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THE PATENT PILOT PROGRAM:

WHAT IS IT, IS IT SUCCESSFUL, AND SHOULD IT EVEN EXIST?

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I. Introduction

Patents are notoriously complex. Unsurprisingly, litigation involving patents shares its subject matter's innate intricacies. In the face of rising patent filings and increasingly complicated patent infringement lawsuits, Congress created the Patent Pilot Program (PPP) to combat several perceived shortcomings found among patent cases. The PPP provides a mechanism to channel patent cases to Article III district court judges that have the interest and ability to preside over, often extremely technical, patent cases. Enacted January 5, 2011, the PPP is just over halfway through the initial 10-year trial period.

This article examines several questions raised by the PPP's existence and seeks to evaluate its empirical and anecdotal success. Part II provides an overview of the PPP and the objectives Congress hoped to achieve with its inception. Part III discusses the case against the PPP, including the creation of specialty courts, erosion of random case assignment, and risks associated with dedicated PPP clerks. Part IV adopts an empirical approach for assessing the success of the PPP, using various metrics of judicial expertise and efficiency. Part V presents a number of personal opinions of several Central District of California district judges within the PPP on the PPP's effects on expertise, efficiency, quality of life, and hiring practices. Part VI discusses whether the PPP has been a success and proposes several changes to help further the PPP's goals.

II. The Patent Pilot Program

The Patent Pilot Program (PPP) was established by Pub. L. No. 111-349.[1] Aptly titled "Division of business among district judges," 28 U.S.C. § 137 states that the business of the court is divided among the various district judges with the chief judge ensuring division pursuant to the

[1] Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 (2012) (Historical and Revision Notes).

rules and orders of the court.[2] The PPP, as a note, provides for additional rules of division for those districts that are designated as participants in the program.[3]

The PPP legislation, entitled "Pilot Program in Certain District Courts," first and foremost establishes the creation of the PPP.[4] District judges that request to hear cases with at least one patent issue may be designated by the chief judge; however, the legislation mandates that initially, all patent cases be assigned randomly amongst all the judges of a participating district.[5] If a non-designated judge receives a patent case, that judge may freely decline the case, and the case is then randomly assigned to one of the district's designated judges.[6]

The PPP legislation also provides several criteria for determining which districts are eligible for designation.[7] Participation in the PPP is limited to the 15 district courts with the most active patent case filings or those district courts that have adopted, or intend to adopt, local rules for patent cases.[8] Per the PPP legislation, at least three larger district courts and at least three smaller district courts must be designated.[9]

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[2] 28 U.S.C. § 137.

[3] Pilot Program in Certain District Courts § 1.

[4] *Id.* § 1(a)(1).

[5] *Id.* § 1(a)(1)(A)–(B); *id.* § 1(a)(2) (senior judges are eligible for designation).

[6] *Id.* § 1(a)(1)(C)–(D).

[7] The 13 currently designated districts are: Central District of California; Northern District of California; Southern District of California; Northern District of Illinois; District of Maryland; District of New Jersey; District of Nevada; Eastern District of New York; Southern District of New York; Western District of Pennsylvania; Western District of Tennessee; Eastern District of Texas; and Northern District of Texas. MARGARET S. WILLIAMS, REBECCA EYRE & JOE CECIL, PATENT PILOT PROGRAM: FIVE-YEAR REPORT (2016), https://www.fjc.gov/sites/default/files/2016/Patent%20Pilot%20Program%20Five-Year%20Report%20(2016).pdf [hereinafter FIVE-YEAR REPORT]. The Southern District of Florida withdrew from the program in July 2014. S.D. Fla. Administrative Order 2014-58. "The District of Delaware was the only patent-intense district not included in the Program." Ron Vogel, *The Patent Pilot Program: Reassignment Rates and the Effect of Local Patent Rules*, NYIPLA October/November 2013 Bulletin, 13 (2013), https://stage.nyphia.org/images/nyipla/Documents/Bulletin/2013/OctNov2013Vogel.pdf.

[8] § 1(b)(2)(A)(i), (ii). Patent local rules serve to supplement the Federal Rules of Civil Procedure and local civil rules to "establish the timing and disclosure requirements for infringement and invalidity contentions, production of infringement [and] invalidity related documents, as well as procedures and timetables for Markman proceedings." Travis Jensen, *Basics*, LOCAL PATENT RULES (Aug. 25, 2017), www.localpatentrules.com/basics (reasoning that Congress presumably understood that districts with patent local rules had a concerted interest in patent litigation).

[9] § 1(b)(2)(B)(i), (ii).

The remaining PPP legislative requirements revolve around monitoring and reporting obligations of the Administrative Office of the United States Courts and the Federal Judicial Center concerning several important metrics indicating the efficacy of the PPP, including:

- An analysis of the PPP's success in developing patent expertise among participating district judges;
- An analysis of the PPP's success in improving judicial efficiency due to expertise;
- A comparison of reversal rates by the Federal Circuit on issues of claim construction and substantive patent law between designated and non-designated district judges;
- A comparison of time elapsed from filing until a summary judgment determination or a trial start date between designated and non-designated district judges;
- A discussion on litigant decisions to select certain districts for particular outcomes or reasons; and
- An analysis on whether the PPP should be expanded or made permanent.[10]

A. The Patent Pilot Program's Inception and Purpose

The Patent Pilot Program's pathway to enactment experienced no truly unordinary treatment, but it is worth recounting the steps to fully understand the purpose of this legislation. The U.S. House of Representatives first introduced the bill on January 22, 2009,[11] and then provided the text of the bill on March 17, 2009.[12] A number of House members spoke on behalf of the importance of the bill.

Henry "Hank" Johnson Jr., a Representative of Georgia, emphasized that the United States patent system played a crucial role in the United States' robust economy, but that there existed concerns over the "expense and duration of patent litigations, as well as the lack of consistency in the patent decisions that [were] handed down by district courts."[13] Mr. Johnson cited a belief that a lack of experience and expertise of the district judges represented the primary explanations for the notorious inconsistencies and reversal rates associated with patent cases.[14] Mr. Johnson also

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[10] *Id.* § 1(e)(1)(A)–(E).

[11] 155 CONG. REC. H484 (daily ed. Jan. 22, 2009) (first introduction of bill).

[12] 155 CONG. REC. H3456–57 (daily ed. Mar. 17, 2009) (text of bill provided). As discussed below, several provisions proposed by the House faced removal in the Senate, including: express preservation of a judge's ability to transfer a case, altered district designation criteria, and explicit funding for judicial training and a patent law clerk. *See supra* notes 27–32 and accompanying text.

[13] 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (statement of Rep. Johnson).

[14] *Id.*

stated that the bill would bring predictability and efficiency to patent litigation by providing an opportunity for "interested judges to gain increased expertise in adjudicating complex and technical patent . . . cases" and thus creating "a cadre of judges" with "advanced knowledge of patent . . . protection."[15]

Lamar Smith, a Representative of Texas, bluntly stated that "patent litigation is too expensive, too time consuming, and too unpredictable."[16] Mr. Smith claimed that "less than 1 percent of all U.S. district case courses [were] patent cases" and they "require[d] a disproportionate share of attention and judicial resources."[17] In a succinct statement, Mr. Smith surmised that judges who regularly preside over patent cases "can be expected to make better decisions."[18]

Adam Schiff, a Representative of California, wanted to "improve the [patent litigation] process" by "encourag[ing] some specialization in the district courts."[19] Mr. Schiff noted that the 109th Congress examined proposed solutions to the growing issues in patent lawsuits and that opposed the creation of the program feared the creation of specialized courts.[20] Mr. Schiff dispelled these concerns, stating that the bill aimed "to maintain generalist judges" and "to preserve random case assignment."[21] Mr. Schiff described several goals of the bill: "enhance expertise;" "provide district courts with resources and training to reduce . . . error rates;" and "help reduce the high costs and lost time associated with patent litigation."[22] Ultimately, the legislation would create a "mechanism to steer patent cases to judges that have the desire and aptitude to hear such cases, while preserving the principle of random assignment in order to prevent forum shopping among the pilot districts."[23] Perhaps less flashy, the bill also sought to assess its own success in terms of efficiency and expertise so that Congress could disband, alter, or make permanent the program.[24]

Clearly, the House had a vision for the bill's purpose. The legislation would create a program which would promote judicial efficiency, predictability, and expertise in district judges that elect to routinely hear patent cases while maintaining the core tenants of the federal judiciary. The bill

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at H3458.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

faced little opposition in the House before moving onto the Senate.[25] In fact, the bill had "passed [in the] House overwhelmingly repeatedly," including by the 109th and 110th Congress.[26]

The Senate, however, proposed an amendment to the bill on December 13, 2010 with three main alterations.[27] First, the Senate added language concerning the right to transfer cases that preserved a judge's ability to "request the reassignment of or otherwise transfer a case."[28] Second, the Senate altered criteria for designating participating courts.[29] Specifically, the Senate amended the bill to designate several larger districts, as well as several smaller districts, whereas the original text only included larger districts.[30] This modification effectively expanded the number of districts eligible for inclusion in the program.[31] Lastly, the Senate removed the "Authorization for Training and Clerkships" section in its entirety, thus eliminating explicit funding for educational and professional development of participating judges, as well as explicit compensation for patent law clerks.[32] While the legislative history does not include an overt record indicating the purpose of removing this funding, a possible, and likely, explanation is simply that the Senate felt that a pilot program lacked sufficient justification for such substantial funding.

While the Senate reviewed the bill, several House members again spoke on the goals and importance of the legislation. Judy Chu, a Representative of California, stated that the reversal rate of patent cases hovered near 50 percent and that the program would help "increase efficiency and consistency in patent . . . litigation and reduce the reversal rate[s]."[33] Ted Poe, a Representative of Texas, also referred to the issue of errors, stating that the "rate of reversal on claim construction issues . . . [was] unacceptably high."[34]

The House of Representatives subsequently approved the amended bill,[35] resulting in an effective enactment date of January 4, 2011.[36] Substantively, the Senate's amendment did not alter the intent of the original text of the bill. According to Darrell Issa, a Representative of California and chief sponsor of the bill, "[t]he core intent of this pilot [was] to steer patent cases

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[25] 155 CONG. REC. H3471 (daily ed. Mar. 17, 2009) (voting 409-7 in favor).
[26] 155 CONG. REC. H3456 (daily ed. Mar. 17, 2009).
[27] 156 CONG. REC. S8946–47 (daily ed. Dec. 13, 2010) (amendment to bill).
[28] *Id.*; *cf.* 155 CONG. REC. H3456–57 (daily ed. Mar. 17, 2009).
[29] 156 CONG. REC. S8946 (daily ed. Dec. 13, 2010).
[30] *Id.*
[31] *Id.*
[32] *Id.*; *cf.* 155 CONG. REC. H3456–57 (daily ed. Mar. 17, 2009).
[33] 156 CONG. REC. H8537 (daily ed. Dec. 16, 2010) (statement by Rep. Chu).
[34] *Id.* (statement by Rep. Poe).
[35] 156 CONG. REC. H8762–63 (daily ed. Dec. 17, 2010) (voting 371-1).
[36] Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 (2012) (Historical and Revision Notes).

to judges that have the desire and aptitude to hear patent cases, while preserving random assignment as much as possible."[37] Fittingly, much of the remainder of this article explores various metrics of efficiency and expertise and determines whether the PPP has effectively achieved these goals. Before addressing these ambitions, however, this article investigates concerns surrounding the creation of specialty courts—alluded to by Darrel Issa and Adam Schiff during House approval[38]—along with other risks, such as non-random case assignment and overly persuasive clerks.

III. The Case Against the Patent Pilot Program's Existence

Prior to the enactment of the Patent Pilot Program, and even during its preliminary 10-year period, the PPP faced criticism. While many policymakers and academics have found common ground in the need for judicial reform to remedy inefficiency and inconsistency related to patent actions, there exist serious concerns regarding the PPP as ratified.

A. The Patent Pilot Program as the Creation of Specialty Courts

As alluded to during Congressional approval, various judicial patent reform proposals created a concern that Congress sought specialty courts. Many judges balked at the idea of "a specialized patent trial court" while taking pride as "the last generalists . . . in the legal profession."[39] Despite these fears surrounding judicial patent reform, the PPP appears to strike a clever middle ground that concentrates patent cases among participating generalist judges rather than creating a full specialty court.[40] Patents represent a complex field of law and proponents of the PPP believe that a small investment in specialization is key to remedying deficiencies of patent litigation management, but evidence suggesting that the PPP represents an actual specialty court is sparse. Further, some view the PPP as simply a tool to more efficiently allocate judicial resources, something that is often seen at the state court level in large counties.[41]

Tangentially related is the idea that the PPP creates specialty *districts*.[42] Just one and a half years into the PPP's tenure, several courts and litigants expressed interest in transferring cases to PPP

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[37] 156 CONG. REC. H8539 (daily ed. Dec. 16, 2010) (statement by Rep. Issa).

[38] 155 CONG. REC. H3456–59 (daily ed. Mar. 17, 2009); 156 CONG. REC. H8536–39 (daily ed. Dec. 16, 2010).

[39] Jesse Greenspan, *Specialized Patent Trial Courts Fail To Gain Traction*, LAW360 (Aug. 7, 2008, 12:00 AM), https://www.law360.com/articles/65462.

[40] *Id.*

[41] *See* Interview with Judge F, U.S. Dist. Judge for the Cent. Dist. of Cal., (Sept. 12, 2018). As will be expounded upon below, this article recounts statements made during a series of interviews with district judges. This article uses letter designations for purposes of anonymity and confidentiality.

[42] Peter Scoolidge, *Venue Implications of the Patent Pilot Program*, LAW360 (Oct. 29, 2012, 12:00 PM), https://www.law360.com/articles/389793/venue-implications-of-the-patent-pilot-program.

districts citing those districts' designation status as a factor for the choice of venue.[43] On the other hand, districts are aware that Congress did not intend to "designate specialty patent districts."[44] The Five-Year Report—conducted per the PPP legislation requirements and discussed more fully in Part IV—concluded that some semblance of forum shopping occurred with regard to patent litigation, but that the decisions to choose some PPP districts likely have little to do with designation status.[45]

Specialization is not a foreign concept in the world of patent law. The prosecution and adjudication of patents feature several means of specialization, including the Court of Appeals for the Federal Circuit, the Patent Trial and Appeal Board and *Inter Partes* review,[46] as well as the unofficial 'specialty court' that is the Eastern District of Texas. The PPP represents just another indication that patent litigation requires additional expertise and is a small step closer to the advent of a sanctioned Article III specialty court.

