THE JOHN MARSHALL
REVIEW OF INTELLECTUAL PROPERTY LAW

PATENT PILOT PROGRAM PERSPECTIVES: PATENT LITIGATION IN THE NORTHERN DISTRICT OF ILLINOIS

RIPL VOLUME 17 EXECUTIVE BOARD

ABSTRACT

A Patent Pilot Program, or PPP, is geared towards giving designated judges in various districts more experience with patent cases. The Volume 17 RIPL Executive Board interviewed several participating judges in the Northern District of Illinois' PPP. This note comprises the substance of those interviews.

Cite as RIPL Volume 17 Executive Board, *Patent Pilot Program Perspectives:* Patent Litigation in the Northern District of Illinois, 17 J. MARSHALL REV. INTELL. PROP. L. 348 (2018).

PATENT PILOT PROGRAM PERSPECTIVES: PATENT LITIGATION IN THE NORTHERN DISTRICT OF ILLINOIS

RIPL VOLUME 17 EXECUTIVE BOARD

PATENT PILOT PROGRAM PERSPECTIVES: PATENT LITIGATION IN THE NORTHERN DISTRICT OF ILLINOIS

RIPL VOLUME 17 EXECUTIVE BOARD*

I. INTRODUCTION

Recognizing that patent litigation can be expensive and unpredictable, Congress sought to create legislation designed to promote judicial experience specifically within patent cases. Congress passed legislation implementing experimental case reassignment programs designed to increase the amount of patent cases certain judges hear.[1] Referred to as either a Patent Pilot Project or Patent Pilot Program ("PPP"), Congress selected various districts to test the effectiveness of PPP's in increasing a particular judge's experience in patent litigation over the course of a ten-year period.[2]

To meet the overall goal of improving the quality of patent litigation in district courts, PPP's seek to increase judges' overall familiarity with patent law by assigning certain judges more cases. [3] Newly-filed patent cases are still randomly assigned to a judge within the district. However, under the PPP, a judge has the option of "opting out" of a patent case assigned to him or her. When a judge opts out of a patent case, the case is randomly reassigned to a group of judges designated to hear reassigned patent cases. [4] The desired effect of a judge opting out provides this group of designated judges the opportunity to hear more patent cases.[5]

As a part of the program, the Federal Judicial Center has monitored the implementation and effectiveness of the PPP since its inception.[6] In April of 2016, the Federal Judicial Center released a Five-Year Report entailing how the program had been performing now that it was half-way through its lifespan.[7] The report goes through an in-depth statistical analysis regarding various topics including: designated judges, filings by district, transfer of patent cases, case duration, and much more.[8]

Based on the Federal Judicial Center's findings, the PPP has had some success in increasing the amount of cases designated judges receive and the rate at which these

---

 This note is comprised of interviews with Judge Thomas M. Durkin, Judge Matthew F. Kennelly, and Judge Rebecca R. Pallmeyer of the United States District Court, Northern District of Illinois; taken over the course of May and June of 2017 by the Volume 17 RIPL Board members Kaylee Willis and Benjamin Lockyer. Its contents compile a uniform effort by both the judges interviewed and the board; edited by Kaylee Willis, Volume 17 Editor-in-Chief, and Benjamin Lockyer, Volume 17 Lead Articles Editor.

[1] Margaret S. Williams, Rebecca Eyre, and Joe Cecil, *Patent Pilot Program: Five-Year Report*, FEDERAL JUDICIAL CENTER, 1 (Apr. 2016).

[2] *Id.* at 3. The participating districts in the PPP as of January 5, 2016 are: C.D. Cal.; N.D. Cal; S.D. Cal; N.D. Ill.; D. Md.; D.N.J.; D. Nev.; E.D.N.Y.; S.D.N.Y.; W.D. Pa.; W.D. Tenn.; E.D. Tex.; N.D. Tex.

[3] Peter Scoolidge, *Venue Implications Of The Patent Pilot Program*, LAW360, 1 (Oct. 29, 2012).

