

Opinions of Counsel after *Halo*

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Opinions of Counsel After *Halo*

- History of Opinions Counsel in Patent Litigation
- *Halo Electronics, Inc. v. Pulse Electronics, Inc.*
- Impact of *Halo* on Opinions of Counsel

History of Opinions of Counsel

Time Period	Opinions of Counsel in Patent Litigation
1983-2003	CAFC Opinions Are Necessary
2004-2014	CAFC Opinions Become Optional
2014	Supreme Court Foreshadows Change

1983-2003 – Opinions Are Necessary

- **CAFC Creates Duty to Seek Advice of Counsel**

A party with actual notice of another's patent rights has "an affirmative duty to exercise due care to determine whether or not he is infringing."

This duty includes the obligation "to seek and obtain competent legal advice from counsel *before* the initiation of any possible infringing activity."

Underwater Devices, Inc. v. Morris-Knudsen Co., Inc., 717 F.2d 1380 (Fed. Cir. 1983).

1983-2003 – Opinions Are Necessary

- **Opinions become more expensive and complicated**
 - Affirmative duty broadly interpreted
 - Adverse inference if opinion not disclosed
 - Trial defenses insufficient
 - Privilege waiver extended to trial counsel

1983-2003 – Opinions Are Necessary

- **The result = an unbalanced legal landscape**
 - Willful infringement asserted in 92% of patent cases
 - Willful infringement claims successful with over 67% of juries

See K. A. Moore, *Empirical Statistics on Willful Patent Infringement*, 14 Fed. Cir. B.J. 227 (2004).

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"Opinion Practice after *Halo* and *Stryker*—More Valuable Now?"