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MCC INTERVIEW: Ahmed J. Davis / Fish & Richardson

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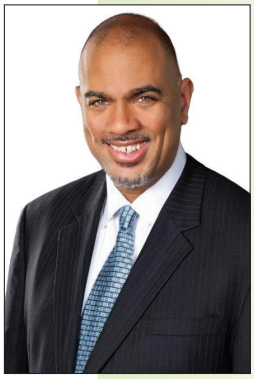
Changing IP Laws, Changing Litigation Strategies

Understanding evolving IP trends is necessary for effective advocacy

*Fish & Richardson's powerhouse IP litigator **Ahmed J. Davis** tips off readers about patent litigation developments in federal district court, in federal appellate court and at the International Trade Commission (ITC) – plus he reviews how the Patent Trial and Appeal Board (PTAB) has influenced patent strategy and litigation. His remarks have been edited for length and style.*

MCC: Tell our readers about your patent litigation practice and the kind of work you do for your high-profile technology clients?



We are the firm that clients call when there is no margin for error.

Davis: I have been blessed to have a broad practice that spans federal district court, the ITC and the U.S. Court of Federal Claims. I have undergraduate and graduate degrees in chemistry, but I have done work across many technology areas, including computer science, electrical engineering and pharmaceutical work. I have learned over time – along with my colleagues – that the most-effective advocates in patent law are those who have the ability to understand complex technology but can then turn it around and explain it in simple terms to a lay jury or to a judge who often has no technical background and perhaps does not hear many patent cases.

Our high-profile technology clients hire us because we have the breadth and the depth to deal with any technology, in any court, and to do so as strong advocates who understand but are not beholden to the technology.

MCC: What are some of the most interesting cases you have handled , and what made them so unique?

Davis: What makes every case I work on interesting and unique is the human element, even in what others might think are run-of-the-mill, boring patent cases. Our hybrid car inventor in the Paice cases was a Ph.D. émigré who fled communist Russia, where he waited in line for bread, to Dallas in the 1970s, where he then waited in line for gas. His eureka moment for the hybrid idea that led to his patents came waiting in that line, when he thought that there had to be a better way.

The cases against Toyota, Ford, Hyundai and Kia Motors have spanned three federal district court cases, two Federal Circuit appeals, an ITC investigation and several PTAB petitions. We've had so many wins over the years. Most recently, in October 2015, we won a $28.9 million jury verdict for Paice against Hyundai and Kia. The jury found all of Paice's hybrid vehicle patent claims valid and willfully infringed, which meant the trial judge could treble the damages award. The case later settled.

In an ITC case for HP, we sought and won a general exclusion order for knockoff products that mirrored HP's inkjet printheads to a T and some that even included actual HP printheads. The HP printheads at issue made their way to the United States after the truck transporting them to an HP facility in Asia was hijacked, and the driver was left in a rice field gagged and bound at the hands and feet.

Being an effective advocate means bringing out those types of stories in a compelling way, so the finder of fact, whether judge or jury, sees that the case matters and is about more than the claim at the end of the patent. When you do that, you realize that every case is interesting, unique and memorable.

MCC: New pleading rules for patent cases became effective in December 2015. How have these new rules impacted patent litigation in federal district courts?

Davis: It has been only a few months since the rules took effect, and we are just beginning to see how these changes will impact our cases. That will play out over the next few years. Filing Rule 12 motions for failure to satisfy the requirements of *Twombly* and *Iqbal* had already become de rigueur, but plaintiffs would just replead with facts to get over a relatively low bar. It will be interesting to see how the new rule changes, including the abrogation of form pleading, such as Form 84, raise the bar for direct infringement claims.

I think time will show that the biggest impact of the rules changes on patent cases will not be the pleading rules but rather the proportionality changes to discovery, including electronic discovery. No longer will the kitchen sink approach to seeking discovery suffice; there needs to be a real justification now for the requests, and the party propounding the discovery needs to articulate why the scope of its request is commensurate with the needs of the case. It will be tougher to justify why you should be able to search the haystack, but if you cannot search the haystack, that means some very important needles will remain unearthed.

