# *An Empirical Evaluation of Whether Federal Trial Judges With More Experience in Patent Claim Construction Are More Accurate*

**David L. Schwartz**

Claim construction is a critical aspect of patent litigation. Since its Markman decision, the Federal Circuit has decided hundreds of cases involving patent claim construction. In these decisions, the Federal Circuit has articulated numerous "canons of constructions" that supposedly guide claim construction. In reality, these "canons of construction" are vague and often contradictory, and require judgment as to which of the "canons of construction" should be applied in a given case. Consequently, district court judges are afforded wide latitude relating to how to construe claims.

Various scholars, including Kimberly Moore, have studied the Federal Circuit's overall reversal rate of district court claim construction cases. These previous studies have shown that the Federal Circuit reverses a large percentage (generally in the range of 33% to 50%) of district court claim constructions. This high reversal rate, among other items, has prompted numerous calls for patent reform. One proposed reform is to create a pilot program of judges interested in patent law in certain judicial districts. These patent-interested judges would hear additional patent cases, and judges uninterested in patent law would not hear patent cases. Presumably the concept behind this proposed pilot program is that judges who hear more patent cases will develop some expertise, including in the area of claim construction. The expectation is that more expertise will translate into a lower reversal rate.

This article examines whether individual district court judges with greater experience with patent cases are less likely to be reversed by the Federal Circuit. More specifically, the article examines whether a district court judge who previously has been reviewed by the Federal Circuit fares better on subsequent appeals.