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Comment: **Practice Makes Perfect?** An Empirical Analysis of H.R. 5418

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SUMMARY:

... United States Patent Office ("USPTO") The Department of Commerce's United States Patent Office is the administrative agency responsible for granting patents. ... Many attribute the increased costs, inconsistencies, and forum shopping to two factors: the relatively high rate of reversals of district court patent decisions, and the relatively long time to resolve patent cases in the district courts. 1. ... Yet another judge points to the relative infrequency of patent cases, inflexible case assignment procedures, time consuming nature of patent cases and even shifts some of the blame to a lack of feedback from the CAFC: My duties as a U.S. ... The raw numbers for each judge were generated by case type, expanded, sorted, and exported into Microsoft Excel(tm), where the following percentages were calculated: Patents as Percentage of Docket: the number of docketed patent items to total docket, including judicial opinions; Patents as Percentage of Judicial Opinions: the number of patent judicial opinions to total judicial opinions; Patent Reversal Rate: the number of patent judicial opinions that were overturned on at least one point of law compared to the number of patent judicial opinions. ... Moreover, the low number of patent cases to the other judges is most likely a result of the equitable case distribution system enforced by the local court rules, not a scarcity of patent cases--the Northern District of Illinois is one of the top district courts in overall patent volume. ... CA 0 H.R. 5418 2.52% 0 E Combining the data for all judges from these courts yields that the reversal rates for judges deciding 3 or more cases a year is 4.57% versus 4.67% for judges deciding fewer than 3, if they decided any patent cases at all.

TEXT:

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I. Introduction

"[O]ne of the most significant problems facing the United States patent system is the spiraling cost and complexity associated with patent rights."ⁿ² The perception exists that the U.S. patent adjudication system is beset with inefficiencies, inconsistencies, and forum shopping.ⁿ³ At the same time, the perceived value of patents in a global, knowledge-based society is increasingly important to business and the economy.ⁿ⁴

A series of bills have been introduced to solve these problems in the U.S. patent system by the creation of experienced patent judges in the district courts. The first of these bills, H.R. 5418, introduced into the House of Representatives on May 18, 2006,ⁿ⁵ would provide funds to establish a pilot program that would train district judges in handling patent cases and add trained clerks.ⁿ⁶ H.R. 5418 was never enacted [*290] into law, but was reintroduced largely unchanged in the 110th Congress as H.R. 34 and again in the 111th Congress as H.R. 628.

These bills are based on the premise that "patent lawyers, academics and judges appear to agree that judicial expertise in patent law is particularly desirable,"ⁿ⁷ and that this expertise is currently lacking. District court judges do not have enough exposure to patent cases because such cases comprise such a small percentage of their total workloads.ⁿ⁸ In support of this premise, a top patent jurist noted that, in the Northern District of Illinois, one of the historically busiest district courts in terms of patent filings, he never had more than 5% of his caseload as patent cases.ⁿ⁹

Working on the notion that practice makes perfect, H.R. 5418 and its progeny propose a system that assigns patent cases to willing judges interested in hearing patent cases.ⁿ¹⁰ As a result, the reversal rates should be lower for a judge that hears more patent cases.ⁿ¹¹ [*291]

H.R. 5418, while less controversial than other proposals such as those creating specialized trial courts, will have little impact if the procedures proposed by this bill are in fact already in practice in the district courts hearing a large volume of patent cases and if the procedures do not achieve the desired results. The practice of handing off patent cases to willing judges who like taking them is an unofficial practice today in some district courts.ⁿ¹² As one judge admits, "A lot of my colleagues hate patent cases. Hate them. They say, 'I tell you what, if you do my patent case, I'll do five ER-ISA cases.'"ⁿ¹³

Further, institutionalizing the practice of using one or two specialized judges per district court will only exacerbate the existing problem of forum shopping. An unexpected consequence may also be an increase in the time to resolve cases because of a shortage of specialized judges.

This analysis examines five of the top 10 districts that have historically had the highest volume of patent cases. For each of these five districts, the percentage of patent cases heard by each judge is examined. Based on the testimony and hearing transcripts, patent cases should be equally distributed in small percentages to each judge. If a court's patent case assignment has a non-random distribution similar to that proposed by H.R. 5418, the reversal rates and resolution times should give insight into the success of the proposal. If the court exhibits a random patent case assignment, the expectation is for a higher reversal rate. Similarly, the reversal rate should be inversely proportional to the volume of patent cases. If this correlation is not evident, then other factors such as local case rules will be analyzed for each studied court, to see if there is any correlation to success or failure.

II. Background

A. Overview of the U.S. Patent System

The Patent Clause of the United States Constitution grants Congress authority to legislate over patents: "Congress shall have Power . . . To promote the Progress of . . . useful Arts, by securing for limited [*292] Times to . . . Inventors the exclusive Right to their . . . Discoveries."ⁿ¹⁴ However, the foundation for the modern patent examination system was not laid until the Patent Act of 1836.ⁿ¹⁵ The Patent Act of 1836 "created the Patent Office, a corps of examiners, modern interference practice, administrative appeal practice, and the modern patent numbering system."ⁿ¹⁶

By the 1970s, the growth of the number of appeals and a shortage of appellate judges had created an enormous problem in the U.S. Federal Judiciary.ⁿ¹⁷ Regional circuit courts heard complex patent cases, resulting in acute problems of forum shopping and lack of uniformity in the area of patent law.ⁿ¹⁸ An overcrowded Supreme Court docket and the complexity of resolving circuit splits in patent cases compounded these problems.ⁿ¹⁹ Congress formed the Hruska Commission to make recommendations for reform.ⁿ²⁰ "The commission identified a lack of uniformity in U.S. patent law across the geographical [jurisdictions of the District Courts]," resulting in a wide variation "in the frequency with which they upheld the validity of patents."ⁿ²¹ This variation caused a great deal of forum shopping.ⁿ²² "The Hruska Commission recommended that a national appeals court be created to handle patent litigation. . . ."ⁿ²³

The present patent court system dates from the 1982 Federal Courts Improvement Act.ⁿ²⁴ The Federal Courts Improvement Act created the United States Court of Appeals for the Federal Circuit ("CAFC").ⁿ²⁵ Two earlier courts were essentially merged to form the CAFC: the United States Court of Claims and the United States Court of Customs and Patent Appeals.ⁿ²⁶ The 73 year-old United States Court of Customs and Patent Appeals was primarily responsible for deciding appeals from decisions of the Patent and Trademark Office [*293] ("PTO") about patent applications and trademark registrations.ⁿ²⁷ The CCPA's jurisdiction also allowed it to hear appeals from the Court of International Trade, primarily dealing with the Smoot-Hawley Tariff Act.ⁿ²⁸ Jurisdiction included appeals from the United States International Trade Commission ("ITC"), dealing with patent infringement by imported goods or by imported goods made with patented U.S. processes.ⁿ²⁹ Among other issues, the Court of Claims dealt with compensation for claims arising from patent infringement against the United States, and had exclusive jurisdiction over patents invented for the United States.ⁿ³⁰

1. United States Court of Appeals for the Federal Circuit ("CAFC")

In response to these problems, the United States Court of Appeals for the Federal Circuit (CAFC) was established as an Article III court on October 1, 1982.ⁿ³¹ Unlike the other circuit courts' regional jurisdictions, the CAFC has national jurisdiction in certain subject areas including, inter alia, patents and trademarks.ⁿ³² See Figure 1.

Figure 1. Patent Jurisdiction of the CAFCⁿ³³

[SEE FIGURE 1 IN ORIGINAL]

The CAFC has twelve judges, appointed for life by the President with the advice and consent of the Senate.ⁿ³⁴ Judges may elect to take [*294] senior status when eligible and handle fewer cases than an active judge.ⁿ³⁵ Each judge has one judicial assistant; active service judges employ three law clerks while senior judges only have one law clerk.ⁿ³⁶ "Most of the law clerks have a technical degree . . ." ⁿ³⁷ In addition to law clerks with technical backgrounds, there is also a senior technical assistant and three technical assistants to the court.ⁿ³⁸ The technical assistants also have technical backgrounds.ⁿ³⁹ The technical assistants assist the judges in reviewing cases before oral argument, by doing legal research, drafting memoranda, and participating in the court's process for avoiding conflicts in published opinions.ⁿ⁴⁰ Technical assistants also comment on the opinions circulated by the judges.ⁿ⁴¹

As of 2001, four of the twelve Federal Circuit judges had technical backgrounds,ⁿ⁴² although they all hired law clerks with various technical backgrounds.ⁿ⁴³ Today the composition of technical and non-technical background of the Federal Circuit judges is similar. The four judges with technical backgrounds from the Moore study are still on the bench.ⁿ⁴⁴ Of particular note is that two of the other judges with non-technical degrees have extensive patent law experience; one has authored a textbook on patent law.ⁿ⁴⁵ The newest addition is the author of the Moore Study, Judge Kimberly A. Moore, with an extensive scholarly background in patent law.ⁿ⁴⁶

Today, almost 20% of the CAFC's crowded docket deals with patent appeals.ⁿ⁴⁷ Congress expected the creation of the CAFC to give judges time for examining and deciding these more complex issues.ⁿ⁴⁸ However, in a typical month, a CAFC judge receives over 2,000 pages [*295] of briefs and averages slightly more than one appeal per day.ⁿ⁴⁹ Because patents are time consuming, the amount of deliberation and time available to spend on the relatively more complex patent appeals does not measure up to the CAFC creator's expectations.ⁿ⁵⁰ Given that district court holdings are reversed at least 35% of the time, there is little penalty to appeal.ⁿ⁵¹ See Table 1.

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Table 1. Percentage of CAFC Workload from Patents 2000-2006.

Percentage of CAFC Workload

2000 ⁿ⁵²

2001 ⁿ⁵³

2002 ⁿ⁵⁴

2003 ⁿ⁵⁵

2004 ⁿ⁵⁶

2005 ⁿ⁵⁷

2006 ⁿ⁵⁸

USPTO

6.03%

4.99%

4.63%

4.60%

4.02%

4.12%

4.06%

ITC

0.13%

0.54%

0.51%

0.91%

0.57%

0.45%

0.51%

U.S. District Courts

30.15%

27.17%

27.46%

32.99%

30.03%

31.38%

29.46%

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2. United States Patent Office ("USPTO")

The Department of Commerce's United States Patent Office is the administrative agency responsible for granting patents.ⁿ⁵⁹ The USPTO does not have a direct role in patent infringement actions.ⁿ⁶⁰ The USPTO does not have any formal patent opposition procedure.ⁿ⁶¹

The types of issues that may go up on appeal to the CAFC are reexamination of patents, reissue applications, or inter-party interference proceedings.ⁿ⁶² Other patentability issues may be raised at the interference proceedings.ⁿ⁶³ In lieu of an appeal to the CAFC, a dissatisfied applicant for a patent may, after exhausting appropriate appeals with the USPTO, file a civil action against the USPTO Director, in the United States District Court for the District of Columbia.ⁿ⁶⁴

The number of appeals from the USPTO account for a small percentage (typically less than 5%) of the appeals heard by the CAFC.ⁿ⁶⁵ The reversal rate for the USPTO is similarly low.ⁿ⁶⁶

3. U.S. International Trade Commission ("ITC")

The ITC was created by Congress as an independent agency "to administer laws regulating trade with the United States."ⁿ⁶⁷ Of particular interest to the patent system is the ITC's authority under section 337 of the Smoot-Hawley Tariff Act to bar importation of goods infringing U.S. patents.ⁿ⁶⁸ The imported goods may directly infringe a U.S. patent or may be made by a process that infringes a U.S. patent.ⁿ⁶⁹ However, there must be an industry in the United States relating to the imported goods.ⁿ⁷⁰ For example, in the telecommunications industry, plaintiffs bring their cases before the ITC under Section 337 of the Smoot-Hawley Tariff Act.ⁿ⁷¹ The ITC attempts to clear these cases in under a year, and can issue import bans on products infringing U.S. patent law.ⁿ⁷²

