DELAWARE LAW REVIEW

VOLUME 7 2004 NUMBER 2

Solving the Mystery of Patentees' "Collective Enthusiasm" for Delaware

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Published by the Delaware State Bar Association

SOLVING THE MYSTERY OF PATENTEES' "COLLECTIVE ENTHUSIASM" FOR DELAWARE

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Although Delaware has long garnered attention for its disproportionate influence in matters of corporation law and its primacy as a forum for corporate disputes, only recently has attention been focused on its prominent role in patent litigation. In fact, the federal bench in Delaware has more experience in resolving patent disputes than any other district in the nation, a fact that has led commentators elsewhere to ask, why Delaware?

In 2001, Professor Kimberly Moore of the George Mason University School of Law published a seminal article reporting on patent litigation in the ninety-four federal judicial districts around the country.[1] She focused on "forum shopping" and the reasons litigants choose to sue where they do. Professor Moore generated a "top ten" list of popular patent venues and found that Delaware ranked sixth. She was surprised by Delaware's stature and was unable from her statistics to find a legitimate reason for "plaintiffs' collective enthusiasm" for Delaware: "[E]ither patent holders are selecting Delaware simply for its convenience (an unlikely answer in light of the size of the state and dearth of industry headquartered there) or patent holders are inaccurately perceiving Delaware to be more favorable to them than it is."[2] Further refinement of her statistics, however, and experience in the District of Delaware yield the mystery's solution.

Delaware's experience in patent litigation reaches back to the beginning of the last century. In the 1920s, Judge Hugh Morris — then the sole federal judge in Delaware

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1. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889 (2001). The district courts in the ninety-four judicial districts are the exclusive trial courts for "any civil action arising under any Act of Congress relating to patents." 28 U.S.C. § 1338(a).

2. Moore, *Forum Shopping*, *supra* note 1, at 918.

— decided many of the country's most important patent cases. In the 1960s and 1970s, Chief Judge Caleb Wright presided over numerous patent cases (involving technologies such as the manufacture of synthetic rubber and polyurethane foam insulation, the zeolite cracking of petroleum to produce gasoline, and the manufacture of transistors), thereby helping "to establish on a national scale the reputation of the District of Delaware as a forum for the expeditious and knowledgeable resolution of patent disputes."[3] This history offers the first clue to patent plaintiffs' choice of Delaware.

Another clue comes from the predictability Delaware offers. Delaware's four district court judges now manage over fifty active patent cases each. This caseload results in a bench with extensive practical experience and a rich collection of rulings that enhance the predictability of patent law as applied in Delaware. As companies have appreciated in bringing their corporate disputes to Delaware's Court of Chancery, predictability can be as important as end results.

Procedural aspects in the Delaware District Court's handling of cases are also attractive to litigants. Delaware offers a stable forum where transfer occurs only in specific circumstances. There is a great likelihood of getting to trial, and predictable case schedules are set.

The final clue comes from the fact that, at the end of the day, there is a high patentee win rate, with juries awarding some of the highest damages in the country.

This article relies on empirical data, complemented by the authors' experience in litigating patent suits in Delaware. The primary source of our data is the Cornell Judicial Statistics Database.[4] The Cornell Database uses data from the Administrative Office of the Courts, the government agency responsible for keeping statistics on federal litigation.[5] Other sources include the District of Delaware Pacer[6] and the U.S. Party/Case Index,[7] which are docketing systems that allow the user to obtain information such as case name, civil action number, filing date, termination date, and docket sheets.

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3. *See, e.g.*, Arthur G. Connolly, Sr. & Donald F. Parsons, Jr., *Senior Judge Caleb M. Wright's Contributions to the Trial of Complex Patent Cases*, 7 DEL. LAWYER 6 (Mar. 1989).

4. Cornell Judicial Statistics Database, http://teddy.law.cornell.edu:8090/questata.htm (last visited November 29, 2004). This database was created by Theodore Eisenberg and Kevin M. Clermont.

5. *See generally* http://www.uscourts.gov/adminoff.html (last visited November 29, 2004).

