

State of the Court of Appeals for the Federal Circuit
Chief Judge Paul R. Michel
June 28, 2007
Cambridge, MD

Thank you for this opportunity to describe the state of the court. In short, it is very good. With a full complement of 12 active judges and four active, senior judges, we are reducing the backlog of cases awaiting argument, and also those awaiting decision. Judges are also sitting more days per year and writing more opinions than before. But the growth in productivity may be outpaced by the growth in filings.

Several trends, visible over the last ten years that add to the court's workload have continued. Filings of patent infringement appeals, for example, have steadily increased. Even more significantly, patent cases have become more complex and hence time-consuming. Meanwhile, MSPB cases, which tend to be much simpler, and were previously the largest portion of pending cases, no longer are. At the end of May, our pendencies were: veterans: 420; patent infringement: 343; and personnel 241. Total filings have been rising steadily, if modestly. Thus, our docket continues to grow, with an increasing proportion of difficult cases.

As I mentioned last year, the number of Veterans' cases has been rising sharply. While that continues to be true, it did not have a major impact because hundreds of veterans' appeals involving the same few issues are stayed pending resolution of a few "test cases." Once we decided the test cases, the stayed appeals were resolved with relatively little effort. However, there are ominous signs that veterans' cases that may require individual, case-by-case, adjudication will soon increase, and probably very sharply. They could in fact swamp our court before year's end, just as we once feared immigration cases could have. The Court of Appeals for Veterans' Claims just received more filings than in any other two-quarter period in its history. That court is now deciding, on average, 300 appeals a month, though 600 cases alone were decided in April. The Board of Veterans' Appeals has also been deciding more cases. Denials of benefits by the Board -- about 9,300 in 2004 -- had almost doubled by 2006 to more than 18,000. About a fifth are appealed from the Veterans' Court, which is now deciding cases at the rate of several thousand per quarter. The impact on our court will be substantial; it could be catastrophic. The concern is that we maintain our ability to decide all cases in a timely manner, with consistently high quality. Three remedies are being pursued: we are working harder, adding visiting judges, and relying on mediation.

We have been hearing more appeals, more rapidly, by scheduling more panels each month. From September through June, a different visiting district judge has sat with the court each month. Two will sit during July, August, and September. In fact, visiting judges have been scheduled through the summer of 2008.

As mentioned, once again we have 12 active judges. Judge Kimberly Moore joined the court in September, replacing Judge Clevenger who took senior status in February of last year, who sits regularly nevertheless.

The Court's Mediation Program continues to evolve. About half of the appeals filed have always dropped out spontaneously before adjudication. We hope our enhanced mediation program will increase settlements further. Starting in January, the program now has two full-time staff—Chief Circuit Mediator James Amend and Circuit Mediation Officer Wendy Dean--as well as two part-time support staff, and 18 pro bono mediators. Participation is now mandatory for all cases our staff selects. We encourage counsel to fill out the required docketing statement carefully and on time, and to consider favorably the potential benefit to their clients. All mediation sessions

are confidential and are not disclosed to our judges. Jim and Wendy will be giving you a more detailed update later today.

I will mention briefly the patent reform legislation now at the markup stage on identical bills before the House and Senate Judiciary Committees. Two provisions of this complex, lengthy bill are of concern. They could impose enormous burdens on the court: one making all claim construction rulings immediately appealable as of right and another that dictates that courts in every case must apportion reasonable royalty damages, and do so by one particular methodology that requires valuation of all prior art. I have informed Congress of my concerns and I know they are being considered.

I note also the bill concerning federal whistleblower cases. It would give petitioners the option of an action in district court, after the MSPB, and of appealing either here or to the regional circuit, not only in Individual Right of Action cases but also in ordinary adverse action cases containing whistleblower claims or defenses. The bill passed the House and was reported out by the Senate Committee. If enacted, however, it would have only limited impact on our workload, and consequently, the speed of adjudication. I estimate that it would divert no more than 100 cases annually.

Immediately preceding this conference, the court held a two-day retreat. There, the judges discussed many matters of court administration. Also participating in the retreat were Solicitor General Paul Clement, the chief judges of the various courts, and the leaders of other tribunals whose cases we review, as well as members of the Federal Circuit Advisory Council. We greatly appreciate their time and their contributions.

The court needs a pro bono program for certain personnel cases. In selected cases, we will now ask counsel to represent pro se MSPB petitioners either with their consent, or, in any event, to file an amicus brief. We need your help and I ask all firms to consider participating. Simply notify Chief Deputy Clerk Pam Twiford if you are willing. This will assist the court in cases presenting difficult issues, particularly concerning pensions, while providing valuable experience to appointed counsel.

