

Delaware Ready For Busy Patent Docket, Even Without Stark

By Ryan Davis

Law360 (February 17, 2022, 8:44 PM EST) -- The District of Delaware's longest-tenured judge is on his way to the Federal Circuit, but the second-busiest district court for patent cases has procedures in place that will allow it to efficiently manage its docket even while short-handed, attorneys say.

The U.S. Senate confirmed Judge Leonard Stark to the appeals court last week after his 14 years in Delaware as a judge and magistrate judge. That leaves open one of four judgeships in the district at a time when only the Western District of Texas gets more patent cases.

"It's going to be tough, just given the sheer number of cases that he was assigned," said Eric Schweibenz of Oblon McClelland Maier & Neustadt LLP. Yet he noted the district has magistrate judges and a visiting judge system "that will help them with a seamless transition."

In 2021, there were 889 patent cases filed in Delaware, according to Lex Machina, placing it a close second behind the Western District of Texas, which had the most at 974. Delaware has long been one of the busier patent districts and has dealt with vacancies before, most recently in 2017 and 2018, when two seats were left unfilled for about a year.

Before that, however, the district had set up a system under which visiting judges from around the country would take on some cases, even when the court was at full strength. That system, along with the currently sitting four magistrate judges, should allow the district to keep things on track for now, said Andrew Russell of Shaw Keller LLP in Wilmington, Delaware.

"It's a small court, so this is something they've had to deal with before, and they're good at it," said Russell, whose firm produces a blog called IP/DE covering patent litigation in Delaware. He added that "the last time, for most cases, it was pretty smooth."

The district currently aims to bring patent cases to trial in about 24 months and is likely to take steps to maintain that timeline, even with the vacancy, said Blair Jacobs of McKool Smith.

"I think most people believe that Delaware will do the best that they possibly can not to let their target trial dates extend significantly, because that will have a pretty big chilling impact on people who are looking to find somewhere to file" and don't want to bring cases in other hot patent courts in Texas, he said.

In the Western District of Texas, nearly all patent cases are assigned to Judge Alan Albright, who has

encouraged patentees to file suit in his Waco court and adopted procedures many patent owners find appealing.

Patent cases in Delaware are spread about equally among the four judges, so losing Judge Stark — who will replace Federal Circuit Judge Kathleen O'Malley when she retires effective March 11 — can't help but have a significant effect, Russell said.

"He's departing from a court that's already very busy, and we only have a total of four Article III judges, so his departure is 25% of our judges," he said.

Help From Pennsylvania and Beyond

The visiting judge program has become an important part of how the district manages its docket. Many of the participants are judges from nearby Pennsylvania, including members of the Third Circuit, and there have also been judges from the Federal Circuit and further afield in states such as Nebraska, Illinois and Tennessee.

In his 2021 annual report, his last as the district's chief judge, Judge Stark noted the court has "enjoyed the assistance of 19 visiting judges during the past seven years who have collectively been assigned 498 cases, which includes 212 patent cases."

When the district has been short-handed or had an influx of cases, the visiting judges have helped effectively manage the docket, and "I expect a similar thing to happen here, but it'll just take a little while to get put in place, I would guess," said Adam Hess of Squire Patton Boggs LLP.

Sometimes, the visiting judges fly into Delaware for hearings, while others located in nearby Philadelphia will hold hearings there. Yet many have been operating remotely during the pandemic.

"The feedback I've gotten is that the visiting judges follow Delaware procedures, and you obviously still have Delaware local counsel involved, so it's still truly a Delaware case," Russell said.

The District of Delaware has long been requesting more judges to manage its caseload. Former Judge Sue L. Robinson testified before Congress in 2013 that the district needed an additional judge, while the Judicial Conference of the United States recommended last year that the First State get two more judges.

What's Next

Increasing the number of judges in a district takes an act of Congress that may not be in the cards, so the best-case scenario right now may be to get someone rapidly confirmed to fill Judge Stark's seat. Delaware's magistrate judges often handle a great deal of work in patent cases, and that experience could make one of them an appealing nominee, Oblon McClelland's Schweibenz said.

"The magistrate judges are a perfect fit if they want to pick one of them because of, ultimately, how much experience they have and how many cases they're handling," he said, adding they know the court's pace and rules and can "hit the ground sprinting."

Further, a nominee with an established track record in the district may be easier for lawmakers to vet and generate bipartisan support for compared to an attorney from the state, McKool Smith's Jacobs

noted. That may be a consideration for President Joe Biden and Sen. Chris Coons, who is on the Senate Judiciary Committee and votes on judicial nominees.

"You have Sen. Coons from Delaware, you have President Biden from Delaware, so I think they'll emphasize finding a nominee who can get through the very process quickly," Jacobs said. "They won't want a significant backlog to develop; that will be important for them."

Keeping a handle on Delaware's patent caseload could be especially important, as it's possible complaints in the district could spike later this year.

That's because the vast number of cases Judge Albright has accumulated in Waco has drawn attention from the Federal Circuit, prominent senators and U.S. Supreme Court Chief Justice John Roberts, who in his annual report acknowledged concerns that the Texas court's policies "might, in effect, enable the plaintiff to select a particular judge to hear a case."

The chief justice asked the Judicial Conference to review the situation, and it said it plans to provide recommendations by May 1. If the conference calls for the Western District of Texas to revise its policies so cases filed in Waco are no longer automatically assigned to Judge Albright, the district will immediately become much less attractive to plaintiffs, Jacobs said.

He noted that since so many companies are incorporated in Delaware and the judges have extensive patent experience, that is where many looking beyond Texas will consider filing.

"You don't even get to the venue analysis if you're incorporated there. That's why I think most people believe it's a solid landing spot," Jacobs said.

Meanwhile, attorneys said Judge Stark will be missed in the First State, but they welcomed his elevation to the Federal Circuit. His background as a district court judge will give him important insight when handling appeals and could aid in crafting opinions the lower courts can apply, Hess said.

"The practical, real-world experience of presiding over district court trials is a perspective that is really valuable at the Federal Circuit," he said.

--Editing by Philip Shea and Kelly Duncan.