6. http://pacer.ded.uscourts.gov (last visited November 29, 2004).

7. http://pacer.uspci.uscourts.gov (last visited November 29, 2004).

I. DELAWARE'S HISTORICAL PROMINENCE IN PATENT LITIGATION

Delaware has been a popular forum for patent lawsuits for decades.[8] Before the 1989 amendments to the general venue statute, a corporate defendant could be sued where it committed allegedly infringing acts and had an established place of business, or where it was incorporated.[9] As the leading state for incorporation, Delaware often presented an attractive venue to plaintiffs in patent cases, particularly compared to a defendant's own "backyard."

Delaware retained its popularity, however, even after the 1989 venue amendment allowed plaintiffs to bring a patent suit in any judicial district where the defendant was subject to personal jurisdiction — almost anywhere in today's commercial environment.[10] Table 1 shows Delaware's popularity, as measured by the number of patent cases filed, during fiscal years 1987-2004, based on data from the U.S. Party/Case Index. The number of patent cases filed in Delaware has increased steadily.

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8. *See, e.g.*, Connolly & Parsons, *supra* note 3.

9. The patent venue statute allows suit "in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). Prior to the 1989 amendment, the Supreme Court defined "resides" narrowly to refer only to the defendant's state of incorporation. David D. Siegel, *Venue In Patent Infringement Suits: Expanded By The New 'Residence' Definition of* 28 U.S.C.A. § 1391(c)*?*, 1 ALB. L.J. SCI. & TECH. 271, 273 (1991).

10. Congress amended the general venue statute to make venue proper in any district where a corporation is subject to personal jurisdiction, and deemed that district to be the corporation's residence for purposes of the patent venue statute. Siegel, *Venue in Patent Infringement Suits, supra* note 9, at 274. The Federal Circuit, in *VE Holding*, confirmed that the general venue statute's definition of "resides" is applicable to the patent venue statute. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1583 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 922 (1991).

Table 1: Number of Patent Cases Filed in Delaware

Fiscal Year	Total Number of Patent Cases Filed in Delaware	Number of Patent Cases Filed in Delaware Per Judge
1987	9	2.3
1988	13	3.3
1989	15	3.8
1990	23	5.8
1991	34	8.5
1992[11]	27	6.8
1993	29	7.3
1994	35	8.8
1995	56	14.0
1996	48	12.0
1997	65	16.3
1998	91	22.8
1999	84	21.0
2000	97	24.3
2001	131	32.8
2002	125	31.3
2003	122	30.5
2004	161	40.3

In short, this district has remained a popular forum for patent litigation, resulting in significant institutional experience with patent cases.

II. UNMATCHED JUDICIAL EXPERIENCE

There are four judges and one magistrate judge on Delaware's district court: Chief Judge Sue L. Robinson; Judges Joseph J. Farnan, Gregory M. Sleet, and Kent A.

11. In 1992, the Judicial Conference changed the end of the reporting period for judicial statistics from June 30 to September 30 to correspond to the federal fiscal year. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1992 FEDERAL COURT MANAGEMENT STATISTICS (1992). Therefore, statistics for 1992 cover a fifteen-month period.

Jordan; and Magistrate Judge Mary Pat Thynge. Judge Farnan has been on the bench the longest, having been sworn in on July 26, 1985. Chief Judge Robinson was a magistrate judge from February 1, 1988 until December 15, 1991, when she became a district judge. She was appointed chief judge in 2000. Judge Sleet was appointed as a district judge on September 23, 1998; and Judge Jordan, the newest member of the bench, was appointed on November 27, 2002. Judge Jordan replaced Judge Roderick R. McKelvie, who retired on June 28, 2002 after ten years as a district judge. Magistrate Judge Mary Pat Thynge was appointed on June 17, 1992 and, in effect, filled the half-year vacancy in 2002 left by Judge McKelvie until Judge Jordan's appointment.

