

Exhibit 4

1 IN THE UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF ARKANSAS
 3 TEXARKANA DIVISION
 4 JOHN WARD, JR.)
)
 5) C.A. NO. 08-4022
 v.) JURY TRIAL DEMANDED
)
 CISCO SYSTEMS, INC.)
 6
 7
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 9 -----
 10 ORAL AND VIDEOTAPED DEPOSITION OF
 ROBERT H. CHIAVELLO, JR.
 11 SEPTEMBER 23, 2009
 VOLUME I

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 13
 14
 15 ORAL AND VIDEOTAPED DEPOSITION OF ROBERT H.
 16 CHIAVELLO, JR., produced as a witness at the instance of
 17 the Defendant, and duly sworn, was taken in the
 18 above-styled and numbered cause on the 23rd day of
 19 September, 2009, from 9:06 a.m. to 11:10 a.m., before
 20 April R. Eichelberger, CSR in and for the State of
 21 Texas, reported by machine shorthand, at the law offices
 22 of Fulbright & Jaworski, 220 Ross Avenue, Suite 2800,
 23 Dallas, Texas, pursuant to the Federal Rules of Civil
 24 Procedure and the provisions stated on the record or
 25 attached hereto.

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 2
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 17 ALSO PRESENT:
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 Kathleen McCurry, Intern
 19
 20
 21
 22
 23
 24
 25

1 EXHIBIT LIST
 2 EXHIBIT NAME DESCRIPTION PAGE
 3 Exhibit 26 Cisco Systems, Inc's Notice of 14
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 5 Exhibit 27 Plaintiff's Initial Disclosure 16
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 9 Exhibit 29 Patent Troll Tracker September 24, 2007 33
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 11 Exhibit 30 Civil Docket 5:07-cv-156-DF-CMC 43
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 12 Exhibit 31 Complaint for Patent Infringement 43
 5:07-cv-156-DF-CMC filed 10/15/2007
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 13 Exhibit 32 Complaint for Patent Infringement 48
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1 PROCEEDINGS
 2 THE VIDEOGRAPHER: Here begins the
 3 videotaped deposition of Robert Chiavello, Tape 1,
 4 Volume 1, in the matter of John Ward, Jr., versus Cisco
 5 Systems, Incorporated. It's in the U.S. District Court,
 6 Western District of Arkansas, Texarkana Division, Case
 7 Number 08-4022. Today's date is September 23rd, 2009.
 8 The time on the video monitor is 9:06 a.m.
 9 The video operator today is Paul Young,
 10 representing West Court Reporting Services. The court
 11 reporter is April Eichelberger from HG Litigation
 12 Services, reporting on behalf of West Court Reporting
 13 Service.
 14 Today's deposition is being taken on
 15 behalf of the defendant and taking place at Fulbright &
 16 Jaworski at 2200 Ross Avenue, Dallas, Texas.
 17 Counsel, please identify yourselves for
 18 the record and whom you represent.
 19 MR. PATTON: I'm Nick Patton. I
 20 represent the plaintiff, Johnny Ward.
 21 MR. SCHWARZ: I'm Kurt Schwarz with
 22 Jackson Walker, and I represent the defendant, Cisco
 23 Systems, Inc.
 24 MS. COLLINS: I'm Joni Collins of
 25 Fulbright & Jaworski, and I represent Mr. Chiavello.

1 me to clarify it?
 2 A. I will.
 3 Q. Okay. Are you on any medication or do you
 4 have any condition that would prevent you from giving
 5 true and complete testimony today?
 6 A. I'm not and I do not.
 7 Q. Okay. Could you please give audible answers
 8 to all of my questions so the court reporter can record
 9 them?
 10 A. Yes.
 11 Q. Okay. You notice -- you mentioned that you've
 12 been deposed before. How many times?
 13 A. Twice.
 14 Q. Okay. And what sort of cases were those?
 15 A. One was a good-faith breach of contract-type
 16 case. I'm not exactly sure what the underlying claims
 17 were. And the other was a trademark case.
 18 Q. Okay. And were you -- were you deposed as a
 19 fact witness or an expert witness?
 20 A. Fact witness.
 21 Q. In both cases?
 22 A. Yes, sir.
 23 Q. Okay. Do you recall the entities that you
 24 were deposed on behalf of?
 25 A. Well, I remember one. I was deposed in a case

1 THE VIDEOGRAPHER: And the witness may
 2 now be sworn in by the court reporter.
 3 ROBERT H. CHIAVELLO, JR.,
 4 having been first duly sworn, testified as follows:
 5 EXAMINATION
 6 BY MR. SCHWARZ:
 7 Q. Good morning. Would you please state your
 8 full name for the record.
 9 A. It's Robert M. Chiavello, Jr.
 10 Q. Okay. Mr. Chiavello, my name Kurt Schwarz
 11 I'm with Jackson Walker, and I represent the defendant
 12 in this lawsuit, Cisco Systems, Inc.
 13 Have you given your deposition or given
 14 testimony before?
 15 A. I have.
 16 Q. Okay. So you're familiar with the basic
 17 ground rules?
 18 A. I am.
 19 Q. Okay. That -- for example, that you're under
 20 oath?
 21 A. Of course. Yes.
 22 Q. Okay. And I've asked you -- and this is a
 23 particular problem for me. If I say something that --
 24 if I ask you a question that's confusing or disjointed
 25 or you don't understand in any way, would you please ask

1 involving EDS, and I was deposed by the plaintiff in
 2 that case, which was two individuals who claimed EDS had
 3 breached an agreement with them. And then in the other
 4 case I was deposed, it was a trademark infringement
 5 case, and I was deposed by the accused infringer is my
 6 recollection.
 7 Q. Okay. Where did you go to college?
 8 A. I went to Washington & Lee University.
 9 Q. Okay. And what was your major?
 10 A. Physics.
 11 Q. And did you grow up in that part of the
 12 country?
 13 A. No, sir.
 14 Q. Where did you grow up?
 15 A. I grew up in New Jersey.
 16 Q. Oh, really? What part?
 17 A. Rutherford, New Jersey, which is in the
 18 northeastern part of New Jersey.
 19 Q. And today is Bruce Springsteen's birthday.
 20 A. Okay.
 21 Q. And you went to law school at John Marshall
 22 Law School; is that correct?
 23 A. That's correct.
 24 Q. Okay. I understand that you're licensed to
 25 practice law in the state of Texas?

1 A. That's correct, yes, sir.
 2 Q. Okay. And since when?
 3 A. 1989, I believe.
 4 Q. And are you certified by the Texas board of
 5 specialization in any area?
 6 A. No, sir.
 7 Q. Okay. Well, I understand also that you're
 8 licensed to practice law in New York?
 9 A. Yes, sir.
 10 Q. Okay. And since when have you been licensed
 11 in New York?
 12 A. I believe it's 1981.
 13 Q. And I also understand that you're licensed to
 14 practice before the U.S. Patent and Trademark Office, is
 15 that correct?
 16 A. That's correct.
 17 Q. Okay. And since when have you been?
 18 A. I believe that's 1986.
 19 Q. Would you briefly go through your employment
 20 history since you were graduated from law school?
 21 A. Sure. I originally went to work for a firm
 22 called Penny Edmonds, and it actually was a little bit
 23 more complicated than that because I originally started
 24 working for a single partner at Penny Edmonds, a man by
 25 the name of Stan Lawrence in New Jersey because New

1 Jersey, at the time, had some restrictions on New York
 2 firms practicing law in the state of New Jersey. But I
 3 was actually being compensated by Penny Edmonds. That
 4 relationship ended pretty quickly, and I went to work --
 5 and I worked for Penny Edmonds until 1985.
 6 In 1985, I went to work for IBM as a
 7 patent attorney. I left IBM in 1988, and in -- on
 8 January 1st, 1981, I started with the firm of Baker
 9 Mills & Glast.
 10 Q. I'm sorry. You said 1981.
 11 A. I'm sorry. No, '89.
 12 Q. '89, okay.
 13 A. Yeah. '88 -- I worked at IBM until 1988,
 14 December 31st, and then January 1, 1989, I started at
 15 Baker Mills & Glast.
 16 Q. And where was that office?
 17 A. Here in Dallas.
 18 Q. Okay. So when did you move down to Dallas?
 19 A. January 1st, 1989.
 20 Q. Okay.
 21 A. I was at Baker Mills & Glast until April of
 22 1990, at which time I joined Baker Botts. I was at
 23 Baker Botts until September of 2002, at which time I
 24 joined Fulbright & Jaworski.
 25 Q. And you've been with Fulbright, obviously,

1 since '02?
 2 A. Yes, sir.
 3 Q. Okay. Would you please describe the nature of
 4 your practice here at Fulbright?
 5 A. I specialize in intellectual property and
 6 primarily handle litigations, court actions involving
 7 intellectual property.
 8 Q. According to your bio on your firm's website,
 9 which I didn't bring today, it says you have personally
 10 handled hundreds of patent cases; is that correct?
 11 A. I believe so, yes. Yes.
 12 Q. Okay. Is it common in patent cases to sue on
 13 the exact date a patent issues?
 14 MR. PATTON: Object, form.
 15 A. No. I would say it's not common.
 16 Q. (BY MR. SCHWARZ) Why would one sue on the
 17 date a patent issues?
 18 MR. PATTON: Object to form.
 19 A. Oh, there are lots of reasons. You know,
 20 primary reason would be concern that it's well-known in
 21 the industry that the patent is going to issue and that
 22 the patent owner would be subject to a declaratory
 23 judgment action by an accused infringer.
 24 Q. (BY MR. SCHWARZ) Okay. What did you do to
 25 prepare for your deposition today?

1 A. Oh, I -- to prepare for the deposition, I met
 2 with my attorney.
 3 Q. And who is your attorney?
 4 A. Ms. Collins.
 5 Q. And she's sitting right next to you, correct?
 6 A. Yes, sir.
 7 Q. Okay. Did you -- have you read the complaint
 8 or the amended complaint in the lawsuit that we're here
 9 for?
 10 A. I looked at a complaint. I can't tell you
 11 whether it was the original complaint or the amended
 12 complaint. I did not read it word for word.
 13 Q. Okay. And when did you do that?
 14 A. Yesterday.
 15 Q. Okay. Have you read Cisco's answer?
 16 A. No, sir.
 17 Q. Okay. Have you read any depositions?
 18 A. No, sir.
 19 Q. Have you read -- have you reviewed any other
 20 documents in preparation for today's?
 21 A. No, sir.
 22 Q. Did you discuss your testimony or your
 23 anticipated testimony here today with Mr. Ward or any of
 24 his attorneys?
 25 A. No, sir.