Plaintiff patent owners find the ITC attractive despite the fact that it has no authority to award damages for infringement.ⁿ⁷³ First, there are no geographic or personal jurisdictional limits if the patents are infringed by foreign imports.ⁿ⁷⁴ Second, "the ITC's exclusion orders are in rem."ⁿ⁷⁵ Most important to patent owners, however, is the rapidity of the ITC's granting of relief: the typical case is resolved in one year "or, at the most, 'in more complicated' cases, within eighteen months."ⁿ⁷⁶ However, seeking injunctive relief through the ITC does not necessarily lighten the District Court workload; because damages [*297] can only be awarded by a court, many patentees pursue a dual litigation track for damages in the federal courts.ⁿ⁷⁷

The appeals from the ITC account for a fraction of the caseload of the CAFC.ⁿ⁷⁸ The reversal rate for ITC decisions are typically much lower than those heard from the district courts.ⁿ⁷⁹

4. U.S. District Courts

Just as the complexity of technology has grown, so has the complexity of the court systems. For example, in 1800 there were only 17 district court judges, and 6 Supreme Court justices, who also doubled as the Circuit Court of Appeals.ⁿ⁸⁰ Today, there are over 90 United States district courts, having "exclusive, original jurisdiction 'of any civil action arising under any Act of Congress relating to patents.'" ⁿ⁸¹ Serving in these district courts are over 600 United States district judges and over 270 senior judges.ⁿ⁸² In addition to those Article III judges, each district has one or more magistrate judges, who are appointed for a renewable fixed term and whose powers are more limited.ⁿ⁸³

By statute, the district courts must notify the USPTO of the commencement and the disposition of patent suits filed pursuant to U.S.C. Title 35.ⁿ⁸⁴ Aside from this requirement, several district courts, notably the Eastern District of Texas and the Northern District of California have augmented their local rules with patent specific procedures.ⁿ⁸⁵

B. Trends in the Patent System

The rate of patent filing doubled during the 1990s.ⁿ⁸⁶ USPTO filing projections presented in the Subcommittee Hearing testimony in October 2005 painted a dire picture: annual patent filings between 2000 and 2010 were predicted to grow at only a slightly slower rate **[*298]** than in the 1990s.ⁿ⁸⁷ In 2000, the USPTO granted about 180,000 patents.ⁿ⁸⁸ If the number of patents issued nearly doubled as well, by 2010, the potential sources of patent litigation could be overwhelming. Fortunately, however, the total numbers of patents granted since 2000 has remained relatively steady, and even declined somewhat, as reflected in

Table 2. Total Patent Filings 2000-2005.

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Table 2. Total Patent Filings 2000-2005.

2000	ⁿ⁸⁹
2001	ⁿ⁹⁰
2002	ⁿ⁹¹
2003	ⁿ⁹²
2004	ⁿ⁹³
2005	ⁿ⁹⁴
176,087	
184,057	
184,428	
187,054	
181,322	
157,740	

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Even if a patent tsunami has not materialized, however, patent litigation has surged. In 2000, the USPTO granted about 180,000 patents, which resulted in around 2,000 patent cases.ⁿ⁹⁵ By September 30, **[*299]** 2004, 3,075 new patent cases were filed in district courts,ⁿ⁹⁶ a 50% increase in four years. The recent trend toward seeking speedy injunctive relief from the ITC is threatened by the increasing patent litigation workload.ⁿ⁹⁷ "Fiscal year 2006 set a new high for the agency's IP work. It launched a record 40 section 337 proceedings between Oct. 1, 2005, and Sept. 30, 2006. This was up 38 percent from fiscal year 2005, and up a whopping 250 percent from four years ago."ⁿ⁹⁸ In June, the Intellectual Property Law Section passed a resolution asking the ITC to add a third courtroom and a fifth administrative law judge.ⁿ⁹⁹ Damage awards are soaring.ⁿ¹⁰⁰ Jury awards in particular have reached the billion-dollar range since 1982.ⁿ¹⁰¹ "Between 1982 and 1992, the damages ranged between \$ 873 million and \$ 19.8 million."ⁿ¹⁰² In one case, Exxon Chemical Patents, Inc. v. Lubrizol Corp., the district trial court awarded \$ 48 million in damages, which was doubled for willfulness, and \$ 8.7 million in interest, plus \$ 23.7 million in attorney's fees--the award totaling over a staggering \$ 130 million.ⁿ¹⁰³ On appeal, this award was reversed rather than remanded.ⁿ¹⁰⁴ As a result, the consequences of a district judge's incorrect claim constructionⁿ¹⁰⁵ can be quite severe.ⁿ¹⁰⁶ **[*300]**

Complexity is increasing. ⁿ¹⁰⁷ Two hundred years ago, patent law was not particularly complex. ⁿ¹⁰⁸ Travel and communication was exceedingly difficult, possibly a reason for so few litigations--one had to know about an infringement for there to be a dispute. ⁿ¹⁰⁹ In contrast, by 1999, over 2,318 patent litigation cases were filed. ⁿ¹¹⁰

When the few cases were litigated, the technology was likely to be understood by "farmer-jurors." ⁿ¹¹¹ Today, the complexity of technology has increased to the point where patent cases consume 9.4% of the time for all civil cases, while only accounting for .57% of the caseload. ⁿ¹¹²

Many attribute the increased costs, inconsistencies, and forum shopping to two factors: the relatively high rate of reversals of district court patent decisions, and the relatively long time to resolve patent cases in the district courts. ⁿ¹¹³

1. Wide Variation in Resolution Times by District Courts

One of the purposes of the creation of the CAFC was to improve the uniformity in patent law and decisions, because of "notorious differences" between the PTO and the courts. ⁿ¹¹⁴ Forum shopping was rampant because of significant divergences among the regional courts of appeal. ⁿ¹¹⁵ Although most would agree that the CAFC largely has met this goal, the problem of forum shopping in patent cases continues to be widespread today at the trial court level. ⁿ¹¹⁶ Empirical studies show that patent cases are not dispersed evenly throughout the district courts, but tend to be consolidated in a few select jurisdictions. ⁿ¹¹⁷ **[*301]**

Patent cases are prone to forum shopping for several reasons. Because of the increasingly global nature of commerce, and liberalization of jurisdiction and venue statutes, particularly for corporate defendants, a patent plaintiff's choice of district courts is widely expanded and expedites forum shopping. ⁿ¹¹⁸ There is a wide variation in the time district courts take to resolve patent cases. ⁿ¹¹⁹ The relatively long time to resolve patent cases by itself would directly impact litigation costs. ⁿ¹²⁰ Because there is a wide variation among the district courts in the times to dispose of cases, plaintiffs seeking relief search out the quickest patent courts, known as "rocket docket." ⁿ¹²¹ An example of the legal gyrations that plaintiffs perform to get within the jurisdiction of one of the rocket dockets involved one plaintiff's paralegal ordering a device made in Florida, and shipping it to Virginia. ⁿ¹²²

Three of the five fastest districts for resolution are "in the 'top twenty' in terms of number of patent cases." ⁿ¹²³ None of the five slowest districts are in the top twenty districts in terms of patent litigation. ⁿ¹²⁴ Because of these differences, many litigants are "voting with their feet;" relief in some patent cases is being sought outside the judiciary. ⁿ¹²⁵

2. High Reversal Rate of District Court Decisions

A high reversal rate is an indicator of confusion among the lower courts. ⁿ¹²⁶ A study of every patent case that went to trial between 1983 and 1999 shows that the high reversal rate was primarily in the area of claim construction. ⁿ¹²⁷ The reversal rate for validity claims was 22%, for infringement claims was 20%, for enforceability was 24%, and for willfulness was 15%. ⁿ¹²⁸

Data for the years 2000-2006 show the number of appeals filed and reversed by the CAFC from the District Courts. See Table 3 below. **[*302]**

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Table 3. Reversal Rates by the CAFC 2000-2006

Reversal Rates

2000 ⁿ¹²⁹

2001 ⁿ¹³⁰

2002 ⁿ¹³¹

2003 ⁿ¹³²

2004 ⁿ¹³³

2005 ⁿ¹³⁴

2006 ⁿ¹³⁵

USPTO

17%

12%

20%

7%

3%

9%

3%

ITC

0%

0%

0%

0%

0%

17%

40%

U.S. District Courts

16%

23%

23%

11%

13%

13%

13%

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Different authorities cite varying figures for the number of reversals of district court decisions by the CAFC. The reversal rate for the district courts by the CAFC is approximately 35%.ⁿ¹³⁶ Another scholar finds the reversal rates are 33% because district court judges improperly construed patent claim terms.ⁿ¹³⁷ Yet another study shows that reversal of claim construction decisions in the last six months of 2003 is running about seventy-one percent.ⁿ¹³⁸ For example, over the year 2003, the reversal rate has been 58%, while other more conservative estimates place it around 47%.ⁿ¹³⁹ During the 10 years since the Supreme Court's decision in *Markman*,ⁿ¹⁴⁰ the reversal rate has steadily increased.ⁿ¹⁴¹ Whether the actual reversal rate is a staggering 71% for a six-month period or 33%, the average reversal rate in other circuits is about 17% to 20%.ⁿ¹⁴²

The high reversal rate has an impact on litigation strategy and the courts in three ways: 1) Patent litigation is far too expensive; 2) parties go through legal "gyrations" to get the case to appeal to avoid a whole [*303] trial, only to have claim construction reversed; and 3) district court judges, to some degree, are demoralized.ⁿ¹⁴³

One study notes that an average patent infringement suit in California will cost each party over two million in litigation expenses.ⁿ¹⁴⁴ Run of the mill cases cost \$ 1.2 million to \$ 10 million to get through *Markman*.ⁿ¹⁴⁵

However, another empirical study shows that the results for expenditures in patent cases are not excessively high.ⁿ¹⁴⁶ This study measured cost as a function of the length of time to termination, number of documents filed in court, and whether cases reach the stage of filing for a summary judgment.ⁿ¹⁴⁷ Overall, another study found that the litigation costs

and settlement costs, though similar, were relatively modest.ⁿ¹⁴⁸ For example, slightly over 40% of all patent cases remained unresolved after 360 days; less than 10% were unresolved after 1080 days.ⁿ¹⁴⁹

The backlog of unresolved pending appeals from the District Courts in the CAFC has remained fairly constant over the last six years. See Table 4. The backlog of appeals pending in the CAFC from the District Courts at the end of each year is typically the highest of any other category. Although fairly constant, however, these cases amount to almost 1/3 of annually pending cases.ⁿ¹⁵⁰ **[*304]**

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Table 4. CAFC Annual Backlog of Pending Patent Cases.

2000ⁿ¹⁵¹

2001ⁿ¹⁵²

2002ⁿ¹⁵³

2003ⁿ¹⁵⁴

2004ⁿ¹⁵⁵

2005ⁿ¹⁵⁶

2006ⁿ¹⁵⁷

Total Pending End of Year

422

350

408

408

364

376

402

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3. District Court Judges are Demoralized

Some scholars claim that the 33% error rate creates doubt about the abilities of district court judges to decide complex technical patent cases.ⁿ¹⁵⁸ This has led at least one district court judge to joke that: "the easiest thing to do is figure out what your decision is and write the opposite."ⁿ¹⁵⁹ Another judge asks: "Are we district judges just stupid?"ⁿ¹⁶⁰

Judge Samuel B. Kent eloquently sums up his feelings:

Frankly, I don't know why I'm so excited about trying to bring this thing [patent suit] to closure. It goes to the Federal Circuit afterwards. You know, it's hard to deal with things that are ultimately resolved by people wearing propeller hats. But we'll just have to see what happens when we give it to them. I could say that with impunity because they've reversed everything I've ever done, so I expect fully they'll reverse this, too.ⁿ¹⁶¹

Yet another judge points to the relative infrequency of patent cases, inflexible case assignment procedures, time consuming nature of patent cases and even shifts some of the blame to a lack of feedback from the CAFC: **[*305]**

My duties as a U.S. District judge require that I be a generalist. . . . Only senior judges . . . can turn away cases which are otherwise randomly assigned to them. I cannot, except in the rare instance of recusal.