B. Erosion of Random Case Assignment

Random case assignment has long been a tenet of the federal judiciary.[47] While the concept is not a right derived from the Constitution or some other grand instrument,[48] the courts rely on a random assignment system to divide work equally among judges, prevent 'judge-shopping,' avoid judges lobbying for individual cases, and foster generalist skills amongst judges.[49]

Some view the PPP as a device obstructing the random assignment of cases because a non-designated judge can simply decline to hear a case.[50] In fact, the PPP and other Congressional proposals to solve patent litigation woes endured critiques related to random case assignment.[51] However, as one district judge[52] stated, the PPP does not obstruct random case assignment because a patent case undergoes random assignment initially and, even if it is later transferred to

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[43] *Id. See, e.g.*, Compression Tech. Sols. LLC v. EMC Corp., No. 4:11-cv-1579, 2012 WL 1188576 (E.D. Mo. Apr. 6, 2012); Datatreasury Corp. v. Capital One Fin. Corp., No. 6:11-cv-92 JDL, 2012 WL 12841482 (E.D. Tex. Jan. 30, 2012); *cf.* Lewis v. Grote Indus., 841 F. Supp. 2d 1049 (N.D. Ill. 2012).

[44] Lewis, 841 F. Supp. 2d at 1056.

[45] FIVE-YEAR REPORT, *supra* note 7, at 36–38, 37 tbl.33; Appendix A.16.

[46] Note that this process recently withstood a constitutionality challenge in *Oil States Energy Services, LLC v. Greene's Energy Group., LLC*, 138 S. Ct. 1365 (2018).

[47] Katherine Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Has Shaped the Evolution of Stop-and-Frisk Law*, 19 MICH. J. RACE & L. 199, 205–07 (2014).

[48] *Id.* at 208.

[49] *Id.* at 206.

[50] *Id.* at 213.

[51] 155 CONG. REC. H3458 (daily ed. Mar. 17, 2009) (statement of Rep. Schiff) (highlighting concerns regarding generalist expertise of judges and random case assignment).

[52] Interview with Judge C, U.S. Dist. Judge for the Cent. Dist. of Cal. (Nov. 29, 2017).

the PPP, undergoes a second random assignment.[53] The same district judge further remarked that the PPP does not "impede judicial independence" as the judge initially assigned a patent case is free to keep or reject the case.[54] Once a patent case is dismissed by a judge who received it randomly, the case, once again, undergoes random assignment, though this time to a PPP judge.

C. Unduly Persuasive (and Congressionally Unapproved Clerks)

The PPP clerk serves as another source of controversy surrounding the PPP. First and foremost, the mere existence of a PPP clerk is grounds for argument. The Senate amended the text of the legislation in part to remove the explicit compensation for a PPP clerk.[55] Because the bill explicitly eliminated this funding, there is a colorable argument that, not only is there no legislation supporting a PPP clerk, but Congress actually affirmatively disapproved of a PPP clerk. Several designated districts have managed a work around on the budget front, but the question remains whether the PPP clerk violates the will of Congress.[56]

Beyond this issue, though, is one that permeates all judicial chambers: the notion that an individual clerk can be unduly persuasive as a result of an increasing "role in the opinion-writing process."[57] The troubling effect of this trend is that "young, inexperienced lawyers" have increasing influence on the "development of the common law."[58]

This concern is exacerbated by the scope of the PPP, which handles 76 percent of all patent cases in participating districts.[59] If a single clerk has a part in up to three-fourths of all patent cases in a district, then that clerk has a sizable ability to inadvertently move a district toward a certain direction with respect to patent outcomes.[60] In some ways, this consistency might be a net

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[53] *Id.*

[54] *Id.*

[55] *Compare* 156 CONG. REC. S8946–47 (daily ed. Dec. 13, 2010) *with* 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (explicitly providing for "compensation of law clerks" in the proposed section 1(f)).

[56] The removal of the PPP clerk funding may not be Congress taking a position against the existence of a PPP clerk, rather it may simply be a budget decision related to the uncertainty of pilot programs. Also of note, only the Central and Northern Districts of California have dedicated PPP clerks as of current.

[57] Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 142 (2014).

[58] *Id.* at 144. Note that each district judge in the Central District of California relies on the PPP clerk in a different capacity, due to both the nature of how individual chambers are run and the preference of the judge for whether their elbow clerks should also be involved in patent case management.

[59] FIVE-YEAR REPORT, *supra* note 7, at 38. Note that this statistic is a reflection of *all* patent cases in PPP districts, while some districts see less. For example, the PPP in the Central District of California handles only about half.

[60] Note that there are designated judges that keep their patent cases entirely in house which would of course reduce the influence a PPP clerk might possess.

benefit, but the level of impact a single clerk could have on an entire area of law in a given district is alarming.

An ideal PPP clerk has five to seven years of experience as a patent attorney.[61] This is a stark contrast to an average elbow clerk fresh out of law school with little to no practice experience.[62] Assuming the PPP clerk falls at or near this ideal level of skill, then the concerns regarding inexperience guiding the law eases. At the bare minimum, the PPP clerk has proficiency in a particular subject matter, while newly minted elbow clerks likely have none in any field of law. This experience may come at a cost, however, as the recognition of a PPP clerk's expertise by a judge may result in greater deference to the PPP clerk's counsel.

IV. An Empirical Look at The Success of the Patent Pilot Program

Because the Patent Pilot Program's enactment revolved around such clear desires to increase judicial expertise and efficiency,[63] it only makes sense to observe the PPP's success at meeting those metrics. As mandated by Pub. L. No. 111-349, the Administrative Office of the United States Courts and the Federal Judicial Center issued a report (Five-Year Report) in 2016—five years after the bill's enactment—that chronicles various data of interest "for all patent cases filed on or after the individual PPP start date designated by each of the 13 current pilot courts through January 5, 2016."[64] This Five-Year Report reveals many key results of the PPP's initial five years, so, coupled with data compiled from Docket Navigator,[65] a picture of the PPP's achievements can be drawn.[66]

[61] Interview with Patent Pilot Program Clerk, Cent. Dist. of Cal. (Nov. 30, 2017). In some ways, identifying that this level of experience is desired is a recognition that patent litigation requires unique expertise beyond the capabilities of most new graduates. Moreover, this increased experience helps mitigate the concerns that judicial clerks comprise a homogenous age range 26 to 30 leaving "no middle cohort" to spread the age gap between clerk and judges. Yoon, *supra* note 57, at 140–41.

[62] Yoon, *supra* note 57, at 138.

[63] *See supra* Part II.A.

[64] FIVE-YEAR REPORT, *supra* note 7, at v. The Southern District of Florida withdrew from the program in July 2014. S.D. Fla. Administrative Order 2014-58.

[65] DOCKET NAVIGATOR (Nov 19, 2017), http://docketnavigator.com.

[66] Note that an unavoidable confounding variable exists in the presentation of data from the Five-Year Report as the District of Delaware, a district with a high volume and sophisticated management of patent cases, opted to remain undesignated. This means that the District of Delaware is included in data related to non-PPP cases and districts which may inflate statistics related to those categories.

A. Expertise of Participating Judges

As proclaimed during Congressional approval of Pub. L. No. 111-49, increased expertise of interested judges formed a significant motivation for the legislation.[67] The sponsoring members of Congress indicated several expertise-bolstering effects provided by the bill, including funneling patent cases to judges with the most experience hearing them and that actually want to hear them,[68] but also by affording judges that do not have or do not feel that they have the aptitude to preside over patent cases an opportunity to withdraw freely.[69]

1. Who is Hearing Patent Cases?

The Five-Year Report includes several data compilations relating to the PPP's ability to attract judges with the most patent experience.[70] As a baseline, the Five-Year Report determined that, as of January 5, 2016, 66 judges had elected to participate in the PPP as designated judges.[71] On average, this means that one-fifth of eligible judges served as PPP judges during the first five years of the PPP.[72] The obvious follow-up is whether the twenty percent of eligible judges that participated in the PPP are the judges that have displayed expertise, or at the minimum, experience presiding over patent cases.

According to the Five-Year Report, about half of judges participating at the outset of the PPP had seen between 0 and 50 patent cases prior to the PPP.[73] About a fourth had seen 51 to 100 patent cases and about a sixth had seen 101 to 150.[74] The remaining seventh of similarly situated judges had seen anywhere from 151 to over 350 cases.[75] This general distribution remained somewhat constant through the first five years of the PPP for the first three buckets of judicial

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[67] *See supra* Part II.A.

[68] *Id.*

[69] Presumably, this is to avoid judges that have no interest or reduced practice from making determinations concerning unfamiliar subject matter that would consequently be more likely to be reversed on appeal.

[70] FIVE-YEAR REPORT, *supra* note 7, at 2–7.

[71] *Id.* at 2. This figure does not include 24 additional judges that served as designated judges, but had left the PPP, either by retirement or otherwise, by January 5, 2016.

[72] *Id.* Eligibility extends to both district and senior district court judges. *See also* FIVE-YEAR REPORT, *supra* note 7, at 3 tbl.1; Appendix A.1.

[73] FIVE-YEAR REPORT, *supra* note 7, at 4 fig.1; Appendix A.2.

[74] FIVE-YEAR REPORT, *supra* note 7, at 4 fig.1; Appendix A.2.

[75] FIVE-YEAR REPORT, *supra* note 7, at 4 fig.1; Appendix A.2. Districts such as the Eastern District of Texas had, by this point, seen an abnormal number of patent cases due to a variety of factors including the allure of speedy local patent rules, Non-Practicing Entity litigation strategies, and a perception of pro-plaintiff outcomes. Daniel Nazer, *Why Patent Trolls Love East Texas … and Why Congress Needs to Fix It*, TECHDIRT (Aug. 18, 2015, 9:24 AM), https://www.techdirt.com/articles/20150817/15454131989/why-patent-trolls-love-east-texas-why-congress-needs-to-fix-it.shtml.

experience, with the 151 to over 350 category jumping to roughly a fifth of the designated judges.[76] This notable increase in the class signaling the most experience with patent cases indicates that the PPP has aided in providing participating judges with more patent experience just by sheer volume.

One of the goals of the PPP, however, included creating a "cadre of judges" with patent expertise,[77] so it is useful to look at the overall patent litigation experience of the designated judges as compared to the non-designated judges. Fortunately, the Five-Year Report also compiled data comparing these two camps.[78] When observing the patent experience of designated judges alongside non-designated judges by January 5, 2016, the designated judges had more patent experience on average in nearly every participating district, though the effect is not particularly strong.[79] Those judges designated at the outset of the PPP began with more patent litigation experience than non-designated judges and the PPP has provided a mechanism for designated judges to accrue more experience at an accelerated rate.[80] Moreover, 76 percent of all patent cases filed in a participating district during these first five years have been before a PPP judge, meaning that three-fourths of all patent cases find their way to a judge likely to have more patent experience.[81] Overall, the Five-Year Report concluded that the PPP has been successful at "assign[ing] patent cases to experienced jurists."[82]

2. Are Participating Judges Getting it Right?

Another indication of judicial expertise is the reversal rate of individual decisions. The high reversal rates associated with patent cases contributed to many sponsoring legislators' desire to

[76] FIVE-YEAR REPORT, *supra* note 7, at 5 fig.2; Appendix A.3.
[77] 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (statement by Rep. Johnson).
[78] FIVE-YEAR REPORT, *supra* note 7, at 6 fig.3, 7 tbl.2; Appendices A.4, A.5.
[79] FIVE-YEAR REPORT, *supra* note 7, at 6 fig.3, 7 tbl.2; Appendices A.4, A.5. The designated judges of the Northern District of California, Eastern District of New York, and Western District of Pennsylvania have *less* patent experience, possibly due to experienced designated judges leaving the bench resulting in the exclusion of those judges' patent statistics from these calculations.
[80] FIVE-YEAR REPORT, *supra* note 7, at 38. The PPP does not handle every patent case in participating districts because the cases are still initially assigned randomly and a non-designated judge may opt to still hear the patent case. However, the first two years of the PPP saw approximately 31 percent of patent cases reassigned to designated judges in PPP districts. Vogel, *supra* note 7, at 13.
[81] FIVE-YEAR REPORT, *supra* note 7, at 32.
[82] *Id.*

institute the PPP.[83] Presumably, more practiced judges can more consistently reach correct determinations and, therefore, would see a lower percentage of decisions reversed on appeal.[84]

As indicated above, the PPP handles over 76 percent of patent cases in designated districts.[85] Despite managing the overwhelming majority of patent cases, the PPP cases only result in 57 percent of the total appeals meaning that PPP cases see less appeals per case than non-PPP cases.[86] This appears to be a clear victory for the expertise goals associated with the PPP as it is a sign that the more experienced judges participating in the PPP have acquired greater consistency in correct rulings relative to their non-designated counterparts. However, as the Five-Year Report makes clear, many confounding variables involved with analyzing appeals make this particular data difficult to draw conclusions from.[87]

Regardless of muddling variables, a look at the results from appeals to the Court of Appeals for the Federal Circuit[88] reveals that PPP cases and non-PPP cases fare equally as well upon review.[89] Affirmations for cases coming from both the PPP and outside the PPP occur at a rate of 72 percent, indicating that both groups have achieved increased consistency in correct rulings.[90] If more lenient appellate decisions—such as affirmations in part and dismissals of appeals—are considered, then PPP decisions are upheld at a rate of 91 percent and non-PPP decisions at a rate of 88 percent; a statistically insignificant difference.[91]

Because the Five-Year Report does not offer conclusive findings when comparing PPP cases with non-PPP cases, it is useful to look to other comparisons for additional insights. One such comparison is the rate of affirmance (or reversal) of patent cases prior to January 4, 2011 against the rate of affirmance (or reversal) of patent cases within the PPP after January 4, 2011. As

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[83] *See supra* Part II.A.

[84] "[C]oncern has arisen over . . . the lack of consistency in the patent decisions that are handed down by the district courts. This bill should help address . . . th[is] concern[]." 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (statement of Rep. Johnson).

[85] FIVE-YEAR REPORT, *supra* note 7, at 32.

