

DISTRICT OF DELAWARE CLE PROGRAM WITH CIRCUIT AND DISTRICT COURT JUDGES

On May 13, 2014, the Intellectual Property Section of the Delaware Chapter of the Federal Bar Association hosted a CLE program featuring Chief Judge Randall Rader and Judge Timothy B. Dyk of the Federal Circuit, Judge Kent A. Jordan of the Third Circuit Court of Appeals, Judges Sue L. Robinson, Leonard P. Stark, and Richard G. Andrews of the District of Delaware, Chief Judge Leonard E. Davis of the Eastern District of Texas, and Magistrate Judge Paul S. Grewal of the Northern District of California.

The theme of the day was making patent litigation more manageable and efficient in an effort to control costs for all litigants and reduce abuses fostered by those high costs. Judge Stark presented findings of the District of Delaware's Patent Study Group and changes in patent litigation procedures that are occurring as a result of the study. There were also discussions of stays pending *inter partes* review ("IPR"), attorneys' fees after recent Supreme Court decisions, and pending congressional initiatives to deal with patent litigation.

Judge Rader: Controlling Costs in Patent Litigation

Chief Judge Rader gave the keynote speech, emphasizing the need for greater efficiency and cost control in patent litigation. Judge Rader suggested that imposing discipline on discovery is key to controlling the expense of patent litigation, and proposed that a much shorter discovery period could save years of litigation and millions of dollars in attorneys' fees while still resulting in discovery of the overwhelming majority of relevant documents. Although he acknowledged that under his proposal, there might be a few cases where key documents would be left undiscovered, Judge Rader suggested that potential "injustice" would be outweighed by the benefit of bringing patent

litigation costs under control, resulting in greater justice throughout the system. In conclusion, Judge Rader called on attorneys, not just judges, to change the way they litigate to help control costs.

District of Delaware Patent Study Group Results

Judge Stark followed with a presentation on his work with Judge Robinson on the District of Delaware's Patent Study Group ("PSG"). The PSG was initiated in January 2014 to address best practices for handling the impressive caseload in the District, to understand possible methods to improve and streamline patent litigation, and to share key insights with others in the patent litigation community. Judge Stark reported that there were 1325 patent cases filed in the District of Delaware in 2013, a 34% increase over the 986 cases filed in 2012. There are currently 1478 patent cases pending in the District, with approximately 370 on the docket of each of the four district court judges. According to the Administrative Office of the United States Courts, Delaware's district judges have the highest weighted case average in the country at 1805 cases per judge, which far exceeds the Administrative Office's goal of 430 weighted cases per judge. Between January 1, 2013 and April 30, 2014, the Court completed 29 trials (16 jury and 13 bench), conducted 113 Markman hearings and decided 830 case dispositive motions.

Over several months, Judges Stark and Robinson met with over 120 attorneys—both outside and in-house counsel—to understand their perspectives on best and worst practices in patent litigation. Several themes emerged: (1) more judicial resources need to be invested earlier in the case; (2) schedules need to be set and respected (but not inflexibly); and (3) decisions need to issue quickly.

As an outgrowth of the PSG, Judge Robinson has already implemented new procedures. She expanded and expressly defined information that parties

should discuss during Rule 26(f) conferences: the information that plaintiffs need to identify accused products and prioritize patents, claims and limitations, as well as the information that defendants need to identify defenses and prioritize prior art and claim limitations. Contrary to her longstanding practice, Judge Robinson now has a presumption *against* bifurcation of damages and requires early disclosure of plaintiffs' damages models and defendants' sales figures. Judge Robinson has also departed from her procedure of holding a combined *Markman* and summary hearing at the end of a case. She will now hold a *Markman* hearing early on and aim to issue an opinion within 30 days.