1 Q. Okay. Have you spoken with Mr. Ward about
2 this case since it was filed?
3 A. I did.
4 Q. And when was that?
5 A. I believe I was served -- I think it was last
6 Thursday.
7 Q. And you started to say that you were served.
8 Could you please put your conversation with Mr. Ward
9 into context?
10 A. Sure. When -- when I was served with the
11 subpoena, I called him to alert him to the fact that I
12 had received a subpoena to make sure that he was aware
13 that I had been -- been noticed.
14 Q. Okay. Had he notified you at any time prior
15 to your being served that you had been designated as a
16 witness in this case?
17 A. Yes, he did.
18 Q. And do you recall when that was?
19 A. No, I don't.
20 Q. Okay. Do you have any sort of attorney-client
21 relationship with Mr. Ward?
22 A. Well, Mr. Ward and I are co-counsel on -- on
23 some cases, and so, of course, we have -- I'm not sure
24 it would be attorney-client privilege in those
25 circumstances, but we're certainly co-counsel in some

1 matters.
2 Q. I understand that. I should have been more
3 clear in my question.
4 Do you have any sort of attorney-client
5 relationship as it relates to the case that we're here
6 for today, the Ward v. Cisco case?
7 A. No.
8 Q. Okay. Are you aware of any communications
9 between you and Mr. Ward that relate to this case that
10 might be privileged?
11 A. Not that I'm aware of.
12 Q. Okay.
13 (Exhibit Number 26 was marked.)
14 MR. PATTON: What number is it?
15 MR. SCHWARZ: This is 26. At least
16 that's what I've been told to start with today.
17 Q. (BY MR. SCHWARZ) I've just handed you a
18 document that has been labeled Exhibit 26, and is this
19 the deposition notice and subpoena that you received
20 last week?
21 A. It appears to be, yes.
22 Q. Okay. Do you understand that we're here in
23 connection with the case of John Ward, Jr., versus Cisco
24 Systems, Inc., which is pending in the U.S. District
25 Court for the Western District of Arkansas?

1 A. Yes, sir.
2 Q. Okay. And do you understand that this case
3 arises out of an underlying patent infringement case
4 pending in the Eastern District of Texas styled
5 ESN v. Cisco?
6 MR. PATTON: Object to form.
7 A. I'm not exactly sure I understand your
8 question.
9 Q. (BY MR. SCHWARZ) Okay. We'll get to those --
10 to those matters a little later.
11 Are you aware of being involved in any
12 litigation where your client is adverse to Cisco?
13 A. Now or in the past?
14 Q. Let's start with now.
15 A. No, I'm not aware of -- I am not personally
16 handling any matter where Cisco is adverse.
17 Q. Okay. In the past, have you?
18 A. Yes.
19 Q. Okay. And what case or cases would those be?
20 A. There were two cases. And I better go back
21 and amend -- amend my answer. I am involved in one case
22 where a -- as I understand it, a Cisco subsidiary is a
23 named defendant. Cisco Systems is not a named
24 defendant, but one of its subsidiaries. The two cases
25 were Fenner Investments, and I can't remember -- I think

1 it was Fenner Investments versus Juniper, and QPSX
2 versus -- again, I think it may have been Juniper, but
3 Cisco was a co-defendant in both of those cases.
4 Q. Okay.
5 (Exhibit Number 27 was marked.)
6 Q. (BY MR. SCHWARZ) I've handed you a document
7 which has been labeled Exhibit 27, and it is plaintiff's
8 initial disclosure in the Ward v. Cisco Systems case.
9 And I would ask you to look at page 6.
10 A. Okay.
11 Q. You'll note that your name is listed as --
12 next to the Number 23. Would you please read for the
13 record the description of the testimony you've been
14 designated as a witness for?
15 A. Starting with my name?
16 Q. Yeah.
17 A. "Bob Chiavello has knowledge of damage done to
18 plaintiff's reputation by defendant's statements. He
19 also has knowledge of plaintiff's reputation in the
20 legal community."
21 Q. Okay. Is that description accurate?
22 A. Yes, sir.
23 Q. Okay. Is that description complete?
24 A. I don't understand.
25 Q. Well, I should have asked it differently. Do

1 you have knowledge of any other -- to your knowledge, do
2 you have personal knowledge of any facts, other than
3 these that have been listed in the designation, that
4 relate to Mr. Ward's claims against Cisco Systems?
5 A. I really don't know because I don't know
6 what -- all of Mr. Ward's claims against Cisco.
7 Q. Fair enough. I will note that, on the
8 Certificate of Service on this document, it indicates
9 that this document was served in December of 2008. Were
10 you contacted by Mr. Ward or his attorney about
11 designated as a person with knowledge of relevant facts
12 at that time?
13 A. I can't --
14 MR. PATTON: Object to form.
15 A. I can't remember.
16 Q. (BY MR. SCHWARZ) Okay. Did you review that
17 description of your anticipated testimony before it was
18 served on other parties in this case?
19 A. No, sir.
20 Q. Have you ever seen that before today?
21 A. No, sir.
22 Q. Okay.
23 (Exhibit Number 28 was marked.)
24 Q. (BY MR. SCHWARZ) I've just handed you a
25 document that's styled Plaintiff's First Supplemental

1 A. I don't know.
2 Q. Okay. What information regarding the facts of
3 this case do you have outside of information about
4 plaintiff's reputation in the legal community and the
5 damage done to plaintiff's reputation by defendant's
6 statements?
7 A. Like I said, I don't know what the -- what the
8 claims are, and so I don't know what facts I may have
9 that would relate to those claims.
10 Q. Okay. Well, then how long have you known
11 Mr. Ward?
12 A. I think 2003.
13 Q. Do you recall the circumstances of your
14 meeting?
15 A. I was introduced to Mr. Ward by Mr. Franklin
16 Jones.
17 Q. And who is Mr. Franklin Jones?
18 A. Mr. Franklin Jones is deceased now. He was
19 one of the pillars of the Texas bar. He was one of the
20 leading attorneys in the state. He practiced law in
21 Marshall, Texas. He was a fine lawyer.
22 Q. And what were the circumstances of your being
23 introduced by Mr. Jones to Mr. Ward?
24 A. Mr. Jones was working with us on a case and
25 informed me that he was -- he was up there in age at the

1 Disclosures, and it's been labeled Exhibit Number 28.
2 Would you please turn to page 7 of this first
3 supplemental disclosure. You are again listed as
4 Number 23, and would you please read the description of
5 your knowledge of facts in this case from that
6 designation?
7 A. "Bob Chiavello has knowledge of damage done to
8 plaintiff's reputation by defendant's statements. He
9 also has knowledge of plaintiff's reputation in the
10 legal community. Mr. Chiavello may have additional info
11 regarding the facts of this case."
12 Q. You'll note that Mr. Ward added the sentence
13 "Mr. Chiavello may have additional info regarding the
14 facts to this case" to --
15 MR. PATTON: Object to form.
16 Q. (BY MR. SCHWARZ) -- the -- to this
17 designation. Did Mr. Ward or his attorney discuss this
18 change -- changed description with you before these
19 disclosures were served on Cisco in September of 2009?
20 A. No, sir.
21 Q. Okay. What info, as it says in the
22 description, regarding the facts of this case that
23 you've learned between December 2008, when those initial
24 disclosures were served, and December 2009, when the
25 supplemental disclosures were served?

1 time. I think he was in his '70s and wanted to cut back
2 a little bit and had suggested that we might want to
3 work with Johnny Ward, who, in his view, was one of the
4 finest young lawyers he had seen in a long time and
5 thought very highly of him and recommended --
6 recommended him to me to work with. And so I was
7 introduced to Johnny by Mr. Jones.
8 Q. Okay. Are you personal friends with Mr. Ward
9 or just business acquaintances?
10 A. We don't see one another socially outside of
11 business, if that's what you mean.
12 Q. Okay. How many cases have you worked on with
13 Mr. Ward over the years?
14 A. I don't remember the exact number.
15 Q. Can you give me a ballpark?
16 A. It's probably in the neighborhood of five.
17 Q. Okay. Is your relationship with Mr. Ward
18 generally that of your firm being lead counsel and
19 Mr. Ward being local counsel?
20 A. Yes, sir.
21 Q. And in light of your previous testimony about
22 the nature of your practice, are the cases that you've
23 been involved with been intellectual property cases?
24 A. Yes, sir.
25 Q. How do you and your clients typically use

1 Mr. Ward as local counsel? What sorts of
 2 responsibilities does he assume?
 3 MR. PATTON: Object to form.
 4 A. It varies from case to case and from week to
 5 week, but Mr. Ward is -- I view him as a trusted
 6 counselor, and so when issues arise, I will call on him
 7 for his advice and counsel.
 8 Q. (BY MR. SCHWARZ) Do you generally ask him to
 9 draft pleadings?
 10 A. Not generally, no.
 11 Q. Or discovery?
 12 A. No. I would say no.
 13 Q. Okay. To interview witnesses?
 14 A. That's a task that I would ask him to do --
 15 Q. Okay.
 16 A. -- and I believe he has done for me.
 17 Q. Does he draft motions for you?
 18 A. I think that's something that I would call on
 19 him to do from time to time.
 20 Q. And take depositions?
 21 A. Yes.
 22 Q. Okay. Draft jury charges?
 23 A. He would assist, yes.
 24 Q. Argue before the court?
 25 A. Yes.

1 you say it was Antor?
 2 A. Yes, sir.
 3 Q. Did you represent the plaintiff or the
 4 defendant in that?
 5 A. Plaintiff.
 6 Q. And do you recall the process by which you and
 7 your client decided to retain Mr. Ward in that case?
 8 A. Yes, sir.
 9 MR. PATTON: Objection, form.
 10 A. I do recall that.
 11 Q. (BY MR. SCHWARZ) Would you describe it for
 12 us, please.
 13 A. That was the matter where Mr. Jones
 14 recommended that we associate with Mr. Ward.
 15 Q. Okay. And how about the Fenner versus Juniper
 16 case?
 17 A. We were very pleased with Mr. Ward's
 18 assistance in the Antor case, and so we recommended him
 19 in the Fenner case to the -- to the plaintiff in that
 20 case, who we represented.
 21 Q. Okay. And was that also true in the other two
 22 Fenner cases that you mentioned?
 23 A. Yes, sir.
 24 Q. Okay. What are your criteria for choosing
 25 local counsel?