[86] *Id.*

[87] *Id.* at 34–35. The Five-Year Report cites "[r]esources, likelihood of success, [and] circuit law" as factors relating to a litigant's decision to appeal. Moreover, the data does not indicate whether appeals are based on substantive patent law or merely procedural deficiencies, plus the data fails to parse out multiple appeals for a single case, thus resulting in additional noise. *Id.*

[88] The Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals involving matters relating to patents. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

[89] FIVE-YEAR REPORT, *supra* note 7, at 36 tbl.32; Appendix A.15.

[90] FIVE-YEAR REPORT, *supra* note 7, at 36.

[91] *Id.* A lack of statistical significance here means that the differences in the two groups of data are unable to be attributed to a true difference or simply to chance. Jeff Sauro, *What Does Statistically Significant Mean?*, MEASURINGU (OCT. 21, 2014), https://measuringu.com/statistically-significant.

described above, the rate of affirmance in PPP districts amounted to 72 percent, or 91 percent when including affirmations in part and dismissals.[92] According to Representative Judy Chu of California, the reversal rate for patent cases hovered near 50 percent prior to January 4, 2011.[93] If this assertion is even remotely accurate, then the PPP judges have definitively seen a marked increase in the ability to consistently make correct determinations. The same can be concluded for non-PPP judges, indicating that the success may not be due exclusively to the PPP's existence, but perhaps due to other factors, such as changes in patent law or increased experience across the board.

Another study found that, in reality, the pre-PPP reversal rates did not differ dramatically from other private civil litigation reversals.[94] Specifically, the cited reversal rate for patent cases, ranged from 8–18 percent, fell at or below the average rate of "private civil actions, particularly complex ones, like bankruptcy, securities, and contracts cases."[95] This study also found that a few key issues—claim construction, indefiniteness, attorney fees, and § 102(a) prior art—possessed much higher reversal rates ranging from 29–36 percent.[96] This study helps dispel the rumor that an appeal to the Federal Circuit resulted in a "coin flip." Moreover, the author of this study posited that the notion of high reversals stemmed from highly publicized claim construction and obviousness reversals, as well as exclusion of summary affirmances from other reversal studies.[97] Regardless, comparing these pre-PPP reversal rates to the current rates reveals somewhat stable outcomes. It appears that, despite Congress' efforts, the PPP has not dramatically changed the reversal rates, but, perhaps more promising, the need for more consistency amongst appeals appears to be exaggerated.

B. Efficiency of Participating Judges

Another hopeful effect of the PPP, as expressed during Congressional approval, is the increased efficiency of patent case management and disposition.[98] Efficiency is a broad term, so it is worth looking to multiple proxies that would indicate changes in productivity. As cited by Representative Lamar Smith of Texas, patent cases monopolized resources as both "too expensive" and "too time consuming."[99] Observing the changes in time to key dispositions—such as Markman hearings, summary judgment, trial, and case termination—may shed light on any alleviation of time and expenses. Moreover, observing the rate of appeals may demonstrate

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[92] FIVE-YEAR REPORT, *supra* note 7, at 36.

[93] 156 CONG. REC. H8537 (daily ed. Dec. 16, 2010) (statement of Rep. Chu).

[94] Ted Sichelman, *Are Appeals at the Federal Circuit a "Coin Flip"?,* PATENTLYO (Apr. 9, 2010), https://patentlyo.com/patent/2010/04/are-appeals-at-the-federal-circuit-a-coin-flip.html.

[95] *Id.*

[96] *Id.* Note that § 102(a) prior art includes patentability bars related to novelty.

[97] *Id.*

[98] *See supra* Part II.A.

[99] 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (statement by Rep. Smith).

whether the PPP has aided in mitigating the burden patent litigation places on the judicial system as a whole.

1. Case Duration Comparisons Between Patent Pilot Program Cases and Non-Patent Pilot Program Cases

Reducing the length of time to patent case milestones would have multiple positive outcomes. Among them, the costs—both time and money—to the court and litigants decreases, litigants gain predictability and strategic information for purposes of evaluating a potential lawsuit, and the court reduces the ever-expanding and notorious district court caseload.[100] Again, the Five-Year Report provides several valuable insights into the effects of the PPP.[101]

The Five-Year Report compares the case duration of patent lawsuits between designated and non-designated judges.[102] First, a look at the number of days the judge actually spent on the case indicates the burden a patent case puts on the judge's time. For time spent on *pending* cases, PPP cases stole less time from the presiding judge than non-PPP cases.[103] For instance, 45 percent of PPP cases took 31 to 180 days of a judge's time, compared to only 31 percent for non-PPP cases.[104] Perhaps more striking, nearly a third of non-PPP cases took over 365 days of a judge's time, while only 16 percent of PPP cases did the same.[105] This indicates that PPP cases are more likely to take less time from a judge, and, perhaps more importantly, shows that PPP cases less often toil in the judicial system for over a year.[106]

A similar pattern emerges in regard to the number of days a judge spends on a case that had *terminated* by January 5, 2016.[107] Nineteen percent of PPP cases are terminated within 181 to 365 days of judge time compared to a paltry 9.2 percent of non-PPP cases.[108] Eighty-eight percent of non-PPP cases consume over 365 days of judge time, while PPP cases reduce that rate

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[100] John Roberts, *2016 Year-End Report on the Federal Judiciary*, SUP. CT. OF THE U.S. (Dec. 31, 2016), https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf.

[101] *See generally* FIVE-YEAR REPORT, *supra* note 7, at 19 tbls.10 & 11, 20 tbls.12 & 13, 22 tbls.15 & 16; Appendices A.7–A.12. The Five-Year Report also performed a statistical analysis to determine if stays had any statistically significant effect on the following conclusions, but found no significance. FIVE-YEAR REPORT, *supra* note 7, at 20.

[102] FIVE-YEAR REPORT, *supra* note 7, at 19 tbls.10 & 11, 20 tbls.12 & 13, 22 tbls.15 & 16; Appendices A.7–A.12.

[103] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.10; Appendix A.7.

[104] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.10; Appendix A.7.

[105] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.10; Appendix A.7.

[106] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.10; Appendix A.7.

[107] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.11; Appendix A.8.

[108] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.11; Appendix A.8.

to 77 percent.[109] Cases in the PPP are terminated faster and are much more likely to terminate within a year relative to cases outside of the PPP.[110]

Of course, the literal time of the judge that patent cases dominate is crucial, but it is also worth examining the total case duration as a representation of the burden patent litigation pace plays on litigants and the judicial system altogether. For cases *pending* as of January 5, 2016, 44.5 percent of PPP cases took 31 to 180 days compared to just 30.5 percent for non-PPP cases.[111] Again, non-PPP lasted much longer than PPP on average with 40 percent lasting more than a year compared to only 22 percent for PPP cases.[112]

A similar trend arises from the case duration of patent cases reaching *termination*.[113] Over five percent more cases terminate within 31 to 180 days if they are part of the PPP.[114] And unsurprisingly, non-PPP cases require more than a year to reach termination nine percent more often than PPP cases.[115] This again reflects the notion that cases in the PPP are more likely to terminate earlier and less likely to labor in the judicial system for extended periods of time. These results are positive for litigants because shorter cases reduce the cost of litigation. Ideally, this reduces certain barriers of entry for parties with meritorious claims that otherwise could not stomach prolonged court battles, but given the many confounding variables associated with patent litigation this may be a stretch.

It is also important to note that the increased expertise of designated judges,[116] whether through participation in the PPP or from a proficiency pre-dating the PPP, likely plays a vital role in reducing the case duration of PPP cases.[117] Designated judges spend, on average, 66 less days on *pending* cases and 30 less days on cases that *terminate* than their non-designated peers.[118] Surprisingly, however, there is no strong correlation with patent experience—when grouped into below-average, average, and above-average buckets of patent experience as measured by number of cases—and case duration.[119] This lack of association appears be related to the effect of the below-average camp's data, despite comprising only a small number of the total patent cases.[120]

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[109] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.11; Appendix A.8.
[110] FIVE-YEAR REPORT, *supra* note 7, at 19 tbl.11; Appendix A.8.
[111] FIVE-YEAR REPORT, *supra* note 7, at 20 tbl.12; Appendix A.9.
[112] FIVE-YEAR REPORT, *supra* note 7, at 20 tbl.12; Appendix A.9.
[113] FIVE-YEAR REPORT, *supra* note 7, at 20 tbl.13; Appendix A.10.
[114] FIVE-YEAR REPORT, *supra* note 7, at 20 tbl.13; Appendix A.10.
[115] FIVE-YEAR REPORT, *supra* note 7, at 20 tbl.13; Appendix A.10.
[116] *See supra* Part IV.A.
[117] FIVE-YEAR REPORT, *supra* note 7, at 21–22.
[118] FIVE-YEAR REPORT, *supra* note 7, at 22 tbl.16; Appendix A.12.
[119] FIVE-YEAR REPORT, *supra* note 7, at 22 tbl.15; Appendix A.11.
[120] The below-average category certainly includes newer judges that have simply not accrued, by natural case assignment, the quantity of patent cases required to place in the average group. These newer judges

Comparing the above-average to average camps the pattern reemerges and it is clear that more experienced judges terminate cases earlier and see a lower rate of prolonged litigation.[121]

2. Time to Milestone Comparisons Between Patent Pilot Program Districts and Non-Patent Pilot Program Districts

Docket Navigator delivers an even more granular view of efficiency by providing data for individual case milestone averages across districts, as well as affording pre-PPP and post-PPP comparisons.[122] First, a look at the time to milestones pre-PPP by (future) designation status forms a baseline to then view the effects of the PPP on those district groups.

Table 1: Average Time to Milestones, January 1, 2008 through January 4, 2011

Average Time to Milestones in Months by Future District Group, January 1, 2008 through January 4, 2011				
(in months)	**Future Non-PPP Districts**	**Future PPP Districts**	**All Districts**	**Future PPP v. Non-PPP**
Claim Construction	22.7	21.8	22.8	-0.9
Summary Judgment (P)	31.3	34.2	33.1	2.9
Infringement (P)	24.6	25.9	26.1	1.3
Valid (P)	26.3	23.6	25.4	-2.7
Enforceable (P)	23.5	24.5	25	1
Summary Judgement (D)	31.6	31.1	31.6	-0.5
Noninfringement (D)	33.8	31.3	32.8	-2.5
Invalid (D)	34.3	27	30	-7.3
Unenforceable (D)	60.3	29.6	47.9	-30.7
Jury Trial	36.8	32	35.1	-4.8
Bench Trial	40.5	40.2	44.9	-0.3
Likely Settlement	11.8	11.6	12	-0.2
Mature Termination	33.5	31.3	32.9	-2.2

Table 1 above shows districts that would ultimately be designated as participants in the PPP enjoyed quicker times to milestones for many key moments in a patent lawsuit's course. A likely explanation for this is that one of the designation criteria for the PPP revolved around districts that heard the most patent cases or districts with local patent rules.[123] It makes sense that districts fitting that criteria would show increased efficiency simply due to interest, expertise, and procedural support mechanisms. Surprisingly, summary judgement in favor of the

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may benefit from newer developments in patent law, both common law and statutory, designed to increase the speed of patent litigation.

[121] FIVE-YEAR REPORT, *supra* note 7, at 22 tbl.15; Appendix A.11.

[122] DOCKET NAVIGATOR (Nov 19, 2017), http://docketnavigator.com. Of note, Docket Navigator does not permit the separation of data between PPP cases and non-PPP cases, so comparisons among participating *districts* is the next best assessment. This unquestionably introduces noise; however, because the PPP handles nearly three-fourths of the patent cases in participating districts, the effect on these results is likely minimal.

[123] Vogel, *supra* note 7, at 13.

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patentee and a finding of infringement occurred in fewer months in districts that would not ultimately become part of the PPP. Regardless, overall, this data comparison indicates that future PPP districts already exercised some extra degree of efficiency when measured by average time than districts that ultimately went undesignated.

Table 2: Average Time to Milestones, January 5, 2011 through November 19, 2017

Average Time to Milestones in Months by District Group, January 5, 2011 through November 19, 2017				
(in months)	**Non-PPP Districts**	**PPP Districts**	**All Districts**	**PPP v. Non-PPP**
Claim Construction	20.6	18.1	19.4	-2.5
Summary Judgment (P)	29.1	23.9	26.4	-5.2
Infringement (P)	20.4	18.6	19.5	-1.8
Valid (P)	21.6	17.3	19.2	-4.3
Enforceable (P)	15.7	12.9	14.1	-2.8
Summary Judgement (D)	26.8	22.8	24.6	-4
Noninfringement (D)	24	23.4	24.7	-0.6
Invalid (D)	23.8	18.8	20.9	-5
Unenforceable (D)	50.9	22.5	69.5	-28.4
Jury Trial	33.6	27.3	30.3	-6.3
Bench Trial	31.4	30.8	31.8	-0.6
Likely Settlement	7.6	6.8	7.2	-0.8
Mature Termination	19.2	16.5	17.8	-2.7

Table 2 reveals more meaningful conclusions regarding the PPP. The obvious takeaway is that every single key milestone occurs more quickly on average in PPP districts than in non-PPP districts. This supports the stated goal of increased efficiency in light of concerns that patent litigation had become too time consuming for both courts and litigants.[124] Not only are PPP districts reaching key dispositions more quickly, but, as compared to the pre-PPP data of Table 1, the difference between how much faster the PPP districts are relative to the non-PPP districts has increased for nearly every single metric over the sampled time range.[125] This revelation may support the other prong of Congress' objective and shows that these designated districts' experience increased efficiency through increased expertise.

If efficiency is sufficiently measured in part by time to milestones, then the PPP has clearly increased the efficiency with which patent litigation is handled. Designated districts not only see most patent cases,[126] but they dispose of them faster and save every involved party costs and

[124] 156 CONG. REC. H8537 (statement of Rep. Chu).

[125] *See* FIVE-YEAR REPORT, *supra* note 7, at 3 tbl.1; Appendix A.1. For example, pre-PPP, the future PPP districts reached likely settlement 0.2 months before non-future PPP districts. Post-PPP, PPP districts reached likely settlement 0.8 months before non-PPP districts. This means that PPP districts did not merely keep pace with their quicker time to settlement, but increased the gap. This trend is true across the board.

[126] FIVE-YEAR REPORT, *supra* note 7, at at 38–39.

time. Whether the increased efficiency is sufficient for the goals of the program is another question that would need to be addressed by the sponsoring members of Congress.

3. Time to Milestone Comparisons Before and After the Patent Pilot Program's Inception

It is also useful to examine the changes both groups of districts have seen since the formation of the PPP. Tables 1 and 2 above demonstrated that designated districts generally reach various milestones more quickly than their non-designated counterparts. Table 3 below looks at how those groups' time to milestones have changed before and after the creation of the PPP on January 5, 2011.

