A debate is currently raging about a Congressional plan to create a program providing certain judges with specialized training in patent law cases. Proponents believe that the new program replaces ill-equipped judges with a skilled group of trained jurists, who will bring efficiency and consistency to the patent litigation process.

Since patents are governed by federal law, court cases involving patent disputes are heard in U.S. district courts, which have been set up throughout the country to hear federal cases. While all district courts are required to follow U.S. law when hearing patent suits (as set out in title 35 of the United States Code), there is considerable disparity in the way in which claims are interpreted under the law by different district court judges. As a result, some litigants have resorted to filing their cases in districts where there have been previous favorable rulings on similar fact patterns, a practice known as “forum shopping.”

In addition to the forum shopping issue, using the federal district courts for patent suits can be problematic because most legal professionals, and consequently most judges, majored in non-technical undergraduate disciplines and have little or no experience with the technical arts. Because of the specialized work involved in patent law, an attorney without the requisite technical coursework is precluded from becoming a patent attorney, and cannot prosecute patent applications before the U.S. Patent and Trademark Office. However, if that same attorney becomes a federal judge, he or she could hear and decide patent disputes.

If a litigant is unhappy with the outcome at the district court level, that party may appeal the case to the Federal Circuit, an appellate court established in 1982 to hear appeals of specialized types of cases, including patent disputes. This will provide an additional level of review, that can safeguard a litigant from an improper or uninformed decision by a lower court. Unfortunately, the appeals process prolongs litigation and adds significant cost.

Appeals in patent cases are both commonplace and necessary. Some sources indicate that approximately one third of all cases appealed to the Federal Circuit over a span of five years have been reversed. This is an alarming rate even given a reasonable margin of error, but it is not surprising. There are currently 680 active district court judges in 94 districts. While approximately 2,800 patent cases are filed annually, only about 3%, or 84 cases, actually go to trial. This small number of trials, combined with the practice of forum shopping, provides most district court judges with little opportunity to develop the expertise needed to rule effectively in patent cases.

In light of this situation, a pilot program has been approved by the U.S. House of Representatives and awaits action by the Senate. Under the new program, certain judges in participating districts would be designated to hear patent cases. The pilot program would select at least five U.S. district courts from the 15 courts with the largest number of patent cases. Judges from those courts who request to hear patent cases would be designated by the chief judge, and the cases would be randomly assigned to those judges.

The program authorizes $5 million annually to provide specific training to those judges designated to hear patent cases. Additionally, funds are allocated to employ law clerks with technical expertise to work with the judges on patent cases.
The program would run for 10 years with reviewed progress reports showing its impact on the patent system. In particular, the progress reports would compare reversal rates by the Federal Circuit between participating and non-participating courts.

Opponents of the legislation assert that the program would increase the practice of forum shopping and would hinder the patent cases from being randomly distributed at the district court level. Some judges, along with patent attorneys, contend that the patent system, on balance, is working well and that patching the system could do more damage than good. These opponents maintain that the establishment of the Federal Circuit provides a sufficient safeguard to litigants, and has resulted in a system that has worked well for decades, at a much lower cost to the American public than the cost of funding the new program.

Proponents, however, point to complex litigation of patent matters, such as the recent Blackberry case, where tens or even hundreds of millions of dollars are at risk. Since the stakes are so high in such cases, and prolonged litigation and the high cost of appeals are so problematic, some consider it unfair to have such cases heard by judges who are not equipped to fully understand the issues and administer justice.

Regardless of whether the current Congressional plan becomes law, the current state of patent litigation and the high number of overturned cases make a compelling argument for improving the judicial system in this highly complex area of the law.

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