1 Q. I know this may vary from case to case, but
 2 let me ask, in general, do you make the decision as to
 3 whom to hire as local counsel or do your clients?
 4 MR. PATTON: Object to form.
 5 A. It does vary from case to case, and I would
 6 say it's usually a collaborative affair.
 7 Q. (BY MR. SCHWARZ) Do you typically recommend
 8 several for a client to choose from or say let's hire
 9 Johnny Ward because he's really good?
 10 MR. PATTON: Object to form.
 11 A. Again, it varies from case to case.
 12 Q. (BY MR. SCHWARZ) Okay. You mentioned you've
 13 probably worked with him on the -- on about five cases.
 14 Can you recall any of them in particular, which clients
 15 you represented?
 16 A. Yes. The Antor -- what we call the Antor
 17 cases, there were a number of cases. We represented
 18 Antor Media in an infringement action against a number
 19 of defendants, and there were a number of separate cases
 20 that were filed.
 21 Another case I recall, the Fenner versus
 22 Juniper case is one and another case involved -- Fenner
 23 versus Microsoft. And I believe Mr. Ward is helping us
 24 with the Fenner versus 3Com case.
 25 Q. And in -- let's start with the first one. Did

1 MR. PATTON: Object to form.
 2 A. Well, I'm sure you appreciate we -- there are
 3 a lot of different factors that go into the decision on
 4 who to associate with as associate counsel in any
 5 matter.
 6 Q. (BY MR. SCHWARZ) Can you list some of those
 7 criteria, for example, in the Fenner versus 3Com case?
 8 A. Well, I would say certainly the most important
 9 matter is the person's legal -- legal skills, his
 10 ability or her ability as a lawyer. Certainly their
 11 reputation as an upstanding person. Knowledge of the
 12 local court is also an important -- important factor.
 13 Q. When you say "knowledge of the local court,"
 14 does that -- are you referring to the judges or just the
 15 system as a whole?
 16 A. Both.
 17 Q. Okay. So would you say that Mr. Ward has a
 18 good relationship with the judges in East Texas?
 19 MR. PATTON: Object to form, calls for
 20 speculation.
 21 A. Yeah, I -- you know, you're asking me what the
 22 judges think, and they don't share that with you.
 23 Q. (BY MR. SCHWARZ) I'm asking -- I'm asking you
 24 your perception.
 25 MR. PATTON: Object to form.

1 A. Yeah, I believe he's well respected by the
2 judges in the Eastern District.
3 Q. (BY MR. SCHWARZ) And he's the son of a
4 federal judge, correct?
5 A. Yes, he is.
6 Q. Do you have personal knowledge of Mr. Ward's
7 reputation in the legal community?
8 A. I believe I do.
9 Q. Okay. And let me back up. When I said "legal
10 community," the reason I used that phrase is because
11 Mr. Ward used it in his -- in the two designations I put
12 before you as Exhibits 27 and 28. Would you define your
13 understanding of legal community?
14 A. Okay. I would say I personally am associated,
15 you might say, in two communities. One community would
16 be the lawyers who practice in Texas and particularly in
17 the Eastern District of Texas generally. And then the
18 second community I would -- I'm associated with would be
19 on a more national level involving intellectual property
20 cases, and so these would include lawyers who do not
21 routinely practice in the Eastern District of Texas, if
22 they ever practice there.
23 Q. Okay. What do you consider to be -- excuse
24 me. Let me back up.
25 You've just basically kind of defined two

1 kind of separate groups of lawyers. Do you -- what do
2 you consider to be the universe of lawyers who might
3 care about Mr. Ward's reputation?
4 MR. PATTON: Object to form.
5 A. Well, I would say both of those groups. You
6 can appreciate there's some overlap between the two
7 groups.
8 Q. (BY MR. SCHWARZ) Right. So please, tell me
9 your understanding of Mr. Ward's reputation.
10 A. My understanding is that -- well, let me --
11 let me ask you to pin down a time.
12 Q. Let's start with today.
13 A. I think he generally has a -- has a good
14 reputation, certainly from my perspective.
15 Q. How about -- you've said you first met him --
16 I'm sorry -- in 2003?
17 A. Yes, sir.
18 Q. How would you evaluate his reputation in 2003?
19 A. Well, when I -- when I first met him, I mean,
20 his -- the -- it was a community of one or two that --
21 well, I would say he had a good reputation at that time
22 and -- yes, I'd say he had a very good reputation at
23 that time. I would distinguish between before I knew
24 him and afterward. Before -- before I was introduced, I
25 didn't know him.

1 Q. Okay. You had not heard of him before that
2 time?
3 A. That's correct.
4 Q. Okay. And if I understand you correctly, you
5 think highly of him today?
6 A. I do.
7 Q. And you believe his reputation today is that
8 of a well-respected honorable attorney?
9 MR. PATTON: Object to form.
10 A. Well, again, you have -- you know, among most
11 people, I think that's true. I think there are some
12 people that -- where that's not true.
13 Q. (BY MR. SCHWARZ) And who would those people
14 be?
15 A. You know, I've had people question his
16 reputation as a result of the comments that your client
17 made that bring us all here today.
18 Q. Okay. Did you ever have -- and you made
19 reference to the comments that were made that are -- you
20 understand that they're the basis of this lawsuit,
21 correct?
22 A. I do. I believe I do.
23 Q. I mean you did -- you mentioned that you
24 were -- I'm not saying you studied it, but you did at
25 least briefly review the -- a petition or a complaint in

1 this case, correct?
2 MR. PATTON: Object to form.
3 A. I briefly reviewed a complaint, yes.
4 Q. (BY MR. SCHWARZ) Okay. Do you understand
5 that certain statements were made by the author of a
6 blog called the Patent Troll Tracker?
7 A. I know that that's -- could you restate the
8 question?
9 Q. Fair enough.
10 A. I'm sorry.
11 Q. Do you understand that certain comments were
12 made to which Mr. Ward has raised objection by an
13 anonymous blogger or a person who was then anonymous
14 called the Patent Troll Tracker?
15 A. Yes, I understand that.
16 Q. Okay. Did you ever have occasion to read the
17 blog Patent Troll Tracker?
18 A. Yes.
19 Q. Okay. And do you recall when you first read
20 it?
21 A. It would have been, I believe, in 2007
22 sometime.
23 Q. Do you recall how you found out about the
24 Patent Troll Tracker blog?
25 A. One of my colleagues informed me about it.

1 Q. Do you recall who that was?
 2 A. I believe it was Kirby Drake.
 3 Q. Do you recall why he recommended that you read
 4 it?
 5 A. Well, it's a she.
 6 Q. Oh, I'm sorry.
 7 A. In -- I believe it was. It was a blog that
 8 was getting a lot of attention in the -- in the
 9 community, and I had heard about -- heard about it and
 10 asked her to show me how to find out what it was about.
 11 Q. Okay. When you -- you mentioned -- you used
 12 the word "community." Would you explain to us what you
 13 mean by the -- by your use of that word?
 14 MR. PATTON: Objection, form.
 15 A. Well, I would use it -- I'm sorry. The two
 16 communities I would -- mentioned before, the national
 17 patent bar and the -- and the Texas bar.
 18 Q. (BY MR. SCHWARZ) Okay. Did you read the
 19 Patent Troll Tracker often?
 20 A. No, sir.
 21 Q. Okay. Did you ever e-mail the Patent Troll
 22 Tracker or otherwise try to communicate with it?
 23 A. No, sir.
 24 Q. Okay. Did you ever recommend to others that
 25 they read the Patent Troll Tracker?

1 A. I don't think I ever did that.
 2 Q. Okay. Were any of the cases that you've been
 3 involved with ever discussed by the Patent Troll
 4 Tracker?
 5 A. I believe that -- I believe at least one of
 6 them has, maybe two of them.
 7 Q. And do you recall which cases?
 8 A. I believe one of the Fenner cases and I
 9 believe one of the Antor cases.
 10 Q. Do you recall what the Patent Troll Tracker
 11 said about the Fenner case?
 12 A. I don't remember the details other than it was
 13 a negative and misleading, if not false, comment about
 14 the case. And my recollection was it was -- it was not
 15 a -- not a positive statement.
 16 Q. You said it was misleading. Do you recall in
 17 what way you considered it misleading?
 18 MR. PATTON: Object to form.
 19 A. My recollection was he just misstated the
 20 facts.
 21 Q. (BY MR. SCHWARZ) And was that the Fenner
 22 case?
 23 A. I believe it was.
 24 Q. Okay. How about the Antor case? Do you
 25 recall the coverage there?

1 A. I don't have a clear recollection of him
 2 having said anything about the Antor case, other than
 3 just maybe reporting on -- well, now that -- now that I
 4 think about it, I think he had -- he made some comments
 5 about our fact that the case was filed with one named
 6 defendant and then multiple defendants were added at a
 7 subsequent time.
 8 And as I recollect, he accused us of doing
 9 something in violation of the rules with respect to
 10 those -- that pleading. That's -- you know, it's been a
 11 while since I reviewed it, and I never did anything
 12 about it after that.
 13 Q. And I believe you've already answered this,
 14 but did you complain to the Patent Troll Tracker about
 15 any of this coverage?
 16 MR. PATTON: Object to form.
 17 A. No, sir.
 18 Q. (BY MR. SCHWARZ) Are you aware that the
 19 Patent Troll Tracker blog has been discontinued?
 20 A. No, I'm not aware that it's been discontinued.
 21 Q. Okay.
 22 A. Well, I should remand that. As I understand,
 23 he's no longer blogging, but it's my understanding his
 24 blog is still available, that if you -- if you seek it
 25 out on the internet, you can find the blog.

1 Q. And I probably should have asked this a while
 2 ago. We've been referring to -- we've been using the
 3 word "blog." Would you explain for the jury what --
 4 what you mean by the term "blog."
 5 A. Well, I'm not sure I have any -- any meaning
 6 for that term, other than what I think is generally
 7 understood. It's a -- it's a website where an
 8 individual or group of individuals can share their
 9 views, publish their views, make public statements about
 10 one or more topics of interest.
 11 Q. Okay. Do you know who Raymond Niro is or
 12 Niro?
 13 A. I do.
 14 Q. And would you tell the jury who he is?
 15 A. Mr. Niro or Niro -- I think it's pronounced
 16 Niro -- is one of the pillars of the national patent
 17 bar.
 18 Q. Okay.
 19 A. Or national intellectual property bar.
 20 Q. Were you aware that he offered a reward to
 21 anyone who could reveal the identity of the Patent Troll
 22 Tracker?
 23 A. Yes.
 24 Q. And how did you learn about that?
 25 A. When it -- when the Troll Tracker's identity

1 was revealed and it became -- there was some publicity
2 over it at that time, and Mr. Niro's reward was
3 mentioned in some of the articles I read. At least one
4 of the articles I read.

5 (Exhibit Number 29 was marked.)

6 Q. (BY MR. SCHWARZ) Do you recall -- I'll
7 represent to you this is Exhibit Number 29. It is a
8 printout of part of the Patent Troll Tracker blog. And
9 do you recall -- by any chance, did you read any part of
10 this at the time it was published, in particular the
11 matter concerning Mr. Niro on the first page?

12 A. I don't recall ever -- ever seeing this
13 before.

14 Q. Okay. You mentioned that the Patent Troll
15 Tracker's identity was exposed. Do you know the name of
16 the Patent Troll Tracker?

17 A. I don't recall it, no.

18 Q. If I represented to you that his name was
19 Richard Frenkel, would that refresh your recollection?

20 A. That's -- that sounds like the name I've heard
21 before, yes.

22 Q. And do you recall when you learned that the
23 Patent Troll Tracker was Mr. Frenkel?

24 A. I don't recall the date, no, sir.

25 Q. Do you know anything else about Mr. Frenkel?

1 they use it as a derogatory term. My understanding is
2 that it's essentially used by anyone who doesn't like a
3 patent owner seeking to enforce his or her patents
4 against them.

