BRIEFS

VOL. 99 NO. 2

ON THE HILL: PATENT Act Aims To Curb Patent Trolls

On Apr. 29, a bipartisan coalition of Senate Judiciary Committee members led by Senators John Cornyn (R-TX) and Chuck Schumer (D-NY) introduced the Protecting American Talent and Entrepreneurship Act of 2015 ("PATENT Act" — S. 1137, 114th Cong. (2015)). The bill aims to reform perceived abuses of the patent litigation system by so-called patent assertion entities ("PAEs"). According to those who oppose PAEs, these entities abuse the system by asserting low-quality patents against operating companies in order to secure quick, nuisance-type settlements.

The PATENT Act increases the risk associated with asserting low-quality patents in a demand letter or lawsuit. It directs district courts to determine whether the losing party's conduct and position were "objectively reasonable in law and fact." If the district court finds that the losing party's conduct or position were not objectively reasonable, the court must assign reasonable attorney fees to the prevailing party.

Although the PATENT Act does target low-quality patents through fee shifting, it gives the district court more discretion than the Innovation Act (H.R. 9, 114th Cong. (Feb. 5, 2015)), a House bill proposed in February by a bipartisan coalition led by Rep. Bob Goodlatte (R-VA-6). Under 35 U.S.C. § 285(a) as revised by the Innovation Act, a district court must shift fees to the losing party unless the court finds that the position and conduct of the losing party are "reasonably justified."

The PATENT Act also addresses the perceived problem of shell company PAEs that may be able to evade attorney fee awards. It requires that PAEs either certify that they are able to pay attorney fees or give notice to other parties with a financial interest in the lawsuit that these other parties may be liable for an award.

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Compared to the Innovation Act, the PATENT Act takes stances on pleading and discovery that are more favorable to patent owners. On pleading, although the PATENT Act requires the patent owner to identify the patent claims it believes are infringed and to describe how it believes the claims are infringed, it does not require the owner to show where "each element of each claim" is found in the accused product. Additionally, in contrast to the Innovation Act, the PATENT Act has only limited provisions for staying discovery and also gives the Judicial Conference discretion to develop discovery rules.

As legislation moves through the Senate and House, another hotly contested issue is what changes, if any, should be made to the post-grant review proceedings established at the U.S. Patent and Trademark Office by the American Invents Act of 2011. A recent roundtable sponsored by the Duke Law Center for Innovation Policy reviewed the empirical evidence relevant to this question. Details are available online at www.law.duke.edu/innovationpolicy/ptabroundtable.

– **ARTI K. RAI** *is the Elvin R. Latty Professor of Law at Duke University and former administrator of the Office of External Affairs at the U.S. Patent and Trademark Office.*

* THINGS TO ADD TO JURY INSTRUCTIONS?

Do not flirt with defendant.

An Australian judge declared a mistrial three weeks into a case after a sheriff caught the jury foreperson "flicking her hair, smiling, raising an eyebrow and nodding in a potentially suggestive manner at the accused man." The incident forced the judge to "discharge her and the remaining jurors and start the case again, slugging taxpayers thousands in court and legal costs," according to *The Daily Telegraph*.

Costumes not allowed.

The Associated Press reported in June that a prospective juror in Vermont appeared for jury service wearing a black-and-white striped jail costume. Deputies directed him to a courtroom where a judge told him he could be held in contempt – but instead released him from service.

JUDICIAL HONORS

CURTIS L. COLLIER, Senior U.S. District Court Judge for the Eastern District of Tennessee, received the 2015 American Inns of Court Professionalism Award at the Sixth Circuit's Annual Judicial Conference. The award honors a lawyer or judge of sterling character, unquestioned integrity, and dedication to the profession. Judge Collier serves on the Judicial Conference of the United States Criminal Law Committee and the Federal Judicial Center's District Judge Education Advisory Committee.

KAREN A. THOMAS, District Court Judge, Campbell County, Kentucky, received the Civic Leadership Award from the Northern Kentucky chapter of Kids Voting in recognition of her commitment to Kentucky youth. Judge Thomas presides over the Northern Kentucky Teen Court in Campbell County, has served as a member of the National Task Force for Youth Courts, and is a founding member of the National Association of Youth Courts.

The Law, *the* Legal System, *or the* Administration *of* Justice

When can judges serve on commissions or engage in political activity?