As noted above, because of the expansive venue statute, a plaintiff generally can bring a patent case in a number of districts. The number of patent complaints filed per district, therefore, is a reflection of plaintiffs' preferences. We found that Delaware ranks fourth of the ninety-four districts in terms of the number of patent complaints filed since 1994, accounting for about 4.5% of the patent complaints. Consistent with Professor Moore's results, we also found, based on data from 1995-1999, that Delaware ranks seventh of the ninety-four judicial districts in terms of number of patent cases terminated, i.e., resolved.[12]

Adjusting these statistics for the number of judges in each district, however, is a better proxy for the experience that each judge develops with patent cases. Table 2 shows that, during the last ten years, the Delaware district judges have averaged over twenty-three patent complaints filed per judge, per year. The Northern District of California came in a distant second with almost eleven patent cases filed per judge, per year — less than half of Delaware's average.

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12. As noted in the introduction, Professor Moore listed the "top ten" patent districts based on the number of patent cases terminated from 1995-1999. From greatest to least terminations, those districts are: Central District of California, Northern District of California, Northern District of Illinois, Southern District of New York, District of Massachusetts, District of Delaware, Southern District of Florida, Eastern District of Virginia, District of New Jersey, and the District of Minnesota. Professor Moore ranked Delaware sixth and the Southern District of Florida seventh. Moore, *Forum Shopping*, *supra* note 1, at 903. The number of terminations in these jurisdictions is almost identical, so the margins of error in Moore's data and our data easily account for the difference in rank.

Table 2: Number of Patent Complaints Filed Per Judgeship Per Year 1/1/94-9/30/04

Rank	District	Number of Patent Complaints Filed Per Judgeship Per Year
1	Del., D.	23.4
2	Cal., N.D.	10.4
3	Wis., W.D.	10.1
4	Minn., D.	9.3
5	Utah, D.	7.1
6	Cal., S.D.	6.9
7/8	Ill., N.D.	6.0
7/8	Wash., W.D.	6.0
9	Fla., M.D.	5.8
10	Mass., D.	5.3

The number of patent complaints filed per judgeship is derived from the U.S. Party/Case Index.[13] We determined the number of judgeships per district using the ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS publication for 2000.

Of all the districts, Delaware also resolves the most patent cases per judge. Using Cornell's Judicial Statistics Database, we analyzed the number of terminations with court involvement per district for fiscal years 1998-2000.[14] The top ten districts are shown in Table 3.

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13. The authors have been informed by the PACER Service Center that the district courts update statistics on PACER from time to time. Therefore, cases may have been filed in the district courts that are not reflected in these numbers. This observation is true for all of the data herein that relies on the U.S. Party/Case Index.

14. Year 2000 is the last year for which information is available on the Cornell Judicial Statistics website. Although it is possible to get pre-1998 data, we chose to focus on the most recent three years of data. Note that these are terminations with court involvement.

Table 3: Patent Cases Terminated With Court Involvement Per Judge Per Year, 1998-2000

Rank	District	Number of Patent Cases Terminated Per Judge Per Year
1	Del., D.	13.3
2	Wis., W.D.	8.7
3	Minn., D.	5.4
4	Mich., W.D.	5.1
5	Wash., W.D.	3.9
6	Cal., S.D.	3.7
7	Tex., N.D.	3.4
8	Utah, D.	3.3
9	Cal., N.D.	3.2
10	Ill., N.D.	3.1

On average, Delaware district judges resolve more cases per year than any other district judges in the country. Of the top ten districts in Table 3, district judges in Delaware resolve, on average, three times more patent cases than judges in the bottom half of the top ten and about one and a half times more than the judges in the second-highest ranking district.

Unquestionably, Delaware's judges can rightfully claim first place in experience with patent litigation.

III. PREDICTABLE CASE MANAGEMENT

Patent cases brought in Delaware have a high likelihood of staying in Delaware. The court employs predictable case scheduling practices, while, at the same time, the court is open to new ideas for better case management.