5 MR. PATTON: Could we take a two-minute
6 break?

7 MR. SCHWARZ: Sure. No problem.

8 THE VIDEOGRAPHER: We're off the record.
9 It's 9:46 a.m.

10 (Break was taken.)

11 THE VIDEOGRAPHER: Back on the record,
12 it's 9:50 a.m.

13 Q. (BY MR. SCHWARZ) Okay. You mentioned just a
14 few moments ago that you felt that the Patent Troll
15 Tracker had an agenda. Would one way of describing that
16 agenda be that the Patent Troll Tracker advocated
17 certain types of patent reform?

18 MR. PATTON: Object to form.

19 A. I don't know.

20 Q. (BY MR. SCHWARZ) Okay. You mentioned that
21 the Patent Troll Tracker was against persons who wanted
22 to enforce their patent rights. Could you expand on
23 that answer?

24 MR. PATTON: Object to form.

25 A. I don't know in what sense. I mean --

1 A. I know that he's a lawyer and that he works
2 for Cisco.

3 Q. Okay.

4 A. Or worked for Cisco at a time.

5 Q. Would you describe for the jury at least your
6 understanding of what the Patent Troll Tracker blog was
7 about?

8 MR. PATTON: Object to form.

9 A. Well, my understanding of it at the time was
10 it was a vehicle to, to put it bluntly, cast aspersions
11 on a category of patent owner and to -- that it -- that
12 there was an agenda to -- that he had an agenda that was
13 against people trying to enforce their patents.

14 Q. (BY MR. SCHWARZ) You made reference to "a
15 category of patent owner." Could you explain for the
16 jury what you meant by that phrase?

17 A. Typically sole inventors, individuals who made
18 inventions and obtained patents for their inventions
19 and, for one reason or another, were seeking to enforce
20 their patents against infringers.

21 Q. Okay. What is your understanding of the
22 meaning of the term "patent troll"?

23 MR. PATTON: Object to form.

24 A. I find it to be a very derogatory term, and I
25 oppose its use by those who do use it because I think

1 Q. (BY MR. SCHWARZ) I guess let me -- let me ask
2 a better question. Was -- in your opinion, was the
3 Patent Troll Tracker against all persons who wished to
4 enforce their patent rights?

5 MR. PATTON: Object to form.

6 A. I think against -- it seemed to me against
7 people that would enforce them against his client.

8 Q. (BY MR. SCHWARZ) Okay.

9 A. Or the client and those similarly situated
10 with his client.

11 Q. Okay. And prior to the disclosure of the
12 Patent Troll Tracker's identity, how would you describe
13 the persons or entities about which the Patent Troll
14 Tracker had favorable views?

15 A. Based on what I had seen and heard, it was
16 apparent that he represented a large company -- a large
17 company or companies such as Cisco.

18 Q. Are you aware -- are you aware of the fact
19 that one of the issues in Mr. Ward's case against Cisco
20 concerns the propriety of a clerk or deputy clerk of the
21 United States District Court for the Eastern District of
22 Texas changing the dates on a complaint and docket sheet
23 to reflect a different date of filing?

24 A. Yes.

25 MR. PATTON: Object to form.

1 A. Yes, sir.
 2 Q. (BY MR. SCHWARZ) In your almost 30 years
 3 experience as a lawyer, have you ever been involved in a
 4 case where the clerk of a court has changed the date of
 5 a filing of a complaint?
 6 MR. PATTON: Object to form.
 7 A. Yes, sir.
 8 Q. (BY MR. SCHWARZ) And what -- would you
 9 describe the circumstances of that case.
 10 A. Yeah, it's happened on a couple of occasions
 11 where -- sometimes they fail to change the stamp at the
 12 beginning of the day. Sometimes clerks make mistakes in
 13 terms of -- you know, they put the wrong month on the
 14 stamp. It typically happens when, you know, we change
 15 months or dates.
 16 And so we received, I'm thinking in two
 17 instances, a complaint that had the wrong date on it.
 18 And it was brought to the attention of the clerk, and
 19 the clerk fixed it.
 20 Q. Okay. And do you recall how it was brought to
 21 the attention of the clerk?
 22 A. In -- in one instance, I know it was simply a
 23 telephone call, and you know, and it was fixed. In the
 24 other instance, I believe a messenger was sent or a
 25 legal assistant was sent down to the clerk's office.

1 MR. PATTON: Object to form.
 2 A. Deadlines are important, yes.
 3 Q. (BY MR. SCHWARZ) Do you regularly refer to
 4 docket sheets for information about cases?
 5 MR. PATTON: Object, form.
 6 A. Yes, sir.
 7 Q. (BY MR. SCHWARZ) And it's important to be
 8 able to rely on a court's docket sheet, isn't it?
 9 A. Absolutely, yes, sir.
 10 Q. Okay.
 11 A. Though I will tell you there are often
 12 inaccuracies on them, so no one would rely entirely on
 13 the docket sheet.
 14 Q. And what else would you rely on?
 15 A. Well, that's a -- that's one of the challenges
 16 in the practice of law is that there's probably no one
 17 thing one can rely on. It's a -- it's a group of --
 18 it's a group of things.
 19 Q. And could you describe some of the members of
 20 that group of things?
 21 A. Well, you would rely on your own file. You
 22 would rely on the court's file. You would rely on --
 23 occasionally rely on your opponent's file.
 24 Q. And you're familiar with the ECF systems,
 25 correct?

1 Q. Okay. And would you explain for the jury why
 2 the date of a filing of a complaint can be of
 3 importance?
 4 MR. PATTON: Object to form.
 5 A. Well, I mean, there are lots of -- lots of
 6 reasons, but we all want -- want to be accurate in what
 7 we do in terms of the court system, I would think. I
 8 would say yes.
 9 Q. (BY MR. SCHWARZ) Well, in terms of a patent
 10 case, subject matter jurisdiction wouldn't exist if a
 11 complaint was filed before the patent issued, correct?
 12 MR. PATTON: Object to form.
 13 A. You know, I don't know.
 14 Q. (BY MR. SCHWARZ) Well, in other cases, the
 15 statute of limitations may run, correct?
 16 A. That could be a -- certainly be an issue, yes,
 17 sir.
 18 Q. Okay. And in cases removed from state court
 19 to federal court, there are deadlines for removal,
 20 correct?
 21 A. There are deadlines, yes, sir.
 22 Q. Okay. And just in general, courts can impose
 23 deadlines on parties to cases, and when you file
 24 something can be -- if you miss a deadline, that can
 25 have significant consequences, correct?

1 MR. PATTON: Object to form.
 2 A. Is that the electronic docketing system?
 3 Q. (BY MR. SCHWARZ) Yeah, the electronic -- I
 4 believe it stands for electronic case filing.
 5 A. Yes, I'm familiar with it, yes, sir.
 6 Q. Have you ever filed something using an ECF
 7 system?
 8 A. I personally have never done that, no, sir.
 9 Q. Have you had either an associate or a staff
 10 member do it for you?
 11 A. Yes, sir.
 12 Q. Okay. And you have seen, I would -- let me
 13 ask you this way: Have you ever seen a document that
 14 has been filed through the ECF system?
 15 A. Yeah, I think -- yes.
 16 Q. And do those documents not have a banner at
 17 the top containing some information about the filing?
 18 MR. PATTON: Object to form.
 19 A. They certainly do now, yes. They frequently
 20 have a banner at the top of the document.
 21 Q. (BY MR. SCHWARZ) Okay. If I wanted to find
 22 out some information about a case that you're involved
 23 with, at least a case in federal court, one of the first
 24 places I'd look is the docket sheet prepared and
 25 maintained by the clerk; wouldn't be the case?

1 MR. PATTON: Object to form.
 2 A. You could do that, yes.
 3 Q. (BY MR. SCHWARZ) Okay. Would you explain for
 4 the jury your understanding of the duties and
 5 responsibilities of a United States district clerk?
 6 MR. PATTON: Object, form.
 7 A. I don't think I've ever really looked at it,
 8 but, from my experience, their responsibilities are to
 9 maintain the files of the United States federal court
 10 for whichever district and division they are charged
 11 with that responsibility.
 12 Q. (BY MR. SCHWARZ) Would you say that it's the
 13 case that a clerk's duties are determined and assigned
 14 by the court for which he or she works?
 15 MR. PATTON: Object to form.
 16 A. I would think so.
 17 Q. (BY MR. SCHWARZ) Okay. In fact, I'll
 18 represent to you that 28 USC Section 956 states that --
 19 and I'm quoting -- The clerk of each court and his
 20 deputies and assistants shall exercise the powers and
 21 perform the duties assigned to them by the court, end
 22 quote.
 23 A. Well, I was going to -- you mentioned the
 24 statute. I was going to say the clerk's duties are also
 25 probably provided by -- almost certainly provided by

1 statute, obviously, the constitution, rules of court, as
 2 well as the orders of the court.
 3 Q. Okay. And based on the statute that I just
 4 quoted to you, would it be fair to say that a clerk
 5 isn't authorized to act beyond the scope of authority
 6 granted to him by the court?
 7 MR. PATTON: Object to form.
 8 A. I think a clerk always has to work under
 9 whatever authority he or she may have.
 10 Q. (BY MR. SCHWARZ) Okay.
 11 A. I don't mean to suggest that that's the
 12 only -- that that statute that you read is the only
 13 authority that they would operate under. I don't -- I
 14 just don't know.
 15 Q. Okay. I'd like to go back to those two
 16 instances you mentioned of clerks getting the date wrong
 17 on a filing.
 18 A. Right.
 19 Q. And you mentioned that in one case there was a
 20 phone call and another case there was -- I believe you
 21 said a courier was sent?
 22 A. Correct.
 23 Q. In those cases, were both parties aware of the
 24 discrepancy on the docket sheet?
 25 MR. PATTON: Object to form.

1 Q. (BY MR. SCHWARZ) I mean -- or the filing?
 2 A. I don't think so.
 3 Q. Okay. So are you saying, in those cases, one
 4 side simply unilaterally had the clerk change a date on
 5 a document?
 6 A. I don't agree with the way you stated it, so
 7 I --
 8 Q. Then please -- are you saying that, in those
 9 cases, one side had the clerk change the date on the
 10 document without informing the other side?
 11 MR. PATTON: Object to form.
 12 A. Maybe I should tell you what happened.
 13 Q. (BY MR. SCHWARZ) Fair enough.
 14 A. The fact of the date on the document was
 15 pointed out to the clerk. The clerk realized the date
 16 was wrong and corrected the error.
 17 Q. Okay.
 18 MR. SCHWARZ: What is this, 30? Let's go
 19 ahead and do 31, too.
 20 MR. PATTON: I have 30.
 21 MR. SCHWARZ: I'm about to give them to
 22 you. Hang on.
 23 MR. PATTON: Oh, okay.
 24 THE WITNESS: 30 and 31.
 25 (Exhibit Number 30 and 31 were marked.)