[4] Michael La Porte, *Judges for Patent Pilot Program Announced in the Northern District of Illinois* (Sep. 19, 2011) available at http://fg-law.com/news_fg-law.html.

[5] *See* Williams et. al., *Patent Pilot Program: Five-Year Report* at 38.

[6] *Id.* at 1.

[7] *See generally*, *id.*

[8] *Id.* at iii.

cases are disposed of.[9] Based on the numbers alone, judges designated as PPP judges do receive more patent cases than non-designated judges, thus necessarily giving them more experience in patent litigation.[10] Further, the report finds that PPP judges reach non-voluntary dismissals of patent cases more than non-designated judges.[11] As such, it appears that the PPP has had some success at the half-way point of its trial run.

However, the report does temper its findings by noting some statistical biases. For example, most judges that are designated as PPP judges, on average, already had more experience in patent litigation than their non-designated counterparts when the PPP began.[12] Thus, it is unclear whether a judge without any experience in patent litigation would benefit from the reassignment of additional patent cases over the course of this program.[13] However, as the Report notes, if a goal of the PPP is to place more patent cases in front of experienced judges, then it appears that goal has been met so far.[14]

While the Federal Judicial Center's Five-Year Report offers an abundance of information throughout its nearly 40 pages of research and analysis, this note offers a look into the PPP from a quantitative angle. To understand more about the effects of the PPP in improving judicial familiarity with patent litigation, members of the Review of Intellectual Property Law ("RIPL") at the John Marshall Law School in Chicago interviewed federal judges participating in the Northern District of Illinois' PPP.

The Northern District of Illinois implemented its PPP on January 4, 2011.[15] Since 2011, patent case filings for the district have increased by 61% as of 2015.[16] During the first five years of the PPP, the district also ranked 4th highest among selected circuits for the number of patent cases filed.[17] The circuits with the highest amount of patent cases filed included the Central District of California, District of New Jersey, and Eastern District of Texas.[18] At the conclusion of the Five-Year Report's study, the Northern District of Illinois ranked fifth nationally among district courts in the total number of filed intellectual property cases.[19]

During May and June of 2017—year six of the PPP—RIPL's members had the pleasure and opportunity to meet with Judges Rebecca Pallmeyer, Matthew Kennelly, and Thomas Durkin of the Northern District of Illinois. RIPL learned about the judges' experiences with the PPP and their perspectives on patent litigation. From these discussions, RIPL had the opportunity to hear about each judge's experience in litigating patent cases prior to their careers as judges, their experiences since participating in the PPP, their methods of hearing patent cases, and their thoughts on specialized courts.

---

[9] *Id.* at 38.

[10] Williams et. al., *Patent Pilot Program: Five Year Report* at 38.

[11] *Id.*

[12] *Id.* at 3-7.

[13] *Id.*

[14] *Id.* at 6.

[15] *Id.* at 1.

[16] Julie Hodek, *Chief Judge Castillo Travels to Republic of Korea to Participate in Global Intellectual Property Court Conference: Number of IP cases filed in Northern District of Illinois grows by 61 percent over four years* (Nov. 23, 2015) available at http://www.ilnd.uscourts.gov/_assets/_news/Korea%20IP%20Press%20Release.pdf.

[17] Williams et. al., at 8-9. (824 patent cases filed).

[18] *Id.* (919 patent cases filed in D.N.J.; 1,592 patent cases filed in C.D. Cal.; and 6,201 patent cases filed in E.D. Tex.).

[19] Hodek, *supra* note 17.

