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Abraham Lincoln Marovitz

United States District Court for the Northern District of Illinois

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Patent Cases in the District Courts—Who Should Hear Them?

JUDGE ABRAHAM LINCOLN MAROVITZ*

I am honored to join in a symposium with my beloved and esteemed friend, John S. Hastings, a former Chief Judge of the 7th Circuit and one of the most respected judges in the country. However, I am not so immodest as to believe that I was invited to contribute to this symposium because of my fame as the Holmes or the Brandeis of the patent field. On the contrary—the genesis of my invitation can be directly traced, I am confident, to my own protestations of gross inadequacy in the patent area, a disclaimer I voiced in a letter published in the *American Bar Association Journal* in response to an article by Richard Gausewitz.¹

I sometimes think that Mr. Justice Frankfurter had judges like me in mind, when he stated in his dissent in *Marconi Wireless Co. v. United States*² that “it is an old observation that the training of the Anglo-American judges ill fits them to discharge the duties cast upon them by patent legislation.”³ That observation was voiced by Justice Frankfurter in 1943 and to a certain degree is as true today as it was thirty years ago. Why is it so; why should it be so; and what is the remedy?

Before I discuss the various cures that have been prescribed for what might be called critical judicial dysfunction in the patent area, it would be well to define the extent and essence of the illness. I might interject here that whatever I have to say is by no means a criticism of the patent bar and should not be taken as such, but rather as a single judge’s frank, perhaps too frank, observations about his own inadequacies and those of the judicial system. The problem is obviously a multi-faceted one which brings into question, not only the relationship between judges and patent cases, but the structure of the judicial system as a whole as it exists in all areas of the law.

Since it was Mr. Gausewitz’s article which precipitated my letter to the *Journal*, I would like to use that article as a starting point for this discussion. Gausewitz divides the members of the bench into two

* United States District Court for the Northern District of Illinois.

¹ Gausewitz, *Toward Patent Experienced Judges*, 58 A.B.A.J. 1087 (1972).

² 320 U.S. 1 (1943).

³ *Id.* at 60-61.

classes: "patent-oriented judges," that is, those judges who have either had patent experience prior to their elevation to the bench, or who have gained proficiency in patent litigation while on the bench, and "patent-inexperienced judges,"—the latter category numbering myself among its cowardly and swollen ranks.⁴ The irony of it all is that while I do consider myself to be a patent-inexperienced judge, I do feel, and please excuse my lack of modesty, that I am otherwise an experienced trial judge equipped to handle any type of case which might arise, having presided over thousands of trials during my fourteen years as a trial judge in the state courts and my twelve years as a federal district court judge—in addition to almost 25 years experience as an active trial lawyer. Why then do I fear patent cases and things that go "bump, in the night?" Answering this question will define the basis of the problem.

In the Northern District of Illinois cases are assigned by lot. Each judge's name is printed on a card and placed in a sealed deck with each judge's name appearing an equal number of times. When a case is filed, a card is torn from the sealed deck and attached to the complaint. Theoretically, each judge is assigned the same number of cases in an equal number of areas. Thus the assignment of a patent case is completely fortuitous. Before taking senior status in August, when I drew an antitrust case, a multi-defendant criminal case, or an involved securities case, I was unperturbed. Nevertheless, when I drew a patent case, to be perfectly honest, I was less than overjoyed. I envisioned inordinate amounts of trial time, mountains of documents, reams of testimony, countless mysterious diagrams, and endless verbal duels between experts who speak in a foreign tongue and write in an alien language. I was overcome by a feeling that I was being compelled to perform in a role for which I was dreadfully ill prepared, and to witness the judicial system operating at its poorest. I might venture to guess that these feelings are not unusual among patent-inexperienced judges in the federal judiciary.