Our IT department, in conjunction with the Clerk's Office, has developed an electronic filing system which is in testing. In addition to filing official, paper copies, all briefs and appendices in counseled cases will also be e-filed. The documents will then be made available on PACER. We hope to publish our new rules and roll out the system this fall. Once the system is implemented, anyone, anywhere will have the opportunity to electronically review the decision below, the evidence supporting that decision, the appellate briefs and appendices, the oral argument, and ultimately our opinion. Your responses to our request for comments have been largely favorable and have constructively focused our attention on technical challenges we should address. We greatly appreciate your input.

The court held a special session on April 2, 2007 to celebrate the 25th anniversary of the signing of the Federal Courts Improvement Act of 1982, the law that created the court. The speakers included three individuals present at the Rose Garden ceremony when President Reagan signed the bill into law: Fred H. Fielding, White House Counsel, now as then; Professor Daniel J. Meador, the "father" of the Federal Circuit; and our very own Judge Daniel Friedman, a member of the original 1982 court. Don Dunner also spoke, as he played an important role in the court's creation, including testifying at hearings held on the bill.

You are already familiar with the renovation of Courtroom 201. Similar improvements are now being realized in Courtroom 402, whose renovation should be completed this summer. In 402 we will not only double the seating capacity but will meet all federal handicap compliance standards. Later, we plan a similar renovation of

our third courtroom, 203. That project will improve lighting and upgrade courtroom infrastructure, while retaining the historical furnishings that tie Courtroom 203 directly to the history of our predecessor court when it sat in what is now the Renwick Gallery.

After 20 years of service, Senior Staff Attorney Eleanor Thayer retired in July, 2006. J. Douglas Steere, who joined the staff in 1992 and became Ellie's deputy in 1995, has been appointed as her replacement. He assists the court with its motions practice, serves on the court's Rules Committee and Advisory Council, and is legal counsel to the Chief Judge. Already, Doug has proven himself to be more than up to the challenge.

In response to a change in the Federal Rules of Appellate Procedure, we have added new Federal Circuit Rule 32.1, which permits citation of nonprecedential opinions if issued after January 1, 2007. Those opinions, of course, are not binding on the court. Nonprecedential as well as precedential opinions are now available on the court's website as they are issued.

Our website also features helpful tips for avoiding rejection of motions papers and briefs. Look under Rules and Forms to find the Top Ten Reasons why briefs are rejected and Top Ten Reasons why motions are rejected. These tips have greatly reduced the rate of rejection and are well worth reviewing. There is also a Guide for Motions Practice which answers common questions. In addition, the court recently began posting selected nonprecedential orders that might be of general interest to the bar.

The court continues to hear oral arguments in other cities around the country. In October 2006, judges sat in Charlottesville and Richmond. Arguments were heard at the law schools of the Universities of Virginia and Richmond, as well as at the Fourth Circuit Courthouse. In March, three judges sat at the Army's Judge Advocate General's School in Charlottesville. This October, nine judges will sit in Manhattan at the law schools of Columbia University, Fordham and NYU, and at the Court of International Trade and the temporary courthouse of the Court of Appeals for the Second Circuit.

As you are no doubt aware, the Supreme Court has decided three of our patent cases this year.

On January 9, 2007, in Medimmune v. Genentech, the Court held that a licensee need not stop paying royalties under its license before seeking a declaratory judgment of invalidity, unenforceability or noninfringement.

The Court decided Microsoft v. AT&T, holding that "Microsoft's liability [under 35 U.S.C. § 271(f) does not] extend to computers made in another country when loaded with Windows software copied abroad from a master disk or electronic transmission dispatched by Microsoft from the United States."

The Court decided KSR v. Teleflex, rejecting rigid application of our teaching-suggestion-motivation test. The Court stated that its opinions have "set forth an expansive and flexible approach inconsistent with the way the [Federal Circuit] applied its TSM test here." Though "[t]here is no necessary inconsistency between the idea underlying the TSM test and the Graham analysis," the Court reasoned, it is error to "transform the principle into a rigid rule."

On May 21, the Court decided Hinck v. United States, affirming our holding that the Tax Court has exclusive jurisdiction to review claims for abatement of interest. The relevant Code section permits the Treasury Secretary to forgive interest on unpaid taxes that has accrued because of the IRS's unreasonable error or delay.

We have one case still pending at the Supreme Court. On May 29, certiorari was granted in John R. Sand & Gravel v. United States, limited to the Question: "Whether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the

Court of Federal Claims.” A divided panel of the Federal Circuit had held that the statute of limitations is “jurisdictional,” and may not be waived by the parties. Argument will be heard next Term.

The Federal Circuit has pending one en banc case. On June 7, we heard oral argument in In re Seagate Technology. We took the case en banc sua sponte to consider whether assertion of the advice-of-counsel defense to willful infringement should extend waiver of the attorney-client privilege to communications with trial counsel. This en banc can perhaps be traced in part to comments by Don Martens and Bill West at the Bench-Bar Conference at Amelia Island. So we stay alert to concerns you raise.

Last year was exciting enough, but this next year promises to be even more exciting.

That concludes my update on the state of the court. Thank you.