1 Q. (BY MR. SCHWARZ) I've just handed you
 2 documents that have been labeled Exhibits 30 and 31.
 3 Could you just describe them for the jury for us?
 4 A. Well, 30 appears to be a copy of a docket
 5 sheet, and 31 appears to be a complaint.
 6 Q. Okay. And looking at these two exhibits, can
 7 you determine what date the complaint that is Exhibit --
 8 I believe it's 30 -- 31 was filed?
 9 MR. PATTON: Object to form.
 10 A. The date that it was filed?
 11 Q. (BY MR. SCHWARZ) Right.
 12 A. Well, based on what's printed at the top of
 13 the document, it appears to have been filed on
 14 October 15, 2007.
 15 Q. And on the docket sheet, can you tell the jury
 16 what date it appears the complaint was filed?
 17 MR. PATTON: Object to form.
 18 A. Well, it appears to be October 15, 2007.
 19 Q. (BY MR. SCHWARZ) Okay. Is there anything on
 20 either document that suggests that the complaint was
 21 filed on October 16?
 22 MR. PATTON: Are you talking about
 23 Exhibit 31?
 24 MR. SCHWARZ: 30 or 31.
 25 MR. PATTON: You said the other document,

1 and I'm not sure which one of the two you're talking
2 about.
3 MR. SCHWARZ: Fair enough. I appreciate
4 that. I want to be clear.
5 Q. (BY MR. SCHWARZ) Is there anything on -- on
6 Exhibit 30 that would suggest that the complaint was
7 filed on October 16?
8 A. No.
9 Q. And how about is there anything on Exhibit 31
10 that suggests that that document was filed on
11 October 16?
12 A. No. And again, I haven't seen these documents
13 before; and 31 is a six-page document, I guess, and I
14 haven't read it. But just looking at the cover page and
15 the last page, I don't see anything that would suggest
16 that it was filed on other than October 15, 2007.
17 Q. In your view, would it be unreasonable for a
18 person viewing these documents to conclude that this
19 lawsuit, ESN versus Cisco, was filed on October 15th?
20 MR. PATTON: Object to form.
21 A. Well, there is a fact that would raise a
22 question in my mind, and that's Mr. Ward's notice of
23 appearance on the 16th.
24 Q. (BY MR. SCHWARZ) And why does that raise a
25 question for you?

1 set -- the courts set rules in terms of dates to
2 respond. The statute sets rules on when you can
3 respond. For example, a plaintiff has 20 days -- I'm
4 sorry. A defendant has 20 days to answer a complaint
5 once they're served with a complaint and summons. And
6 so those types of dates, as I say, there are court
7 orders that require you to do things by -- by certain
8 dates, and those dates are important.
9 Q. (BY MR. SCHWARZ) Okay. So in any given case,
10 there could be many, many important dates?
11 A. Absolutely.
12 Q. And do you believe that it's incumbent on
13 parties to double-check all of those?
14 MR. PATTON: Object to form.
15 A. Well, not all of them. But -- but frequently,
16 it is important to double-check those, those dates, yes,
17 sir.
18 Q. (BY MR. SCHWARZ) And do you do that
19 frequently?
20 A. You know, not to quibble with your term
21 "frequently," but it happens with a high degree of
22 regularity, yes, sir.
23 Q. Okay. So if -- if one called a clerk about
24 Exhibits 30 and 31, how would the clerk determine that
25 there was anything incorrect about what was displayed

1 A. Because typically notices of appearance are
2 filed at the same time as the complaint.
3 Q. Is there any way -- in your experience with
4 the ECF system, is there some way to kind of look behind
5 what's on the -- on the face of the system, so to speak,
6 to determine whether the dates listed there are correct?
7 MR. PATTON: Object.
8 A. Well, certainly, yes.
9 MR. PATTON: Object to form.
10 Q. (BY MR. SCHWARZ) And how is that?
11 A. Call the clerk.
12 Q. Okay. So do you think it's incumbent on
13 persons to call the clerk and check with every filing
14 that's made to make -- to confirm that the date that's
15 displayed on the ECF system is correct?
16 A. I wouldn't say with every filing, but with --
17 with something that might be of importance where that --
18 you mentioned earlier that dates are important. When
19 those -- if there's a filing where there's an important
20 date, absolutely.
21 Q. Okay. And what sorts of filing dates are
22 important?
23 MR. PATTON: Object to form.
24 A. Well, you mentioned things like statute of
25 limitations, and you mentioned there are rules that

1 there?
2 MR. PATTON: Object to form.
3 A. You know, I really don't know all of the
4 details and all of the procedures that clerks -- that
5 the clerks of the various district courts follow. But I
6 do understand that they have -- they do have procedures
7 that are what I would view as backup systems and that
8 they have a way of double-checking entries is what I
9 would call it.
10 (Momentary off-the-record discussion.)
11 (Exhibit Numbers 32 and 33 were marked.)
12 Q. (BY MR. SCHWARZ) Would you please describe
13 the documents that have been handed to you that are
14 labeled Exhibits 32 and 33?
15 A. 32 appears to be a complaint, and 33 appears
16 to be a docket sheet.
17 Q. Okay. And if you'd like the time to actually
18 compare them word for word, feel free and we'll go off
19 the record and you can do that. But does the complaint
20 that is -- that has been labeled Exhibit 32 appear to be
21 the same complaint as Exhibit Number 31?
22 A. Yeah, I would just -- quickly scanning it,
23 Mr. Schwarz, they do appear to be essentially the same.
24 I mean, you know, there are -- there's a difference, of
25 course, at the top.

1 Q. And would you describe what that difference
2 is?
3 A. The exhibit -- Exhibit 32 bears the date of
4 October 16, 2007, at the top.
5 Q. And --
6 A. And on each page.
7 Q. And on Exhibit 33?
8 A. Exhibit 33, you're saying in comparison to
9 Exhibit 30?
10 Q. Correct.
11 A. Well, first, there at least would appear to be
12 three additional entries on the docket, and the date --
13 let me say Exhibit 33 appears to have at least three
14 more entries than Exhibit 30, and the date filed for the
15 complaint is October 16, 2007, on Exhibit 33.
16 Q. Okay.
17 A. You know, you asked me a question about
18 Exhibit 30 and whether there was anything on the -- on
19 the docket that appeared that the date of October 15,
20 2007, might be wrong. And in looking at it, there's --
21 there's the statement on -- in the -- what they call the
22 docket text at the end of Docket Entry Number 1.
23 It says "entered October 16, 2007," so
24 that -- if I had been looking at this docket, that would
25 tell me there's -- there's something inconsistent, and

1 that would -- that would raise a question in my mind as
2 to what the -- whether which date -- which of the two
3 dates was the -- was the right date.
4 Q. Fair enough. Would it be unreasonable for
5 someone comparing the two docket sheets and the two
6 complaints that I've handed you that collectively are
7 exhibits, I believe it's 30 through 33, would it be
8 unreasonable to conclude that the filing date was
9 changed?
10 MR. PATTON: Object to form.
11 A. The filing date was changed --
12 Q. (BY MR. SCHWARZ) Okay.
13 A. -- in one -- in one respect, yes.
14 Q. Okay. Are you familiar with the Patent Troll
15 Tracker blogs at issue in this lawsuit?
16 A. I don't understand your question.
17 Q. Okay.
18 A. You mean the specific blogs that made the --
19 made the statements that bring us all here today?
20 Q. Correct.
21 A. Yes, I'm generally familiar with those
22 statements. Let me say I'm generally familiar with
23 the -- with that blog, those blog entries, statements,
24 yes.
25 (Exhibits 34, 35, and 36 were marked.)

1 Q. (BY MR. SCHWARZ) Mr. Chiavello, I've handed
2 you three documents that have been labeled Exhibits 34,
3 35, and 36, and I will represent to you that these three
4 documents are exhibits to Mr. Ward's amended complaint
5 in the case that we're here about today. That is not
6 exactly explained, but if you look at the very top, the
7 banner notes that it's Document 66-1, 66-2, and 66-3.
8 And I'll represent to you that Document 66, to which
9 these are attachments, are Mr. Ward's amended complaint
10 in the present lawsuit.
11 Have you seen any of these blogs before?
12 A. You know, yes, I've -- well, I've seen papers
13 that would look like this. You know, again, I don't
14 remember reading them in this form. You know, as I look
15 at it, as I read this first -- these first couple of
16 statements, I don't think I ever read this before,
17 frankly, because, in reading this, I'm really outraged
18 by what I've read, and I don't recall being outraged
19 before. In particular, the comment about the Banana
20 Republic of East Texas I think is just absolutely
21 outrageous.
22 MR. PATTON: Could we maybe clear
23 something up here? You've given 34 and 35, and I would
24 assume that the -- the first blog is at the bottom of
25 the page on 34. That's the 17th.

1 MR. SCHWARZ: Yes, I agree with that.
2 MR. PATTON: Okay. Sometimes people
3 separate them out. It's a separate document. But you
4 have the 17th and the 18th both on 34 and 35?
5 MR. SCHWARZ: That is correct.
6 MR. PATTON: Okay.
7 MR. SCHWARZ: And as I represented to
8 Mr. Chiavello, I'll simply say that this is how they've
9 been filed with the amended complaint.
10 MR. PATTON: Okay.
11 Q. (BY MR. SCHWARZ) So I take it that you feel
12 that the -- the reference to the Banana Republic of East
13 Texas is a derogatory and untoward expression?
14 A. Yes, sir.
15 Q. If you would compare -- and you'll note that
16 that reference is made in a blog that is dated Thursday,
17 October 18th, under the title "ESN convinces EDTX court
18 clerk to alter documents to try to manufacture subject
19 matter jurisdiction where none existed." Is that
20 correct?
21 A. That's what it says, yes, sir.
22 Q. Okay. I'd ask you to look at the following
23 two exhibits, 35 and 36. And under the same Thursday,
24 October 18th entry with the same -- the same title, do
25 you see any reference to the Banana Republic of East

1 Texas?

2 MR. PATTON: And this is what I'm trying

3 to clear up and want to make certain, because the top

4 one on 35 does have the Banana Republic on the first

5 page.

6 THE WITNESS: Right.

7 MR. PATTON: But I think what you're

8 referring -- you're wanting to refer to is right

9 underneath it, which is the October 17th or it will be

10 the next one, which is dated the 18th, but was actually

11 corrected on the 19th.

12 MR. SCHWARZ: Okay. Perhaps we should go

13 off the record for a second just to clarify this.

14 MR. PATTON: That's probably a good idea.

15 MR. SCHWARZ: Okay.

16 THE VIDEOGRAPHER: We're off the record

17 at 10:17 a.m.

18 (Momentary off-the-record discussion.)

