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Trial courts may take on patent cases

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MILWAUKEE — Litigants would be getting a two-for-one deal under a proposal to give patent cases only to those federal trial judges who have volunteered to take them on, according to Chief U.S. District Judge James F. Holderman of the Northern District of Illinois.

Holderman on Tuesday said he supports a proposed pilot program that would provide extra training as well as the assistance of law clerks with a background in technical matters for judges who ask that patent matters be included on their dockets.

Holderman said the additional education would help these judges grapple with the technological and scientific issues that can arise in patent disputes.

But the fact that these judges would continue to hear other types of cases would guard against the danger — faced by anyone serving on a specialized court — of becoming insulated, Holderman said.

“It allows both the benefits of getting a generalist judge and a judge with enhanced expertise, all in the same person,” Holderman said during a panel discussion titled “Patent Litigation Reform in the Courts and Congress.”

But attorney Kristin Graham Noel of Madison, Wis., suggested that such judges might not offer the benefits that their proponents believe.

“I would play devil’s advocate and say that having generalists generally is a good thing,” Noel said.

Noel questioned how having judges with special training preside over patent cases would advance patent law.

“It’s not voodoo,” she said. “What is complicated is probably the underlying technology and science, and perhaps a special master with training in a particular science can equip the judges with that expertise.”

The panel discussion was conducted during the joint meeting of the 7th Circuit Judicial Conference and the 7th Circuit Bar Association.

Others serving on the panel were Chicago attorney Meredith Martin Addy and Professor Matthew Sag of DePaul University College of Law.

Following the program, Holderman said

district court judges would still be “the old generalist judges” if the pilot program becomes a reality.

“We’ll still be handling those criminal cases. We’ll still be handling the civil rights cases, the employment discrimination cases, the antitrust cases,” Holderman said. “But we will have enhanced expertise.”

Two judges serving on the federal bench in Chicago returned a split opinion on the idea of having only volunteers preside over patent cases.

“I’m not crazy about it,” District Judge Charles P. Kocoras said.

Kocoras said there was no reason to think that district judges are unable to handle any kind of case that is thrown at them.

And having only a subset of judges handle patent cases would interfere with the system of randomly assigning cases — “We should all take the luck of the draw” — and could lead to further specialization of Article III judges, according to Kocoras.

“In some ways, it opens up the door for the argument that other types of cases should be subject to special assignment,” he said.

But U.S. District Judges James B. Moran had a more favorable view of reserving patent cases for those judges who want them.

“I think it’s a good idea,” Moran said. “I know there are some judges who just absolutely *hate* patent cases and in those circumstances both the judge and the litigants are better off if the judge doesn’t hear the case.”

Moran himself said he would volunteer for service in patent cases.

But he made it clear that there was a category of cases he considered to constitute hardship duty.

“I do think having judges over 50 handle computer software issues may be a violation of due process,” said Moran, who turns 77 next month.

Proposed legislation would create a 10-year pilot program in which trial judges in certain federal districts would be given the option of volunteering to hear cases related to patents or plant variety protection.

Cases involving such matters would first be randomly assigned to any district judge.

If that judge declines to hear the case, the case would then be randomly assigned to one of the judges who volunteered to take on patent and plant variety protection matters.

At least \$5 million would be appropriated each year to provide those judges with extra training and with the help of law clerks with expertise in technical matters.

The program would be conducted in at least five district courts in at least three different judicial circuits.

The courts would be among the 15 with the highest number of patent and plant variety cases on their dockets.

In addition to the Northern District of Illinois, districts with a high volume of such cases include the Southern District of California and the Southern District of New York.

The legislation was introduced by U.S. Rep. Darrell E. Issa, R-Calif.

The measure, H.R. 34, passed the House and is now pending in the Senate Judiciary Committee.

Following Tuesday’s panel discussion, Holderman said the idea of allowing a judge to reject a case assigned to him or her at random was not new.

Federal judges on senior status already have that option, Holderman said.

“And so it really is not anything that’s tremendously momentous, but I believe it would assist the patent bar,” Holderman said of the proposed legislation.

Holderman called for such a system in “The Patent Litigation Predicament in the United States,” an article he recently wrote in collaboration with a law clerk, Halley Guren.

“The designated judge, armed with additional training, would be able to better understand the technological issues and the nuances associated with the advancements in technology without isolating litigants at the trial level in a forum apart from other litigation matters,” Holderman wrote. “These designated judges would thus continue to be a part of the traditional jurisprudence in the United States, encouraging cross-pollination among different areas of law and protecting against the balkanization of areas of law.”