Many provisions in the code of judicial conduct refer to "the law, the legal system, or the administration of justice" to define aspects of judges' ethical obligations, often using the term to create an exception to a rule. Although the parameters of the phrase may seem self-evident, exceptions would become rules if the phrase were read to cover any undertaking involving a law, any social problem affecting the courts, or any political issue playing out in the legal system. Further, a broad interpretation could confuse the public about distinctions between the judiciary and other branches.

The phrase has been extensively interpreted in the context of government boards or commissions where judicial ethics advisory committees have had to define "the law, the legal system, or the administration of justice" to determine which commissions are appropriate for judicial membership. The advisory committee for federal judges has distinguished between commissions directed toward "improving the law, qua law, or improving the legal system or administration of justice" and those "merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." (*U.S. Advisory Opinion 93 (2009)).* The committee emphasized that service on a commission is more likely to be appropriate if it "enhances the prestige, efficiency or function of the legal system itself" or "serves the interests generally of those who use the legal system, rather than the interests of any specific constituency."

A similar test adopted by other advisory committees analyzes whether the government commission has an articulable connection to the law, the legal system, or the administration of justice, rather than an indirect or incidental relationship. For example, the Massachusetts committee stated that, to come within the exception, a commission must have a "direct nexus" to how "the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business." (*Massachusetts Advisory Opinion 1998-13.*)

Political activity

Canon 5C of the 1990 American Bar Association Model Code of Judicial Conduct prohibited judges from engaging in political activity but created an exception "on behalf of measures to improve the law, the legal system or the administration of justice." Canon 4 of the 2007 model code provides that a judge "shall not engage in political . . . activity that is inconsistent with the independence, integrity, or impartiality of the judiciary" but does not include an express exception for political activity related to the administration of justice.

Although such activity may still be implicitly permitted as not "inconsistent with the independence, integrity, or impartiality of the judiciary," the absence of explicit permission may discourage judges from engaging in such activity and subject them to criticism if they do. (Several states that have otherwise adopted much of the 2007 model code have retained the exception, including Arizona, Connecticut, Missouri, New Hampshire, New Mexico, Pennsylvania, and Wyoming.)

Interpreting the 1990 exception, advisory committees have allowed judges to publicly support or oppose ballot initiatives, bond questions, proposed legislation or constitutional amendments, and funding plans on matters such as judicial compensation, court structure, court budgets, new courthouses, judicial selection, and sentencing. On behalf of or in opposition to such measures, a judge may, for example, write newspaper editorials; appear on radio and television talk shows; make presentations to civic, charitable, and professional organizations; take part in panel discussions with other officials at public meetings; and contribute personal funds to and participate in nonprofit organizations involved in the effort.

The phrase also defines when judges may appear at public hearings or consult with executive or legislative branch officials. The California committee identified appearances addressing the legal process as "the clearest examples of permissible activities." (*California Advisory Opinion 2014-6.)* With respect to substantive legal issues, the committee stated, a judge may "advocate only on behalf of the legal system – focusing on court users, the courts, or the administration of justice," not any particular cause or group. Further, the committee concluded that judicial comment should be limited to the judicial perspective and not "insert a judge's views on economics, science, social policy, or morality into the official public discourse on legislation" or encroach "into the political (policy-making) domain of the other branches."

– **CYNTHIA GRAY** *is director of the Center for Judicial Ethics of the National Center for State Courts. The full version of this column appeared in the spring 2015* Judicial Conduct Reporter, *which can be found, with cited advisory opinions, at* **www.ncsc.org/cje**.

JUDICIAL HONORS

MARY E. STALEY, Cobb County, Georgia Superior Court, received the 2015 Woman of Distinction Award from the Cobb Chamber of Commerce. Judge Staley presides over Cobb's Mental Health Accountability Court, which provides an alternative to jail time for those with mental health issues. **FERNANDE (NAN) R.V. DUFFLY, Associate Justice of the Massachusetts Supreme Judicial Court**, received the Margaret Brent Women Lawyers of Achievement Award from the ABA Commission on Women in the Profession.

RICHARD L. YOUNG, Chief District Court Judge for the Southern District of Indiana, received the Evansville Bar Association's James Bethel Gresham Freedom Award. Judge Young is the Seventh Circuit District Court's judge representative to the Judicial Conference of the United States and has served on its Committee on the Administration of the Magistrate Judges System.