II. PRIOR EXPERIENCE AND BACKGROUNDS

Judge Rebecca R. Pallmeyer has been a part of the Northern District of Illinois' PPP since its start in 2011. An experienced judge in patent litigation, Judge Pallmeyer has heard a variety of patent cases and currently serves as the President of the Richard Linn American Inn of Court—a society of students, judges, and intellectual property practitioners.[20] Despite the Judge's years of experience in hearing patent cases and involvement in the intellectual property community, she did not litigate very many intellectual property cases while in private practice. When asked about her interest in intellectual property:

> **J. PALLMEYER:** I always liked math and science. In fact, I always get a little annoyed when lawyers say, "I was never any good at math and science, that's why I went to law school." I think that it's insulting to lawyers. In fact, I have a minor in math. I like science. I like learning new technology, information, and just science generally. I think many judges have that sense of curiosity about the world. I didn't have a STEM background, so there's always some learning to do, but I think a judge with a STEM background would still have some areas that they are unfamiliar with. So, I don't think that's a big disadvantage.
>
> **RIPL: Did you try any intellectual property cases when you were in practice?**
>
> **J. PALLMEYER**: No. I did not have any IP cases in practice. I may have had some trade secret cases, but not copyright, trademark, or patent.
>
> **RIPL: Was this the same for when you were a magistrate judge?**
>
> **J. PALLMEYER:** No, as a magistrate judge I had a lot to do with IP cases. In fact, my first big summary judgment case had to do with patents. I remember the issue had something to do with the on-sale clause… I'll have to dig it up. The magistrate judges do quite a bit of work with IP cases. I'm trying to encourage the Linn Inn people to get them more involved.

Judge Thomas M. Durkin has been a federal judge for the past five years and is a newer member on the Northern District of Illinois' list of PPP judges. Prior to his career as a judge, Judge Durkin served for thirteen years as an Assistant United States Attorney in the Northern District of Illinois.

Following his time in the United States Attorney's Office, Judge Durkin practiced as a partner at Mayor Brown in Chicago, where he handled issues regarding complex litigation and white-collar defense. During his time in private practice, the Judge did "work on" some patent cases. As he explained:

> **J. DURKIN:** Well, I probably worked on six to nine cases. "Worked on" is a lot different than trying a case. "Worked on a case" is even different from

[20] *See generally*, THE RICHARD LINN AMERICAN INN OF COURT, http://www.linninn.org.

filing a complaint or responding to a complaint. Working on a case involving patents can involve investigating and providing advice about validity, infringement, or licensing issues. I tried a case to a jury in Buffalo, New York that involved infringement and validity issues. I've also tried a bench trial in this district involving the same scientific issues. I've tried several arbitrations that are confidential, but involved licensing issues.

RIPL: So, is it fair to say then that you got familiar with both the technology and the specific laws governing those patent disputes?

J. DURKIN: Well, you have to get familiar with the technology in any validity or infringement case. For infringement, you of course have to be familiar with the technology because you have to understand why a product infringes or doesn't infringe. For validity, you have to know what the product is, but ultimately your goal is to invalidate a patent or argue that it is valid. But of course, you need to learn the technology. It's usually not self-taught. It's usually taught by the client because the client has the scientists and the technical experts. I don't have a scientific background. I have an accounting background. But, in many cases at Mayer Brown, where I worked, there were lawyers that had a scientific background that got involved in the case and they would also help in the education process.

RIPL: So, do you think that by relying on these attorneys and experts provided by the clients, you have been able to close any gaps in your knowledge or better understand the technology?

J. DURKIN: Well, for each case. The particular science that is involved is sometimes complex. It's not something that you carry over to another case. But, the technique of learning all you can about a product, the science, reading a patent carefully and multiple times, and reading the references in the patent is something that carries over from case to case. If you can't understand a patent or the science behind it, you work with another attorney with a scientific background or with the client to get more insight on the issue.