19 THE VIDEOGRAPHER: We're back on record

20 at 10:19 a.m. Please proceed.

21 Q. (BY MR. SCHWARZ) Mr. Chiavello, while we were

22 off the record, Mr. Patton and I had a discussion and we

23 clarified these exhibits. There are some questions

24 about these exhibits. And I'll ask him to -- I will try

25 to put our understanding on the record, and I'll ask

1 MR. PATTON: Sorry to interrupt you.

2 MR. SCHWARZ: No, that's okay. We want

3 everything to be clear about it.

4 Q. (BY MR. SCHWARZ) Like I said, while I don't

5 think there's any dispute about that, for today, I'm not

6 going to be referring -- the dates are not going to be

7 significant other than what's posted on there; and if

8 they are, I'm sure Mr. Patton will correct me.

9 But in any event, to get back to the

10 question which led into this morass of clarifications,

11 if you would compare the October 18th, 2007, entry that

12 is on Exhibit 34 with that on Exhibit 36, which

13 Mr. Patton has just explained was edited, I believe you

14 said, on the 19th --

15 MR. PATTON: That's correct.

16 Q. (BY MR. SCHWARZ) -- do you see that the

17 reference to the Banana Republic of East Texas is no

18 longer there?

19 A. I see that omission, yes, sir.

20 Q. Okay. If -- if I understand what you said

21 earlier, this is the first time you've actually read

22 these blogs?

23 A. I believe -- I believe that's to be the case.

24 Q. Okay. I'd ask you to look at the blog entry

25 dated October 17th.

1 Mr. Patton to correct me or expand upon it if he sees

2 fit.

3 But I believe we've agreed that Exhibit 34

4 was -- Exhibit 34 and Exhibit 35 are identical copies.

5 And on each of them, there is, at the bottom of the

6 first page of Exhibit 34 and the bottom of the first

7 page of Exhibit 5 [sic], there is an October 17th, 2007,

8 blog entry. And above that is an October 18th, 2007,

9 blog entry. And those are identical.

10 Exhibit 36 has, on one page, a changed

11 version of the blog entry, which is on -- at the top of

12 the first page of Exhibits 34 and 35.

13 MR. SCHWARZ: Is that -- is that our

14 understanding, Mr. Patton?

15 MR. PATTON: It is, except you've got to

16 understand that the October -- Exhibit 36 was the

17 amended or edited version of the October 18th blog, and

18 while it shows October 18th on the face of Exhibit 36,

19 that blog was edited on the 19th.

20 MR. SCHWARZ: While I don't believe there

21 is any dispute about that, I'd simply comment --

22 MR. PATTON: Right. I can promise you

23 there is no dispute about that.

24 MR. SCHWARZ: Right. I don't believe

25 there's --

1 A. On which -- on Exhibit 34?

2 Q. Yeah, on 34 or 35, because they're identical.

3 And I'd ask you to read it, and then I'll have a very

4 good question for you.

5 A. I've read it, and in reading it, it jogged a

6 recollection. You asked me earlier today whether you

7 could file a lawsuit if a patent -- before a patent

8 issues, and there's a reference here to GAF versus Elk.

9 I recall that case, and the answer is, no, you cannot

10 file a patent infringement suit before the patent

11 issues.

12 Q. Right. Thank you.

13 Having read the October 17th blog, is

14 there any mention of Mr. Ward in it?

15 A. I believe so, yes. In the last paragraph,

16 he's mentioned twice.

17 Q. Okay. And in what context is he mentioned?

18 A. What do you mean by "in what context"?

19 Q. Well, how was he referenced in that last

20 paragraph?

21 A. Rudely, I would say.

22 Q. He's referenced twice, correct?

23 A. Yes, sir.

24 Q. And are you saying that -- stating that he is

25 local counsel is referencing him rudely?

1 A. The last sentence says, "Wonder how I don't
2 Johnny Ward will play there," question mark. I read
3 that as a negative comment about Johnny Ward.
4 Q. So do you think that that -- that comment
5 would harm Mr. Ward's reputation?
6 A. It's a negative comment, yes, and negative
7 comments can harm a person's reputation.
8 Q. I'd ask you to look at now the October 18th
9 blog, either on Exhibit 34 or 35, again because they're
10 identical.
11 A. Okay. I'm looking at 34.
12 Q. That's fine.
13 A. Okay. I've read it.
14 Q. Is there any mention of Mr. Ward's name there?
15 A. I don't -- I don't see one, no, sir.
16 Q. I'd ask you to look at the October 18th blog
17 on Exhibit 36.
18 A. I'm looking at it.
19 Q. If you wouldn't mind reading it.
20 A. Okay.
21 Q. And is there any mention of Mr. Ward's name
22 there?
23 A. His name?
24 Q. Correct.
25 A. No, no, his name is not mentioned.

1 Q. Mr. Ward has testified that you told him that
2 there were clients or potential clients, and I believe
3 he's testified that -- that there were -- in his
4 recollection, that this happened more than once, but in
5 any event, that there was at least one client who -- who
6 refused to hire Mr. Ward because of the patent troll --
7 Patent Troll Tracker blogs. Is that true?
8 A. Yes, sir.
9 Q. And do you recall how many -- first, how many
10 clients or potential clients there were?
11 A. By my recollection, there were three
12 instances.
13 Q. Okay. And who were those? Could I simply
14 call them clients, for the sake of our discussion here?
15 A. Yes, sir.
16 Q. Okay. And who were those clients?
17 MS. COLLINS: Objection, privileged.
18 A. Yeah, I'm not going to reveal the names.
19 Q. (BY MR. SCHWARZ) Okay. When did these --
20 when did these events occur?
21 A. My recollection is it was at the end of 2007,
22 early part of 2008.
23 Q. Without naming the clients -- let me back up
24 for a moment. Let's just make sure our record's clear.
25 Would you please name those clients for

1 us?
2 MS. COLLINS: Objection, privileged.
3 A. I will not name the clients.
4 Q. (BY MR. SCHWARZ) Okay.
5 MR. SCHWARZ: Are you instructing your
6 client not to answer the question?
7 MS. COLLINS: Yes, sir.
8 MR. SCHWARZ: Okay.
9 Q. (BY MR. SCHWARZ) Did these clients -- if --
10 did any of these clients say that they did not want to
11 retain Mr. Ward solely because of the Patent Troll
12 Tracker blogs?
13 A. In all three instances, that was identified as
14 the reason, yes, sir.
15 Q. When you said "the reason," was it the only
16 reason?
17 A. To the best as I recall, that was the stated
18 reason.
19 Q. Okay. Did you try to convince them otherwise?
20 A. Yes, sir.
21 Q. Okay. And could I ask you first what it was
22 that they said was their reason for not wanting to
23 retain Mr. Ward?
24 A. Well, again, I -- the specific communication
25 is privileged, and I don't remember the exact -- exact

1 words. But in all three instances, there was -- there
2 was mention of these statements and the concern about
3 Mr. Ward being somebody to -- a concern about his
4 honesty and their willingness to have him act as their
5 attorney.
6 Q. Okay. And what did you tell them, to the
7 extent that you can, to disabuse them of the notion that
8 there was a problem with Mr. Ward's integrity?
9 A. Well, again, in all three cases, I was
10 outraged and tried to defend Mr. -- Mr. Ward's
11 integrity. But in those cases, I was unsuccessful.
12 Q. Okay. Did you say that the blogs were untrue?
13 A. Yes.
14 Q. Had you actually read them at the time?
15 A. No. I was familiar with them, though.
16 Q. And how was it that you were familiar with
17 them?
18 A. You know, Mr. Schwarz, in reading these, now
19 that I've read them a couple of times, the one on the
20 17th I may have read at the time. I don't think I read
21 the one on the 18th. I'm pretty confident I don't
22 recall having read the one on -- well, I just don't
23 remember the one on the 36 -- Exhibit 36.
24 That Banana Republic comment really kind
25 of sticks out at me, and as I say, I just don't recall

1 having seen that before or the comment about Mr. Ward in
 2 the -- in the one dated the 17th. So I just don't
 3 recall whether I read them or not.
 4 Q. Do you know whether these clients had actually
 5 read the blogs?
 6 MR. PATTON: Object, form.
 7 A. You know, I believe they represented that they
 8 had, yes, sir.
 9 Q. (BY MR. SCHWARZ) And if I recall your
 10 testimony from just a few moments ago you believe all
 11 of this -- all three of these clients declined
 12 Mr. Ward's representation either in late 2007 or early
 13 2008, correct?
 14 A. Correct.
 15 Q. Okay. By early 2008, do you know what time
 16 frame -- could you explain what time frame you have in
 17 mind?
 18 A. First quarter 2008.
 19 Q. So the first three months of 2008?
 20 A. That's correct.
 21 Q. Do you have -- can you recall with any greater
 22 specificity when that might have been?
 23 A. I believe one was in December of 2007, and I
 24 believe the other two were either in December or
 25 January/February time frame.

1 Q. Okay. Mr. Ward has testified that he is
 2 currently working on several cases with you and your
 3 firm; is that correct?
 4 A. Yes, sir.
 5 Q. Okay. And what cases is he working on?
 6 A. I thought we went over this before, but
 7 it's -- he is co-counsel with us on a -- on a various
 8 number of the Antor cases, and he is co-counsel with us
 9 on at least one -- on the Fenner case, which we call
 10 Fenner 3.
 11 Q. Okay. And I apologize if I asked the question
 12 twice.
 13 And did any of those clients retain
 14 Mr. Ward after the -- after October of 2007?
 15 A. I believe for sure the Fenner 3 case. I
 16 believe that that's the case.
 17 Q. Do you know if the folks at Fenner knew about
 18 those blog posts at the time they retained Mr. Ward?
 19 A. I think -- I think they did.
 20 Q. Okay. Did they express any opinion about
 21 those posts?
 22 A. They -- you mean about the specific posts
 23 about Mr. Ward or about the -- about the Patent Troll
 24 Tracker blog in general?
 25 Q. Fair question. Let's start with the Patent

1 Troll Tracker in general.
 2 MR. PATTON: Object to form.
 3 A. I believe the comments had been that they had
 4 been treated just as improperly as Mr. Ward had been
 5 treated. I think he had made negative statements about
 6 Fenner Investments.
 7 Q. (BY MR. SCHWARZ) Okay. So at least as to
 8 those clients, is it fair to say Mr. Ward's reputation
 9 is intact?
 10 MR. PATTON: Object to form.
 11 A. It's hard -- hard for me to say. I mean, they
 12 were aware that -- that there had been some negative
 13 statements made about -- about him.
 14 Q. (BY MR. SCHWARZ) Since those blog posts, the
 15 Patent Troll Tracker blog posts that we've discussed,
 16 has Mr. Ward's performance as a lawyer diminished in any
 17 respect?
 18 MR. PATTON: Object to form.
 19 A. You mean his performance as advocating for
 20 clients? I'm not sure I understand your --
 21 Q. (BY MR. SCHWARZ) Correct.
 22 A. I'm not aware of his performance changing,
 23 other than it gets better as time goes on, I think.
 24 Q. Okay. So he still works his cases
 25 effectively?