Table 3: Change in Average Time to Milestones

Change in Average Time to Milestones in Months by District Group, January 1, 2008 through January 4, 2011 v. January 5, 2011 through November 19, 2017				
(in months)	Non-PPP Districts	PPP Districts	All Districts	PPP v. Non-PPP
Claim Construction	-2.1	-3.7	-3.4	-1.6
Summary Judgment (P)	-2.2	-10.3	-6.7	-8.1
Infringement (P)	-4.2	-7.3	-6.6	-3.1
Valid (P)	-4.7	-6.3	-6.2	-1.6
Enforceable (P)	-7.8	-11.6	-10.9	-3.8
Summary Judgement (D)	-4.8	-8.3	-7	-3.5
Noninfringement (D)	-9.8	-7.9	-8.1	1.9
Invalid (D)	-10.5	-8.2	-9.1	2.3
Unenforceable (D)	-9.4	-7.1	21.6	2.3
Jury Trial	-3.2	-4.7	-4.8	-1.5
Bench Trial	-9.1	-9.4	-13.1	-0.3
Likely Settlement	-4.2	-4.8	-4.8	-0.6
Mature Termination	-14.3	-14.8	-15.1	-0.5

On average, time to milestones in patent lawsuits has reduced significantly since the introduction of the PPP, regardless of designation. This is a surprising, but pleasant result. This means no matter where a litigant files a patent lawsuit, that litigant can expect a much shorter battle than in the past. This blanket improvement may be explained by various factors, particularly the adoption of earlier Markman hearings in many PPP cases,[127] as well as changes in case law and statutory schemes such as the America Invents Act. Despite the drastic improvements seen in non-PPP districts, most key milestones see a more dramatic increase in speed in PPP districts.[128] This is another win for the PPP as it indicates that the PPP routinely handles patent cases with greater speed. When looking at case durations, it is even clearer how successful the PPP has been at reducing the cost and time of patent litigation. When compared to the pre-enactment

[127] *Id.* at 23–25.

[128] With the exception of findings of noninfringement in favor of the non-patentee, invalidity in favor of the non-patentee, and unenforceability in favor of the non-patentee.

times to milestones, patent cases in PPP districts terminate an average 0.3 months to 1.5 years earlier than those in non-PPP districts.[129]

A major caveat of the information from Tables 1–3 is that the data represents district-wide averages meaning that time to milestone data of patent cases heard by non-designated judges within a PPP district are ultimately included. This could obviously have a deleterious effect on the PPP average time to milestones if the non-PPP judges—who are presumably less experienced as they have not seen the same volume of cases that PPP judges have—routinely require longer amounts of time to dispose of patent cases. It is unclear what effect, if any, this phenomenon may have on the compiled data, but since the vast majority of patent cases in a PPP district pass through designated judges,[130] there is a strong possibility that the effect is minor or non-existent.

V. An Anecdotal Sampling of Judges' Opinions on the Patent Pilot Program's Efficacy

While the numbers certainly indicate that the Patent Pilot Program is easily on pace to accomplish its multiple goals, it is worth examining the effect the PPP has on those performing-the legwork, the district judges.[131] Judges participated in short interviews designed to extract personal views on the success of the PPP from the perspectives of expertise and efficiency, as well as to determine the value of the PPP clerk. Judges also answered questions relating to their personal reasons for participating in the PPP and what the PPP's future is or should look like.

Obviously, the most useful candidates to answer the questions posed by this article are the participating judges. These judges witness first-hand how the PPP affects individual patent lawsuits and are a repository of anecdotal information on the benefits and caveats of the PPP. As identified below, many of the interviewed PPP judges find patent cases interesting and that the PPP has been a resounding success that should be continued with some minor alterations.

[129] A case is deemed complete at one of the following junctures: Jury Trial, Bench Trial, Likely Settlement, and Mature Termination.

[130] FIVE-YEAR REPORT, *supra* note 7, at 38.

[131] Six PPP judges in the Central District of California were interviewed over the period from November 27, 2018 to September 12, 2018. To preserve anonymity and judicial confidentiality they are referenced as Judge A, Judge B, Judge C, Judge D, Judge E, and Judge F. In some parts, for added precaution, judges will not be specified by name or letter. Unfortunately, due to scheduling and access constraints, no judges outside of the PPP could be interviewed. Interviews with non-PPP judges were planned and designed to determine the reasons for not participating, efficiency increases due to the lack of patent cases, any changes to hiring practices given the ability to send patent cases to the PPP, and any changes related to the enjoyment of judging and/or life as a result of the ability to avoid patent cases.

A. Reasons for Participating

The first question in each interview with a PPP judge asked for that judge's reason(s) for opting into the PPP program and electing to take on more patent cases.[132] Unsurprisingly, nearly all of the PPP judges cited that patents— both the field of law and the accompanying subject matter — interested them.[133] Judge A stated that, while patent lawsuits can pose difficult questions of law and technology, the quality of attorneys typically found in patent cases act as an additional draw.[134] Specifically, Judge A believes that strong counsel routinely appear in patent lawsuits due to the large monetary stakes and a relatively small bar that prevents certain types of "shenanigans" from occurring.[135] Judges B and C also stated that quality lawyering represented an appeal to patent cases.[136] Additionally, Judge C finds that patent litigation represents a "cutting-edge" area of the law and of innovation, and further believes that the United States economy heavily relies on patents and the protection of intellectual property in general.[137]

Judge D described himself as a "frustrated scientist" who left the world of math and technology in lieu of the law, but always enjoyed the sciences.[138] Judge D presented very strong views on the importance of patents, stating that patents are "where the money and the action are" from Orange County all the way to the global economy.[139] Judge D equated the current progression of 35 U.S.C. § 101 law to the creation of basic tenets of property "500 years ago upon the grounds of Blackacre."[140] As a final reason, Judge D stated that he has a duty to serve the people and that, through the creation of the PPP, Congress has asked for a "modest degree of specialization."[141] To cap off his justification for joining the PPP, Judge D simply asked, "Why would you not want to be a patent judge?"[142]

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[132] *See* Appendix D.

[133] Interview with Judge A, U.S. Dist. Judge for the Cent. Dist. of Cal. (Nov. 27, 2017); Interview with Judge B, U.S. Dist. Judge for the Cent. Dist. of Cal. (Nov. 27, 2017); Interview with Judge C, *supra* note 52; Interview with Judge D, U.S. Dist. Judge for the Cent. Dist. of Cal. (Nov. 29, 2017); Interview with Judge E, U.S. Dist. Judge for the Cent. Dist. of Cal. (April 9, 2018); Interview with Judge F, *supra* note 41.

[134] Interview with Judge A, *supra* note 133.

[135] *Id.*

[136] Interview with Judge B, *supra* note 133; Interview with Judge C, *supra* note 52.

[137] Interview with Judge C, *supra* note 52.

[138] Interview with Judge D, *supra* note 133.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

Judge E expressed that the motivation to join the PPP included a desire to be exposed to additional areas of the law.[143] On the other hand, Judge F, who specialized due to need in particular areas while occupying a prior judge position, joined the program because of a recognized need and after encouragement to join from colleagues.[144]

As expected, many of the PPP judges find interest in the various technologies that accompany patent lawsuits, as well as the intellectual challenges of an ever-changing area of law. Several of the PPP judges appreciate the quality of litigants associated with patent cases, which, in retrospect, is not very unexpected. Sophisticated parties may alleviate at least some of the inherent substantive and procedural complexities of patent lawsuits.

B. Expertise and Efficiency

Next, the PPP judges answered questions related to their personal changes in expertise and efficiency in the context of patent cases since their participation in the PPP.[145] In terms of effects on expertise, Judge A indicated some skepticism stating that it is difficult to determine an increase in expertise if success is measured by reversals because this requires assuming that the Federal Circuit is consistently ruling correctly on appeals.[146] Regardless, Judge A indicated that the PPP clerk provides additional expertise when necessary.[147]

Judge B stated that the PPP unquestionably reached its objective to increase expertise by funneling patent cases to interested judges.[148] Judge B noted that the sheer increase of volume of patent cases is a primary candidate for the increased expertise and that the volume permits greater comfort with patent cases.[149]

Judge C also stated at least some personal increase in expertise in patent cases due to the PPP, attributing the increase as a by-product of the enhanced volume of cases.[150] In particular, the greater volume leads to a greater focus on case law developments. Regarding an improved ability to understand complex technologies, Judge C believed that there is no significant change, mostly due to consistent use of technology tutorials.[151]

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[143] Interview with Judge E, *supra* note 133.
[144] Interview with Judge F, *supra* note 41.
[145] *See* Appendix D.
[146] Interview with Judge A, *supra* note 133.
[147] *Id.*
[148] Interview with Judge B, *supra* note 133.
[149] *Id.*
[150] Interview with Judge C, *supra* note 52.
[151] *Id.*

Judge D also indicated a personal development of expertise due largely to the increased volume of patent cases.[152] Judge D playfully described the progression of expertise as moving first from a position of "hmm, I don't get this," to a recognition of when attorneys attempt to be clever or "play games."[153]

Judge E described an increase in expertise due to "concentrated exposure," as well as access to additional resources, such as the PPP clerk.[154] Further, Judge E added that this additional exposure represents the value of the PPP, as the difficulty of patent cases is alleviated by the extra experience.[155]

Judge F felt similarly, stating that familiarity with an area makes addressing it the next time around easier and more comfortable.[156] While not necessarily finding that complex technologies are easier to understand as a result of concentrated patent dockets, has found that the high volume of cases has revealed how the patent litigation game works or how patent litigation specific mechanisms, such as claim construction, mirror other means of textual interpretation, such as contract or statutory construction.[157]

Clearly, personal expertise has increased amongst these PPP judges. But, importantly, the increased expertise frequently transpired as a direct result of the PPP's stated objective: channeling patent cases to interested judges to create a "cadre of judges" with patent expertise.[158] The majority of patent cases these judges preside over are a direct result of the PPP reassignment rules and are leading to greater personal expertise amongst the judges.

Anecdotal remarks by the interviewed judges regarding increases in efficiency proved to be a similar story. Judges answered questions regarding any increases in speed with which cases reached major milestones or dispositions.[159] Judge A felt there has been at least some increase in efficiency, though Judge A credited the bulk of the increase to the presence of PPP clerks and their expertise and focus.[160] Judge A noted that, regardless of the PPP clerk's aid, the judge must still learn the disputes and technologies at issue.[161] As with expertise, Judge A remained skeptical that efficiency improvements could be reliably tracked.[162] Judge B also indicated an

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[152] Interview with Judge D, *supra* note 133.
[153] *Id.*
[154] Interview with Judge E, *supra* note 133.
[155] *Id.*
[156] Interview with Judge F, *supra* note 41.
[157] *Id.*
[158] 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (statement of Rep. Johnson).
[159] *See* Appendix D.
[160] Interview with Judge A, *supra* note 133.
[161] *Id.*
[162] *Id.*

increase in efficiency and explicitly referenced the Five-Year Report's findings that support that conclusion.[163] Judge C maintained that patent case efficiency remained mostly unchanged.[164] Judge D also represented that efficiency increased as a result of the PPP.[165] Judge E mentioned that the PPP created a "core group of judges" able to tackle the district's patent issues with greater efficiency.[166] Judge F also found that additional resources, most notably the presence of the PPP clerk, led to a greater efficiency for patent cases, as well as non-patent matters because elbow clerks were less swamped with unfamiliar and complex patent cases.[167]

On the issue of efficiency, all the judges felt theirs improved due to the PPP; however, the judges provided little detail beyond that. Measuring personal efficiency is a challenge, so the lack of insights may be partly due to the difficulty of observing one's own changes in speed. Regardless, the opinions that patent cases move more quickly appears to be supported to some degree, which is promising.

Overall, the interviewed judges felt that both expertise and, in some cases, efficiency increased as a result of participation in the PPP, either by seeing more cases or by having additional resources such as the PPP clerk. These anecdotal data points should not be taken as a clear indication that expertise and efficiency are in fact greater, but rather that the sampled judges feel that this is the case. Fortunately, the empirical data supports the bulk of the opinions repeated here.

C. Patent Pilot Program Clerk and Changes to Hiring Practices

The judges also provided comments relating to the PPP clerk's value and their effects on the success of the PPP in the Central District of California.[168] As noted in Part III.C., the mere existence of a PPP clerk is a controversial topic, but all the interviewed judges unanimously agreed that the PPP clerk delivered immense value for a myriad of reasons. Judge A credited much of the expertise and efficiency increases to the presence of the PPP clerk.[169] Judge A also mentioned that the PPP clerk's contributions bred a certain consistency in the district.[170]

[163] Interview with Judge B, *supra* note 133.
[164] Interview with Judge C, *supra* note 52.
[165] Interview with Judge D, *supra* note 133.
[166] Interview with Judge E, *supra* note 133.
[167] Interview with Judge F, *supra* note 41.
[168] *See* Appendix D.
[169] Interview with Judge A, *supra* note 133.
[170] *Id.*

Judge C found the PPP clerk extremely helpful as a means of "focused manpower" and as a consultant for elbow clerks.[171] Perhaps most useful for Judge C, the PPP clerk acts as a "scout for developments" which aides Judge C's noted increases in expertise and efficiency.[172]

Judge E described the PPP clerk as "indispensable."[173] Judge E also mentioned that the PPP clerk provided an outlet for judges and elbow clerks to brainstorm when issues are challenging or not entirely understood.[174] Each interviewed judge indicated that the PPP clerk filled an important role, whether that role was categorized as merely consultative or one of heavy reliance. The interviewed judges did not provide specific reasons for why a judge relied on the PPP clerk in varying capacities, but, regardless, the PPP clerk remains a vital resource for judges interested in patent litigation.