Judge Matthew F. Kennelly, like Judge Pallmeyer, is one of the original designated patent pilot judges in the district.[21] As a judge, Judge Kennelly has heard a variety of intellectual property cases and was a part of the committee that drafted the Northern District of Illinois' local patent rules. Despite Judge Kennelly's involvement in intellectual property, he tells RIPL that he recalls being involved in only two intellectual property cases when he was in private practice (and both were trademark). One of which he recalls as, "one little war story" he had to tell:

J. KENNELLY: No, no. This is just one, just one little one. I wouldn't expect anybody to be fans of professional wrestling. I watched it when my son was a

[21] *See* Court Information Release, *Patent Pilot Project in the Northern District of Illinois*, United States District Court for the Northern District of Illinois (Sep. 19, 2011).

kid because he liked it. I don't remember if it was Hulk Hogan—I think it was actually Randy "the Macho Man" Savage – who was this big-time wrestler and was like the champion in those days, and Dennis Rodman who was an all-star player for the Chicago Bulls. After he left the Bulls, or right around the time he was leaving—I guess in order to make money—he decided to go into professional wrestling. There was this infamous scene—they're all staged right?—where he snuck up behind Randy "the Macho Man" Savage and hit him over the head with a metal chair. So, I had this case to establish intellectual property rights. It didn't involve Vince McMahon, but it was the with guy who was something like the CEO of the World Wrestling Federation, and he was on the witness stand in front of Magistrate Judge Denlow. We were all having fun with the case, and at some point during the cross examination, I said: "Now I have one more question for you. I want you to understand you're under oath. Did the Macho Man know in advance that he was going to get hit with the chair?" And the judge looked at him and said, "Now you're under oath." And, he kind of gave him a look, he said, "I'm under oath, right? Yeah, he knew in advance." I said, "I knew it!" So, anyway, that was my involvement in intellectual property law prior to becoming a judge.

With their varied experiences, RIPL asked the Judges about their understanding of technology and science as it applies to the realm of patent law, and what they do to learn about the technical aspects of a case. Each judge noted that they will request demonstrations by the parties to explain the science and technical aspects behind the patent(s) at issue.

As Judge Pallmeyer noted, it is difficult for a judge to develop an expertise in a particular area of patent law because of how broad patentable subject matter can be.

RIPL: Do you feel that having a science background hurts or helps you in analyzing [patent] cases? As far as understanding the subject matter of the technology?

J. PALLMEYER: I'm sure the more you know the better off you are. So yes, any additional education in that arena would be useful.

RIPL: Do you do anything in particular to learn more about the patent or the invention?

J. PALLMEYER: I do what I can to learn about it by reading the patent of course. I will also have a science day where the lawyers come in with a power point or a demonstration.

RIPL: Since participating in the PPP, do you believe that you have gained more experience handling patent cases as a judge in the program? If so, why?

J. PALLMEYER: I believe that I have definitely gotten more confident in trying patent cases. Do I think I have a significantly greater familiarity in trying patent cases? Sure. Remember, the things that can be patented are so broad. So it's unlikely that you will see repeats in patent cases. You learn the

> law better with each case. For example, you learn how sections 101 or 102 work and how the procedure works overall. So, I feel more comfortable with the procedure, like how a claim construction proceeding works or how a case is effectively tried to a jury in this area. However, developing a familiarity with certain areas of science is unlikely because of how broad patentable subject matter is. Every patent case a judge hears is different.

Judge Kennelly noted how attorneys can fall into traps due to the amount of time they can spend on a case learning a particular field.

> **RIPL:** Did you have an interest in science or study intellectual property while you were in college or law school?
>
> **J. KENNELLY**: No, I always got good grades in chemistry, but that's about the extent of it. I mean – I did a lot of criminal defense – and as a criminal defense lawyer, I had to learn a lot about forensic science, but that was the extent of it. That was the extent. I really didn't have any technical background before coming over here.
>
> **RIPL:** So then, as a judge without a science or engineering background, do you think not having a science or engineering background helps or hinders you in actually trying to understand the cases you're hearing?
>
> **J. KENNELLY:** Well, I'll tell you what – one of the things that's very hard for a lawyer in any kind of a field to do is to simplify a case. You get involved with it, you delve into the depths of it, you work with it for a long time. Eventually, at some point in time, you've got to communicate it to somebody who hasn't done all that, and is going to get it cold. You also have to make sure these people are able to understand it quickly because you don't have multiple opportunities to explain it to them. It might be a judge or it might be a jury. So, I think the need to do that requires people to understand their case in a simple way, which isn't bad *even if* you're communicating it to an expert. One of the problems with lawyers is we usually tend to make simple things complicated, and really, we should be doing the opposite. So anytime I think the lawyer has to communicate his or her case to somebody who doesn't have the background—if they're a good lawyer—it forces them to simplify the case. I think that's a good thing, because it requires you to focus on what's really important and what's not really important and to get the technical details out of it. So that's one of the reasons that I'm not a big fan of having specialized courts because I think it encourages people that speak "inside baseball."

