**Eastern District of Texas Bench Bar Panel**

**Judicial Update: From Delaware to Texas to California (.75 hrs)**

**October 28, 2022**

**Discussion Topics**

**Panelist:** Judge Leonard Stark, Court of Appeals, Federal Circuit, Chief Judge Rodney Gilstrap, EDTX, Judge Amos Mazzant, EDTX, Judge Lee Yeakel, WDTX, Chief Judge Colm Connolly, District of Delaware, Judge Richard Andrews, District of Delaware, Chief Judge Richard Seeborg, ND California; Co-Moderators: Kevin Collins, Covington & Burling, Josh Thane, Haltom & Doan

1. **Trial Management Protocols**
   1. *Setting Timeline for Trial*:
      1. *Background*: The judges in the districts represented on the panel generally give each side a specific amount of time for openings, closings, and presentation of evidence at trial, and generally allow between one to two weeks for a patent trial.
   2. *Voir Dire:* 
      1. *Background*: Some districts allow the attorneys to conduct a substantial questioning of the jury panel, while in others the judges conduct the voir dire themselves with little input from the attorneys.
   3. *Objections / Narratives: What You Allow Attorneys To Say in Front of the Jury*
      1. *Background*: Judges have different views on how succinct an attorney’s explanation of their objections can be, as well as different views on how closely the examination of a witness needs to stick to questions at issue at trial as opposed to thematic issues.
2. **Case Management** 
   1. Time to claim construction
      1. *Background*: Claim construction is a critical milestone in patent cases, following which disputes often resolve or narrow.
   2. Time to trial
      1. *Background*: Some districts move notably faster than other jurisdictions.
   3. Early case narrowing requirements
      1. *Background*: Although all courts require parties to narrow their case as trial approaches, this is generally done on a case-by-case basis. However, in what appears to be a first, on April 26, 2022, Chief Judge Connolly issued a form Scheduling Order for Hatch-Waxman Cases that requires disclosure of asserted claims within a week or so of the initial scheduling conference. The order requires that, absent an agreement to the contrary between the parties, “Plaintiff(s) may assert *no more than ten claims of any one patent and no more than 32 claims in total against any one Defendant*.”  (Paragraph 5, Scheduling Order for Hatch-Waxman Patent Infringement Cases.)
   4. Pre-trial case narrowing
      1. *Background*: Chief Judge Gilstrap’s Sample Docket Control Order requires that, six weeks before jury selection, parties file a Joint Pretrial Order, detailing their respective contentions. The order states that contentions cannot be “amended, supplemented, *or dropped* without leave of the Court . . . upon a showing of good cause.”
3. **Standing And Litigation Funding Issues**
   1. *Background*: Judge Connolly has issued a standing order requiring disclosure of third-party funding arrangements at outset of litigation, while some courts not only do not require such a disclosure, but have denied motions to compel discovery into litigation funding.
4. **Section 101 Patent Eligibility Disputes** 
   1. Pre-*Markman* Section 101 motions
      1. *Background*: While EDTX, DEL and NDCA all require Section 101 patent eligibility contentions in some form, since 2015, Chief Judge Gilstrap has maintained special procedures governing dispositive motions raising Section 101 arguments. Among other things, the “Standing Order Regarding Motions Under 35 U.S.C § 101” requires lead counsel for each side to meet and confer “one-on-one” to decide whether the patent eligibility issues can be resolved without claim construction. The Standing Order states that “efficiency is enhanced by early input as to the propriety or lack thereof regarding claim construction prior to consideration of such motions.”
   2. Whether Section 101 patent eligibility rules are clear
      1. *Background*: There is a wide variance between EDTX, NDCA, and DEL courts in how often Section 101 motions, particularly early motions to dismiss, are granted.
5. **Patent Contention Disclosures, Early Disclosures, and Treatment of Amendments and Omissions**
   1. *Background*: While the judges on the panel all have mechanisms for patent contention disclosures, some are handled by local patent rules, some by local discovery rules, and some by individual judges scheduling orders. Additionally, the districts have different rules regarding amending contentions, with amendments granted by right in some circumstances in some districts and other districts or judges requiring leave of court for any amendment.

1. **Filing Deadline Times** 
   1. *Background*: The districts on the panel have different cutoffs for filings and service, with Delaware’s filing deadline recently moved from 6:00 p.m. ET to 5:00 p.m. ET, EDTX’s filing deadline at midnight CT but service after 5:00 p.m. CT considered served the following day, and NDCA’s filing and service deadlines at midnight PT.
2. **Experts** 
   1. *Daubert* motions and policing procedural rules / deadlines regarding experts
      1. *Background*: Courts are the gatekeepers and play an important role in preventing presentation of junk science to juries. Indeed, per Docket Navigator, nationally, parties who file *Daubert* challenges in patent cases obtain at least some relief about 42% of the time.
3. **Motions for Summary Judgment** 
   1. Ranking MSJs
      1. *Background*: In April 2021, Chief Judge Connolly issued a Standing Order for Summary Judgment Practice in Patent Cases requiring that parties who file more than one summary judgment motion “number each motion to make clear the order the party wishes the Court to consider the motions in question.” The Standing Order states that the “Court will review the party’s summary judgment motions in the order designated” and if a motion is denied “barring exceptional reasons . . . the Court will not review any further summary judgment motions filed by the party.”
   2. Expectations of success in MSJs
      1. *Background*: Judge Connolly’s Standing Order for Summary Judgment Practice in Patent Cases reads: “[a] wise judge who once sat on this Court was fond of saying that winning summary judgment in a patent case is like hitting a hole in one,” and the standing order notes that “the odds of hitting a hole in one are 12,500 to 1.”
4. **Learnings from COVID-19**
   1. *Necessity of in-person activities* 
      1. *Background*: Through the pandemic, most courts allowed some form of remote deposition and trial testimony, including in criminal cases. Now that courts are mostly back to business as usual, are there any practices worth retaining to make litigation more efficient and affordable?
5. **The State of Patent Law**
   1. *Background*: Many aspects of patent law have undergone significant changes in the last decade or so, from the implementation of the AIA to changes in Supreme Court 101 jurisprudence to changes in patent venue.