Several judges also indicated that the existence of a PPP clerk altered the hiring needs of a judge's elbow clerks.[175] For instance, one judge stated that the PPP clerk's aid removes the need to fill chambers with "techies," thus providing some flexibility when hiring elbow clerks. This reliance on the PPP clerk occurred with more than one of the sampled judges. Another of the sampled judges keeps much of the patent litigation in chambers, meaning that that judge looks particularly for elbow clerks with interest and experience in patent cases. In that case, there is a reduced pool of elbow clerks to draw from, but it ensures that that judge has sufficient resources when dealing with patent lawsuits. Conversely, hopeful law clerks with an interest or experience in patent matters possess a greater chance at landing a clerkship with a judge that keeps patent cases wholly in-house. Regardless of a particular judge's use of elbow clerks or the PPP clerk for patent cases, the PPP appears to either grant increased flexibility in the hiring practices of a judge's own law clerk, or restrict the available candidates to those looking for patent work.[176] In the event of using the PPP clerk for patent cases, the added flexibility could potentially translate to a chambers' increased efficiency in dealing with non-patent matters by means of greater familiarity with other fields of law in lieu of patent cases. But it also means that those chambers are at the will of the PPP clerk's bandwidth as the PPP clerk is a limited resource stretched across multiple chambers. In the case of a judge shouldering the patent caseload via elbow clerks, this may mean that those particular chambers are highly effective at managing patent cases or simply much busier. This may also mean that those patent-experienced elbow clerks

[171] Interview with Judge C, *supra* note 52.
[172] *Id.*
[173] Interview with Judge E, *supra* note 133.
[174] *Id.*
[175] The following opinions and statements are not attributed to any specific interviewee in order to preserve anonymity and judicial confidentiality.
[176] This is not to say that elbow clerks *require* technical background to work on patent matters, nor does it suggest that every single elbow clerk in a judge's chambers needs patent experience to keep patent cases in house. For example, one elbow clerk with patent experience and one or two without likely suffices.

may have a larger challenge—possibly due to the need for introductory research—working on non-patent cases due to their relative unfamiliarity with non-patent matters. Both methods of participation have their arguments for and against, but, without question, PPP clerks can play a critical role in patent litigation support and education for designated judges and their chambers.

D. Future of the Patent Pilot Program

Each sampled judge also provided remarks related to the overall success of the PPP and what the future of the PPP should look like.[177] Only Judge A held an agnostic view of the PPP, citing a "mostly neutral outlook on the program" and that it is an "interesting experiment."[178] Judge A, as indicated in Judge A's previous opinions, took issue with the "amorphous results" currently used to determine success and offered an alternative remedy to the issues associated with patent litigation, explored further below.[179] Concerning the PPP's future, Judge A did not have any particular changes or a strong inclination that the PPP should become the norm.[180]

Otherwise, the remaining judges agreed that the PPP represented a resounding success.[181] Judge B sees the PPP following suit of many pilot programs before it and becoming the standard and strongly wants that to be the end result.[182] Judge C stated that the consolidation of cases—nearly two-thirds of patent cases in the Central District of California—signifies an obvious success of the PPP, but does not want to force the program onto any district that wishes to abstain.[183] In other words, Judge C envisions the program extending past the 10-year trial run on an opt-in basis.[184] Judge C also suggested a greater focus on education of patent litigation related content for designated judges as a means of trading ideas and experiences.[185] Judge D also would like to see the program continue, but with funding for dedicated clerks.[186] While not specific to the PPP, Judge D, and others, mentioned that patent cases tend to require more judicial resources, resulting in heavy caseloads.[187] Judge E showed great respect for the PPP, stating that it "heightens the stature of the court" because it is a "proactive and thoughtful" approach to confronting difficult cases.[188] Judge F believes that the PPP is a positive representation of

[177] *See* Appendix D.
[178] Interview with Judge A, *supra* note 133.
[179] *Id.*
[180] *Id.*
[181] Interview with Judge B, *supra* note 133; Interview with Judge C, *supra* note 52; Interview with Judge D, *supra* note 133.
[182] Interview with Judge B, *supra* note 133.
[183] Interview with Judge C, *supra* note 52.
[184] *Id.*
[185] *Id.*
[186] Interview with Judge D, *supra* note 133.
[187] *Id.*
[188] Interview with Judge E, *supra* note 133.

efficient judicial resource allocation, as it permits those best armed to tackle specific types of cases to handle the lion's share.[189]

For the most part, the sampled judges are in agreement that the program should continue, albeit with some modifications. These modifications focus mostly on providing or conserving judicial resources, something that district judges would naturally want given the extreme workload before them. The original text of the bill proposed definite funding for judicial training and a dedicated PPP clerk, but the Senate removed that grant.[190] If the removal occurred primarily because of budgetary restrictions for a pilot program, then the funding could feasibly return at the close of the PPP. The only substantial quality of life input from judges related to the increased case load due to the reassignment of the patent cases.

E. Additional Comments

Some judges provided additional commentary on the PPP and patent law in general that is worth recounting. Judge A, who held great skepticism on the ability to truly measure the success of the PPP and ultimately had a neutral outlook on the PPP, offered an alternative means to solve some of the problems that patent lawsuits face.[191] Specifically, Judge A suggested that a major issue in patent law is that patent drafters purposely aim for ambiguity which results in prolonged disputes.[192] To remedy this, Judge A suggested applying a tenet of contract law, *contra preferentum*, to discourage sloppy and nonsensical technical jargon.[193] Construing ambiguous terms of a patent against the drafter, according to Judge A, would greatly reduce the number of disputes and the judicial resources required to handle them.[194]

Judge B mentioned that the PPP provided some opportunities for district judges to interact with Federal Circuit judges leading to new relationships and an exchange of ideas.[195] Moreover, Judge B stated that the PPP gives clerks a stronger chance of moving to the Federal Circuit given the increased practice and familiarity the clerks involved with the PPP face.[196]

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[189] Interview with Judge F, *supra* note 41.

[190] *Compare* 155 CONG. REC. H3457 (daily ed. Mar. 17, 2009) (proposing in subsection (f) that "not less than $5,000,000" be spent on training and clerkships) *with* Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011).

[191] Interview with Judge A, *supra* note 133.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] Interview with Judge B, *supra* note 133.

[196] *Id.*

VI. The Patent Pilot Program's Success and Future

Equipped with both empirical and anecdotal evidence regarding the Patent Pilot Program's ability to enhance the expertise and efficiency with which the judicial system handles and disposes of patent lawsuits, this article can offer a holistic assessment of the success of the PPP program. Of course, these results are measured against the backdrop of the Congressional goals outlined prior to ratification of the PPP; but, as discovered, the PPP generated additional consequences not explicitly stated or foreseen by sponsoring members.

A. The Patent Pilot Program's Success

Overall, the PPP is a resounding success. Congress sought to enhance the expertise of judges hearing patent cases and to decrease the time devoted to patent cases.[197] At the time of Congressional approval, patent cases had a reputation of taking unnecessarily long amounts of time from both the court's and litigant's perspectives, and of too frequently receiving reversals from the Federal Circuit.[198]

The empirical data plainly supports that, as a result of the PPP's reassignment system, a judge with greater experience handling patent cases is more likely to preside over patent lawsuits.[199] And, as it turns out, the issues relating to unpredictable outcomes appear exaggerated and limited to a few key issues.[200] Overall, reversal rates of patent cases match those of similar complex fields of law.[201]

From the perspective of individual judges, judges feel more equipped to handle patent cases primarily from the increased patent caseload. The introduction of PPP clerks assist judicial expertise as a means of conveying developments in patent law to judges and as additional eyes on complex issues and technologies.

Efficiency increases, though difficult to measure from anecdotal evidence, are clearly supported by decreases in time to major case milestones. Across the board, speed of patent cases increased; however, districts participating in the PPP saw more dramatic pace increases for nearly every important action of a patent lawsuit. The increased expertise of judges presiding over patent cases, along with the focus and aide from dedicated PPP clerks, certainly plays a role in the efficiency changes. While patent litigation is indisputably an expensive endeavor,[202] these

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[197] *See supra* Part II.A.

[198] *Id.*

[199] *See supra* Part IV.A.i.

[200] *See supra* notes 83–97 and accompanying text.

[201] *Id.*

[202] *See* Samson Vermont, *AIPLA Survey of Costs of Patent Litigation and Inter Partes Review*, PATENTATTORNEY (Jan. 30, 2017), https://www.patentattorney.com/aipla-survey-of-costs-of-patent-litigation-and-inter-partes-review.

efficiency metrics demonstrate that the PPP effectively reduced the time and judicial resources devoted to patent cases.

1. Unintended Benefits

Something as influential as the PPP is bound to have at least some unintended benefits (or consequences). One such benefit, as cited by multiple judges, is that clerk involvement with the PPP acts as a sort of grooming process for promotion to the Federal Circuit.[203] Two judges also felt that, while there is no explicit structure or funding for collaboration among PPP judges and Federal Circuit judges, conferences and other events occur that result in a welcomed exchange of ideas and experiences, as well as the formation of collegial trust and respect.[204] Clearly the increased involvement in patent litigation from the advent of the PPP helps to create the "cadre of judges" that Congress desired.

And while a correlation is not entirely supported, there is a colorable claim that the influx of more patent cases in PPP districts is a contributing factor for local patent rules adoption among many PPP districts. In specific, five of the designated districts adopted local patent rules after the ratification of the PPP.[205] The remaining districts adopted local patent rules well in advance of the PPP.[206] Local patent rules are widely believed to promote more efficient case management[207] and were even a designation criterion for PPP districts because the presence of local patent rules presumably indicated a high volume and/or expertise in patent cases.[208]

B. The Patent Pilot Program's Future and Potential Changes

As Judge B stated, often pilot programs become the standard.[209] There is no indication that the system introduced by the PPP—namely the ability to reassign cases to judges interested and experienced in patent law—is ending at the close of the PPP's 10-year trial run. Nearly all the judges interviewed believed that the PPP's mechanism should remain given the clear benefits

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[203] Interview with Judge A, *supra* note 133; Interview with Judge B, *supra* note 133.

[204] Interview with Judge B, *supra* note 133; Interview with Judge C, *supra* note 52.

[205] *See* Travis Jensen, *Adoption Dates*, LOC. PATENT RULES, http://www.localpatentrules.com/adoption-dates (last updated Aug. 25, 2017).

[206] *Id.* Curiously, the Central District of California is the only PPP district without district-wide local patent rules, though Judge Guilford has created his own. *See Local Rules*, https://www.cacd.uscourts.gov/court-procedures/local-rules; Andrew J. Guilford, *Standing Patent Rules*, https://www.cacd.uscourts.gov/sites/default/files/documents/AG/AD/Standing Patent Rules.pdf.

[207] Pauline M. Pelletier, *The Impact of Local Patent Rules on Rate and Timing of Case Resolution Relative to Claim Construction: An Empirical Study of the Past Decade*, 8 J. BUS. & TECH. L. 451, 457 (2013).

[208] Pilot Program in Certain District Courts, Pub. L. No. 111-349 § 1(b)(2)(A)(ii), 124 Stat. 3674, 3675 (2011).

[209] Interview with Judge B, *supra* note 133.

that the program provides to both the court system and to litigants.[210] The numbers suggest similar conclusions, finding that judicial expertise increases and case length decreases in response to this scheme.[211] Given the empirical and anecdotal success of the PPP, the reassignment of patent cases should unquestionably remain. The question, though, is with what modifications?

The sampled judges provided several key alterations that may ultimately improve this system.[212] First and foremost, a dedicated funding clause needs to return to the text of the legislation for the purpose of compensating a patent clerk and for providing training and development opportunities to designated judges. Presumably, the Senate, understandably, removed this proposed funding to reduce the cost of a pilot program, but if the program becomes permanent, the additional bandwidth and training is necessary. Patent cases will never cease to be complex, and they will always require significant labor efforts. Providing Congressionally-sanctioned support is critical to ensuring that the program continues to enhance the patent litigation process. According to the sampled judges, the patent clerk provides invaluable support to the designated judges, ranging from consultative aide to assistance akin to an elbow clerk's role.[213]

On the topic of the patent clerk's role, creating a more standardized role of the patent clerk could help mitigate any worries regarding the persuasiveness of a patent clerk on an entire district.[214] For instance, limitations on the patent clerk handling entire patent cases would require that more than one clerk contributes thoughts. Another possible role for the PPP clerk is one focused on the education of elbow clerks and judges on patent litigation so that each individual chamber is more equipped to handle tough patent matters.[215] Alternatively, a budget allowing for more than one patent clerk might mitigate these concerns as well. Moreover, additional patent clerks might incentivize greater PPP participation if judges know that there is sufficient support for their increased patent caseload. This boils down to a budgetary question though, rather than an issue relating to efficacy or appropriateness. Standardized roles may also have an added benefit of attracting more patent clerks since much of the patent clerk role currently is a black box hidden behind the veils of each chamber's practice.

Some concerns regarding the creation of specialty patent districts ideally dissipate if the program is opened to all districts and those new districts receive the same benefits that PPP districts see now. However, legislators should heed Judge C's suggestion that each district court should be

[210] *See supra* Part V.D.

[211] *See supra* Part IV.

[212] *See supra* Part V.D.

[213] *Id.*

[214] Judge A, however, felt that the PPP clerk contributed a consistency among the district's rulings, which might be a benefit for litigants when deciding which court to bring a case in. *See* Interview with Judge A, *supra* note 133.

[215] Interview with Patent Pilot Program Clerk, *supra* note 61.

able to adopt the program's reassignment mechanism, rather than have the mechanism forced upon it.

A final potential change comes again at the district level. Some means of flexibility for how each district ultimately implements the program is a must. Each district has different needs, is different in size and capacity, and has different practices. Allowing districts to tailor the PPP's mechanism to best suit each district ensures greater participation and efficacy.