. . .

Only when a patent case comes our way do we brush up on the latest developments in patent laws. We do not as a matter of course receive the opinions issued by the United States Courts of Appeals for the Federal Circuit in chambers as we U.S. District Judges do the Opinion of our respective regional federal appellate courts.ⁿ¹⁶²

C. H.R. 5418

The major rationale behind H.R. 5418 is that "the district court judges have too little exposure to develop the skills necessary for efficient conduct of such litigation."ⁿ¹⁶³ One of the claims is that federal district court judges have not developed expertise in patent cases, especially claim construction, because, on average, they have only one patent trial every 6 to 8 years.ⁿ¹⁶⁴ In the district court system, there are nearly 680 active district court judges and another 290 senior judges that currently hear around 3% of the approximately 3000 patent cases filed each year.ⁿ¹⁶⁵ For example, in FY 2004, this meant that the average district court judge received only 4-5 new patent cases each year, amounting to only around 1% of their caseload.ⁿ¹⁶⁶ Even in one of the historically busiest district courts for patents, the U.S. District Court in Chicago, one judge reported that his patent case workload never exceed five percent.ⁿ¹⁶⁷ **[*306]**

The American Bar Association Section of Intellectual Property passed a resolution supporting in principle a pilot program of the type contemplated in H.R. 5418.ⁿ¹⁶⁸ A number of other patent related trade associations, which include AIPLA, IPO, BSA, CEA, ACT, BIO, and PhRMA have expressed support for the enactment of the pilot program.ⁿ¹⁶⁹

The opposition cited a lack of evidence of a problem with district court patent cases, and no evidence that H.R. 5418 would solve a purported problem.ⁿ¹⁷⁰ The supporters said that empirical studies show a problem and that "foreign countries have benefited from setting up specialized courts to handle patents."ⁿ¹⁷¹

H.R. 5418 was introduced into the 109th Congress on March 26, 2006, passed in the House, and referred to the Senate on September 29, 2006. On November 13, 2006, the bill was referred to the Committee on the Judiciary.ⁿ¹⁷²

1. Proposed Case Assignment System

Section 137 of 28 U.S.C.A provides that the local rules and order of the district court will govern the division of business, including case assignments, among the district judges.ⁿ¹⁷³ The chief judge of the district court is responsible for the enforcement and observance of the case assignments according to these local rules.ⁿ¹⁷⁴ If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.ⁿ¹⁷⁵ **[*307]**

Case assignment may be prescribed by local court rules per 28 U.S.C.A. § S 137 or by general order.ⁿ¹⁷⁶ One system that many courts use is the blind assignment of cases to particular judges.ⁿ¹⁷⁷ Under such an assignment plan, a party does not learn which judge will hear the case until after the case is filed, and the clerk has no discretion in assigning cases.ⁿ¹⁷⁸ A general order providing for the assignment of cases which have been identified by the chief judge as protracted, difficult, or widely publicized was within the power granted by 28 USCA § S 137 to control the assignment of cases so as to facilitate the business of the court.ⁿ¹⁷⁹ Similarly, district judges may by rule, order, or consent transfer cases between themselves for the expeditious administration of justice.ⁿ¹⁸⁰

The Pilot Program proposes a case assignment system in which district judges may request that the chief judge of the court designate them to hear patent or plant variety cases.ⁿ¹⁸¹ Initially, a patent or plant variety case is randomly assigned to any of the judges in that district court.ⁿ¹⁸² However, if a judge who has not been designated as a patent judge is assigned to a case, that judge may decline to accept the case.ⁿ¹⁸³ A case so declined is then randomly assigned to one of the designated patent judges.ⁿ¹⁸⁴ Senior judges can be designated as patent judges; however, there must be at least one active judge designated as a patent judge.ⁿ¹⁸⁵ The local rules of transferring and reassigning cases are not affected by the rules of the H.R. 5418 pilot program.ⁿ¹⁸⁶

2. Criteria for Pilot Courts

At least five courts will be chosen for the Pilot Program by the Administrative Office of the United State Courts in at least 3 different judicial circuits.ⁿ¹⁸⁷ These courts will be chosen from among the top 15 district courts in which the largest number of patent and plant variety protection cases was filed in the most recent calendar year.ⁿ¹⁸⁸ The **[*308]** court must also have at least 10 district judges,ⁿ¹⁸⁹ of which at least three have requested to be designated as patent judges.ⁿ¹⁹⁰ The most recent incarnation of H.R. 5418, H.R. 628, was amended to include courts that have adopted local patent rules.

3. Metrics

The success of the ten-year pilot program will be measured on a number of factorsⁿ¹⁹¹ --which include:

(A) an analysis of the extent to which the program has succeeded in developing expertise in patent and plant variety protection cases among the district judges of the district courts so designated;

(B) an analysis of the extent to which the program has improved the efficiency of the courts involved by reason of such expertise;

(C) with respect to patent cases handled by the judges designated pursuant to subsection (a)(1)(A) and judges not so designated, a comparison between the 2 groups of judges with respect to--

(i) the rate of reversal by the Court of Appeals for the Federal Circuit, of such cases on the issues of claim construction and substantive patent law; and

(ii) the period of time elapsed from the date on which a case is filed to the date on which trial begins or summary judgment is entered;ⁿ¹⁹²

Two key measurements are made: 1) the rate of reversal by the CAFC of patent cases on issues of claim construction and substantive patent law; and 2) the period of time elapse from the date on which a case is filed to the date on which trail begins or summary judgment is entered.ⁿ¹⁹³

III. Commentary

A. Case Assignment and Reversal Rates in Selected Courts

This analysis looks at the case assignment profile for five district courts. The case assignment system proposed by H.R. 5418 should **[*309]** produce a non-random assignment of patent cases to designated judges. If the distribution of cases to district judges is totally random, one would expect to see roughly the same percentage of patent cases heard by each district judge. If a court's assignment profile was non-random, then the actual procedures would simulate the procedures proposed by H.R. 5418, and might shed light on H.R. 5418's impact.

The district courts were chosen for this study based on the volume of patent litigation for the period between 1995-1999. Although the Eastern District of Virginia technically will not qualify for the pilot program because there are fewer than 10 judges,ⁿ¹⁹⁴ it was included because of its patent rocket-docket reputation, its ranking as number eight in patent volume,ⁿ¹⁹⁵ and because its Chief Judge, T.S. Ellis, III, testified at the H.R. 5418 congressional hearings as an expert in patent litigation.ⁿ¹⁹⁶ In addition, the Eastern District of Texas has gained recent popularity as a patent rocket docket and was included for that reason.ⁿ¹⁹⁷ See Table 5. The statistics are examined for each court separately, due to the varying number of judges in each court.

Table 5. Data for District Courts Chosen For Studyⁿ¹⁹⁸

[SEE TABLE 5 IN ORIGINAL] **[*310]**

1. The Data

The data for these courts were obtained from Westlaw profiler-WLDⁿ¹⁹⁹ database for each district court judge. The list of judges for each court was obtained from the home page of the district court.ⁿ²⁰⁰ All judges listed--active, magistrate, and senior judges--were included. H.R. 5418 allows senior judges to be designated if at least one active judge is also designated.ⁿ²⁰¹ Magistrate judges are not included because, under H.R. 5418 § S 1(b) (1), the judges must be appointed by the President under 28 U.S.C. 133(a), or "on a temporary basis under other provisions of law."ⁿ²⁰²

For each judge, a Document-List query was run for the period between January 1, 2001, and December 31, 2006. The Document-List query returned all cases on that judge's docket for that period. This included judicial opinions as well as court orders. A search filter allowed queries to distinguish between judicial opinions and docket items.

Most importantly, administrative office of the District Court's determination classifies each item in the document list by the "Nature of the Suit."ⁿ²⁰³ The Nature of the Suit field is listed in Westlaw as the Primary Case Type.ⁿ²⁰⁴ Therefore here, the primary case type of "In **[*311]** tellectual Property - Patents" was used--this excluded copyright and trademark cases.

By combining the filters for judicial opinions and primary case type, the list of all patent opinions for each judge for the specified time period was returned. Each opinion was annotated with the Westlaw symbols for history, including whether the case had been overturned on a point of law. The reversal rate was determined from this indicator by a manual count.ⁿ²⁰⁵ The raw numbers for each judge were generated by case type, expanded, sorted, and exported into Microsoft Excel(tm), where the following percentages were calculated:

Patents as Percentage of Docket: the number of docketed patent items to total docket, including judicial opinions;

Patents as Percentage of Judicial Opinions: the number of patent judicial opinions to total judicial opinions;

Patent Reversal Rate: the number of patent judicial opinions that were overturned on at least one point of law compared to the number of patent judicial opinions.

Overall Reversal Rate: the total number of patent cases reversed compared to the total number of patent cases.

Note that the patent reversal rate includes all reversals, not just reversals in the narrow area of claim construction. As a result, reversal rates may appear lower than in that smaller subset. However, because the hypothesis being tested is that the more experience a district judge has in patent law, the lower the reversal rate, procedural reversals would be expected to decline as well as reversals due to claim construction. Consequently, reversals of all types were included, regardless of type or number of claims.

2. The Eastern District of Texas: Divisional Assignment

In the most recently favored stop for patent litigation, the Eastern District of Texas, cases are assigned randomly, but each judge is assigned a fixed percentage of cases from each division. The Chief Judge, exercising this power pursuant to 28 U.S.C. § 137, periodically issues General Orders modifying the percentages as needed by shifting workloads, recusals, new appointments, and retirements. For example, the caseload for one active Article III judge might get 35% of all civil cases from a particular district, 100% of the criminal cases [*312] from another district.ⁿ²⁰⁶ The workloads for magistrate judges are similarly designated.ⁿ²⁰⁷

In practice, the total statistics of caseload for 2001-2006 show a wide variation in the percentage of patent cases in the judges' workload. A sampling of data for the Eastern District of Texas (the country's latest patent rocket docketⁿ²⁰⁸) shows some surprising results. Rather than an even distribution, two district judges account for around 18% of all patent cases heard. See Table 6.

Table 6. Eastern District of Texas Case Workload

[SEE TABLE 6 IN ORIGINAL]

Overall, decisions of the judges in the Eastern District of Texas were seldom reversed as seen in Figure 2. Surprisingly, for this period only one judge showed a non-zero reversal rate of about 25%. The top jurists had no reversals. However, no strong correlation seems to exist between the number of patent cases heard and the reversal rate; all but one of the judges who only had 3% or less of their docket filled with patent cases, had no reversals. [*313]

Figure 2. ED TX Patent Reversals to Docket

[SEE FIGURE 2 IN ORIGINAL]

Conclusion: The Eastern District of Texas case assignment practice is similar to the one proposed by H.R. 5418. No strong correlation is seen between the practice with patent cases and lower reversal rates.

3. Northern District of California: Ballot System

The Northern District of California's case assignment system is designed to be proportionate, random, and blind.ⁿ²⁰⁹ A ballot system is used, which can be either manual or automated.ⁿ²¹⁰ The clerk of the court assigns cases to judges who have chambers in the courthouse in which the action arises.ⁿ²¹¹ One ballot per judge is placed in a given case category.ⁿ²¹² Newly filed cases are assigned to one of seventeen categories.ⁿ²¹³ Within each category, the assignments should result in an approximately equal distribution of newly filed civil cases within [*314] each of the categories.ⁿ²¹⁴ Patent cases are assigned to the Intellectual Property category, which also includes trademark and copyright cases.ⁿ²¹⁵

A separate system of assignment is maintained for intellectual property cases.ⁿ²¹⁶ The system is still random, but venue can be in any courthouse in the district, not just the courthouse in which the case is filed initially.ⁿ²¹⁷ Thus, patents cases are randomly assigned to any of the judges in the district, thereby eliminating an opportunity for judge shopping.