What is it that distinguishes patent suits from antitrust, criminal, securities, and other federal matters? First and foremost is the time element. The cardinal concept that lies at the very foundation of the entire judicial system, with its provision for pre-trial procedures, its provision for summary disposal at various junctures, its encouragement of settlement, and its countenancing of plea bargaining, is the resolution of conflict, short of trial, and the *conservation of judicial time*. Time, in our overtaxed and undermanned judicial system, is the rarest and scarcest of commodities. As our hypertechnological age, our ex-

⁴ Gausewitz, *supra* note 1, at 1087.

panding economic frontiers, and our decaying moral fibre generate litigation in a rising geometric progression, court calendars swell until they burst at their seams, and dockets overload until they collapse under their own weight. The cries of indignation about court delay and denial of speedy trials are heard in the halls of justice until the word comes down from on high that all civil litigation must be suspended in order to try criminal cases. Despite these difficulties, a judge's calendar, if it is operating properly, runs like a finely tuned instrument, processing and disposing of litigation in a timely and orderly fashion—for justice delayed is indeed justice denied, no matter how small or large the case may be. Any matter that consumes vast amounts of time—time that is not utilized in its most efficient manner—poses a threat to the fine calibration of that instrument.

Patent suits, both intrinsically and extrinsically, pose just such a threat. That such actions fly in the face of that cardinal rule regarding time conservation is not due to any fault inherent in patent litigation, but rather to defects in the judicial system itself. At the outset, the very nature of a patent case requires significant amounts of time. These cases often involve multiple defendants and huge amounts of money, and require lengthy, complicated trials. It was these characteristics that led the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University Foundation*⁵ to observe that patent cases "seem to take an inordinate amount of trial time"⁶ and that

while the three year trend in the district courts appears to be toward more expeditious handling of civil cases tried without a jury in terms of an annual increase in the percentage of cases concluded in three trial days or less and an overall decrease in percentage of cases requiring 10 or more days, the trends in patent litigation are exactly contrary.⁷

Nevertheless, there is something beyond the outward appearance of patent cases that is responsible for the large amounts of time necessary. Antitrust and securities cases are also inherently time consuming. They too involve multiple defendants and plaintiffs and large amounts of money, yet they are resolved more efficiently than patent cases. Why? The simple answer is that a judge has encountered the elements of these areas of law on numerous occasions, both in his practice prior to being appointed to the bench, and afterwards, and he is therefore intimately familiar with their terms, language, and underlying circumstances. Patent litigation, on the other hand, is infrequently

⁵ 402 U.S. 313 (1971).

⁶ *Id.* at 337.

⁷ *Id.* at n.31.

encountered by judges and even less frequently, if ever, dealt with by practicing non-patent lawyers. Keeping in mind that it is judicial time which is of the essence, let us examine the decisional process.

The judicial system as it is designed (and this may be an oversimplification) has three stages. The first step is the determination of the facts. The second, the choice of applicable statutory or case law. The third step is the superimposition of the former over the latter. Thus, when the facts conform to a certain blueprint of applicable law, a decision is reached. Of course, no body of law can anticipate every set of circumstances, and judges must, at times, create new law by carving out exceptions and analogizing to other areas of the law. In most cases, this process is not a difficult one, given the fact that the terms involved are merely common everyday language converted to legal usage. The commonness of the language and a judge's familiarity with the underlying circumstances, having encountered them in his prior practice, combine to render most areas of the law comprehensible. The issues may be complex but the language is universal. Thus, the concepts of the "reasonable man," "criminal intent," "monopolization," and "insider information" are employed and interpreted in terms of past experience and the language of life.

Patent cases are an entirely different matter. Rather than requiring three steps in the decisional process, they require four—that additional step taking more time than the other three combined. Aside from discerning the facts and segregating the law, a judge must learn an entirely new technical and foreign language—call it "patenteese" if you will. It is principally the language of physics, chemistry, and engineering—a language with which the judge has no familiarity—both in regard to underlying circumstances, and to the very terms used. It is a jargon in which a judge must be reeducated before he can proceed to properly understand the basic facts and to render a proper decision.