Appendix A – Tables and Figures Extracted from the Five-Year Report[216]

A.1 – Table 1 – Patent Experience

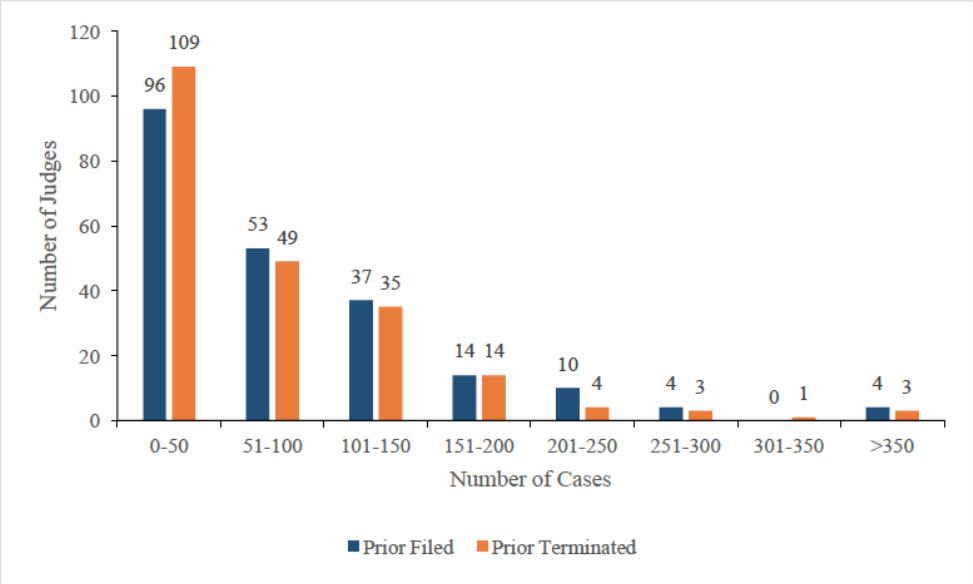
Table 1: All Judges, Judges Assigned at Least One Patent Case Since Start of PPP, and Designated Judges, as of January 5, 2016

District	All active and senior judges	Active and senior judges assigned at least one patent case	Number of current designated judges	Percentage of district's judges serving as designated judges
C.D. Cal.	41	35	6	15%
N.D. Cal.	27	21	4	15%
S.D. Cal.	20	15	5	25%
N.D. Ill.	43	40	13	30%
D. Md.	21	17	3	14%
D.N.J.	27	23	5	19%
D. Nev.	14	13	3	21%
E.D.N.Y.	30	24	4	13%
S.D.N.Y.	56	43	10	18%
W.D. Pa.	16	11	5	31%
W.D. Tenn.[7]	8	4	2	25%
E.D. Tex.	12	11	4	33%
N.D. Tex.	14	13	3	21%
All Pilot Courts	**329**	**270**	**66**	**20%**

[216] FIVE-YEAR REPORT, *supra* note 7.

A.2 – Figure 1 – Patent Experience Prior to PPP

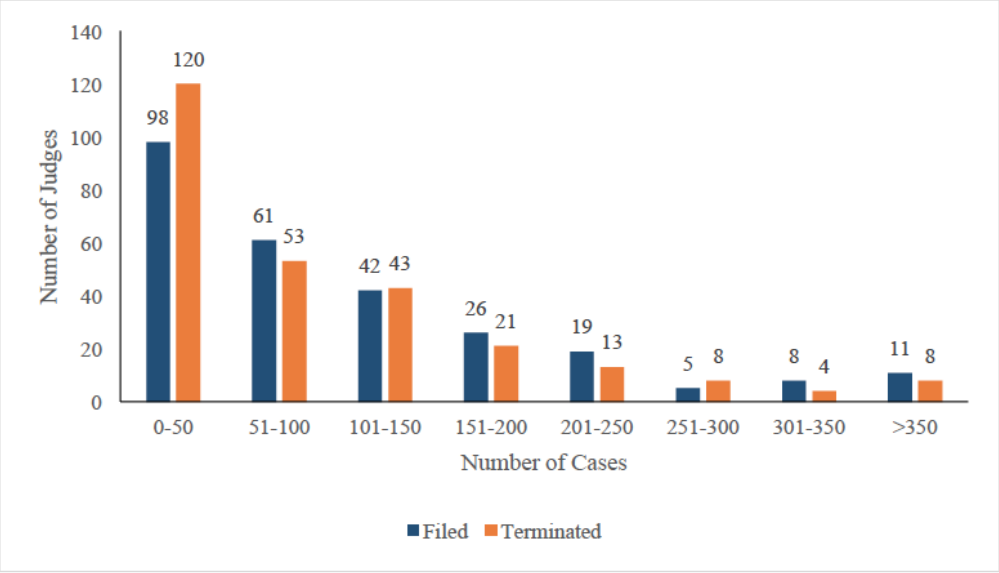
Figure 1: Patent Experience Prior to the Start of the PPP, All Active and Senior Judges Assigned at Least One Patent Case and Serving at the Start of the PPP



Note: This figure includes only those judges on the bench as of the start of the pilot in each pilot district. Of the 270 judges with at least one patent case in our data, 218 were serving at the start of the pilot in their court.

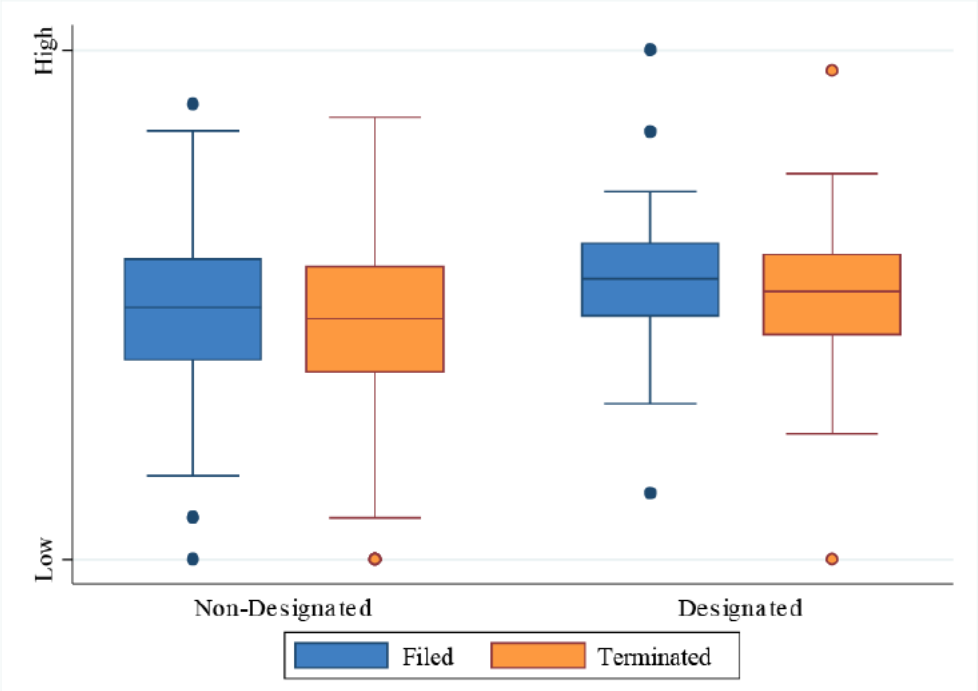
A.3 – Figure 2 – Patent Experience Through January 5, 2016

Figure 2: All Patent Experience Through January 5, 2016, All Active and Senior Judges Assigned at Least One Patent Case



A.4 – Figure 3 – Patent Experience of Designated and Non-Designated Judges

Figure 3: Patent Experience of Designated and Nondesignated Judges, Through January 5, 2016[10]



A.5 – Table 2 – Patent Experience by PPP District and Judge

Table 2: Patent Experience by District, Designated and Nondesignated Judges, All Patent Cases[11]

	Designated Judges		Nondesignated Judges	
District	Average number of filed cases per judge	Average number of terminated cases per judge	Average number of filed cases per judge	Average number of terminated cases per judge
C.D. Cal.	252	209	178	160
N.D. Cal.	180	149	200	169
S.D. Cal.	210	166	120	101
N.D. Ill.	121	104	88	76
D. Md.	63	49	34	30
D.N.J.	154	114	109	83
D. Nev.	52	39	35	29
E.D.N.Y.	30	19	40	36
S.D.N.Y.	89	75	36	29
W.D. Pa.	35	29	35	31
W.D. Tenn.	86	55	26	19
E.D. Tex.	1,519	1,033	758	575
N.D. Tex.	213	176	102	94
All Pilot Courts	**211**	**160**	**115**	**96**

A.6 – Table 3 – Patent Case Filings by PPP District

Table 3: All Patent Cases Filed, by District, from Each Court's Pilot Start Date to January 5, 2016[14]

District	Number of patent cases filed	Percentage of total patent cases filed in all pilot courts	Number of pilot cases	Percentage of patent cases that are pilot cases	Former pilot cases
C.D. Cal.	1,592	13%	785	49%	84
N.D. Cal.	794	6%	184	23%	54
S.D. Cal.	562	5%	424	75%	63
N.D. Ill.	824	7%	478	58%	15
D. Md.	143	1%	84	59%	2
D.N.J.	919	7%	521	57%	30
D. Nev.	146	1%	93	64%	9
E.D.N.Y.	142	1%	105	74%	3
S.D.N.Y.	559	5%	248	44%	4
W.D. Pa.	92	1%	86	93%	1
W.D. Tenn.	53	<1%	51	96%	0
E.D. Tex.	6,201	50%	6,102	98%	95
N.D. Tex.	339	3%	291	86%	15
All Pilot Courts	**12,366**	**100%**	**9,452**	**76%**	**375**

A.7 – Table 10 – Judge Time Spent on Pending Cases

Table 10: Judge Time on Pending Cases, Current Judge's Start Date on Case to January 5, 2016

Judge time on case, in days	Number of Cases		
	Pilot cases only	Nonpilot cases only	All cases
1	0	0	0
2–7	22	7	29
8–30	85	46	131
31–180	998	189	1,187
181–365	754	185	939
More than 365	359	185	544
Number of Cases	**2,218**	**612**	**2,830**

A.8 – Table 11 – Judge Time Spent on Terminated Cases

Table 11: Judge Time on Terminated Cases, Current Judge's Start Date on Case to January 5, 2016

Judge time on case, in days	Number of Cases		
	Pilot cases only	Nonpilot cases only	All cases
1	0	0	0
2–7	0	0	0
8–30	3	7	10
31–180	302	56	358
181–365	1,368	212	1,580
More than 365	5,561	2,027	7,588
Number of Cases	**7,234**	**2,302**	**9,536**

A.9 – Table 12 – Case Duration for Pending Cases

Table 12: Case Duration for Cases Pending as of January 5, 2016

Case duration, in days	Number of Cases		
	Pilot cases only	Nonpilot cases only	All cases
1	0	0	0
2–7	18	5	23
8–30	73	30	103
31–180	986	187	1,173
181–365	643	144	787
More than 365	498	246	744
Number of Cases	**2,218**	**612**	**2,830**

A.10 – Table 13 – Case Duration for Terminated Cases

Table 13: Case Duration for Cases Terminated as of January 5, 2016

Case duration, in days	Number of Cases		
	Pilot cases only	Nonpilot cases only	All cases
1	10	2	12
2–7	29	18	47
8–30	333	91	424
31–180	3,299	910	4,209
181–365	2,062	609	2,671
More than 365	1,501	672	2,173
Number of Cases	**7,225**	**2,298**	**9,536**

A.11 – Table 15 – Case Duration by Judicial Patent Experience

Table 15: Frequency of Case Duration by Judicial Patent Experience, Pending and Terminated Cases

Case duration, in days	Patent Litigation Experience		
	Below average	Average	Above average
1	0	5	7
2–7	2	21	47
8–30	12	162	353
31–180	149	1,786	3,447
181–365	73	1,174	2,211
More than 365	67	1,302	1,548
Number of Cases	**303**	**4,450**	**7,613**

A.12 – Table 16 – Average Case Duration

Table 16: Average Case Duration in Days, Nondesignated and Designated Judges

Case status	Average Case Duration	
	Nondesignated judges	Designated judges
Pending cases only	357 days	291 days
Terminated cases only	275 days	245 days
All cases	287 days	257 days

A.13 – Table 29 – Appeals by District

Table 29: Appeals by District (All Cases and Pilot Cases)

District	Cases with at least one appeal	Percentage of all cases with at least one appeal	Pilot cases with at least one appeal	Percentage of pilot cases with at least one appeal
C.D. Cal.	113	7%	56	7%
N.D. Cal.	74	9%	8	4%
S.D. Cal.	25	4%	21	5%
N.D. Ill.	52	6%	42	9%
D. Md.	8	6%	7	8%
D.N.J.	31	3%	12	2%
D. Nev.	10	7%	5	5%
E.D.N.Y.	5	4%	4	4%
S.D.N.Y.	37	7%	18	7%
W.D. Pa.	4	4%	4	5%
W.D. Tenn.	0	0%	0	0%
E.D. Tex.	80	1%	74	1%
N.D. Tex.	10	3%	4	1%
All Pilot Courts	**449**	**4%**	**255**	**3%**

A.14 – Table 30 – Appeals Percentages by PPP District

Table 30: Percentage of Filings, Appeals, Pilot Cases, and Pilot Cases with Appeals, by District

District	Percentage of filings	Percentage of appeals	Percentage of pilot cases	Percentage of pilot case appeals
C.D. Cal.	13%	25%	8%	22%
N.D. Cal.	6%	16%	2%	3%
S.D. Cal.	5%	6%	4%	8%
N.D. Ill.	7%	12%	5%	16%
D. Md.	1%	2%	1%	3%
D.N.J.	7%	7%	6%	5%
D. Nev.	1%	2%	1%	2%
E.D.N.Y.	1%	1%	1%	2%
S.D.N.Y.	5%	8%	3%	7%
W.D. Pa.	1%	1%	1%	2%
W.D. Tenn.	<1%	0%	1%	0%
E.D. Tex.	50%	18%	65%	29%
N.D. Tex.	3%	2%	3%	2%

A.15 – Table 32 – Appeals to the CAFC

Table 32: Appeals of Pilot and Nonpilot Cases to the CAFC, 2012–2015[43]

Appellate decision	Pilot cases	Nonpilot cases
Affirmed, including summary affirmance	63	64
Affirmed in part and reversed in part (with/without remand)	9	9
Dismissed, including under Fed. R. App. P. 42(b)	85	49
Remanded	2	2
Reversed	3	5
Reversed and remanded	5	3
Vacated	1	0
Vacated and remanded	4	6
Total	**172**	**138**

