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## 1 Size Doesn't Fit All In Patent Trials

Law360, New York (October 28, 2010) -- Our founding fathers recognized the importance of the patent system when they included Clause 8 in Article I, Section 8, of the U.S. Constitution. That clause, which precedes even such important provisions as the Bill of Rights, empowers Congress "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

This guest column discusses how the strong public policy involving patent protection is affected by the simple act of a trial judge limiting trial time for patent cases. The amount of trial time courts allow for patent disputes has a great impact on the patent system and the well-being of the nation's economy.

It would be difficult to find anyone to disagree with the proposition that the time allotted to a jury trial needs to carefully balance the rights of the litigants, jurors and trial judges. On the other hand, arriving at a reasonable balance is not an easy task, especially in patent cases where complicated legal theories and complex technologies are involved.

While judges are in agreement that every case is unique and deserves individual attention, a pattern of distinctly different trial times for patent cases emerges across different district courts.

We recently conducted a survey directed to all district judges in the U.S. regarding the jury trial time allotment.[1] The survey solicited answers to two questions. The first question, with four subparts, asked for an average trial time allotment in: 1) all cases across the docket, 2) simple patent cases, 3) patent cases involving one complex patent and 4) patent cases involving five patents.

The second question asked for the factors considered by the court in setting trial times for patent cases.

Not all of the responses directly answered the questions. Yet others were quite unequivocal. One of the most pointed comments was the following:

"I realize you wouldn't want to write the article unless there were judges somewhere who have decided that 10 or 15 hours is sufficient for any case no matter how complex, but these judges are

outliers."

Despite that comment, our analysis demonstrates that the problem of the allocation of inadequate trial times for complex patent cases might be more prevalent than believed and is not limited to a few outliers.

Most of the responding judges agreed in principle that every case is different and is governed by its own circumstances. The common response was, "It depends on the case."

The factor most frequently listed in deciding on trial time allotment was input from counsel and perceived quality of counsel. Approximately half of those responding listed counsel input as the most important or second to most important factor.

Examples of comments along these lines are as follows:

- 1) "As much time as parties advise."
- 2) "Ask lawyers how much time they thought they needed; give them most of that."
- 3) "I find that the attorneys' estimates are generally pretty accurate."

One judge responded as follows:

"I listen to the lawyers' estimates of the time necessary to try the case. If I think they are asking for too much time for the issues in the case, we will discuss the estimate in detail. I may limit the number of witnesses, including experts, allowed. I do not have a set amount of trial time for any type of case."

Among other factors most often listed as important in the trial time allotment were the number of witnesses, the number and the complexity of the patents, the number of experts, and exhibits.

In terms of the specific time recommendations, 70 percent of the responding judges who indicated an actual number of days or hours allotted per case recommended between seven and 14 days of trial for a simple patent case and about 14 days for a complex patent case.

The lowest recommended trial times were three days for a simple patent case and five days for a complex patent case. At the higher end, one judge indicated that up to three months should be allotted for a complex multipatent case, and another judge indicated that up to 50 hours per side should be allotted for a complex single-patent case.

With the vast majority of trial time recommendations being in a reasonable range and with judges willing to look to the counsel for estimates, it is troubling to see the response of one judge who said, "No trial — even [a] complex tech. patent cas[e] — gets more than 20 h[ours] per side."

After carefully analyzing all responses, we are left with the conclusion that trial times for a patent case vary radically depending on the district and judge to whom a case has been assigned.

One response from the U.S. District Court for the Eastern District of Texas,[2] one of the districts that handles the most patent cases in the country, included a recommendation of "six to 10 hours per side" for a simple patent case, "10 to 12 hours per side" in a complex patent case involving one patent and "12 to 18 hours per side" in a complex patent case involving five patents.[3]

Our research of actual patent jury trials in the Eastern District of Texas showed results consistent with the short trial times reported by the Eastern District of Texas respondent.

Out of 41 patent jury trials conducted in the Eastern District of Texas between January 2004 and June 2010, none exceeded 10 days. Only two had a total duration of nine and 10 days. Twenty-three cases (56 percent) had a total duration of five days or less. In 16 cases (39 percent), the jury trial was completed in six or seven days.

Thus, 95 percent of the patent cases tried in the Eastern District of Texas were completed in seven days or less.

Given the median distribution, it appears that litigants in the Eastern District of Texas are expected to present their side of the case to the jury in two or 2 1/2 days. For example, in *Centocor Ortho Biotech Inc. v. Abbott Laboratories*[4] the jury reached a verdict of infringement of four claims in five trial days with a damage award in excess of \$1.5 billion.[5] The patents involved anti-tumor necrosis factor antibodies.