Judge Durkin also noted the importance of understanding that the ultimate audience in a patent case—a judge or a jury—may not understand the technical, scientific aspects of your case. Thus, this creates the need for a balance between simplifying an argument without losing its complexity and persuasiveness.

RIPL: Since you are now a Judge and do not have all the resources that you had at Mayer Brown, do you still feel that you have all the resources you need to learn the technology or the laws surrounding the patent?

J. DURKIN: Well I do because the parties have to educate me. In most patent cases, I will often ask for a neutral tutorial, where the parties will educate me on the technology. Even though I ask for a neutral tutorial, it's hard for lawyers on either side to not be advocates, but in general, I can get my questions answered. The beauty of being a judge is that if I don't know the answer, I simply ask the parties to educate me on the matter. If I still don't understand it, I ask the parties to do a better job and ask again. This is important because if they can't make it understandable to me, they are not likely to make it understandable to a jury.

I'm not unique in this. No judge wants to make a decision until he or she fully understands what is being decided. I have the ability as a judge to insist the parties educate me. I don't have to be an electrical engineer, or a biochemistry major, or a physician to learn and get educated. Keep in mind that many patent cases are decided by juries. I don't want to say you need to dumb it down, but you do need to simplify your case and put it in layman's terms, so that it is easier to understand. Of course, you make an argument that is so simple, that it makes no sense, or is not consistent with what the facts are. But, I think that most things can be put in some form where a jury with a general good set of educational qualifications can pick up what the key issues are in a case. That's really the goal of a trial lawyer, in any case, but especially in a patent case where you need to make the complex understandable. If you're good at that, you're a good trial lawyer. If you're bad at it—if you can't talk in a way that a jury can understand, you're going to lose your case.

III. ON SPECIALIZED COURTS

One of the philosophies behind adopting the PPP was to increase judicial expertise in regard to patent law.[22] The approach behind this philosophy was essentially that the more knowledgeable the designated patent pilot judges are with regard to patent cases, the lower the reversal rate of that district will be.[23] RIPL asked the judges about their thoughts on specialized courts and whether there should be one for patents.

J. PALLMEYER: I'm in general not a proponent of specialized courts. Patent law is large and complicated and it helps to have some expertise. But there are other areas like that too. We don't have specialized securities fraud courts or admiralty courts. We expect district court judges to get up to speed in

[22] Ethan S. Chatlynne, *On Measuring the Expertise of Patent-Pilot Judges: Encouraging Enhancement of Claim-Construction Uniformity*, 12 J. MARSHALL REV. INTELL. PROP. L. 309, 310 (2013).

[23] *See generally, id.*

certain areas and patents certainly create their own particular challenges, and I can see the argument. I personally resist specialization. I believe that one of the strengths of our system is random assignment.

J. DURKIN: Well I think that's what the Federal Circuit was created for; so that you wouldn't have inter-circuit conflicts in patent law. Having certainty is extremely important, especially in terms of business decisions. It's the only real specialty court in the Article III world that I'm aware of. District court judges are generalists. All appellate court judges are generalists, except for the Federal Circuit, although the array of cases they hear beyond patent cases is itself pretty wide.

Some judges don't want to hear patent cases. Most judges in this district keep their patent cases. If you don't want to hear a patent case, the program provides an avenue for you not to hear them. There is always a fear about a party judge shopping.