1 A. To my knowledge, yes.
 2 Q. Okay. Has your opinion of Mr. Ward changed as
 3 a result of the poll -- Patent Troll Tracker blog?
 4 A. Yes.
 5 Q. And in what respect?
 6 A. I had a high regard for him before. I have
 7 higher regard for him now, standing up to face Cisco in
 8 this matter. It takes an -- it's an act of courage to
 9 take on a big company like Cisco.
 10 Q. Okay. You said earlier that there were some
 11 clients who -- who declined to hire Mr. Ward because of
 12 the Patent Troll Tracker blogs, correct?
 13 A. I said that, yes, sir.
 14 Q. Okay. And I assume, based on our earlier
 15 discussion, that you had given those clients your
 16 typical high praise and expressed your admiration for
 17 Mr. Ward; is that correct?
 18 A. Yes, sir.
 19 Q. And despite the fact that you, with 30 years
 20 experience in IP law and a partner at easily one of the
 21 most prestigious firms ever -- I mean anywhere, they
 22 chose to -- apparently chose to believe the expressions
 23 of an anonymous blogger over your recommendation?
 24 A. I guess you could say that, yes, sir.
 25 Q. Okay. Were those clients that we were

1 discussing, are they presently your clients?
 2 A. Two of them are, yes, sir.
 3 Q. You stated a moment ago that you actually
 4 think more highly of Mr. Ward as a result of the events
 5 that started the Patent Troll Tracker's blogs, correct?
 6 A. Yes, sir.
 7 Q. Okay. Isn't it possible that Mr. Ward's
 8 reputation actually has been enhanced because of the
 9 controversy?
 10 MR. PATTON: Object to form.
 11 A. Well, again, I guess you have to be specific
 12 as to who you are -- who you are referring to.
 13 Q. (BY MR. SCHWARZ) Well, has anyone spoken to
 14 you saying that they respect Mr. Ward even more because
 15 of the events that have transpired since the Patent
 16 Troll Tracker blogs have -- were posted?
 17 A. I think one or more of my colleagues here at
 18 the firm have voiced similar expressions.
 19 Q. Okay. And could you be a little bit more --
 20 could you expand on that and tell me what sorts of
 21 things your colleagues have expressed to you?
 22 A. Generally that they are impressed -- again
 23 I'll use the word Mr. Ward's courage in standing up to
 24 Cisco and a regard for his willingness to try to remedy
 25 the evil that this Troll Tracker perpetuated against the

1 effective litigator, didn't he?
 2 A. Well, I don't know about -- I mean -- I think
 3 it's his intent, from reading these statements that
 4 you've handed me, was just the opposite, that he had --
 5 he and Mr. Albritton had done something dishonest. I
 6 don't view people who do things dishonestly as being
 7 effective at all.
 8 MR. SCHWARZ: Objection, nonresponsive.
 9 Q. (BY MR. SCHWARZ) Has Mr. Ward told you that
 10 he's received some very positive messages in response to
 11 the Patent Troll Tracker controversy?
 12 A. I don't recall.
 13 Q. Okay. Did he tell you that one message that
 14 he received called him a hero?
 15 A. He did not tell me that, no, sir.
 16 Q. Okay. Would that expression, referring to
 17 someone as a hero, be considered a symptom of an injured
 18 reputation?
 19 A. It would -- actually, I would think it's a
 20 symptom of an injured -- of an injury, yes, sir. Heroes
 21 tend to be injured in the actions that they undertake.
 22 That's why we call them heroes.
 23 Q. Do you -- would you describe for the jury the
 24 damage that you believe has been done to Mr. Ward's
 25 reputation?

1 administration of justice in the federal system and in
 2 the Eastern District of Texas, in particular, and stand
 3 up for the many people who I believe were victimized by
 4 the Troll Tracker.
 5 And Mr. Ward and Mr. Albritton, by the
 6 way, as well, I think it was an act of bravery on their
 7 part to take on this individual and Cisco to try and
 8 remedy the wrong that they perpetuated against --
 9 certainly against Mr. Ward and Mr. Albritton.
 10 Q. Have you ever filed a patent infringement
 11 case, for want of a better expression, amended after
 12 midnight, when/ particularly on the date of patent
 13 issue?
 14 A. Yes, sir.
 15 Q. And why do you do that?
 16 A. To avoid a defendant infringer from filing a
 17 declaratory judgment action against you, against the
 18 patent owner.
 19 Q. And would you say that that is a sign of an
 20 effective and aggressive litigator?
 21 A. I would say it's an effective litigator. It's
 22 certainly something you have to be concerned about, and
 23 in some instances, it's necessary.
 24 Q. Okay. And so the Patent Troll Tracker, at
 25 least in part, publicized the fact that Mr. Ward was an

1 MR. PATTON: Object to form.
 2 A. I believe there are members of the
 3 community -- by that, the -- certainly the national
 4 patent community, that believe that there were questions
 5 about his ethics and integrity sufficient enough that
 6 they would be unwilling to retain him as counsel.
 7 Q. Okay. And we've discussed a few of those,
 8 correct?
 9 A. Yes, sir.
 10 Q. Are you aware of any others?
 11 A. Not that I can recall.
 12 Q. Do you have any other knowledge or information
 13 about Mr. Ward's claim that Cisco injured his
 14 reputation?
 15 A. Other than what we've discussed here today?
 16 Q. Correct.
 17 A. I don't -- again, I mean, I don't know what --
 18 I may know some fact that -- and it may relate to his
 19 claim. I just don't know, you know, what specifically
 20 you're asking.
 21 Q. Well, you've been designated as a fact witness
 22 as to his reputation, and I believe you answered those
 23 questions pretty fully, correct?
 24 A. I tried to.
 25 Q. Okay. And you've also been designated as a

1 witness as to the injury to his reputation. And have
 2 you told us everything that you can think of today
 3 concerning the injury to Mr. Ward's reputation?
 4 A. Well, you know, obviously we did not discuss
 5 the privileged communications, and you know, there may
 6 be some other facts that -- that I would recall if you
 7 would ask me questions that were directed at certain
 8 facts. I think your question is a hard one to answer.
 9 Q. And I appreciate -- I appreciate that fact.
 10 On the other hand, I'm dealing with a designation that
 11 simply says reputation and injury to reputation.
 12 A. Uh-huh.
 13 Q. Can you think of any other clients or
 14 potential clients that Mr. Ward has not gotten in whole
 15 or in part because of the Patent Troll Tracker blogs?
 16 A. I am not specifically aware on a first-hand
 17 basis, but I definitely perceived in the community and
 18 in the national community that there were concerns.
 19 And in fact, last week I attended the
 20 Intellectual Property Owners conference, and a speaker,
 21 whose name I do not recall, but she was discussing
 22 patent venue or venue in patent cases, and she referred
 23 to the Eastern District in what I would consider a
 24 negative manner, which I attribute to the comments of
 25 the Troll Tracker.

1 It was -- it is my perception that he
 2 created this negative view of the Eastern District of
 3 Texas and the local -- as they would say, the local
 4 counsel and the lawyers who practice in that district.
 5 So I mean, it's out there. People sort of treat it as
 6 an assumed fact that they don't get a fair shake in the
 7 Eastern District, which I find to be just absolutely
 8 outrageous.
 9 Q. Okay. You -- I believe you've already
 10 answered this, but you don't recall the name of the
 11 speaker at the IP conference?
 12 A. No, I don't remember her name. No, sir.
 13 Q. Okay. And what would lead you to believe that
 14 she had ever seen the Patent Troll Tracker blogs that
 15 we're talking about here?
 16 A. Well, what would lead me to believe is that,
 17 in the community, the national patent community, it was
 18 given quite a bit of prominent -- prominence and treated
 19 with some -- some authority. In a number of instances,
 20 members of the national patent community would refer to
 21 the Patent Troll Tracker as almost authority for things
 22 going on in the Eastern District and other places.
 23 Q. Who would treat it as authority? Do you
 24 recall?
 25 A. Aside from the clients that I've mentioned,

1 who I won't -- won't mention, let me think here for a
 2 second. The names just don't -- don't come to me at the
 3 moment. I mean, I -- and I would not limit it, by the
 4 way, to the national patent community. It was -- it
 5 received commentary here in the Dallas area as well.
 6 Lawyers at other law firms, in-house counsel.
 7 Q. Can you identify any of them?
 8 A. I can't remember anybody specifically.
 9 Q. Okay. You said --
 10 A. I believe --
 11 Q. I'm sorry.
 12 A. I will tell you I believe there was one or
 13 more presentations at the Dallas Bar, and I believe Bart
 14 Showalter referred to the -- to the Troll Tracker in
 15 a -- as somewhat of an authority on this topic, and he's
 16 an attorney at Baker Botts.
 17 Q. Right. And --
 18 A. As I say, I just have a vague recollection of
 19 those comments.
 20 Q. That's fine. I appreciate that. You
 21 mentioned that Mr. Showalter is at Baker Botts. Does he
 22 have a good reputation in the legal community?
 23 A. Sure.
 24 Q. I've just been handed a note saying we're
 25 almost out of tape.