The jury trial in *Medtronic Vascular Inc. v. Boston Scientific Corp.*[6] concluded in six days. The patents there involved a reinforced monorail balloon catheter. The jury found that nine accused products infringed two claims of one of the four asserted patents, that 10 products infringed eight claims of two asserted patents and that none of the patents were invalid.

The jury awarded \$83 million for infringement of one patent and \$167 million for infringement of the other two patents.

Another jury trial concluded in six days in the *Grantley Patent Holding Ltd. v. Clear Channel Communications Inc.*[7] case. The jury found infringement of two claims of one patent, 15 claims of a second patent and 11 claims of yet a third patent. Furthermore, the jury found willful infringement and no invalidity and awarded in excess of \$66 million in damages.

This trend of high complexity and short trial times seems to extend throughout the docket of the Eastern District of Texas, with only minor exceptions.[8]

Literal infringement, infringement under the doctrine of equivalents, invalidity due to obviousness, lack of novelty, written description, enablement, lost profits and reasonable royalty damages, and willful infringement are just a few arguments well-known to all patent litigators.

According to the survey and data, litigants in the Eastern District of Texas would have to cover all of these issues in a matter of hours.

With all due respect, understanding of those concepts, along with an understanding of the technology behind the patents, the scope of the claims and the mechanism behind the allegedly infringing devices must take more than six days, especially in an adversarial system where two opponents argue for quite opposite conclusions.

In contrast, another district that tries a large number of patent cases, the Central District of California, seems to follow a different jury trial time allotment practice. Out of all patent cases filed between January 2004 and June 2010, nine resulted in a jury trial. Two of those cases entailed a 12-day trial. One case involved a 17-day trial and another an 18-day jury trial. In other words, these four cases averaged 14.75 trial days.

In the *Siemens v. Seagate Technology*[9] case, which exemplifies the trend in the jury trial time allotment in this district, the jury trial concluded after 18 days. The patents involved a magnetoresistive sensor. The jury returned a verdict of invalidity of six asserted claims and finding of no inequitable conduct and awarded no damages.

While an 18-day (or more) jury trial for a patent case is unheard of in the Eastern District of Texas, it is a reality in other districts where the complexity of certain cases calls for this amount of trial time. It is striking that two of the districts that handle the most patent cases in the country have such dramatically different allocations of trial time.

It is true, as one of the judges pointed out, that a long trial involving complex technology can lose the jurors' interest and concentration. But nothing can lose the juror's interest faster than a presentment of complex patent theories and technology in an inadequately short period of time.

Perhaps trial lawyers could never have too much time. Some judges, it would seem, could never have too little. Yet the right balance is critical to a fair resolution on the merits. Due process requires that our court system provide adequate time for the parties to fully explain their positions and for the judges and jurors to fully understand them.

This guest column will have achieved its purpose if it at least causes some retrospective thinking by our federal judges about the extreme importance of granting adequate time for patent trials — particularly where juries are involved.

--By Timothy J. Malloy (pictured), James R. Nuttall and Anna M. Targowska, McAndrews Held & Malloy Ltd.

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[1] Six hundred and seven letters were sent, one to each district judge in the United States. To date (9/15/10), 55 responses (i.e., about 9 percent) have been received. Out of the 55 responses, 34 came from judges who had tried patent cases and provided feedback, and 21 from those who had not.

[2] Another judge provided a response to the survey but had not conducted a patent jury trial within the period referenced in this guest column. The response from this judge indicated much longer trial times, including "usually one week or less" for a simple patent case, "between one and two weeks" in a complex case involving one patent, and "probably two or more weeks" in a complex patent case involving five patents.

[3] According to that respondent, "per side estimates do not include voir dire, opening, or closing arguments. Per side times are only for direct and cross-examination."

[4] Docket No: 2:07-CV-193-TJW.

[5] Assuming 6.5 hours per trial day, this represents a result of over \$4 million per minute of trial time. Even without considering that startling observation, five trial days would intuitively seem a rather uncomfortably short time to determine a \$1.5 billion case.

[6] Docket No: 2:06-CV-78.

[7] Docket No: 9:06-CV-259.

[8] Another recent trial is consistent with our research. In Mirror Worlds LLC v. Apple Inc., Docket No: 6:08-CV-88, the jury reached a verdict of infringement of three patents in five trial days with a damage award in excess of \$600 million. The patents there involved document streaming technology. The jury also found the infringement was willful and that the patents were not invalid.

[9] Docket No: 9:07-CV-788.

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