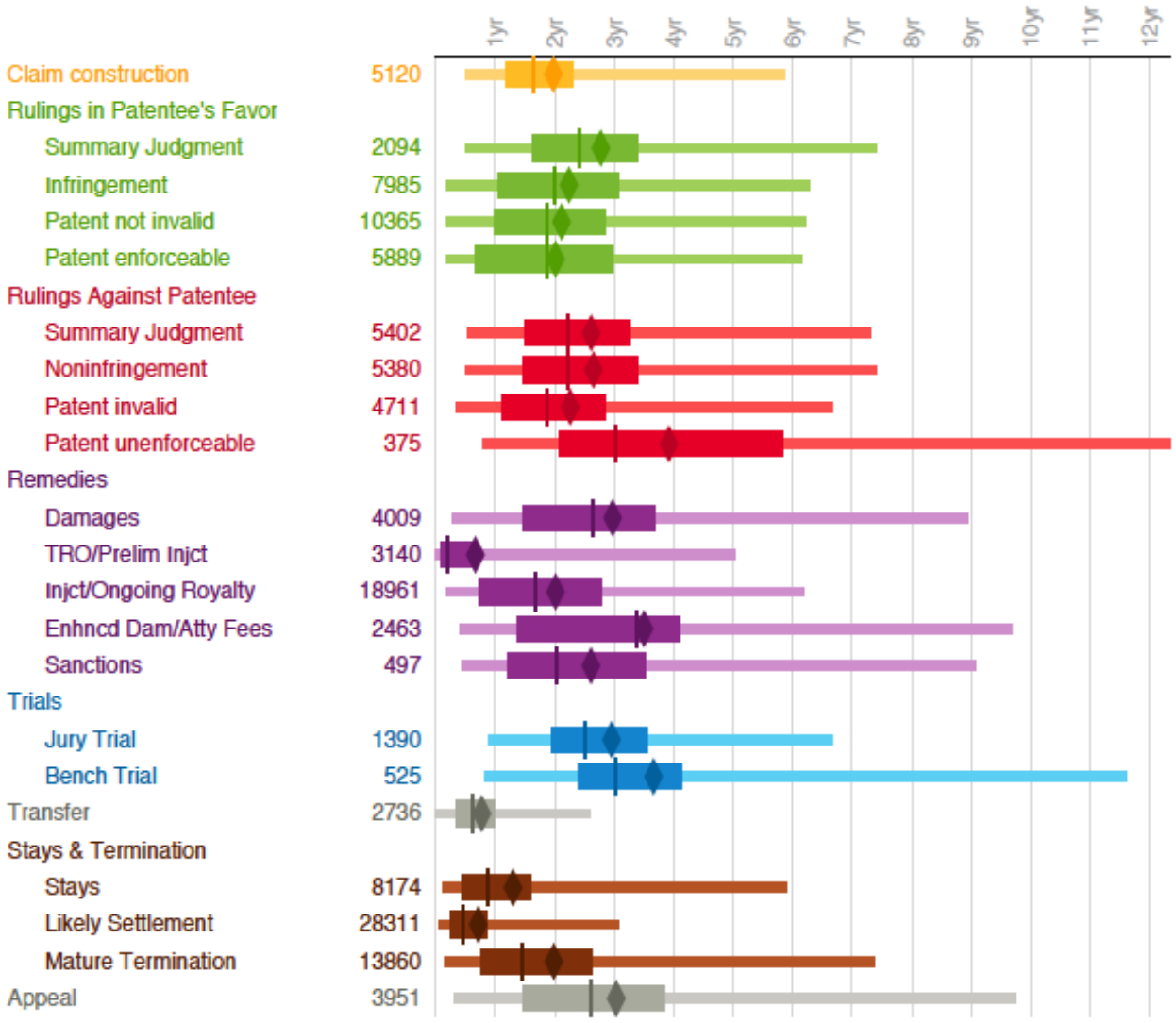
A.16 – Table 33 – Patent Filings v. Civil Filings by Venue

Table 33: Patent Filings and Civil Filings, 2011–2015, All Pilot Courts

	2011		2012		2013		2014		2015	
District	Civil	Patent	Civil	Patent	Civil	Patent	Civil	Patent	Civil	Patent
C.D. Cal.	5%	9%	6%	9%	5%	7%	5%	6%	5%	5%
N.D. Cal.	2%	6%	3%	5%	2%	4%	2%	5%	2%	4%
S.D. Cal.	1%	2%	1%	3%	1%	4%	1%	2%	1%	2%
N.D. Ill.	3%	6%	4%	4%	3%	3%	4%	3%	4%	3%
D. Md.	1%	1%	1%	1%	1%	<1%	1%	1%	1%	1%
D.N.J.	3%	5%	3%	3%	3%	2%	3%	6%	4%	5%
D. Nev.	1%	1%	1%	1%	1%	1%	1%	1%	1%	<1%
E.D.N.Y.	2%	1%	2%	1%	3%	1%	3%	1%	3%	1%
S.D.N.Y.	3%	4%	4%	3%	3%	2%	4%	2%	4%	2%
W.D. Pa.	1%	<1%	1%	1%	1%	<1%	1%	<1%	1%	<1%
W.D. Tenn.	1%	<1%	1%	1%	<1%	<1%	<1%	<1%	<1%	<1%
E.D. Tex.	1%	15%	1%	22%	1%	24%	1%	27%	2%	42%
N.D. Tex.	2%	1%	3%	1%	2%	1%	2%	1%	2%	2%

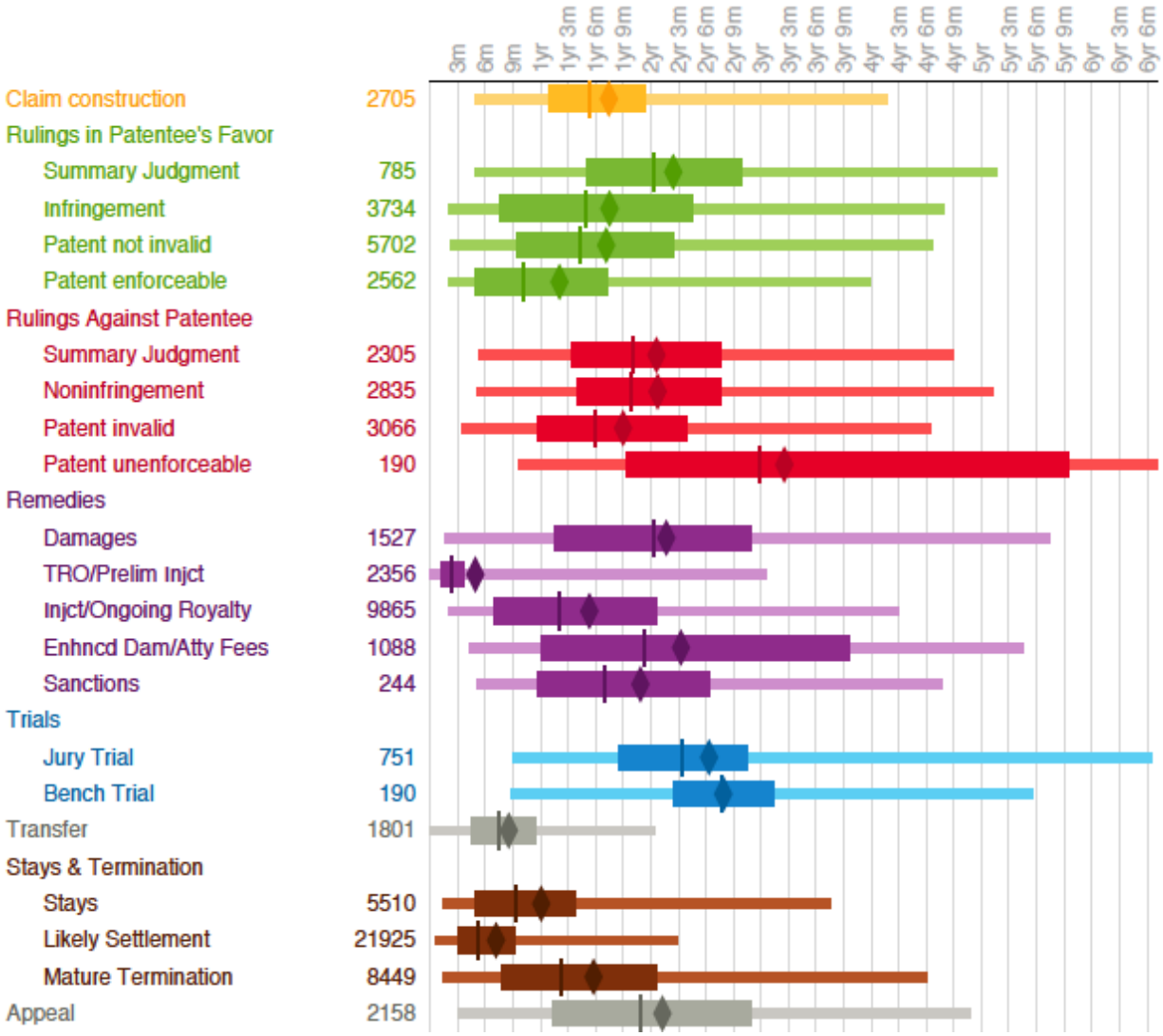
Appendix B – Tables Generated from Docket Navigator[217]

B.1 – All Districts, Pre-PPP

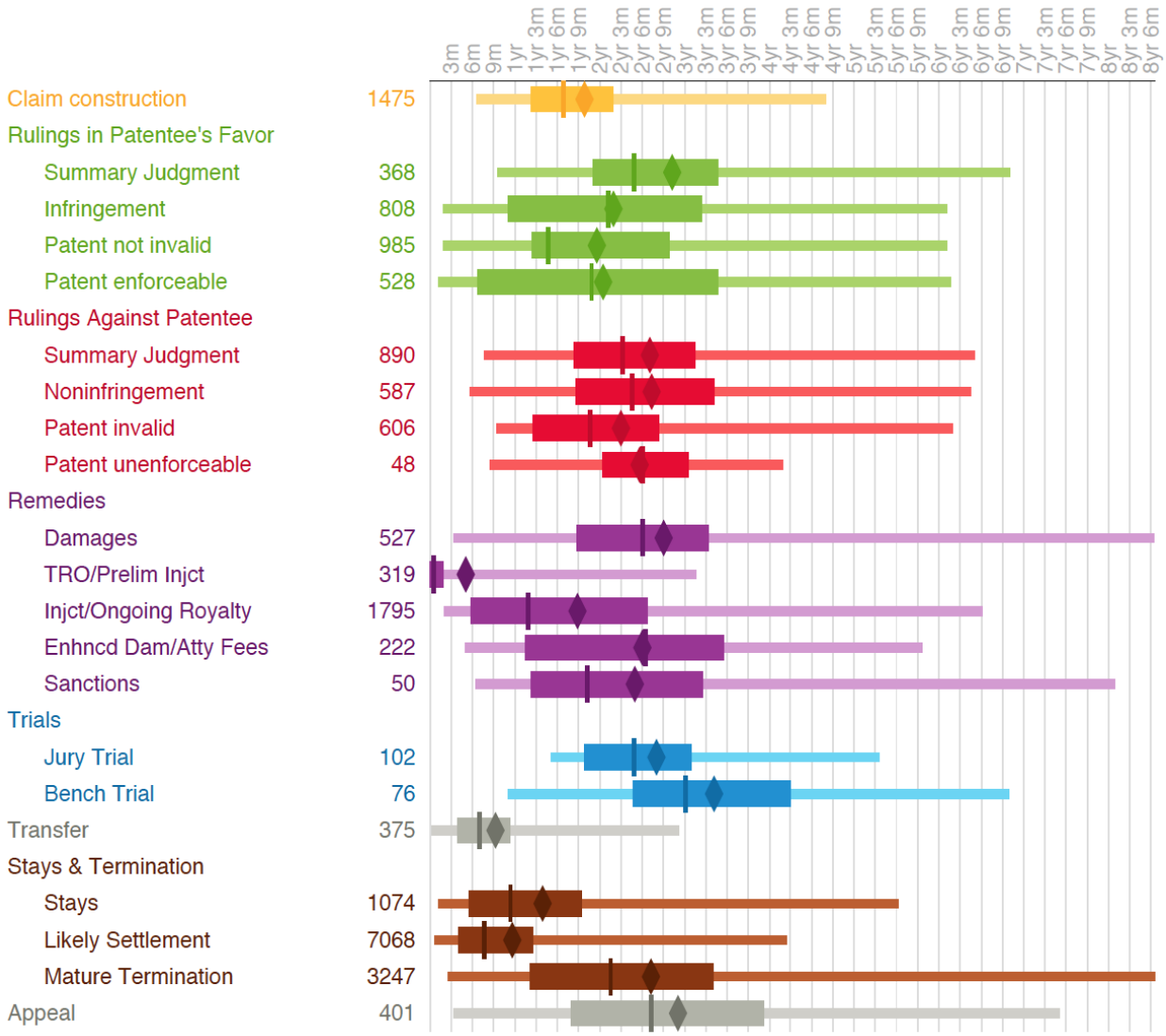


[217] DOCKET NAVIGATOR (Nov 19, 2017), http://docketnavigator.com.