Reassignment of cases in the Northern District is generally done for the usual reasons, including an intra-district reassignment of cases due to volume.ⁿ²¹⁸ However, intellectual property cases are excepted from this rule and cannot be reassigned to load balance.ⁿ²¹⁹ Like any other cases, except for a capital habeas corpus case, an intellectual property case may be reassigned between judges.ⁿ²²⁰ Reassigning a case between judges required written orders by the transferring

judge and the accepting judge, and does not require any additional approval. ⁿ²²¹ Under such a system, a judge who does not want to hear a patent cases could transfer to a willing patent judge. **[*315]**

Table 7. Northern District of California

[SEE TABLE 7 IN ORIGINAL]

Figure 3. ND CA Patent Reversals to Docket

[SEE FIGURE 3 IN ORIGINAL]

4. Central District of California: Automated Case Assignment System

The Central District of California has a random assignment system known as the Automated Case Assignment System (ACAS) or Assignment Wheel. ⁿ²²² The system is designed to have an equal number of cases assigned to each judge over a period of time. ⁿ²²³ After filing and numbering a case, the Clerk used the ACAS system to randomly obtain the name of the judge to whom the case will be assigned. ⁿ²²⁴ **[*316]**

The case stays with the judge to whom the cases is assigned until terminated or transferred. ⁿ²²⁵ A case can be transferred by an order jointly signed by the transferor and transferee judges. ⁿ²²⁶ If such a transfer is made it shall be debited and credited against the transferor and transferee judges, respectively, in the ACAS. ⁿ²²⁷ A self-recusing judge may appeal the transfer as not being "a case of equal or similar weight and complexity." ⁿ²²⁸

The case assignment statistics from the Central District of California show substantial skew. Here, one district judge appears to be the predominant favorite for being assigned patent cases. Coming in at between 5-6 of the case load, three other judges are not even close seconds--but are still significant considering that they match or exceed the highest percentage of case load seen by the top patent jurist in the Northern District of Illinois. The patent assignments to other judges are less than 5%.

Table 8. Central District of California

[SEE TABLE 8 IN ORIGINAL]

No strong correlation appears between the number of patent opinions reversed with the size of a judge's patent docket. See Figure 4. Four judges with only 2% of their workload had high reversal rates; but so did the judge with a 10% workload. **[*317]**

Figure 4: CD CA Patent Reversals to Docket

[SEE FIGURE 4 IN ORIGINAL]

Conclusion: The Central District of California practices a assignments similar to that proposed by H.R. 5418, but no negative correlation exists between reversal rates and assignments.

5. The Eastern District of Virginia: Equitable Distribution

The Eastern District of Virginia has been nicknamed the rocket docket for good reason: this district is the quickest of all districts in regards to patent litigation. ⁿ²²⁹ The Eastern District of Virginia, was ranked eighth in volume for the period 1995-1996, and was favored for years as a patent rocket docket because of a reputation as the quickest judicial districts for patent cases, with a resolution mean time of .43 years. ⁿ²³⁰ In 2001, the Eastern District of Virginia led all other district courts in the shortest time to resolution with a mean of .43 years; in contrast the mean time for all district courts is 1.12 years. ⁿ²³¹

In, the Eastern District of Virginia ⁿ²³², the data suggest that blind assignment process is actually practiced and no one judge hears a larger number of patent cases than another. See Table 9. **[*318]**

Table 9. Eastern District of Virginia.

[SEE TABLE 9 IN ORIGINAL]

Here, reversal rates were overall low for all judges. Only one judge experienced reversals. See Figure 1. This reversal rate was unremarkable - around 9%.

Figure 5. ED VA Patent Reversals to Docket

[SEE FIGURE 5 IN ORIGINAL]

Conclusion: The Eastern District of Virginia actually practices equitable random distribution of patent cases with little ill affect on the reversal rate. Again, no strong correlation appears between reversals and caseload.

6. Northern District of Illinois: Equitable Assignment Decks

The Northern District of Illinois historically has been one of the busiest patent district courts. ⁿ²³³ For more than 50 years, the Northern **[*319]** District has used a random assignment system. ⁿ²³⁴ An important goal of the rules and procedures for case assignment and reassignment procedures is to secure "an equitable distribution of cases, both in quantity and kind, among the judges." ⁿ²³⁵

The case assignment system is computerized. Both civil cases and criminal cases first are grouped into categories, usually by the type of case. The workload is balanced as the case types for each category are chosen to generate about the same amount of judicial work. Each category has its own "assignment deck" ⁿ²³⁶ containing the name of each regular active judge on full assignment. Senior judges appear half as often. After verification of the case number and category, the computer "shuffles" the assignment deck to pick a judge from one of the unused names remaining in the assignment deck for the category selected. Once assigned, computerized reassignment procedures ensure the equitable distribution of the caseload. ⁿ²³⁷ Such a distribution serves to provide the new judge with a calendar that is reasonably close to the average in terms of workload. ⁿ²³⁸

Just as in the Senate Subcommittee testimony, all but one of the judges' workloads exceeded 5%. Even with such emphasis placed on random case assignment, the statistics show that two of the judges average 1.5 to 2 times as many patent items on the docket for the years 2001-2006. See Table 10. Moreover, the low number of patent cases to the other judges is most likely a result of the equitable case distribution system enforced by the local court rules, not a scarcity of patent cases--the Northern District of Illinois is one of the top district courts in overall patent volume. The remaining assignments follow an expected curve, accounting for some senior judges having as little as half the workload of an active judge. **[*320]**

Table 10. Northern District of Illinois

[SEE TABLE 10 IN ORIGINAL]

Conclusion: The Northern District of Illinois appears to practice equitable case distribution, but reversal rates are consistently inconsistent. See Figure 6.

Figure 6. ND ILL Patent Reversals to Docket

[SEE FIGURE 6 IN ORIGINAL]

B. Criticisms of the H.R. 5418 Proposal

H.R. 5418 oversimplifies a problem that has many complex variables. H.R. 5418 makes at least the five simplifying assumptions:

- 1) the system is broken;
- 2) that the greater the number of docket assignments, the greater the number of opinions, and with the greater number of opinions, come fewer reversals;

[*321]

- 3) technically trained law clerks will perform better than non-technically trained law clerks; and

4) forum shopping already exists as evidenced by the consolidation of patent cases in a small set of courts with the composition of the set changing from year to year, so adding more certainty to judge selection won't change the picture;

1. It's Not Broken

Critics of the proposed legislation have offered various criticisms of this bill. First, many, even including Judge Ellisⁿ²³⁹, do not think the system is broken. By some standards, the U.S. patent system is a model of efficiency.ⁿ²⁴⁰ For example, Japan has a specialized patent trial court system.ⁿ²⁴¹ In a comparison of the U.S. and Japanese patent systems, the time from the filing of a case in the U.S. District Court to its resolution was compared to cases reaching final judgment in Japanese patent courts.ⁿ²⁴² For cases terminating during the twelve month period ending June, 30, 1998, the median time for U.S. patent cases was 8 months as compared to Japanese intellectual property cases of 1-2 years.ⁿ²⁴³

Still others criticize the data presented at the Subcommittee Hearing, opining that the creation of judges with specialized patent expert would be "an inefficient solution to a nonexistent problem."ⁿ²⁴⁴ First, Professor Moore's statistics on reversal rates are inconsistent,ⁿ²⁴⁵ and second, overlooks the large number of district rulings that are never appealed.ⁿ²⁴⁶ Claim construction is an extremely narrow area, and the smaller the data sample, the worse the reversal rates appear.

[*322]

Outside the narrow area of claim construction, for example, federal judges' performance on patent trials is similar to that in all civil trials. For example, of the 2,744 patent lawsuits terminated in fiscal year 2004, 2646 were disposed of before trial--a 3.6% trial rate that is only slightly higher than the 2% of all federal civil cases do not settle before trial.ⁿ²⁴⁷ However, even though the numbers seems small, there is 1.8 times difference in the rate. In the small sample of data for the district courts studied here for 5 years, the rate is 11.20% of all docketed patent items to issued patent opinions to 8.99% of all non-patent docketed items to issued non-patent opinions. For this period, patent opinions issued at a slightly reduced rate, 1.25 x times the rate of non-patent opinions.

2. Technical Expertise Does Not Equal Fewer Reversals

H.R. 5418 provides funds for hiring law clerks with expertise in technical matters arising in patent and plant variety protection cases. Presumably, this position is similar to that of the technical assistant in the CAFC. However, what sort of technical expertise should one have in the broad range of patents? Pharmaceutical, biotechnology, mechanical engineering, electrical engineering, nanotechnology? Patent cases are not the only complex and infrequent case types. For example, judges hear only one espionage case every five years.ⁿ²⁴⁸ Securities and antitrust cases are similarly complex.

Aside from the issues of breadth of the technical patent matters, others point to studies which suggest that even technology savvy judges do no better than liberal-arts educated judges.ⁿ²⁴⁹ The study by Professor Kimberly Moore found that there is no difference in the likelihood that judges with technical backgrounds will construe claims differently than those judges without technical backgrounds.ⁿ²⁵⁰ A recent review of 1,400 appeals found that district court judges with bachelors, or masters-in-science, degree have a 67% affirmance rate, which is better than the average of 60% found in this report.ⁿ²⁵¹ How **[*323]** ever, the same report found that the best performing judges, with an affirmance rate of 71%, were those with Ivy-League degrees.ⁿ²⁵²

Supporters of specialized judges point to specialized courts in the United States--tax, bankruptcy, and administrative courts. Creation of a specialized patent trial court system in the United States, similar to bankruptcy courts, has historically been controversial and rejected.ⁿ²⁵³ Specialized patent and intellectual property courts currently exist in six countries, in addition to European Union's proposed patent court system.ⁿ²⁵⁴

3. Magistrate Judges Should Not Be Excluded

Because magistrate judges are appointed by Article III judges, under 28 U.S.C. § 631, and not by the President as the bill requires, magistrate judges are ineligible for designation. Presumably, magistrate judges were not included because their duties vary so much from court to court. However, this bill should be modified to allow for designation of magistrate judges for three reasons: 1) magistrate judges issue patent opinions in some court; 2) magistrate judges account for a significant percentage of pre-trial discovery in patent cases; and, 3) several patent-prominent district courts would not have the minimum requisite number of judges to qualify for the pilot program.

First, magistrate judges in some courts decide patent cases and account for reversals. For example, in the Northern District of California, magistrate judges issued approximately 37, or 14%, of all patent opinions during this period, while accounting for none of the reversals. The Eastern District of Texas and the Northern District of Illinois similarly have magistrate judges decide patent cases.

Second, even in those district in which magistrate judges do not issue patent opinions, the magistrate judges account for a substantial percentage of patent activity on the docket. In the Eastern District of Virginia and the Central District of California, the magistrate judges have the same percentage of patents in their dockets as do active judges. See Table 11. [*324]

B

Table 11. Comparison of Magistrate Judges and Judges: Patents as Percentage of Total Docket

District Court

Article III Judges

Magistrate Judges

E.D. TX

3.51%

.75%

N.D. CA

2.69%

4.97%

E.D. VA

0.72%

0.5%

N.D. ILL

1.77%

1.47%

C.D. CA

2.45%

2.52%

E

Finally, excluding magistrate judges eliminates several important district courts from the pilot program. For example, none of the courts in Texas would qualify.

