

***Octane* Requires More Fitness**

Gregory L. Hillyer

November 3, 2016

www.brinksgilson.com



35 USC § 285

"The court in exceptional cases may award reasonable attorney fees to the prevailing party"

www.brinksgilson.com

2

Requirements for Fees

- Prevailing Party
- Exceptional Case
- Exercise of Discretion to Award Fees

Genesis of “Exceptional” in § 285

- **Pre-1946** ▪ American Rule Governed
- **1946** ▪ 70 Gave Courts Discretion to Award Fees
- **1952** ▪ 285 Added Term “Exception

“Exceptional” Pre-Octane

Brooks Furniture Mfg., Inc. v. Dutailier Int’l Inc., 393 F. 3d 1378 (Fed. Cir. 2005)

- Exceptional case either:
 - Material inappropriate conduct related to the matter in litigation
- OR**
- Objectively baseless & brought in subjective bad faith

Evidentiary Standard Pre-Octane

“Clear and Convincing
Evidence”

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Octane Requires More Fitness

Also available as part of the eCourse

[2016 Advanced Patent Law eConference - Austin](#)

First appeared as part of the conference materials for the
21st Annual Advanced Patent Law Institute session

"*Octane* Requires More Fitness"