A. Rare Transfer

Transfer motions in Delaware are rarely granted. This factor may be important to patentees who wish to avoid suit in the defendant's backyard, given that a likely forum for transfer is the defendant's home turf. Since 1990, only 3.8% of all patent cases filed in

Delaware have been transferred. Of the transfer motions granted, more than half involved related litigation in another forum.

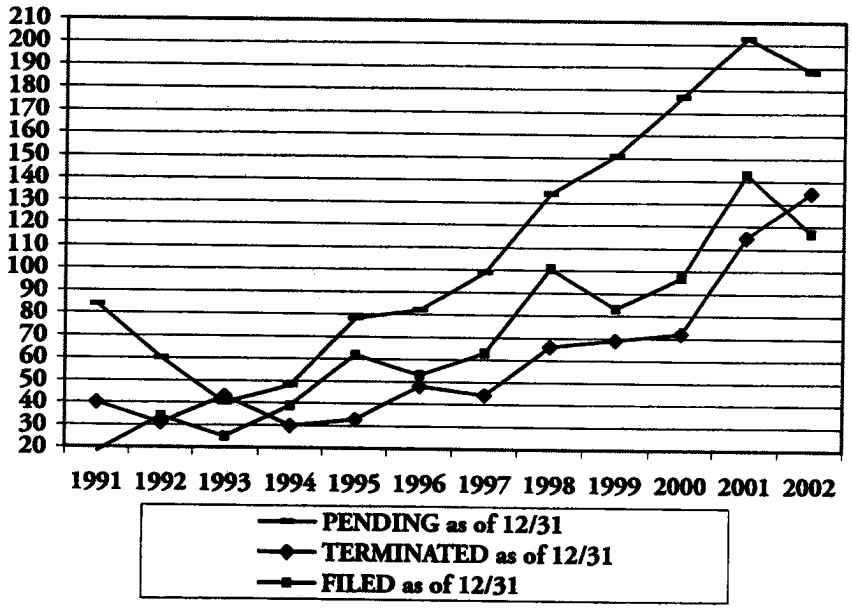
B. Early Scheduling Conference and Predictable Dates

The District of Delaware distinguishes itself by holding a scheduling conference early on, where all dates in the litigation — including a trial date — are set. Although the exact timing depends on the judge, scheduling conferences are usually held within three months of filing. Trial dates are set at the scheduling conference and are usually slated for sixteen to twenty-two months after filing. Barring unforeseen circumstances or agreement of the parties, that date usually holds. Thus, unlike in many other districts where the trial date may be uncertain, far off, or subject to last-minute scheduling or deferral, litigants in Delaware have predictability about when they will get to trial.

The Delaware judges resolve patent cases quickly. Table 4 shows the total number of patent cases pending, terminated, and filed in Delaware as of December 31 each year from 1991-2002.

Table 4: Number of Patent Cases in Delaware Pending, Terminated, and Filed as of 12/31

Year	Pending as of 12/31	Terminated as of 12/31	Filed as of 12/31
1991	84	40	18
1992	60	31	32
1993	40	43	25
1994	48	30	37
1995	78	33	60
1996	82	48	51
1997	99	44	61
1998	134	66	99
1999	151	69	83
2000	177	72	97
2001	203	115	144
2002	188	135	117



The number of patent cases pending and terminated are data provided to us by the Delaware District Court. The number of cases filed as of December 31 is from the U.S. Party/Case Index.

The Delaware judges take about 1.35 years (about 16 months), on average, to resolve a patent case. To calculate this statistic, we documented the date filed and the date closed of the patent suits filed in 1999, 2000, and 2001 in Delaware using the U.S. Party/Case Index and calculated the time from filing until closing:

Year	Number of Patent Cases Filed	Number of Patent Cases Closed	Average Time to Termination
1999	83	81	1.49
2000	97	93	1.35
2001	144	131	1.2

Because there are still cases pending for each of these years, we can expect the average time from filing to closing to rise slightly.