There is a huge benefit in having a random assignment in cases. You shouldn't be able to game the system by figuring out how you can go to particular judge. In large districts, if half the judges opt out of patent cases and you have twenty or thirty judges in the district, you still have a random assignment of patent cases to about ten to fifteen judges. This allows the random assignment system to work, but it also puts these cases in front of judges who want to hear them.

Should this be the case for all complex cases? Why are patent cases special? There are some judges who are experts in anti-trust. Does that mean a judge who is not, or maybe prefers not to hear anti-trust cases can opt out of the case? There are no rules that allow that. You get cases whether you enjoy the subject matter or not. You learn the subject matter if you don't know it. You work hard on a case to understand it, even if it's an area you don't have a particular interest in. Patents appear to be the only type of case, at least in the Northern District, that can be reassigned to a special list of judges. I suppose that's a good thing because patent law is perceived to be complex. But the truth is that it's not so complex, that even the judge who doesn't want to do it couldn't learn it. That's the way it has been as long as patent litigation has occurred in federal courts. Most federal judges got to the bench because they have a pretty wide-range of experience. Trial lawyers have experience learning things that they know nothing about, as a trial lawyer, and learning enough just to present a case. It's the same thing as a judge.

I don't know why people view patents as overly complicated such that they want to opt out of them. There are a number of cases that are more complicated than patent cases where judges can't opt out. For example, your average anti-trust case can be just as complicated or more so that a patent case. Bankruptcy appeals can be complicated. Bankruptcy law is an area unto itself where bankruptcy judges and practitioners specialize in the field. Yet many district court judges with no experience in bankruptcy law hear

bankruptcy appeals. Can you opt out of these cases? No. The bankruptcy appeal is randomly assigned to you, and you simply handle it.

IV. IMPROVING JUDICIAL EXPERIENCE IN PATENT LITIGATION

In discussions, Judge Pallmeyer and Judge Kennelly noted that a potential way of increasing a judge's familiarity with patent cases would be to limit the number of PPP judges who can be reassigned patent cases or increase the number of patent cases being reassigned.

J. PALLMEYER: With respect to the question of is there a more effective way of getting judges a whole lot more patent experience. I think what we could do is limit the number of judges who can be in the pilot. So, you are going to be forced to have those judges get more patent work. Now still, it wouldn't be a guarantee because even if you have the patent pilot, you have to have the judges who are not in the pilot saying I don't want to do patent cases. We in our court have lots of judges who are willing to hear patent cases. So, in other words, they don't throw off that many extra. It happens from time to time. But that's a relatively small number of judges. Most of the judges, whether they're in the patent pilot program or not they keep their patent cases. So, the only way, if you really want to develop a judge's expertise, might be to limit the number of judges who can hear patent cases at all. So, I guess this probably comes close to creating a specialized court.

It might be different here in the Northern District [as opposed to other districts] because so many of our judges are in the patent pilot and it might be different because a lot of our judges who are not in the patent pilot handle a lot of patent cases. I'm guessing that there are districts with patent pilot programs like ours have different effects because you might have districts with judges have more judges who want out and less judges who want in.

Another way may be to limit the number of patent cases a non-pilot judge can keep so they are forced to get rid of cases. This way more cases are being redistributed. However, I feel you would get a lot of pushback from this. A lot of judges feel strongly in favor of the random assignment system. If you really wanted to develop a system where some judges are trying substantially more patent cases, then that may be your only way of doing it.

J. KENNELLY: You know, if we had a situation where we would say, okay there's five judges that are going to hear all the patent cases. I suspect that over time those five judges would become really knowledgeable about the law, at least. Now with the technical stuff, these judges would still have to learn it. However, these judges would develop a certain amount of background and expertise. However, this consideration was never part of the proposal.

I think one of the things that got cut out of [the PPP], was that there was going to be there was going to be extra funding to get law clerks that had sort

of technical backgrounds for the PPP districts. So, you might be able to hire 3 or 4 law clerks for the court as a whole who have engineering, chemical, biotech or whatever backgrounds. And that I think might have been pretty valuable in helping the decision maker understand the science and avoid making mistakes. But you know, that's money, and money got cut out of the bill.