I am not trying to be facetious when I draw this analogy: most cases are in English, but in patent litigation it is as if the judge is suddenly required to learn Chinese in order to decide a case. Granted, given enough time a judge can obtain a working knowledge of the new language, but in a system where time is of the essence, why should he be required to expend the vast amount of time necessary to do so, especially when there are far more expeditious alternatives? I therefore respectfully disagree with the statement made a couple of years ago by former Judge Simon Rifkind, a most respected and exceptionally talented jurist now in private practice, that there is nothing peculiarly esoteric about the patent law. Judge Rifkind maintained that

the pure patent case is rare, and that most patent cases today are a combination of elements with which most judges are familiar, such as fraud, contracts, and antitrust, and that a judge should be able within a short time to sufficiently train himself to understand those few principles of patent law applicable to his case. He further stated: "Patent law is no more difficult of comprehension than the antitrust law or the securities law or any other branch of the law. It can be read."⁸ Granted, a judge can train himself to understand the principles of patent law, and the patent law can be read. I have no difficulty with the patent *law*, but the patent *facts* cannot be read, and the application of law to those *facts*, absent a knowledge of "patenteese," a knowledge that takes more than a short time to obtain, presents a difficult problem. One cannot suddenly have thrust upon him a complex chemical formula, an intricate device, or an involved piece of machinery, and expect to have a "feel" for its unique characteristics or to deal with the concept of its inventiveness. It is for this very reason that most patent lawyers have undergraduate degrees in some technological area, and no securities or antitrust lawyer, who majored in political science, would ever think of switching to patent law in mid-career. By the same token, someone seeking to litigate a patent would never go to a real estate lawyer for representation. Therefore, I do not believe that justice is best served by requiring patent clients and patent lawyers to try their cases before "patent-ignorant" judges.

I agree wholeheartedly that a federal judge, given his exalted position, should be a good enough lawyer to handle anything that comes his way—and that there is a great danger in segmenting the courts and judges into specialized areas—but such statements beg the question. The issue is not whether a judge can or ought to train himself to properly handle patent cases, but rather whether he should be required to do so given the large amount of time it requires. My thesis then, given the critical drain on judicial time that can be attributed to assignment of patent cases to patent-inexperienced judges, given the uniqueness of patent litigation, and given the alternatives for the preservation of that time, is that patent cases should not be assigned to patent-inexperienced judges.

What are the available alternatives? Several have been suggested. One plan attributed to Judge Caleb Wright of the district court in Delaware would have each district court employ an expert technical consultant whom the judge would consult after hearing all of the evidence. That plan does not appeal to me since I believe that the

⁸ Rifkind, *Improving the Patent System*, 1972 APLA BULL. 604, 683.

delegation of *any* element of the decisional process should be avoided, and the use of the technological interpreter comes too close to allowing such a delegation. The unavailability of adverse cross-examination is a second key consideration in rejecting this proposal.

Another suggested alternative is the hearing of patent suits by a three-judge court, with one judge being patent-oriented. Although such a plan has some merit, it conflicts with the preservation of judicial time. Three-judge courts are peculiar institutions. They involve scheduling problems, since three judges must be able to agree on a given time for trial and, furthermore, they have a tendency to shift responsibility from a single judge as such to the entity of a three-judge court—an entity that seems to exist independent of the individual judges involved. A judge on a three-judge court often never really feels that the case is his, but rather that it belongs to the “three-judge court.” In addition, it seems unwise to require the time of three judges, when one patent-oriented judge could do an adequate job by himself.

A third proposed plan, and probably the most common one, is the creation of a specialized patent court to deal with all patent trials. That plan too falls short of accomplishing what is necessary.

I find Mr. Gausewitz’s recommendation,⁹ one I have advocated for many years, the most appealing. It calls for the appointment, in the large metropolitan multi-judge districts, of one or two patent lawyers to that district court as judges, and either assignment of all patent cases to them, or provision for an option available to judges in their respective districts to whom the case may have been assigned, to either hear or decline to hear patent cases. If they decline, the case is assigned to one of the patent judges. Such a system would free patent-inexperienced judges to uncrowd their overloaded dockets and would be a great benefit, not only to the just and speedy resolution of patent cases, but to the judicial system as a whole.

⁹ See Gausewitz, *supra* note 1, at 1089-90.