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MCC: Your trial practice spans both the district court and the ITC. What trends are you seeing in ITC litigation?

Davis: When I joined Fish 15 years ago and first started working on ITC cases, we often relegated the economic domestic industry requirement to the back burner because we assumed that proving it would be a fait accompli. It simply was not the real focus of cases. But then a few years later, the Supreme Court issued its *eBay* decision, which made it significantly more difficult to obtain a permanent injunction in district court. This turned the ITC (and its general exclusion orders) into an attractive alternative venue for non-practicing entities. With increased ITC investigations involving NPEs, we have seen renewed scrutiny and rigor being given to how you satisfy the economic domestic industry. The pendulum has swung back again, and there are fewer NPE cases now, which I expect will continue.

We are also beginning to see more cases involving less traditional IP being enforced: design patents, copyrights and trade secrets.

MCC: Have the new America Invents Act (AIA) post-grant proceedings affected your trial practice, and if so, in what way?

Davis: Absolutely, the new AIA post-grant proceedings have changed the game. Having this new vehicle to challenge patent validity at the PTAB (which uses a more favorable standard for patent challengers) while the litigation is still going on creates a whole host of strategic decisions that we have to be prepared to counsel our clients on and explain to less patent-savvy district judges. Whether to file an IPR or a declaratory judgment action for invalidity despite the potential waiver that creates, the timing of such decisions and the parallel tracks that can take place on appeal – just to name a few things – have changed how we evaluate, plan for and conduct our litigation.

I was recently in the middle of a trial, literally halfway through what was a devastating cross-examination of the other side's technical witness, when the PTAB issued a final decision invalidating a significant number of the other side's claims on the patents in the suit. We won the trial, and the case settled shortly thereafter instead of being appealed. The PTAB decision was a real driver for that settlement.

MCC: Some firms use different advocates for trial and appellate work, but you handle both. What advantages do you see in handling cases from trial through appeal?

Davis: I have been involved in many cases where another firm handled the district court litigation and then Fish was hired for the appeal. The real benefit of being experienced in both is that you have a better grasp at the trial level of how to best position the case for appeal. Frequently, when we take a case over on appeal, there have been decisions made at the district court, such as waiver of certain arguments, which make the appeal more challenging than perhaps it otherwise needed to be. I recognize that our clients may not decide to go with different appellate counsel until there is a bad result at the trial level, but it serves the client's best interest to have potential appellate counsel involved in the run-up to and during trial. At Fish, we have both great trial and appellate lawyers, so we are able to bring those forces to bear for our clients in ways many firms aren't able to.

MCC: We hear a lot about companies wanting to stay out of court. Are you seeing a difference in the way big companies settle patent disputes now compared with when you started practicing law?

Davis: Yes, I think there is a difference, not only in how big companies are settling cases but also in the firms that they are hiring to handle their cases. When I started practicing law, the vast majority of the patent cases we saw were legitimate business competitors, so the drivers for settlement were different. Losing a case to a direct competitor and running the palpable risk of a permanent injunction resulted in a lot more bet-the-company cases. Those regularly would end up settling with cross-licenses and covenants not to sue or some sort of détente.

Now we develop case exit strategies at the beginning, knowing that the more pressure and uncertainty we can create for plaintiffs, the more we can position our clients as being ready for trial, the more likely it is to reach a pretrial resolution that is satisfactory to our big clients. Our degrees say we are both attorneys and counselors at law, and our ability to do both well requires that we not lose sight of our clients' larger business goals.

But one thing hasn't changed. The biggest companies still want the most experienced and knowledgeable litigators by their side, whether they are being sued or looking to exert their own large patent portfolios in a competitor-to-competitor case. So demand for our services is up, and our caseload is going up. We are the firm that clients call when there is no margin for error.