V. REVERSAL RATES AS A MEASURE OF SUCCESS

In consideration of the reversal rate as a measure of success, the Judges all agreed that the reversal rates of patent cases should not be a metric of success for the PPP.

J. PALLMEYER: I will be very candid with you in saying that the reversal rate may be more a function of the Federal Circuit than it is the lower courts. Lower courts—here I'm speaking more for myself, but I think my colleagues feel this way—we're not ideologues, and we don't have preconceived notions of things. We have strong feelings, but we have no strong feelings about our cases. We don't really bring those things into the work place. My sense is that we are trying to follow the tea leaves from the federal court of appeals, and if they are clear we will not get reversed. If they are not so clear, then we will get reversed because we don't necessarily understand what they want from us if they themselves have opinions that go in different directions.

I think trial court judges are doing as good as job as they can do with patent cases and other cases by reading what the Federal Circuit Court of Appeals says and trying to apply law. If the goal is to lower the reversal rate, it suggests that the district judges were doing something wrong and the program is designed to get them to do it right. I disagree with that premise. I don't think before or since the patent pilot that the reason for the reversals is that district judges were making mistakes. I think we are not getting the guidance we need. That's what I believe.

J. KENNELLY: I think the reversal rate is more about the Federal Circuit than it is about the lower courts. I think it's about unwillingness to actually provide and to accord deference to the lower court rulings…and if that's the way they want to do it that's fine, but then nobody should complain about the lower court.

In other words, it's not because we're stupid (laughs), …it's because particularly on claim construction, irrespective of what they say about the deference they're giving, in fact they're doing claim construction *de novo*. And so, if at any time that happens and there's no deference being paid to what the lower court found, there's going to be lots of differences. There's going to be lots of reversals. It's really one of the few areas of the law that I think does involve factual findings, and that nonetheless the appeals courts really aren't according any deference to the lower court on.

So, if you think though in terms of the purpose of it, if the purpose was to cut the reversal rate; well let's see. Let's do a study – there might not even be enough cases – but let's take the cases that got reassigned. Let's come up with comparable districts. Now it's hard to do this because East Texas and Delaware have all the cases. You could weed out all the statistical noise and say, okay, the cases from this district where nobody was opting out of cases get reversed more than cases out of this district where three judges out of the six were opting out? I'm not sure what we'd find out. I mean, I don't know what that study would show, but I wouldn't hold my breath thinking it's going to show a big difference.

J. DURKIN: I think you can get reversed regardless of whether you're hearing more than your share of patent cases or not. There are reversals because of claim construction errors. There are reversals because the Federal Circuit creates new law and you couldn't have anticipated it. I don't think reversals are a proper metric for judging whether or not judges with more experience in patent litigation have fewer or more reversals. I think that the better metric is talking to lawyers who try cases before such judges and ask them whether their case was enhanced by a judge who has heard a lot of patent cases, as opposed to one who has heard only one or two cases in their career. That to me, although difficult to measure, would be a better metric than reversal rates. If the reason for reversal is due to a bone-headed mistake, that a judge who has more experience would not have made, well then that's a good point. I think you have to examine reversals and their reasons before you can use a blunt instrument as a measure of success of a project like that. I think you have to examine the basis of a reversal. I would argue the better metric is the feedback of the attorneys appearing before judges in patent cases.

At this point, while there are certainly some similarities between the PPP's Five-Year Report and the interviewed Judges' perspectives, there is not a uniform agreement. Being just over halfway through its life-span, the PPP still has a few more years that could yield different results. If the number of patent filings in the Northern District of Illinois increases, it's possible there could be results showing improvement in the number of cases heard by designated judges and the speed at which these cases reach a final resolution. As such, the issue of whether PPP's have further developed in reaching the goal of promoting judicial experience in patent litigation will be revisited in 2021 when the PPP concludes.[24]

[24] Williams, *supra* note 2, at 1.