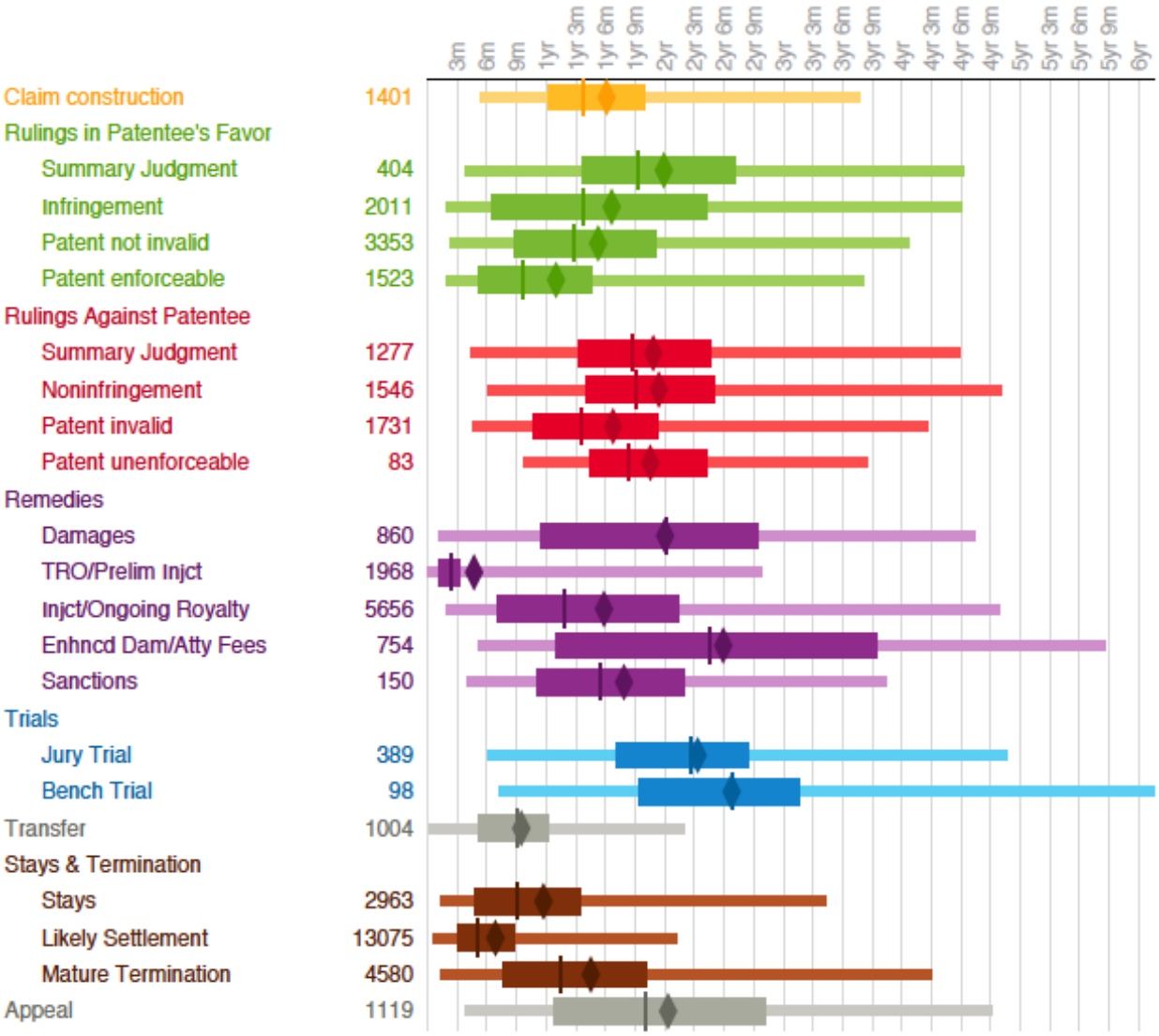
B.2 – All Districts, Post-PPP



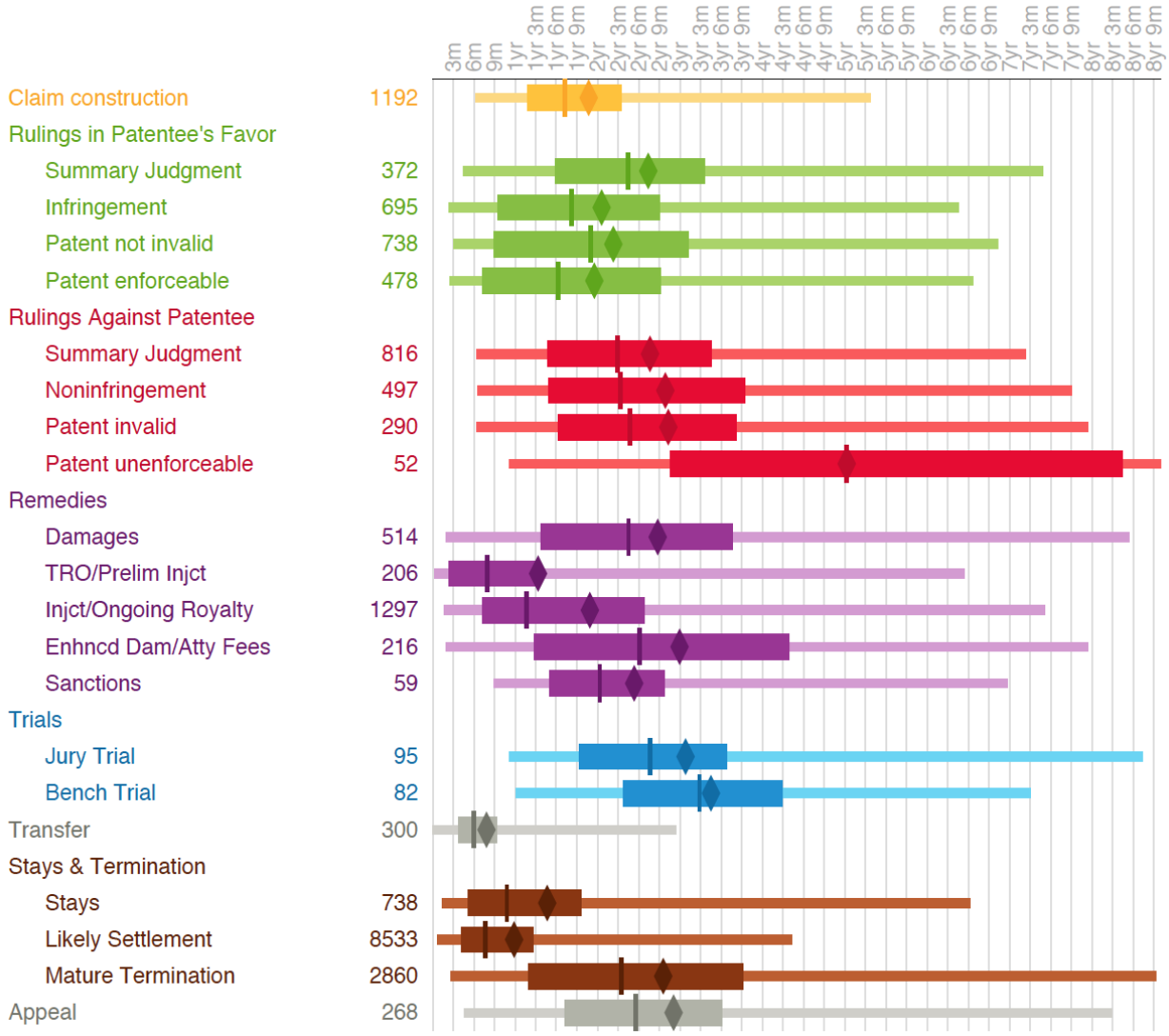
B.3 – PPP Districts, Pre-PPP



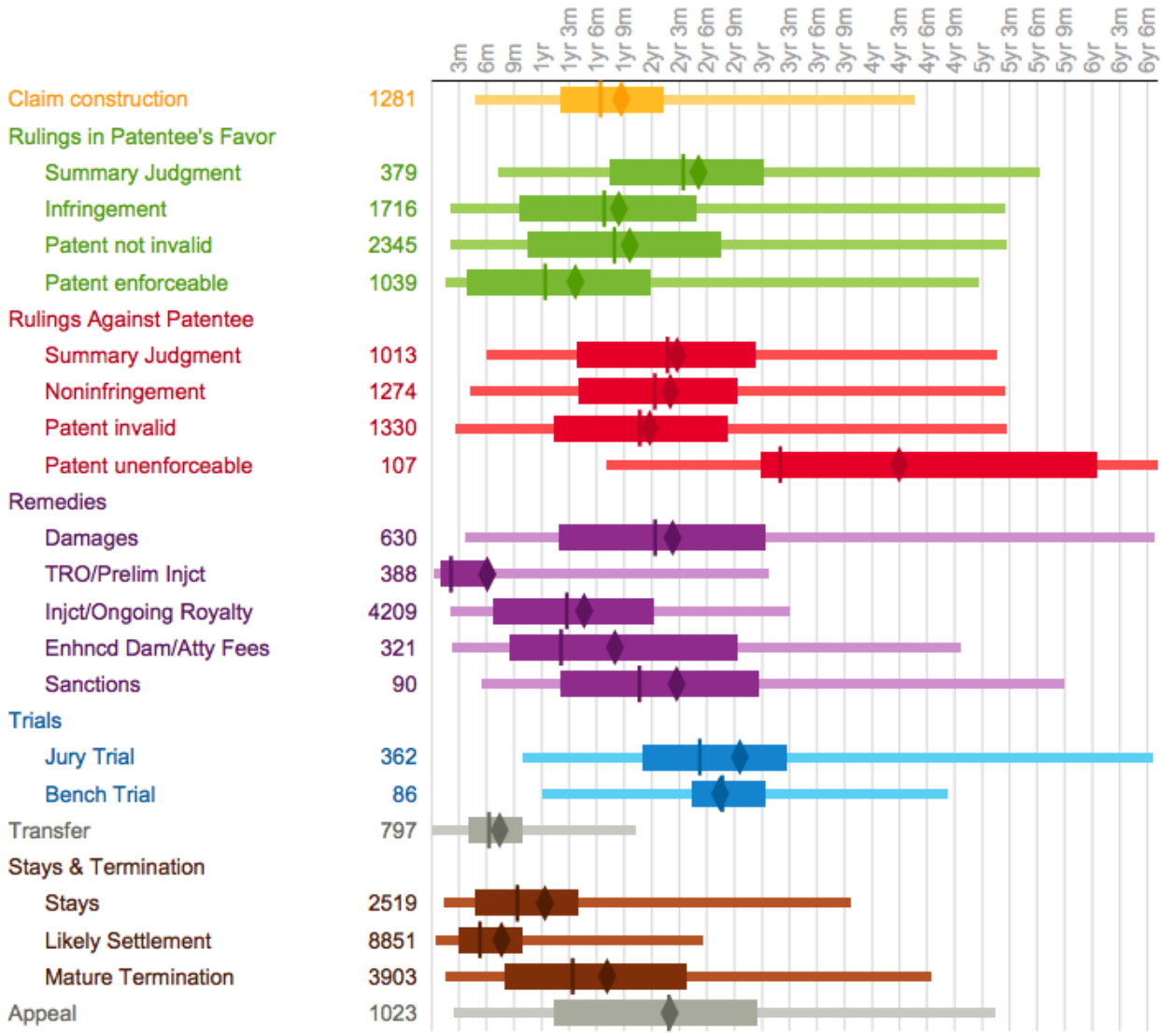
B.4 – PPP Districts, Post-PPP



B.5 – Non-PPP Districts, Pre-PPP



B.6 – Non-PPP Districts, Post-PPP



Appendix C – Data Compiled from Docket Navigator

C.1 – All Districts – Months to Milestones

All Districts	Pre-PPP	Claim Construction	22.8
		Summary Judgment (P)	33.1
		Infringement (P)	26.1
		Valid (P)	25.4
		Enforceable (P)	25.0
		Summary Judgement (D)	31.6
		Noninfringement (D)	32.8
		Invalid (D)	30.0
		Unenforceable (D)	47.9
		Jury Trial	35.1
		Bench Trial	44.9
		Likely Settlement	12.0
		Mature Termination	32.9
	Post-PPP	Claim Construction	19.4
		Summary Judgment (P)	26.4
		Infringement (P)	19.5
		Valid (P)	19.2
		Enforceable (P)	14.1
		Summary Judgement (D)	24.6
		Noninfringement (D)	24.7
		Invalid (D)	20.9
		Unenforceable (D)	69.5
		Jury Trial	30.3
		Bench Trial	31.8
		Likely Settlement	7.2
		Mature Termination	17.8

C.2 – PPP Districts – Months to Milestones[218]

PPP Districts	Pre-PPP	Claim Construction	21.8
		Summary Judgment (P)	34.2
		Infringement (P)	25.9
		Valid (P)	23.6
		Enforceable (P)	24.5
		Summary Judgement (D)	31.1
		Noninfringement (D)	31.3
		Invalid (D)	27.0
		Unenforceable (D)	29.6
		Jury Trial	32.0
		Bench Trial	40.2
		Likely Settlement	11.6
		Mature Termination	31.3
	Post-PPP	Claim Construction	18.1
		Summary Judgment (P)	23.9
		Infringement (P)	18.6
		Valid (P)	17.3
		Enforceable (P)	12.9
		Summary Judgement (D)	22.8
		Noninfringement (D)	23.4
		Invalid (D)	18.8
		Unenforceable (D)	22.5
		Jury Trial	27.3
		Bench Trial	30.8
		Likely Settlement	6.8
		Mature Termination	16.5

[218] PPP Districts include: Central District of California; Northern District of California; Southern District of California; Northern District of Illinois; District of Maryland; District of New Jersey; District of Nevada; Eastern District of New York; Southern District of New York; Western District of Pennsylvania; Western District of Tennessee; Eastern District of Texas; and Northern District of Texas.

C.3 – Non-PPP Districts – Months to Milestones[219]

Non-PPP Districts	Pre-PPP	Claim Construction	22.7
		Summary Judgment (P)	31.3
		Infringement (P)	24.6
		Valid (P)	26.3
		Enforceable (P)	23.5
		Summary Judgement (D)	31.6
		Noninfringement (D)	33.8
		Invalid (D)	34.3
		Unenforceable (D)	60.3
		Jury Trial	36.8
		Bench Trial	40.5
		Likely Settlement	11.8
		Mature Termination	33.5
	Post-PPP	Claim Construction	20.6
		Summary Judgment (P)	29.1
		Infringement (P)	20.4
		Valid (P)	21.6
		Enforceable (P)	15.7
		Summary Judgement (D)	26.8
		Noninfringement (D)	24.0
		Invalid (D)	23.8
		Unenforceable (D)	50.9
		Jury Trial	33.6
		Bench Trial	31.4
		Likely Settlement	7.6
		Mature Termination	19.2

[219] Non-PPP Districts include: All District Courts in the First Circuit, Eighth Circuit, Tenth Circuit, Eleventh Circuit, and D.C. Circuit; all District Courts of Arizona, Connecticut, Delaware, Hawaii, Idaho, Montana, Oregon, South Carolina, Vermont, Alaska, West Virginia, Virginia, North Carolina, Louisiana, Mississippi, Michigan, Ohio, Kentucky, Indiana, Wisconsin, Washington, Guam, Northern Mariana Islands, and Virgin Islands; Eastern District of California, Central District of Illinois; Southern District of Illinois; Northern District of New York; Western District of New York; Eastern District of Pennsylvania; Middle District of Pennsylvania; Eastern District of Tennessee; Middle District of Tennessee; Southern District of Texas; and Western District of Texas.

Appendix D – General Interview Questions for PPP Judges

Participation

- Why did you opt to participate in the program?

Expertise

- Do you feel that your expertise in patent litigation has increased?
- If yes, what do you believe are the causes (e.g., volume of cases, local patent rules)?
- Do you find that arguments, patents, and complex technologies are easier to understand?

Efficiency

- Do you feel that efficiency has been increased related to patent litigation issues (e.g., speed of cases as a whole, speed to major case milestones)?

Patent Pilot Program Clerk

- Do you find a dedicated patent clerk has helped?
- If yes, in terms of expertise, efficiency, or both?
- Does a dedicated patent clerk change your clerk hiring practices (e.g., do not require clerks with patent experience/interest)?

Concluding Remarks

- Overall, do you believe the program is a good one?
- Should the program continue, and, if so, in what capacity?
- Do you have any additional comments?