4. Judge Shopping

Designating patent judges will add certainty to "judge shopping" in forum selection. Presently, defendants and plaintiffs both shop for either the quickest or slowest courts with the highest and lowest reversal rates--whichever suits their interests.ⁿ²⁵⁵ The problem of "judge shopping" is added to the mix by designating and codifying "patent judges" under H.R. 5418. Another important goal of the case assignment system is that "no one should be able to manipulate the assignment system in order to determine in advance which judge will get a case where the assignment is by lot."ⁿ²⁵⁶

As a result, courts take the security and secrecy of judge assignment seriously. For example, the local court rules of the Northern District of Illinois explicitly address this concern and provide for enforcement. Any person that violates the case assignment procedures "shall be punished for contempt of court."ⁿ²⁵⁷

For obvious security reasons, the deputies assigning the cases do not have access to the software that sets up the assignment decks. The deputies responsible for setting up the decks do not assign cases. This system together with the changes in the make up of the deck due to equalization and the shuffling of the names prior

[*325]

to the actual assignment assures that staff cannot determine in advance the name of the judge to whom a case will be assigned.ⁿ²⁵⁸

Today, there is still an element of equitableness and randomness in patent case assignments--even in those jurisdictions where some judges are unofficial patent judges. At the very least, this aspect of case assignment is not widely known, as evidenced by the bill hearings and testimony.

5. Practice Does Not Make Perfect

The data for these selected courts can be summarized in the table below. The courts with the overall best records for reversals do not all follow the H.R. 5418 model. The highest overall reversal rates are also in a court practicing the proposed H.R. 5418 case assignment method. See Table 12 - 14. No strong correlation seems to exist between equitable case assignment procedures and designated patent judge assignment.

B

Table 12. Comparison of Court Averages (magistrates included)

District Court

Overall Reversal Rate to Patent Opinions

Case Assignment System

Patents as Percentage of Total Docket

Overall Reversal Rate to Patent Docket

E.D. TX

1.32%

H.R. 5418

2.61%

0.00%

N.D. CA

1.89%

Equitable

3.37%

0.27%

E.D. VA

6.25%

Equitable

0.64%

0.72%

N.D. ILL

7.10%

Equitable

1.74%

1.98%

C.D. CA

22.92%

H.R. 5418

2.51%

0.36%

E

B

Table 13. Comparison of Court Averages (no magistrate judges)

District Court

Overall Reversal Rate to Patent Opinions

Case Assignment System

Patents as Percentage of Total Docket

Overall Reversal Rate to Patent Docket

E.D. TX

0

H.R. 5418

3.51%

0.00%

N.D. CA

2.2%

Equitable

2.69%

0.41%

E.D. VA

6.25%

Equitable

0.72%

1.04%

E [*326]

B

N.D. ILL

6.47%

Equitable

1.77%

2.03%

C.D. CA

22.92%

H.R. 5418

2.45%

0.69%

E

B

Table 14. Comparison of Court Averages (magistrate judges only)

District Court

Overall Reversal Rate to Patent Opinions

Case Assignment System

Patents as Percentage of Total Docket

Overall Reversal Rate to Patent Docket

E.D. TX

11.11%

H.R. 5418

.75%

1.47%

N.D. CA

0

Equitable

4.97%

0

E.D. VA

0

Equitable

0.5%

0

N.D. ILL

5.88%

Equitable

1.47%

1.54%

C.D. CA

0

H.R. 5418

2.52%

0

E

Combining the data for all judges from these courts yields that the reversal rates for judges deciding 3 or more cases a year is 4.57% versus 4.67% for judges deciding fewer than 3, if they decided any patent cases at all. The percentage of the patent workload for those judges is only slightly higher: 3.71% to 2.27%.

Similar studies indicate that the results in these five courts are not anomalous. A preliminary report by a private data firm, examining 1400 appeals, has found that district court judges who have heard a minimum of 100 patent cases have an identical affirmance rate, around 60%, as those judges that have heard fewer cases.ⁿ²⁵⁹

At least for these top five patent courts, for these top patent judges, and for this time period, the amount of docket assignments to designated patent judges does not appear to correlate to a lower reversal rate. More experience does not cause lower reversal rates.

C. "Secrets" of Success?

If there is not strong correlation between the rate of reversals and the percentage of the workload, what explains the relative success in terms of reversals, and speed of adjudication, of a small court like the Eastern District of Virginia or the Eastern District of Texas? Why would the Northern District of Illinois, with as similar assignment system to the Eastern District of Virginia, be cited for its high reversal rates? Why would an assignment system similar to that practiced by the Central District of California provide better or different results than the Eastern District of Texas?

Possible answers lie in an examination of two indisputably respected and successful forums: the ITC and the Eastern District of Virginia. Both are known for the speed, and the ITC is especially noted for its low reversal rate. What is the secret?

1. The Eastern District of Virginia: The Master Docket

There are three main ingredients to the success of patent litigation in the Eastern District: 1) the early setting of a fixed and "immutable" trial date; 2) a culture supporting a fixed and immutable trial date; and 3) a master docket.ⁿ²⁶⁰

The trial dates are rigorously maintained. Judge Ellis has never granted a motion to continue a civil trial in twelve years.ⁿ²⁶¹ For example, even a serious heart attack suffered by one of the primary attorneys on the way to trial only delayed the trial until the following day.ⁿ²⁶² This discipline is practiced by judges as well: judges must promptly consider and decide various non-dispositive and dispositive motions during the course of the trial.ⁿ²⁶³

The absence of a judge is no reason to delay a trial because of a feature unique to the Eastern District: the master docket.ⁿ²⁶⁴ The master docket system has been in effect in the Eastern District since the 1950s.ⁿ²⁶⁵

As of 1999, no other district court used the master docket concept; instead, judges have individual dockets assigned to them.ⁿ²⁶⁶ A judge will deal with those cases on their individual docket from beginning to end.ⁿ²⁶⁷ If a judge becomes ill or absent for any reason, or has conflicts with other delayed trials on their docket, another judge does not step in--the cases are delayed.ⁿ²⁶⁸ In the master docket concept, all cases are not assigned to individual judges to hear all proceedings relating to that case from beginning to end.ⁿ²⁶⁹ If a judge is unavailable, another judge will step in to hear that portion of the proceeding.ⁿ²⁷⁰ [*328] The absence of a judge is never a reason to postpone a trial or hearing in the Eastern District.ⁿ²⁷¹

The master docket system, however, is voluntary and hence fragile--a single new judge could decide not to participate.ⁿ²⁷² As a result, the system may not scale well to an extremely large district court such as the Northern District of Illinois.

2. ITC: Discovery

One important difference between the ITC and most district court proceedings is in discovery.ⁿ²⁷³ ITC discovery procedures must be completed quickly because there must be a briefing, a hearing, and a decision by the Administrative Law Judge within nine months of issuing an Initial Determination.ⁿ²⁷⁴ Another difference is that a staff ITC Investigative Attorney participates in the discovery process.ⁿ²⁷⁵

3. Eastern District of Texas: Rules of Practice for Patent Cases

The Eastern District of Texas has formulated a set of "Rules of Practice for Patent Cases before the Eastern District of Texas."ⁿ²⁷⁶ On February 22, 2005, the Eastern District Court implemented a system of uniform patent rules as part of their local rules.ⁿ²⁷⁷

These rules apply to all civil actions filed in or transferred to this Court which allege infringement of a utility patent in a complaint, counterclaim, cross-claim or third party claim, or which seek a declaratory judgment that a utility patent is not infringed, is invalid or is unenforceable.ⁿ²⁷⁸

These rules augment the discovery rules of Federal Rules of Civil Procedure 26.ⁿ²⁷⁹ First, the Initial Case Management Statementⁿ²⁸⁰ must also address, among others, the following patent claim specific issues: 1) any modifications to the deadlines imposed by the Patent Rules; 2) **[*329]** whether live testimony will be heard at a Claim Construction Hearing; and, 3) need for limits on discovery relating to claim construction.ⁿ²⁸¹

Within 10 days after the Initial Case Management Conference, the plaintiff must serve on all parties a "Disclosure of Asserted Claims and Preliminary Infringement Contentions."ⁿ²⁸²

These rules are flexible; judges may opt out of this rule by entering an order.ⁿ²⁸³ Accordingly, the court may "accelerate, extend, eliminate, or modify the obligations or deadlines set forth" in these Patent Rules based on the following factors of a case, such as the complexity of the case, the number of patents, claims, products, or parties involved.ⁿ²⁸⁴

4. Northern District of California: Local Patent Rules

The Northern District of California enacted Local Rule for Practice for Patent Cases, effective January 1, 2001.ⁿ²⁸⁵ These rules were in effect for the period that the data were collected and apply to all civil actions originating in or transferred into the district that allege infringement of a utility patent in any claim, counterclaim, or third party claim.ⁿ²⁸⁶ The rules apply for declaratory judgments that a utility patent is infringed, invalid, or otherwise unenforceable.ⁿ²⁸⁷

The patent rules are comprehensive, tailored to patent adjudication, and provide guidance for each step of the process. In addition to the requirements of the Federal Rules of Civil Procedure, the parties in a patent case must adhere to additional requirements and deadlines in planning, discovery, confidentiality, and presentation of evidence. In issues of claim construction, separate Claim Construction Hearings are held. The parties must provide additional Claim Construction briefs in preparation for the hearing.

For example, the rules describe in detail how each party must present the initial closures as follows:

Separately for each opposing party, the "Disclosure of Asserted Claims and Preliminary Infringement Contentions" shall contain the following information:

(a) Each claim of each patent in suit that is allegedly infringed by each opposing party;

[*330]

(b) Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality ("Accused Instrumentality") of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;

(c) A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including for each element that such party contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;

(d) Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality;

(e) For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and

(f) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.ⁿ²⁸⁸

In two recent 2006 decisions,ⁿ²⁸⁹ the CAFC has affirmed that parties must comply with the requirements of the Patent Local Rules for the Northern District of California. "These decisions are a strong indication that the Northern District's Patent Local Rules have real teeth, providing district court judges with considerable discretionary power in ensuring that parties comply with them, even when failing to do so is outcome determinative."ⁿ²⁹⁰ Dismissals based on

enforcement [*331] of local rules in patent cases are also harder to overturn, because those are subject to abuse-of-discretion review; whereas "claim construction" or summary judgments are reviewed de novo. ⁿ²⁹¹

The Eastern District of Texas implemented their local rules based on the rules in the Northern District of California, which provide "a structure for the unique 'claims construction' portion of a patent case and move cases along through the initial stages with a minimum of fuss and attention by a busy judge." ⁿ²⁹² In addition to experienced trial judges, these rules have been identified as common feature in the success and popularity of this district court with patent holders. ⁿ²⁹³

Other district courts have taken note of the Northern District's local patent rules and have used them as a model. The Western District of Pennsylvania adopted local patent rules that incorporate several features of the rules that have generally been in effect in the Northern District of California and employed by various individual judges around the country.

In contrast to the rules of the Northern District of California, however, the local patent rules for the Western District of Pennsylvania contain provisions that encourage an even swifter and more comprehensive approach to patent litigation. To accomplish these objectives, the new Pennsylvania rules further provide additional cost and time saving measures, including default protective orders to preserve confidentiality, Infringement Contention Timetable, and a Model Chart For Disputed Claim Terms, among others. ⁿ²⁹⁴

Effective April 3, 2006, the United States District Court for the Southern District of California has issued proposed new rules of local practice for patent cases, also modeled after the Northern District of California. These local rules cover, among other issues, initial disclosures in patent cases, and case management and responses to discovery. ⁿ²⁹⁵ Like in other district courts, several improvements were made, [*332] including a "Joint Claim Construction Worksheet" and a "Timeline for Patent Cases." ⁿ²⁹⁶

IV. Conclusion

Based on the reversal data for the five districts studied, no apparent correlation exists between the number of cases a patent judge hears and the reversal rate. Furthermore, several of the districts are currently practicing the proposed case assignment system proposed in H.R. 5418. For these courts, the overall performance of the court is not correlated with this type of assignment system.

