

## ALERTS

### **“The Times They Are A-Changin’” – Delaware’s Judge Stark Outlines New Patent Case Management Practices**

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The Honorable Leonard Stark of the District of Delaware, who will soon be the District’s Chief Judge, has announced that he is changing the way he manages patent cases. He outlined the coming changes at a May 13 continuing legal education (CLE) presentation sponsored by the Delaware Chapter of the Federal Bar Association. Practitioners before Judge Stark need to be aware of these changes and begin thinking about how these new practices and procedures will affect their cases.

#### ***Chief Judge Rader Sets the Stage***

The CLE presentation began with Federal Circuit Court of Appeals Chief Judge Randall Rader singing Bob Dylan’s “The Times They Are A-Changin’” with new lyrics emphasizing needed changes in U.S. patent litigation. After his musical interlude, Judge Rader discussed the unreasonably high cost of patent litigation in the U.S. as opposed to other countries—which is largely the result of the broad discovery allowed in the U.S.—and the difficulties in attempting to categorize and curb “patent trolls” through legislation. He believes that district court judges are in the best position to recognize and stop abusive litigation practices. As to out of control litigation costs, Judge Rader proposed limiting the amount of discovery because 90 percent of the relevant documents are known to the parties before discovery even begins. He said he “believes in a little injustice,” meaning that ignoring the final 10 percent of the documents would have only a de minimus effect on outcomes in exchange for a dramatic increase in efficiency.

#### ***The District of Delaware’s Patent Study Group***

With the backdrop of Judge Rader’s comments, Judge Stark took the stage and described the crowded District of Delaware docket, the District’s Patent Study Group and his plans for more efficiently handling his personal docket of more than 500 active patent cases and 400 pending motions. Delaware currently has 1,478 patent cases, or 370 patent cases per judge, while the nationwide average is 10 patent cases per judge. In 2014 alone, Judge Stark projects plaintiffs will file approximately 1,100 patent cases in Delaware.

In an effort to better manage their dockets and discern the best practices in patent case management, Judge Stark and Delaware’s Judge Sue Robinson formed a Patent Study Group. During more than 15 hours of meetings, they met with more than 120 attorneys from more than 25 law firms and in-house legal departments across the country. They heard that

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Delaware was doing a good job handling its docket of patent cases but could improve in certain specific areas. First, it was recommended that the judges devote more resources earlier in their cases, which could help identify weaker cases and end them early. Second, it was important to set a schedule including a trial date at the beginning of the case and keep it. And third, they heard about the importance of issuing decisions quickly, even if those decisions are not long, written opinions.

In response to what Judge Robinson heard during these meetings, she issued a new, much-discussed model scheduling order earlier this year. She made many changes to her standard practices, including earlier Markman claim construction hearings (and a goal of issuing claim construction opinions within 30 days of the hearings), no longer presumptively bifurcating liability from damages, and enacting an 8 p.m. Eastern time filing deadline for filings due on a certain day (sorry West Coast practitioners).

### ***Judge Stark's New Practices***

Judge Stark is now following suit with changes of his own. He has not yet issued a new form scheduling order, but he expects to this summer. Some of Judge Stark's changes will be similar to Judge Robinson's. Judge Stark outlined the following expected changes:

- He will hold early case management conferences in chambers. Before these conferences, the parties will be required to meet, discuss items on a checklist prepared by the court and certify the discussion has taken place. The checklist items will be discussed at the case management conference.
- Case management conferences will be set after any defendant files a motion or an answer. Judge Stark will no longer wait until all defendants have responded to the complaint to set a scheduling conference. This implies that a motion to dismiss will not delay the start of a patent case.
- Each case will be treated individually for purposes of setting scheduling conferences. Related cases involving the same patent(s) will not necessarily proceed on the same track.
- He will presumptively set a trial date in the initial case scheduling order.
- Motions to transfer, stay or dismiss will be referred to a Magistrate Judge.
- He eventually may refer case management conferences and scheduling to a Magistrate Judge.
- He will be less resistant to early Markman hearings, especially where construction of a small number of terms could be case dispositive.
- Motions to amend and strike will be handled the same way as discovery disputes - with short letter briefs preceding a teleconference.
- He will require Delaware and lead counsel (if different) for both

sides to certify they have spoken before allowing a discovery dispute teleconference, and counsel must provide a joint agenda for the conference.

- He will set an aspirational goal of issuing a Markman opinion within 60 days of the claim construction hearing, or he will let the parties know he will not meet this 60-day goal.
- He will set page limits on all motions for summary judgment, Daubert motions, and post-trial motions and limit each party to a single motion and brief of each type.
- He will make an effort to provide his post-trial inclinations (e.g., whether he might disturb a jury verdict) shortly after the end of trial.

Both Judge Robinson and Judge Stark plan to monitor the efficacy of their new procedures and modify them as needed. Interestingly, Delaware's other Article III judges, Chief Judge Gregory Sleet and Judge Richard Andrews, have not indicated that their procedures will change.

### ***How Will These Changes Affect Case Strategy?***

Given these upcoming changes, practitioners with patent cases before Judge Stark will have some new strategic options. For instance, Judge Stark indicated he will be more inclined to allow early claim construction and early summary judgment, something he has rarely allowed in the past. Defendants in cases where construction of one or two claim terms will be dispositive (or there is a good argument construction of the terms will be dispositive) should strongly consider pushing for early claim construction and summary judgment. In a case where the accused infringer has both a strong non-infringement position and solid prior art, early summary disposition could be more efficient than pursuing invalidity through inter partes review.

In addition, plaintiffs before Judge Stark now need to be better prepared to hit the ground running. The time between filing of the complaint and the start of discovery will be dramatically shorter. Plaintiffs will also need to explain their infringement position and damages theory early in the case—perhaps before discovery begins in earnest. Retaining a damages expert early in the case will make this easier.

Finally, both plaintiffs and defendants will need to plan on focusing their summary judgment and Daubert motions on only a few, concise arguments. Judge Stark's limit of one summary judgment motion with a brief of a finite length and one Daubert motion with a brief of finite length will force litigants to select and pursue only their best arguments in a concise fashion (which is the best practice in any event).

Between recent Supreme Court decisions on attorneys' fees awards and proposed legislation to thwart patent trolls, curbing patent litigation abuse is an unquestionably hot topic. Can district court judges "end abuse through proper discipline" as Chief Judge Rader suggests? Or is legislative action required? New patent case management procedures from two of the top patent judges in the country, Judges Robinson and Stark, will try to keep justice in the hands of judges.

For more information, contact the Barnes & Thornburg attorney with

whom you work or a member of the firm's Intellectual Property Law Department in the following offices: Atlanta (404-846-1693), Chicago (312-357-1313), Columbus (614-628-0096), Delaware (302-300-3434) Elkhart (574-293-0681), Fort Wayne (260-423-9440), Grand Rapids (616-742-3930), Indianapolis (317-236-1313), Los Angeles (310-284-3880), Minneapolis (612-333-2111), South Bend (574-233-1171), Washington, D.C. (202-289-1313).

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