Judge Stark, who is in the process of revising his procedures, shared some changes that he will likely implement as early as this summer. These possible changes include: (1) early case management conferences, which either he or Magistrate Judge Burke will handle; (2) scheduling of multi-defendant cases after any defendant files a responsive pleading; and (3) referral of scheduling matters to a Magistrate Judge. Judge Stark may also refer motions to dismiss, transfer and stay to a Magistrate Judge and channel motions to amend and strike into his existing discovery dispute procedures. He also is considering setting an aspirational goal of issuing claim construction opinions within 60 days of the hearing (or notifying the parties if he is unable to do so). After trial, Judge Stark hopes to give the parties an indication of whether he is likely to disturb a jury verdict so that the parties will be able to take his views into account in drafting their post-trial briefs. He may also impose global page limits for *Daubert* and post-trial motions in the future.

District Court Judicial Panel

A district court judges' panel comprising Chief Judge Davis, Magistrate Judge Grewal, and District of Delaware Judges Robinson, Stark and Andrews discussed motions to stay pending inter partes review ("IPR"), motions for attorneys' fees, early claim construction/summary judgment, and pending congressional patent legislation.

Motions to Stay Pending IPR. All of the judges suggested that they have been more inclined to consider stays in light of the stated congressional intent of allowing validity determinations to be made by the PTO, but emphasized the continued need to consider the facts of each case. Some of the factors the judges considered important are who filed the IPR and whether estoppel will apply.

Attorneys' Fees. Commenting on the Supreme Court's decisions in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.* and *Highmark Inc. v. Allcare Health Management System, Inc.*, the judges have experienced, and expect to continue to experience, an uptake in attorneys' fees motions. They expressed some concern that this uptake would increase the total number of motions pending on their dockets and potentially decrease civility among attorneys. The judges suggested that increased filings of motions for attorneys' fees may have greater effect on settlement than on the merits.

Early Claim Construction/Summary Judgment. The judges also addressed the possibility of early claim construction and summary judgment to improve efficiency. At least a few suggested that they would be more likely to grant early claim construction or summary judgment if the proposed issues are discrete and likely to be dispositive. In addition, Judge Robinson noted she would be more likely to consider this if defendant has provided plaintiff with the necessary facts for plaintiff to fairly respond to the motion without the need for additional discovery.

Pending Legislation. All the judges agreed that the courts are equipped to develop practices to respond to the more recent causes for changes in patent litigation, including the growth in NPE cases. The judges emphasized their commitment to following any legislation that is ultimately passed, while also expressing some concern about congressionally mandated hard and fast rules in litigation.

Appellate Judicial Panel

The afternoon concluded with an Appellate Court Judicial Panel composed of Chief Judge Rader and Judge Dyk, moderated by Judge Jordan. Judge Rader built upon his opening remarks by stressing the importance of efficiency in patent litigation, including suggesting that early valuation of patent cases could be used to tailor the case proceedings and more efficiently manage the docket. Judge Dyk recognized that there were good reasons to postpone rulings on fees until after the completion of an appeal on the merits. In response to a question about injunctions, Judge Rader noted that significant market impact warrants a second look at whether an injunction is merited.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP is active in patent infringement and other intellectual property litigation in the District of Delaware and elsewhere, serving as lead counsel in many cases, and assisting as co-counsel in other cases brought to Delaware by patent litigators from around the country. In one role or the other, the firm is counsel in nearly half of the intellectual property cases pending in the District of Delaware.

Intellectual Property Litigation Group Partners

JACK B. BLUMENFELD
302-351-9291
jblumenfeld@mnat.com

MARY B. GRAHAM
302-351-9199
mgramham@mnat.com

THOMAS C. GRIMM
302-351-9595
tgrimm@mnat.com

KAREN JACOBS
302-351-9227
kjacobs@mnat.com

JULIA HEANEY
302-351-9221
jheaney@mnat.com

MARYELLEN NOREIKA
302-351-9278
mnoreika@mnat.com

RODGER D. SMITH
302-351-9205
rsmith@mnat.com