As the data suggests, magistrate judges already shoulder a substantial amount of patent-discovery and preliminary-motions work in all districts. In some district courts, the magistrate judges decide the cases, contributing to the overall reversal rate. Excluding magistrate judges from the system ignores their impact on patent adjudication. Additionally, the exclusion of magistrate judges by H.R. 5418 eliminates two of the top patent district courts from receiving additional funding to improve patent litigation.

The underlying secret to more efficient and accurate patent decisions lies not in the assignment system, but in the local rules employed by the district courts. Patent specific rules, especially with respect to discovery, ameliorate the problems caused by infrequent hearing of patent cases and reduce mistakes. Patent specific deadlines ensure the timely processing of the case and reduce costs. Patent rules provide the institutional learning necessary to bridge the experience gap caused by the loss of a trained patent jurist. The money spent in training law clerks and judges in the pilot program is lost when one of these trained people leave.

Rather than initiating a pilot program that merely formalizes existing court procedures, a pilot program should be initiated that implements and measures the effect of a uniform set of patent specific rules in the busiest as well as the poorest performing district courts. Uniformity in rules would reduce forum shopping, costs, and offset the lack of experience of judges who infrequently hear patent cases. Coupled with uniform patent rules, the addition of old-fashioned virtues of strict adherence to schedules, as in the Eastern District of Virginia, would improve patent adjudication.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Jurisdiction
Subject Matter Jurisdiction
Jurisdiction Over Actions
Exclusive Jurisdiction
International Trade Law
General Overview
Patent Law
Jurisdiction & Review
General Overview

FOOTNOTES:

n1 Brooke Terpening, Esq., attorney at Swartz Lenamon, specializing in criminal defense and personal injury. Many thanks to my advisor, Professor Hannibal Travis, for his guidance and comments.

n2 ADVISORY COMM. ON PATENT LAW REFORM, REPORT TO THE SECRETARY OF COMM. 75 (1992), available at <http://ipmall.info/hostedresources/lipa/patents/patentact/ACPLR-3.pdf>.

n3 See Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary [SUBCOMM. REPORT], 109th Cong. 2 (2005).

n4 See id.

n5 See <http://thomas.loc.gov/home/c109bills.html> (follow "5401-5500" hyperlink; then follow "H.R.5418.RFS" hyperlink; then follow "Bill Summary & Status" hyperlink; then follow "All Information" hyperlink).

n6 H.R. 518 reads:

AN ACT

To establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PILOT PROGRAM IN CERTAIN DISTRICT COURTS.

(a) Establishment-

(1) IN GENERAL- There is established a program, in each of the United States district courts designated under subsection (b), under which--

(A) those district judges of that district court who request to hear cases under which one or more issues arising under any Act of Congress relating to patents or plant variety protection must be decided, are designated by the chief judge of the court to hear those cases;

(B) cases described in subparagraph (A) are randomly assigned to the judges of the district court, regardless of whether the judges are designated under subparagraph (A);

(C) a judge not designated under subparagraph (A) to whom a case is assigned under subparagraph (B) may decline to accept the case; and

(D) a case declined under subparagraph (C) is randomly reassigned to one of those judges of the court designated under subparagraph (A).

(2) SENIOR JUDGES- Senior judges of a district court may be designated under paragraph (1)(A) if at least 1 judge of the court in regular active service is also so designated.

(3) RIGHT TO TRANSFER CASES PRESERVED- This section shall not be construed to limit the ability of a judge to request the re-assignment of or otherwise transfer a case to which the judge is assigned under this section, in accordance with otherwise applicable rules of the court.

(b) Designation- The Director of the Administrative Office of the United States Courts shall, not later than 6 months after the date of the enactment of this Act, designate not less than 5 United States district courts, in at least 3 different judicial circuits, in which the program established under subsection (a) will be carried out. The Director shall make such designation from among the 15 district courts in which the largest number of patent and plant variety protection cases were filed in the most recent calendar year that has ended, except that the Director may only designate a court in which--

(1) at least 10 district judges are authorized to be appointed by the President, whether under section 133(a) of title 28, United States Code, or on a temporary basis under other provisions of law; and

(2) at least 3 judges of the court have made the request under subsection (a)(1)(A).

(c) Duration- The program established under subsection (a) shall terminate 10 years after the end of the 6-month period described in subsection (b).

(d) Applicability- The program established under subsection (a) shall apply in a district court designated under subsection (b) only to cases commenced on or after the date of such designation.

(e) Reporting to Congress-

(1) IN GENERAL- At the times specified in paragraph (2), the Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b) and the Director of the Federal Judicial Center, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the pilot program established under subsection (a). The report shall include--

(A) an analysis of the extent to which the program has succeeded in developing expertise in patent and plant variety protection cases among the district judges of the district courts so designated;

(B) an analysis of the extent to which the program has improved the efficiency of the courts involved by reason of such expertise;

(C) with respect to patent cases handled by the judges designated pursuant to subsection (a)(1)(A) and judges not so designated, a comparison between the 2 groups of judges with respect to--

(i) the rate of reversal by the Court of Appeals for the Federal Circuit, of such cases on the issues of claim construction and substantive patent law; and

(ii) the period of time elapsed from the date on which a case is filed to the date on which trial begins or summary judgment is entered;

(D) a discussion of any evidence indicating that litigants select certain of the judicial districts designated under subsection (b) in an attempt to ensure a given outcome; and

(E) an analysis of whether the pilot program should be extended to other district courts, or should be made permanent and apply to all district courts.

(2) TIMETABLE FOR REPORTS- The times referred to in paragraph (1) are--

(A) not later than the date that is 5 years and 3 months after the end of the 6-month period described in subsection (b); and

(B) not later than 5 years after the date described in subparagraph (A).

(3) PERIODIC REPORTING- The Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b) and the Director of the Federal Judicial Center, shall keep the committees referred to in paragraph (1) informed, on a periodic basis while the pilot program is in effect, with respect to the matters referred to in subparagraphs (A) through (E) of paragraph (1).

(f) Authorization for Training and Clerkships- In addition to any other funds made available to carry out this section, there is authorized to be appropriated not less than \$ 5,000,000 in each fiscal year for--

(1) educational and professional development of those district judges designated under subsection (a)(1)(A) in matters relating to patents and plant variety protection; and

(2) compensation of law clerks with expertise in technical matters arising in patent and plant variety protection cases, to be appointed by the courts designated under subsection (b) to assist those courts in such cases.

Amounts made available pursuant to this subsection shall remain available until expended.

Passed the House of Representatives September 28, 2006.

Attest:

KAREN L. HAAS

Clerk.

H.R. 5418, 109th Cong. (2d Sess. 2006) available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5418.RFS>: (last visited Mar. 14, 2007)..

n7 SUBCOMM. REPORT, supra note 3, at 21 (statement of John B. Pegram, Senior Counsel, New York Office, Fish & Richardson, P.C.).

n8 See James F. Holderman, Judicial Patent Specialization: A View from the Trial Bench, 2002 U. ILL. J.L. TECH. & POL'Y 425, 429 (2002).

n9 See id.

n10 See H.R. 5418, *supra* note 7.

n11 See SUBCOMM. REPORT, *supra* note 3, at 57.

n12 Interview with Hannibal Travis, former law clerk in the U.S. District Court for the Central District of California, and Assistant Professor of Law, Florida International University, College of Law, Miami, Fla. (discussing patent case assignment practices). See <http://law.fiu.edu/faculty/facultytravis.htm>.

n13 Kathleen M. O'Malley, Patti Saris, & Ronald H. Whyte, A Panel Discussion: Claim Construction from the Perspective of the District Judge, 54 CASE W. RES. L. REV. 671, 683 n.31 (2004).

n14 U.S. CONST. art. I, § 8, cl. 8.

n15 See Edward C. Walterscheid, To Promote the Progress to Useful Arts: American Patent Law and Administration, 1787-1836 (Part 11), 79 J. PAT. & TRADEMARK OFF. SOC'Y 61, 61 (1997).

n16 *Id.*

n17 See Matthew D. Henry & John L. Turner, The Court of Appeals for the Federal Circuit's Impact on Patent Litigation, 35 J. LEGAL STUD. 85, 85 (2006).

n18 See A.B.A. TASK FORCE [TASK FORCE], ANTITRUST LAW SECTION, REPORT ON THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 8 (2002), available at <http://www.abanet.org/antitrust/at-comments/2002/reports/federalcircuitreport.pdf>.

n19 See *id.* at 9.

n20 See Henry, *supra* note 17, at 85-86.

n21 *Id.*

n22 See *id.*

n23 *Id.* at 86.

n24 See TASK FORCE, *supra* note 18, at 6.

n25 See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

n26 See TASK FORCE, *supra* note 18, at 6.

n27 See John B. Pegram, Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765, 771 (2000).

n28 See *id.*

n29 See *id.*

n30 See *id.*

n31 See About the Court, FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/about.html>.

n32 See *id.* Other subject areas include a wide variety: international trade, government contracts, certain money claims against the federal government, and veteran's benefits. See *id.*

n33 See Pegram, *supra* note 27 at 767.

n34 See About the Court, *supra* note 31.

n35 See *id.*

n36 See *id.*

n37 Setsuko Asami, Japan-U.S. Patent Infringement Litigation Comparison: A Visit to the United States Court of Appeals for the Federal Circuit, 5 CASRIP NEWSLETTER, Fall 1998, <http://www.law.washington.edu/CASRIP/Newsletter/Vol5/newsv5i3asami.htm>.

n38 See *id.* at Figure 3.

n39 See *id.*

n40 See *id.*

n41 See id.

n42 See Kimberly A. Moore, Are District Court Judges Equipped to Resolve Patent Cases?, 12 FED. CIR. B.J. 1, 15 n.71 (2002).

n43 See id. at 15.

n44 See id. at 15 n.71; see also Judicial Biographies, FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judgbios.html> (last visited Oct. 31, 2006).

n45 Judges Paul R. Michel and Randal R. Rader, respectively. See Judicial Biographies, supra at note 44; see also Kimberly A. Moore, Are District Court Judges Equipped to Resolve Patent Cases?, 15 HARV. J.L. & TECH. 1, 24 n. 97 (2001).

n46 See Judicial Biographies, supra note 44.

n47 See Pegram, supra note 27 at 771.

n48 See id.

n49 See id.

n50 See id.

n51 See SUBCOMM. REPORT, supra note 3, at 4 (2005).

n52 See ADMIN. OFFICE OF THE FED. CTS., 2000 ANN. REP. 119, Table B-8, available at www.cafc.uscourts.gov/pdf/b08sep00.pdf.

n53 See ADMIN. OFFICE OF THE FED. CTS., 2001 ANN. REP. 115, Table B-8, available at www.cafc.uscourts.gov/pdf/b08sep01.pdf.

n54 See ADMIN. OFFICE OF THE FED. CTS., 2002 ANN. REP. 114, Table B-8, available at www.cafc.uscourts.gov/pdf/b08sep02.pdf.

n55 See ADMIN. OFFICE OF THE FED. CTS., 2003 ANN. REP. Table B-8, available at www.cafc.uscourts.gov/pdf/b08sep03.pdf.

n56 See ADMIN. OFFICE OF THE FED. CTS., 2004 ANN. REP. Table B-8, available at www.cafc.uscourts.gov/pdf/b08sep04.pdf.

n57 See ADMIN. OFFICE OF THE FED. CTS., 2005 ANN. REP. Table B-8, available at www.ca9c.uscourts.gov/pdf/b08sep05.pdf.

n58 See ADMIN. OFFICE OF THE FED. CTS., 2006 ANN. REP. Table B-8, available at www.ca9c.uscourts.gov/pdf/b08sep06.pdf.

n59 See Pegram, *supra* note 27, at 771-72.

