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As Patent Pilot Program Ends, Judges Give Mixed Reviews

By **Ryan Davis**

Law360 (June 24, 2021, 8:25 PM EDT) -- A federal program that directed many patent cases to judges who volunteered to hear them will end next month. In interviews with Law360, some participating judges praised the program for helping them better manage complex cases, while others said it had little tangible impact.

Congress created the Patent Pilot Program in 2011 with the goal of enhancing judges' expertise in the complexities of patent litigation. In the 13 participating district courts, 59 judges who expressed an interest in patent cases retained those that were assigned to them, while other judges could decide either to keep patent cases or send them to a pilot program judge.

Set to run for 10 years, the program will sunset on July 4.

Depending on a district's patent caseload and the preferences of its judges, the program resulted in some districts where participating judges received the bulk of patent cases, while in others it moved the needle only slightly.

Judges who ended up with more patent cases under the program said it worked as intended, improving litigation by giving judges with an interest in patent law an opportunity to focus on it.

"I think it's been successful in giving those judges more experience to develop their talents and their skills in the patent area. I think it's achieved the goal," said Judge James V. Selna of the Central District of California. For instance, Judge Selna said he found ways to better coordinate situations where there are multiple lawsuits involving the same patent.

Of the 28 judges in the Central District of California, six volunteered to be part of the pilot program, and Judge Selna said they heard about 70% of the district's patent cases in the past decade. He noted that six judges would have heard only about 20% of patent cases if they were randomly assigned, as they were before the program.

"In a way, it's the best of both worlds," Judge Selna said. "Judges who like patent cases and get them at random can keep them, judges who prefer not to do it can pass them along, and those who are interested in patent litigation, namely the judges in the patent pilot program, have an increased number of cases to work on."

The program was so effective, he said, that the Central District of California plans to keep it in place as a district program, even though it is ending at the federal level.

"Collectively, the judges here believe it's worked and made a significant contribution in this area, to the patent practitioners and the public generally," Judge Selna said.

'A Mixed Bag'

Most judges who participated in the pilot program said they expect that once it ends next month, their districts will revert to a system where patent cases are randomly assigned to all judges.

Judge Matthew Kennelly in the Northern District of Illinois said that from his perspective, the end of the program would barely be noticeable. He said he volunteered for the program because he enjoys the challenge of complex patent cases, but he received only one or two more patent cases per year than he did before.

"The long and the short of it is that I frankly think the program ended up having very little effect," he said.

Northern District of Texas Chief Judge Barbara M.G. Lynn called the pilot program "a mixed bag," noting that while participating judges were able to hone their skills in patent cases, the overall volume of patent cases filed in the district didn't increase as they'd hoped.

Three of the 12 judges in the Northern District of Texas were part of the pilot program, all of them based in the Dallas division. They ended up hearing every patent case filed in the division.

"I think we developed more experience over the years, but we all had experience before," Judge Lynn said.

The judges anticipated that by joining the program and signaling their interest in patent litigation, plaintiffs would begin filing more cases in Dallas, rather than in the Eastern District and Western District of Texas, which are patent hotbeds.

That did not end up happening, which Judge Lynn attributed in part to the Northern District's having a heavier criminal docket than the others, which leads to less certainty about patent trial dates. Also, by filing in the Eastern or Western District, plaintiffs usually know which judge they will get.

The pilot program "did not accomplish the objective that we were hoping for it, which is that we would get substantially more cases than we did," she said. "Because I think all of us agree these are very interesting and challenging cases."

What Comes Next

In the Northern District of Illinois, nine of the 22 judges agreed to be part of the patent pilot program, and many of those who did not still frequently opted to hold onto the patent cases they were assigned, Judge Kennelly said. As a result, he barely got more patent cases under the program than he did previously, and he said he didn't feel he gained much useful experience.

"My own take, personally, was that if what was intended by this was that you were going to create this

cadre of expert judges, it had no effect on that at all," he said.

But for Judge Cathy Ann Bencivengo of the Southern District of California, a former patent attorney, the prospect of returning to a system where cases are randomly assigned to judges is unappealing to participants and nonparticipants alike.

The program's end, she said, is coming "much to the disappointment of me, who enjoys patent cases — since with a random selection, I'm going to have far fewer — and to some of my colleagues, who were happy not to do them and now have to do them again."

In the Southern District of California, five of the 13 judges elected to be part of the pilot program. They ended up hearing close to 80% of the district's patent cases, according to Judge Bencivengo, who was co-chair of the patent litigation group at DLA Piper before becoming a magistrate judge in 2005.

"I think there was tremendous benefit in the pilot program to having this subgroup of judges," she said. Both within the district and at conferences, participants have been "sharing our experiences in how we're managing our cases, where the problem areas are, and how we're addressing them," she noted.

For example, some pilot districts started requiring patent plaintiffs to select sample claims to litigate and defendants to do the same with invalidity arguments. That helped avoid situations where litigants would assert hundreds of claims, which is "just so unmanageable on its face and unnecessary," Judge Bencivengo said.

After the end of the program, "there will be judges who haven't touched these cases in a really long time," Judge Bencivengo said. "So one would hope that they'll reach out to people who have been doing them and say, 'What are your suggestions as to how to proceed, now that I've got to do these again?'"

Measuring the Effect

The lawmakers who crafted the program said it would help improve judges' expertise and efficiency in patent litigation, which they claimed was time- and resource-intensive and frequently resulted in decisions that were overturned.

"The idea behind [the program] is simple: Practice makes perfect, or at least better," former Rep. Lamar Smith, R-Texas, said during a debate in the House of Representatives in 2006, years before the legislation passed." "Judges who are able to focus more attention on patent cases are more likely to render decisions that will not be reversed on appeal."

But the Federal Judicial Center prepared two reports on the program, in 2016 and 2019, and found its impact to be mixed. While cases before pilot program judges moved somewhat more quickly, the Federal Judicial Center found that patent decisions were affirmed on appeal at an "overwhelming" rate, regardless of whether a judge was in the program.

Although judges had varied opinions about the program, patent litigators said they enjoyed that it directed more patent cases to judges who volunteered to focus on them.

Patent litigation often involves complicated technology and patent-specific legal doctrines that are far from intuitive, which can result in delays when judges aren't familiar with them, said J.C. Rozendaal of Sterne Kessler Goldstein & Fox PLLC.

"I was a fan of the program. I like the idea of having patent cases decided by judges who are enthusiastic about patent law," he said. Now that it's ending, "I do have some concern about patent cases being put on the docket of people who don't feel comfortable and don't feel energized to dive into them."

Similarly, Yar Chaikovsky of Paul Hastings LLP said the end of the program is going to mean litigants will have the challenge of educating more judges about patent law. He said many lawyers would welcome other districts following the Central District of California's lead in keeping the program in place.

"It's been a positive program for the bench, bar and clients," he said. "One would hope that it's a program that continues."

--Editing by Alanna Weissman.