1 MR. SCHWARZ: Why don't we take just a
 2 short break.
 3 THE VIDEOGRAPHER: And this ends Tape
 4 Number 1, Volume 1 of the Robert Chiavello deposition.
 5 Going off record at 10:51 a.m.
 6 (Break was taken.)
 7 THE VIDEOGRAPHER: We're going back on
 8 the record at 10:58 a.m. This marks Tape Number 2,
 9 Volume 1 on Robert Chiavello's deposition. Please
 10 proceed.
 11 Q. (BY MR. SCHWARZ) Mr. Chiavello, before we
 12 broke to change the videotape, we were discussing
 13 comments by a number of people, including a woman whose
 14 name you can't recall who you heard at -- I believe you
 15 said it was an IP -- IP Owner's conference.
 16 A. It's called the Intellectual Property Owners
 17 Annual Meeting, and it was in Chicago. The -- it was
 18 the 14th and 15th of September. She spoke on the 15th,
 19 I recall.
 20 Q. Okay.
 21 A. She was the moderator, as I recall.
 22 Q. Okay. And you said that she made some
 23 references to the Eastern District of Texas, and I just
 24 want to kind of focus on -- on just what she said. Do
 25 you recall, with any greater specificity than you've

1 already described, what she said about the Eastern
 2 District of Texas?
 3 A. Yes, sir. She used it as -- she was giving a
 4 talk about the top ten districts where patent cases were
 5 filed, and she was discussing the reasons why cases were
 6 filed in the various districts. And she said the reason
 7 people filed in the Eastern District of Texas was to
 8 strike fear in the hearts of defendants.
 9 Q. And do you disagree with that?
 10 A. Absolutely.
 11 Q. And in your opinion, why do people file in the
 12 Eastern District of Texas?
 13 A. There are a variety of reasons, and they've
 14 changed over time. I would say on one of the most
 15 important reasons is the fact that the judges assign
 16 specific trial settings and stick to those trial
 17 settings. That is a very important consideration.
 18 Number two, the judges in the Eastern
 19 District have significant experience with patent
 20 matters.
 21 Number three, there are rules specifically
 22 directed to patent matters in the Eastern District, and
 23 there's a body of law that's developed over time. So
 24 there's a high degree of predictability in terms of what
 25 rules will apply and how those rules will apply in

1 particular circumstances.
 2 I would say that those three -- those
 3 three factors -- well, the fourth factor I would
 4 identify is the -- what we call the file-to-trial time.
 5 That's increased a bit over the years, but it is
 6 generally -- and by the way, this professor pointed out,
 7 it's roughly in the middle of the pack. And so those
 8 four factors together generally make it a cost-effective
 9 venue to resolve a patent dispute.
 10 I would say the judges in the Eastern
 11 District are -- the three judges that handle patent
 12 cases are three good men. They try to get it right.
 13 They're fair-minded -- they're fair-minded, I would just
 14 say, good judges and believe that they are some of the
 15 best judges in the -- in the U.S. system.
 16 So I'm a -- I've been a huge fan of the
 17 Eastern District since 1990 when I first had a case in
 18 front of Judge William Wayne Justice in Tyler and
 19 have -- another factor is the court clerks are
 20 effective. They do a very good job, and they're very
 21 knowledgeable and helpful.
 22 And then a fifth fact -- sixth factor, I
 23 would say, is it has the best electronic filing system
 24 in the country, to my -- in my experience. So those are
 25 just, you know, what I can think of off the top of my

1 head.
 2 Q. We've got six things to hang the ED Texas hat
 3 on.
 4 And I'd like to get back, you mentioned in
 5 your last response, that the woman who gave this talk
 6 was a professor?
 7 A. I believe that's right. I believe that's
 8 correct.
 9 Q. Do you believe she's a professor of law?
 10 A. Yes, sir.
 11 Q. Okay. Have any recollection as to where?
 12 A. As to where?
 13 Q. As to where.
 14 A. I don't.
 15 Q. Okay. Did she mention by name the Patent
 16 Troll Tracker?
 17 A. No, sir.
 18 Q. And by name, I should say I meant the name
 19 "Patent Troll Tracker."
 20 A. She did not.
 21 Q. Did she mention the name "Mr. Frenkel"?
 22 A. She did not.
 23 Q. Has -- have you ever heard negative views of
 24 the Eastern District of Texas before?
 25 A. Yes, sir.

1 Q. Had you heard them before the Patent Troll
 2 Tracker expressed his views about the Eastern District
 3 of Texas?
 4 A. I don't know when he started.
 5 Q. Well, let's just pick a date of October 2007.
 6 A. I believe I had heard -- I believe I had heard
 7 negative comments before that date. I'm trying to think
 8 back. I believe I had, yes.
 9 Q. Okay. I mean, isn't it common for anyone
 10 who's at least on the losing side of a case to find
 11 fault everywhere but with themselves?
 12 MR. PATTON: Object to form.
 13 A. Oh, that may be true, but that's not what
 14 we're talking about. We're talking about people who
 15 have lawsuits filed against them, not necessarily who
 16 have gone to -- gone to judgment.
 17 Q. (BY MR. SCHWARZ) Okay. So apart from the
 18 professor at the IP meeting that you discussed, you
 19 mentioned earlier that -- you made reference to the
 20 national community when I asked you about --
 21 A. Yes, sir.
 22 Q. -- Mr. Ward's reputation. And could I ask you
 23 to describe any other instances where you heard of
 24 something or otherwise received information that
 25 suggested that Mr. Ward's reputation had been -- had

1 been injured or diminished in any way?
 2 A. You know, in -- as a result of your questions,
 3 I do recall another instance where we gave a
 4 presentation to a client and had recommended Mr. Ward
 5 and received a very harsh response. And it was very --
 6 it was a troubling meeting because one of my colleagues
 7 mentioned to me later that I was probably too aggressive
 8 in trying to defend him in that meeting.
 9 Q. Did anyone in -- well, first, let's run
 10 through this. Would you please identify the folks that
 11 you were speaking with?
 12 A. I will not. It's a client of the firm.
 13 Q. Okay. And so you're invoking privilege?
 14 A. Yes, sir.
 15 Q. Okay. You said there was a harsh response and
 16 that it was -- it was a troubling meeting. Did anyone
 17 in that meeting make reference to the Patent Troll
 18 Tracker blog?
 19 A. As I'm recalling it now, yes, sir.
 20 Q. And could you tell us what was said about the
 21 Patent Troll Tracker blog?
 22 A. Again, without disclosing a privileged
 23 communication, it was cited again as an authority for --
 24 a reason for not wanting Mr. Ward to be on the trial
 25 team.

1 A. I believe it was in January or February of
 2 2008.
 3 Q. January or February of 2008. Have you
 4 recommended Mr. Ward to be counsel for any other clients
 5 since January or February of 2008?
 6 A. I would be reasonably confident -- I'd have to
 7 think about it, you know, for specific instances, but
 8 I'm sure I have.
 9 Q. Okay. Have you received any negative feedback
 10 when you've made those recommendations?
 11 A. Well, that's the -- I can't remember any
 12 specific instances since -- since the early part of
 13 2008, and so I just don't -- I just don't recall any
 14 particular instances.
 15 MR. SCHWARZ: No further questions. I
 16 pass the witness.
 17 MR. PATTON: I just have a couple of
 18 questions.
 19 EXAMINATION
 20 BY MR. PATTON:
 21 Q. In the instances that you have described,
 22 Mr. Chiavello, when you were told these things about
 23 Johnny Ward, did you form an impression about what they
 24 meant?
 25 A. Yes, sir.

1 Q. And I believe you said that you defended
 2 Mr. Ward's reputation in that meeting?
 3 A. I was -- I was, again, truly outraged by it.
 4 Q. I take it Mr. Ward was not retained in that
 5 case?
 6 A. That's correct.
 7 Q. Okay. I just want to make sure. I don't
 8 think we had covered that -- that small detail.
 9 So that makes a total of four clients who
 10 have declined to retain Mr. Ward?
 11 A. Yeah. And just to be specific, one of them is
 12 not a client. It was a -- it was another lawyer who
 13 would -- who we were investigating co-counsel together.
 14 Q. Okay. But someone had come to you with the
 15 intention of at least possibly retaining your services
 16 and those of Mr. Ward?
 17 A. That's correct, yes, sir.
 18 Q. Okay. Can you think of any other instances,
 19 now that we've gone through those four, where anyone has
 20 declined to retain Mr. Ward?
 21 A. No, sir. There may have been some others, and
 22 certainly if I can recall them, I'll tell you.
 23 Q. Okay. Can you tell me when this last
 24 conversation or meeting took place that you referred to
 25 as a troubling meeting?

1 Q. Was that a positive impression of Johnny Ward
 2 or a negative impression?
 3 A. It was a negative impression.
 4 Q. Okay. And if I understand your prior
 5 testimony, none of these people agreed with you that
 6 Johnny Ward should be hired?
 7 A. That's correct.
 8 MR. PATTON: I'll pass the witness.
 9 MR. SCHWARZ: That's all I have for
 10 today. Thank you.
 11 THE WITNESS: Thank you.
 12 THE VIDEOGRAPHER: And this concludes the
 13 video deposition of Robert Chiavello, consisting of two
 14 tapes. We're now going off the record. The time is
 15 11:10 a.m.
 16 (Proceeding concluded.)
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1 CHANGES AND SIGNATURE
 2 WITNESS: Robert Chiavello Jr. DATE: September 23, 2009
 3 PAGE LINE CHANGE REASON
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1 IN THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF ARKANSAS
 2 TEXARKANA DIVISION
 3 JOHN WARD, JR.)
)
 4) C.A. NO. 08-4022
 v.) JURY TRIAL DEMANDED
 5)
 CISCO SYSTEMS, INC.)
 6
 7
 8
 9

10 REPORTER'S CERTIFICATION
 11 DEPOSITION OF ROBERT H. CHIAVELLO, JR.
 12 SEPTEMBER 23, 2009
 13

14
 15 I, April Eichelberger, Certified Shorthand Reporter
 16 in and for the State of Texas, hereby certify to the
 17 following:
 18 That the witness, ROBERT H. CHIAVELLO, JR., was duly
 19 sworn by the officer and that the transcript of the oral
 20 deposition is a true record of the testimony given by
 21 the witness;
 22 That the deposition transcript was submitted on
 23 _____ to the witness or to the attorney
 24 for the witness for examination, signature and return to
 25 me by _____;

1 I, ROBERT H. CHIAVELLO, JR., have read the
 2 foregoing deposition and hereby affix my signature that
 3 same is true and correct, except as noted above.
 4
 5 _____
 6 ROBERT H. CHIAVELLO, JR.
 7
 8 THE STATE OF _____)
 9 COUNTY OF _____)
 10
 11 Before me, _____, on
 12 this day personally appeared ROBERT H. CHIAVELLO, JR.,
 13 known to me (or proved to me under oath or through
 14 _____) (description of identity
 15 card or other document)) to be the person whose name is
 16 subscribed to the foregoing instrument and acknowledged
 17 to me that they executed the same for the purposes and
 18 consideration therein expressed.
 19 Given under my hand and seal of office this
 20 _____ day of _____, _____.
 21
 22 _____
 23 NOTARY PUBLIC IN AND FOR
 24 THE STATE OF _____
 25 COMMISSION EXPIRES: _____

1 That the amount of time used by each party at the
 2 deposition is as follows:
 3 MR. SCHWARZ.....1 hour, 51 minutes
 4 MR. PATTON.....1 minutes
 5 MS. COLLINS.....0 minutes;
 6 That pursuant to information given to the deposition
 7 officer at the time said testimony was taken, the
 8 following includes counsel for all parties of record:
 9 FOR THE PLAINTIFF:
 10 Mr. Nicholas H. Patton
 11 FOR THE DEFENDANT:
 12 Mr. Kurt Schwarz
 13 FOR THE WITNESS:
 14 Ms. Joni Collins
 15 That \$ _____ is the deposition officer's charges
 16 to the Defendant for preparing the original deposition
 17 transcript and any copies of exhibits;
 18 I further certify that I am neither counsel for,
 19 related to, nor employed by any of the parties or
 20 attorneys in the action in which this proceeding was
 21 taken, and further that I am not financially or
 22 otherwise interested in the outcome of the action.
 23 Certified to by me this _____ day of
 24 _____, 2009.
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April Eichelberger
Texas CSR No. 7495
Expiration Date: December 31, 2009
HG Litigation, Firm No. 69
As certified partner for
West Court Reporting Services