n60 See *id.*

n61 See *id.*

n62 See *id.*

n63 See *id.*

n64 See 35 U.S.C. § 145.

n65 See *supra* Table 1.

n66 *Id.*

n67 Pegram, *supra* note 27, at 772.

n68 See *id.* at 772-73.

n69 See *id.*

n70 See *id.*

n71 Smoot-Hawley's Revenge, WALL ST. J., Aug. 23, 2006, at A10.

n72 See Pegram, *supra* note 27, at 771-72.

n73 See id. at 772.

n74 See id.

n75 Id.

n76 Id.

n77 See Steve Seidenberg, Patent Rocket Docket, A.B.A. J., Jan. 2007, at 38.

n78 See supra Table 1.

n79 See note infra Table 3.

n80 See Pegram, supra note 27, at 767-68.

n81 Id. at 768 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Id. (citing 29 U.S.C. § 1331)).

n82 See id. at 769.

n83 Id.

n84 See 35 U.S.C. § 290.

n85 See Kimberly A. Moore, Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?, 79 N.C. L. REV. 889, 900 (2001).

n86 See James Bessen & Michael J. Meurer, Lessons for Patent Policy from Empirical Research on Patent Litigation, 9 LEWIS & CLARK L. REV. 1, 24 (2005).

n87 See SUBCOMM. REPORT, supra note 3, at 48 (statement of Chris J. Katopis, Table II - USPTO Workload Projections).

n88 See Bessen & Meurer, supra note 86, at 2-3.

n89 See PATENT TECHNOLOGY MONITORING BRANCH (PTMB), ELECTRONIC INFORMATION PRODUCTS DIVISION, U.S. PATENT AND TRADEMARK OFFICE, PATENTING TRENDS CALENDAR YEAR 2000, available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pattr00.htm>

n90 See PATENT TECHNOLOGY MONITORING BRANCH (PTMB), ELECTRONIC INFORMATION PRODUCTS DIVISION, U.S. PATENT AND TRADEMARK OFFICE, PATENTING TRENDS CALENDAR YEAR 2001, available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pattr01.html>.

n91 See PATENT TECHNOLOGY MONITORING BRANCH (PTMB), ELECTRONIC INFORMATION PRODUCTS DIVISION, U.S. PATENT AND TRADEMARK OFFICE, PATENTING TRENDS CALENDAR YEAR 2002 (document dated 04-FEB-2003), available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pattr02.html>.

n92 See PATENT TECHNOLOGY MONITORING BRANCH (PTMB), ELECTRONIC INFORMATION PRODUCTS DIVISION, U.S. PATENT AND TRADEMARK OFFICE, PATENTING TRENDS CALENDAR YEAR 2003 (document dated 04-Mar-2004), available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pattr03.html>.

n93 See PATENT TECHNOLOGY MONITORING BRANCH (PTMB), ELECTRONIC INFORMATION PRODUCTS DIVISION, U.S. PATENT AND TRADEMARK OFFICE, PATENTING TRENDS CALENDAR YEAR 2004 (document dated 09-FEB-2005), available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pattr04.html>.

n94 See PATENT TECHNOLOGY MONITORING BRANCH (PTMB), ELECTRONIC INFORMATION PRODUCTS DIVISION, U.S. PATENT AND TRADEMARK OFFICE, PATENTING TRENDS CALENDAR YEAR 2005 (document dated 08-FEB-2006), available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pattr05.html>.

n95 See Bessen & Meurer, *supra* note 86, at 2.

n96 See SUBCOMM REPORT, *supra* note 3, at 16 (statement of John B. Pegram citing Administrative Office of the U.S. Courts, Judicial Business of the United States Courts-2004., Table C-2A, available at <http://www.uscourts.gov/judbus2004/appendices/c2a.pdf>).

n97 See Seidenberg, *supra* note 77.

n98 *Id.*

n99 See *id.*

n100 See Moore, *supra* note 49, at 11-12.

n101 See Ted D. Lee & Michelle Evans, The Charade: Trying a Patent Case to All "Three" Juries, 8 TEX. INTELL. PROP. L.J. 1, 9 (1999).

n102 See *id.*

n103 See Moore, *supra* note 100, at 11-12.

n104 See *id.* at 12.

n105 See Michael C. Smith, *Rocket Docket: Marshall Court Leads Nation in Hearing Patent Cases*, 69 TEX. B. J. 1045 (2006). On the issue of "Claims construction," Smith says:

"Claims construction" often requires a brief explanation. One of the aspects of patent cases that is unusual--what, in fact, requires the special rules for the initial stages--is the 1995 decision by the Federal Circuit Court of Appeals, which is the appellate court to which all patent cases are appealed, that the determination of what the terms in a patent mean is a legal issue, not a factual one. Consequently, judges, not juries, must decide what the words in a patent mean.

As noted, patents are essentially deeds to an idea, and the initial question, "What does this patent cover?" requires an analysis of what the patent means and covers--not unlike a survey of a piece of land. Judges now do this during "claims construction" or Markman hearings by construing what the terms in the patent claims mean and, accordingly, what the patent covers. Essentially, they determine whether a word in the patent means what the plaintiff argues it does, what the defendant argues, or something entirely different.

But the mortality rate of judges' claims construction rulings in patent cases, which are reviewed under the *de novo* standard, is extraordinarily high on appeal, with the Federal Circuit reversing at least part of the judge's ruling approximately 40 percent of the time. But not in Marshall. Despite handling more than 200 patent cases between them at a time, Judges Ward and Davis have never been reversed by the Federal Circuit--the closest either has come was a revision of one claim term in one order by Judge Ward. This startling fact underscores the expertise that the local judges have developed in these complex cases. For better or worse, when the judge hands down his construction of the terms in the patent, thus setting the metes and bounds of the plaintiff's invention, the ruling is--at least thus far--virtually bulletproof on appeal. *Id.* at 1048.

n106 See Moore, *supra* note 100, at 11-12.

n107 See Pegram, *supra* note 27, at 767.

n108 See *id.*

n109 See *id.*

n110 See *id.*

n111 See *id.*

n112 See Moore, *supra* note 85, 933.

n113 See SUBCOMM. REPORT, *supra* note 3, at 2.

n114 See *id.* at 15 (statement of John B. Pegram, Senior Counsel, New York Office, Fish & Richardson, P.C.).

n115 See id.

n116 See Moore, supra note 112, at 889-90, 903.

n117 See id. at 889, 892, 903.

n118 See id. at 892-95.

n119 See id. at 908-09.

n120 See O'Malley, supra note 13, at 681.

n121 See Moore, supra note 85, at 900 n.47.

n122 See T.S. Ellis, III, Quicker and Less Expensive Patent Enforcement of Patents in the United States Courts, CASRIP PUBLICATION SERIES NO. 5: STREAMLINING INTERNATIONAL INTELLECTUAL PROPERTY 1999, at 14.

n123 Moore, supra note 85, at 909.

n124 See id. at 909.

n125 See Smoot-Hawley's Revenge, supra note 71.

n126 See Kimberly A. Moore, Markman Eight Years Later: Is Claim Construction More Predictible?, 9 LEWIS & CLARK L. REV. 231, 231 (2005).

n127 See Moore, supra note 42, at 13-15.

n128 See id. at 14.

n129 See supra note 52.

n130 See supra note 53.

n131 See supra note 54.

n132 See supra note 55.

n133 See supra note 56.

n134 See supra note 57.

n135 See supra note 58.

n136 See SUBCOMM. REPORT, supra note 3, at 7 (statement of Prof. Kimberly A. Moore).

n137 See Moore, supra note 42, at 1-3.

n138 Kathleen M. O'Malley, Patti Saris & Ronald H. White, A Panel Discussion: Claim Construction from the Perspective of the District Judge, 54 CASE W. RES. L. REV. 671, 690 n.31 (2004).

n139 Id.

n140 See generally Markman v. Westview Instr., Inc., 517 U.S. 370 (1996).

n141 Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 21 (2005) (statement of Prof. Kimberly A. Moore); Kimberly A. Moore, Markman Eight Years Later: Is Claim Construction More Predictable?, 9 LEWIS & CLARK L. REV. 231, 245-247 (2005).

n142 Kathleen M. O'Malley, Patti Saris, & Ronald H. White, A Panel Discussion: Claim Construction from the Perspective of the District Judge, 54 CASE W. RES. L. REV. 671, 679 (2004).

n143 Id. at 681.

n144 Report of Economic Survey, AMERICAN INTELLECTUAL PROP. LAW ASS'N 72 (1999).

n145 O'Malley et al., supra note 142, at 681.

n146 Jay P. Kesan & Gwendolyn G. Ball, How are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes, 84 WASH. U. L. REV. 237, 281-82 (2006).

n147 *Id.* at 257-58.

n148 *Id.* at 281-82.

n149 *Id.* at 283 fig.2b.

n150 See ADMIN. OFFICE OF THE FED. CTS., 2006 ANN. REP., at tbl.B-8, available at <http://www.fedcir.gov/pdf/asooct2005.pdf>.

n151 See ADMIN. OFFICE OF THE FED. CTS., 2000 ANN. REP., at 119 tbl.B-8, available at www.fedcir.gov/pdf/b08sep00.pdf.

n152 See ADMIN. OFFICE OF THE FED. CTS., 2001 ANN. REP., at 115 tbl.B-8, available at www.fedcir.gov/pdf/b08sep01.pdf.

n153 See ADMIN. OFFICE OF THE FED. CTS., 2002 ANN. REP., at 114 tbl.B-8, available at www.fedcir.gov/pdf/b08sep02.pdf.

n154 See ADMIN. OFFICE OF THE FED. CTS., 2003 ANN. REP., at tbl.B-8, available at www.fedcir.gov/pdf/b08sep03.pdf.

n155 See ADMIN. OFFICE OF THE FED. CTS., 2004 ANN. REP., at tbl.B-8, available at <http://www.fedcir.gov/pdf/aosep04.pdf>.

n156 See ADMIN. OFFICE OF THE FED. CTS., 2005 ANN. REP., at tbl.B-8, available at <http://www.fedcir.gov/pdf/asooct2005.pdf>.

n157 See ADMIN. OFFICE OF THE FED. CTS., 2006 ANN. REP., at tbl.B-8, available at <http://www.fedcir.gov/pdf/asooct2005.pdf>.

n158 Kimberly A. Moore, Are District Court Judges Equipped to Resolve Patent Cases?, 12 FED. CIR. B.J. 1, 2 (2002).

n159 O'Malley et al., *supra* note 142, at 682-83.

n160 *Id.* at 682.

n161 Moore, *supra* note 158, at 9.

n162 Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 5-6 (2005) (statement of John B. Pegram, Senior Counsel, New York Office, Fish & Richardson, P.C) (quoting Judge Holderman).

n163 Id.

n164 John B. Pegram, Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765, 770 (2000).

n165 Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 20 (2005) (statement of Prof. Kimberly A. Moore).

n166 Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 5 (2005) (statement of John B. Pegram, Senior Counsel, New York Office, Fish & Richardson, P.C.).

n167 H.R. Rep. No. 109-673, available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109&>.

n168 ABA Comm. on Intell. Prop., Resolution 601-8 (2000), available at <http://www.abanet.org/intelprop/jun00chair.html>. The Resolution was approved to establish a pilot program to encourage enhancement of expertise in patent cases among patent judges or similar legislation. The Resolution supports, in principle, the implementation of a pilot program to determine whether the consolidation of patent cases among designated judges in whose districts such cases are filed improves the litigation of patent cases; and, SPECIFICALLY, the Section supports, in principle, a pilot program of the type contemplated by H.R. 5418 (109th Congress, 1st Sess.) (2005) (Issa).

n169 H.R. Rep. No. 109-673, available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr673&dbname=109&>.

n170 ABA IP Law Section on Pilot Program For Trying Patent Cases, Resolution 72 PTCJ 235 (2006).

n171 Id.

