



Monday, October 20
9:00 am-10:30 am

008 Teaching New Dogs Old Tricks: Using Traditional Litigation Tools for Strategic Advantage

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Dale Malone

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Faculty Biographies

Robert P. Latham

Robert P. Latham is a trial lawyer and partner with Jackson Walker LLP with offices in Dallas and Houston. He has developed nationally recognized expertise in the areas of intellectual property litigation and media law.

Mr. Latham has tried significant cases in numerous jurisdictions. His intellectual property cases involved patent, copyright, trademark, unfair competition, and trade secret disputes. Mr. Latham's media law practice involved the representation of international, national, and local media clients in matters involving the defense of libel, invasion of privacy, and newsgathering tort claims. His varied trial practice has involved complex commercial disputes as well as securities, probate, employment, professional negligence, banking, construction, real estate, product liability, telecommunications, energy, international, and class action matters.

Mr. Latham frequently speaks and writes in the areas of media law, intellectual property, litigation strategy, and sports law. He has been on the faculty of conferences organized by the American Bar Association, the Texas, Dallas and Houston Bar Associations, and the New York State Bar Association. He is a member of the United States Olympic Committee General Assembly and is vice-chairman of the United States of America Rugby Football Union.

Mr. Latham graduated from Stanford University and received his JD from the University of Virginia.

Dale Malone

Dale Malone is senior litigation counsel to Avid Technology, Inc. in Tewksbury, MA. Avid is a global leader in technology solutions that enable film, video, audio, animation, games, and broadcast professionals to work more efficiently, productively, and creatively. Avid's products and customers have received the most prestigious awards in the industries that they serve, including multiple Oscar, Emmy, and Grammy statuettes.

Prior to moving in-house, Mr. Malone spent twenty years litigating intellectual property matters with Banner & Witcoff, Ltd. and its predecessor firms, participating in several landmark patent trials, including those involving Amgen's EPO and Genentech's t-PA products.

Mr. Malone received a BS from the Massachusetts Institute of Technology and is a graduate of the University of Michigan Law School.

Carla Swansburg

Carla Swansburg is senior counsel with Royal Bank of Canada Law Group in Toronto. Ms. Swansburg manages complex litigation involving Royal Bank Financial Group and many of its subsidiaries throughout the world, including RBC's network of global private banking offices throughout the US, Europe, Asia, Latin America, and the Caribbean. Ms. Swansburg also handles commercial claims and class actions relating to fraud, banking, securities, breach of contract, and trust among other matters. She frequently leads or supports internal investigations.

Prior to joining RBC, Ms. Swansburg practiced with Osler, Hoskin & Harcourt in their litigation group for several years.

Ms. Swansburg speaks frequently on topics such as ADR, privilege, litigation management, and e-discovery. She is the president of ACC's Ontario Chapter and the secretary of the board of directors of the Barbra Schliker Commemorative Clinic.



Who Are These “New Dogs”?

- Lawyers Who are New to You
 - A firm you haven't worked with before
 - Attorneys who haven't worked with you before
 - New associates, junior lawyers
- Lawyers Who are New to the Profession
 - i.e., the attorneys who actually do your work
- How to Work With Them to Get YOUR Case handled YOUR way?



First Steps

- Internal Case Assessment
- Assembling the Litigation Team



Who's On the Team?

- In-house counsel as part of the litigation team
 - Strategy
 - E-discovery
 - Witness selection and preparation
 - Avoiding micromanagement
- Joint defense groups
 - Divide cost of common work
 - Often difficult to manage effectively



Does Your Dog Bite?

- Checks and balances
 - In-house counsel is more personally involved in the dispute, but detached from the fray and more conscious of cost
 - Outside counsel is detached from the business, but focused on thoroughness and effective representation (i.e. “winning”)
- Zealous advocacy – how much is too much?
 - Picking the right battles
 - Thoroughness vs. cost-effectiveness
 - Avoiding the arms war escalation
- Educating the other party
 - Parallel lines of communication
- The Contingency Plaintiff
- Mediation (= a neutral party to tell you how bad your case is, or tell your opponent how bad its case is)



Early Case Assessment

- What is it really?
- When might it be appropriate?
- How to go about it?
- Advantages and Disadvantages
- Tricks for finding the smoking gun early
 - Early Request for Particulars/Requests to Admit
 - Key witness interviews
 - Worst case scenarios



Strategic Motions Practice

- What motions make sense
- When to forego motions
- Using motions for partial summary judgment
- Motions to educate the other side



Avoiding Trial

- When “done” is just as important as “right”
 - Settlement Opportunities
 - Creative use of discovery and other case events to create leverage
 - Never a good time/Never a bad time
- Getting a result without a trial
 - Mediation
 - Mini-trial
 - Judicial strong-arming
 - Arbitration
 - “baseball” arbitration (binding or non-binding)



Trial Preparation Strategies

- Trial checklists and timetables
- Agreed statements of fact
- Mock juries, retired judges and others to help prepare counsel, witnesses and business partners
- Case themes and presentation plans



Appellate Considerations

- When to appeal and why
 - Cost-benefit analysis vs. professional pride
 - Intangibles – can you live with this precedent? Is it a precedent?
 - What is the state of your law?
 - Need for a high-level precedent?
- Interlocutory appeals



Cost-Shifting Strategies

- By contract (arbitration)
- By issue
- By statute
- Offers to Settle and Offers of Judgment
- Extraordinary circumstances
- Equitable Grounds