that Elasto --

8 MR. BRITTINGHAM: Certain curable fluro-estimar
9 compositions and precursors thereof.

10 MR. REISER: But to me that case is an example of
11 how reasonable people can try very complex case in a very
12 efficient way. Because I think counsel on both sides and
13 the staff attorney did a lot to focus on just a few issues
14 and it was done pretty quickly.

15 MR. BRITTINGHAM: No and I think that's true.
16 But over -- you know when we started getting into
17 electronically stored documents and now there were so many
18 sources of documents you know the first thing everybody
19 wanted was every email and every copy and everything.

20 And that did create tons of documents and tons of
21 opportunity for fighting about documents and things. And
22 then I think the bar as a whole, not just in the ITC but
23 certainly the patent lawyers that I work with on a daily
24 basis started figuring out that that was sort of like asking
25 for more snow in the middle of a blizzard, it's just not

1 worth it.

2 And so people started to kind of ratchet it down.
3 The courts also contributed with limits on Interrogatories
4 and the real world limit of 175 Interrogatories isn't that
5 much of a limit however I do remember during the TI Samsung
6 case walking by -- I think it was Juan's case, walking by
7 the fax machine and seeing a letter that said, "We agree
8 that you can have an extension of time to respond to
9 Interrogatory 1764 through 1768."

10 I mean there have been a lot of forces that have
11 I think contributed to help us all focus more and then an
12 ITC case where you know your time is precious, that's
13 critical. So I think it is kind of a natural evolution.

14 MR. JARVIS: I'd all the impact of technology and
15 infrastructure capabilities. There was a time when you
16 actually couldn't email a draft document around for review
17 because there was no email. So fax machines were the state
18 of the art. God forbid the thing jammed you know, so things
19 have changed massively in that respect.

20 We now have document predictive coating to help
21 us find the right documents. We ship massive amounts of
22 data around. The most profitable activity ever conceived
23 of, document review, is now largely automated and what
24 portions can't be automated are delegated to entry level
25 folks.

1 So I think the infrastructure has had a
2 tremendous impact. I remember my first job and my first 337
3 case was watching the printer -- which printed 4 pages per
4 minute, so I could get the Brief off for our portion of the
5 D-RAMS case, get in the car, go to the Marine Terminal at
6 Laguardia, fly to D.C., get another car, go to the
7 Commission which was then over on 7th Street, file it, race
8 over to the ICC where the judge's offices were and serve it.

9 That was first year associate work at the time --
10 advanced couriers. So I would say infrastructure
11 improvements have done a lot to improve the quality of my
12 life.

13 MR. REISER: So I've let Bill down, we are
14 actually five minutes over time. If anyone has any
15 questions I think I can speak for the panel and say that we
16 would be happy to talk to you afterward but in deference to
17 the scheduling we need to say goodbye. Thank you all very
18 much.

19 (Whereupon the meeting was adjourned at 3:04
20 p.m.)

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CERTIFICATE OF REPORTER

TITLE: In The Matter Of: 2016 ITC Trial Lawyers Association Annual Meeting

INVESTIGATION NOS.:

HEARING DATE: 11-15-16

LOCATION: Washington, D.C.

NATURE OF HEARING: Meeting

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