n172 <http://thomas.loc.gov/home/c109bills.html> (follow [5400 - 5500] hyperlink; then follow [H.R.5418.RFS] hyperlink; then follow [Bill Summary & Status] hyperlink; then follow [All Information] hyperlink).

n173 28 U.S.C. § 137.

n174 Id.

n175 Id.

n176 United States v. Keane, 375 F. Supp. 1201, 1204-05 (N.D. Ill. 1974).

n177 J. Robert Brown, Jr. & Allison Herren Lee, Neutral Assignment of Judges at the Court of Appeals, 78 TEX. L. REV. 1037, 1075 tbl.1 (2000).

n178 Id. at 1075.

n179 Keane, 375 F. Supp. at 1204-05.

n180 Id.

n181 H.R. 5418 B (1) (a) (1) (A).

n182 H.R. 5418 B (1) (a) (1) (B).

n183 H.R. 5418 B (1) (a) (1) (C).

n184 H.R. 5418 B (1) (a) (1) (D).

n185 H.R. 5418 B (1) (a) (2).

n186 H.R. 5418 B (1) (a) (3).

n187 H.R. 5418 B (1) (b).

n188 Id.

n189 H.R. 5418 B (1) (b) (1).

n190 H.R. 5418 B (1) (b) (2).

n191 H.R. 5418 B (1) (e).

n192 Id.

n193 Id.

n194 See C. Erik Hawes & James Beebe, H.R. 5418 and Specialized "Patent Courts": The Latest Congressional Effort at Patent Reform, 25 A.B.A. SEC. INTELL. PROP. L., at 18 (2007).

n195 See Moore, *supra* note 85, at 902-03.

n196 See Improving Federal Court Adjudication of Patent Cases: Hearing on H.R. 5418 Before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 69 (2005) (statement of T.S. Ellis, III, Chief Justice, Eastern District of Virginia).

n197 See C. Erik Hawes & James Beebe, Is Texas at Risk of Being Excluded from Latest Congressional Patent Reform Effort?, ST. B. TEX. SEC. INTELL. PROP. L., Winter 2007, at 6, available at <http://www.texasbariplaw.org/newsletters.htm> (click on "Winter 2007").

n198 Moore, *supra* note 111, at 902-03 (showing no data for the Eastern District of Texas in this study).

n199 This database, available through Westlaw, contains profiles of attorneys and judges, and contains more than 1,000,000 profiles of law firms, offices, and lawyers from all 50 states, Puerto Rico, the Virgin Islands, the District of Columbia, Canada, England, and Europe. The profiles are linked to cases and documents, starting in 1990.

n200 See <http://www.cacd.uscourts.gov/> (click on "Judges Procedures and Schedules"); <http://www.cand.uscourts.gov/> (click on "Judges"); <http://www.txed.uscourts.gov/> (click on "Judges"); <http://www.vaed.uscourts.gov/locations/ale.htm#telephone>; <http://www.ilnd.uscourts.gov/home/Judges.aspx>.

n201 H.R. 5418 B 1(a) (2).

n202 H.R. 5418 B 1(b) (1).

n203 Studies have found that only 5% of all cases listed by the Patent Trade Office were not included as patent cases in the Administrative Office's data, indicating that the AO data is relatively complete. See, e.g., Jay P. Kesan & Gwendolyn G. Ball, How are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes, 84 WASH. U. L. REV. 237, 250 n.84 (2006).

n204 Instant Message Conversation with Patrick Y., Westlaw Technical Support (2008) (on file with author). Relevant portions of the conversation are as follows:

...

You Say: Does Westlaw use the Nature of Suit field from the original case data?

...

Patrick Y. Says: OK--I know what you mean. Yes--these Primary Case Type designations come from the Nature of Suit field as found in our Dockets

You Say: What is the original source data for your docket information?

Patrick Y. Says: The courts themselves--our dockets are linked directly to the court's docket system. . . .

n205 Because of the small number of patent decisions, as opposed to docketed items, the manual count was straightforward, but still prone to transcription error.

n206 E.D. TEX. GEN. ORD. No. 06-13, available at <http://www.txed.uscourts.gov/Rules/GeneralOrders/2006/GO-06-13.pdf>.

n207 E.D. TEX. GEN. ORD. No. 04-23, available at <http://www.txed.uscourts.gov/Rules/GeneralOrders/2004/go04-23.pdf>.

n208 Michael C. Smith, Three more news stories on ED patent docket, EASTERN DISTRICT OF TEXAS FEDERAL COURT PRACTICE, Oct. 5, 2006, <http://mcsmith.blogs.com/easterndistrictoftexas/2006/10/threemorenews.html> (last visited Oct. 5, 2006).

n209 N.D. CAL. GEN. ORD. No. 44 B (D) (2) (a), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n210 N.D. CAL. GEN. ORD. No. 44 B (D) (2) (b), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n211 N.D. CAL. GEN. ORD. No. 44 B (D) (1), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n212 N.D. CAL. GEN. ORD. No. 44 B (D) (2) (b), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n213 Id.

n214 Id.

n215 N.D. CAL. GEN. ORD. No. 44 B (D) (5), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n216 Id. Other categories of cases that have separate assignment plans include Prisoner Petitions, Securities Class Actions, and Capital Habeas Corpus cases. Id.

n217 Id.

n218 N.D. CAL. GEN. ORD. No. 44 β (E), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n219 N.D. CAL. GEN. ORD. No. 44 β (D) (5) (2), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n220 N.D. CAL. GEN. ORD. No. 44 β (E) (4), available at <http://www.cand.uscourts.gov/CAND/LocalRul.nsf/10ffec4f66aa15db88256d4f005bb710/4ea42a44f165eac488256d4f005bc781?OpenDocument>.

n221 Id.

n222 C.D. CAL. GEN. ORD. NO. 05-06 β 21.2.

n223 Id.

n224 Id.

n225 C.D. CAL. GEN. ORD. NO. 05-06 β 3.2.1.

n226 Id.

n227 Id.

n228 C.D. CAL. GEN. ORD. NO. 05-06 β 3.2.2.

n229 Moore, *supra* note 198, at 19, Table 3.

n230 Id.

n231 Id.

n232 T.S. Ellis, III, Quicker and Less Expensive Patent Enforcement of Patents in the United States Courts, 5 CASRIP PUBLICATION SERIES: STREAMLINING INT'L INTELL. PROP. 11, 14 (1999).

n233 See Holderman, *supra* note 8, at 4.

n234 N.D. Ill. LR.40.1 (committee comment).

n235 N.D. Ill. LR40.1(a). Assignment of Cases: General.

n236 " Prior to the introduction of the computerized assignment system, physical decks of assignment cards were used. The terms 'assignment deck; and even 'assignment card' continue in use as metaphors to describe the manner in which the computer operates." N.D. Ill. LR 40.1 Committee Comment.

n237 N.D. Ill. LR 40.1 (d).

n238 N.D. Ill. Court Rules, at 14-16.

n239 See Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 2 (2005).

n240 Setsuko Asami, Japan-U.S. Patent Infringement Litigation Comparison: A Visit to the United States Court of Appeals for the Federal Circuit, CASRIP NEWSLETTER, Fall 1998, available at <http://www.law.washington.edu/CASRIP/Newsletter/Vol5/news5i3asami.htm#top>.

n241 *Id.*

n242 *Id.*

n243 See *id.* at tbl. 1-2.

n244 Paul M. Shoenhard, Judging Trial Judges, IP LAW AND BUSINESS, March 2006, available at <http://www.ropesgray.com/files/Publication/0f6472fc-e2b7-489f-92e2-a44b949bbeed/Presentation/PublicationAttachment/ca41a2a3-a964-44ad-8d25-aa9f019318d0/ArticleMarch2006JudgingTrialJudgesShoenhard.pdf>. (last visited Jan. 31, 2007).

n245 " Although she reports a claim construction reversal rate of 34.5 percent, these reversals only result in 29.7 percent of claim construction cases being reversed or vacated by the court according to statistics Moore has published elsewhere." *Id.*

n246 *Id.*

n247 *Id.*

n248 Improving Federal Court Adjudication of Patent Cases: Hearing before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 69 (2005) (statement of Thomas S. Ellis III, Chief Justice, Eastern District of Virginia), available at <http://commdocs.house.gov/committees/judiciary/hju23816.000/hju238160.HTM#40>

n249 See generally, Kimberly A. Moore, Are District Court Judges Equipped to Resolve Patent Cases?, 12 FED. CIR. B.J. 1, 11 (2002).

n250 *Id.*

n251 See LegalMetric Press Release, EWORLDWIRE, Aug. 22, 2006, <http://www.eworldwire.com/pressreleases/15326> ("LegalMetric, LLC is a St. Louis-based company specializing in the analysis of district court dockets, in preparation of Judge Reports and District Reports as litigation tools for legal professionals.").

n252 See *id.*

n253 See Pegram, *supra* note 27, at 765-72.

n254 *Id.*

n255 See Moore, *supra* note 85.

n256 N.D. Ill. LR40.1(c) committee cmt.

n257 N.D. Ill. LR40.1(c) (emphasis added) (*italics added*).

n258 *Id.*

n259 See LegalMetric Press Release, *supra* note 251.

n260 T.S. Ellis, III, *supra* note 122, at 12-13.

n261 *Id.* at 13.

n262 *Id.*

n263 *Id.*

n264 Id.

n265 Id. at 14 (stating that Senior District Judge Albert Bryan was instrumental in developing the system and is still hearing cases).

n266 Id. at 13.

n267 Id.

n268 Id.

n269 Id.

n270 Id.

n271 Id.

n272 Id. at 14.

n273 See Pegram, *supra* note 27, at 765-72.

n274 Id.

n275 Id.

n276 E.D. Tex. P.R., available at <http://www.txed.uscourts.gov/Rules/LocalRules/Documents/Appendix%20M.pdf>.

n277 General Order Adopting Uniform Patent Rules, E.D. Tex. Gen. Order 05-8, available at www.txed.uscourts.gov.

n278 E.D. Tex. P.R. 1-2.

n279 E.D. Tex. P.R. 2-5.

n280 Fed. R. Civ. P. 26(f).

n281 E.D. Tex. P.R. 2-1(a).

n282 E.D. Tex. P.R. 3-1.

n283 See generally Home Page for E.D. Tex., www.txed.uscourts.gov.

n284 E.D. Tex. P.R. 1-2.

n285 E.D. Tex. P.R. 1-3.

n286 E.D. Tex. P.R. 1-2.

n287 Id.

n288 E.D. Tex. P.R. 3-1.

n289 See generally *02 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355 (Fed. Cir. 2006); *Safecluck, LLC v. Visa Int'l Serv. Ass'n*, 2006 WL 3017347 (Fed. Cir. Oct. 23, 2006).

n290 Eric W. Bass & Jeffrey M. Fisher, *Federal Circuit Affirms: Local Patent Rules Have Strong Bite*, IPFRONTLINE, Dec. 19, 2006, <http://www.ipfrontline.com/depts/article.asp?id=13694&deptid=4> (last visited Nov. 14, 2008).

n291 Id.

n292 Michael C. Smith, *Rocket Docket: Marshall Court Leads Nation in Hearing Patent Cases*, TEX. B. J., Dec. 2006, at 1045, available at <http://www.texasbar.com/Template.cfm?Section=PastIssues&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16308>.

n293 Id.

n294 Kenneth R. Adamo & Robert C. Kahrl., *Federal District Court in Pittsburgh Adopts Specialized Local Rules for Patent Cases*, JONES DAY, Jan. 2005, <http://www.jonesday.com/pubs/pubsdetail.aspx?pubID=1366> (last visited Nov. 14, 2008).

n295 See S.D. Cal. Gen. Order 549, and S.D. Cal. Patent L.R. 1.1-4.5, available at <http://www.casd.uscourts.gov/index.php?page=general-orders>.

n296 See id.