Professor Moore categorized Delaware as a "slow" district, which was one reason she was unable to explain "plaintiffs' collective enthusiasm" for Delaware.[15] From her data, Professor Moore concluded that the average time from filing to closing of patent cases filed in 1995-1999 in all jurisdictions was 1.12 years, with the quickest districts with fifty or more patent cases having average terminations of .43-.77 years.[16] Delaware's average time of resolution for cases filed during that time was 1.68 years. The fact that Delaware has so many patent trials (*see infra* Part IV) but takes only eight months longer, on average, than the average time of disposition indicates that most of its patent cases (including those that reach trial) are resolved relatively quickly.

C. Flexible Approaches

The Delaware judges experiment with procedures to resolve patent cases efficiently and effectively, with frequent consultation with litigants about best practices. For example, Chief Judge Robinson and an ad hoc committee have established a default standard for discovery of electronic documents to be used in cases pending before her (and which is available for use by the other Delaware district judges) if the parties are unable to agree on procedures for electronic discovery. Judge Jordan has revitalized the District of Delaware Intellectual Property Advisory Committee, consisting of experienced patent litigators from Delaware and around the country, as a means for the court to discuss efforts to continue to improve the administration of justice in intellectual property cases in Delaware.

The court is now experimenting with the use of special masters for discovery disputes in patent cases. On September 15, 2004, the court established a Special Master Panel for Intellectual Property Cases:

> [G]iven this Court's significant docket of complex intellectual property cases and given that this Court's Magistrate Judge is routinely scheduling hearings and mediation calendars six to eight months out, the need to appoint Special Masters to achieve these stated goals [of effective case management and prompt disposition] is clear.

When judges appoint a special master in an intellectual property case, the matter will be referred to the panel, which will assign a special master from the panel. Judge

15. Moore, *Forum Shopping*, *supra* note 1, at 909.

16. *Id.* at 908.

Farnan was the first to make a referral to the panel in the *St. Clair v. Canon* case, when he appointed a special master to resolve a dispute regarding St. Clair's assertion of privilege for documents sought by the defendants.[17] Chief Judge Robinson recently appointed a special master in three of her patent cases.[18]

Even before the court's September 15th order, special masters were occasionally appointed to handle a variety of issues, such as pre-trial matters, claim construction, and discovery disputes. Notwithstanding the creation of the Special Master Panel, members of the court have emphasized that special masters will be appointed only on those few occasions where circumstances warrant their use.

IV. FREQUENT PATENT TRIALS

Patentees can appreciate that prospects are good for their patent cases reaching trial in Delaware and know that their trials will be handled by an experienced trial judge.

A. A High Number of Trials

More patent trials are held in Delaware than in any other district. Since the beginning of 1997 (to September 30, 2004), there have been at least seventy patent jury trials and thirty-eight patent bench trials in Delaware.[19] During this time, Judge Farnan has presided over twenty-three patent jury trials and at least thirteen patent bench trials. Chief Judge Robinson has conducted twenty-two jury and at least thirteen bench trials. Judge Sleet, since joining the bench in 1998, has held five jury trials and at least two bench trials. Judge Jordan has presided over one patent bench trial and four patent jury trials, including one that settled before the trial concluded. Magistrate Thynge has presided over two jury trials and one bench trial.

Indicative of how many patent trials Delaware judges conduct, only one *district* held more patent jury trials than Judge Farnan, and only ten of the ninety-four *districts* held more than Chief Judge Robinson, based on data from 1997-2000.

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17. C.A. No. 03-241-JJF (D.I. 843).

18. British Telecom. v. Qwest Comm'ns, C.A. No. 03-527-SLR (D.I. 96); British Telecom. v. Level 3 Comm'ns, C.A. No. 03-530-SLR (D.I. 161); Arnco Corp. v. British Telecom., C.A. No. 04-222-SLR (D.I. 94).

19. The bench trials include trials of equitable issues, where infringement or invalidity were tried to a jury.

Over 16% of patent cases in Delaware reach trial:

Table 5: Percentage of Patent Cases Reaching Trial (Bench and Jury) in Districts Trying at Least Ten Patent Cases During 1995-2000

District	Number of Patent Trials 1995-2000	Number of Patent Cases Filed 1995-2000	Percent Patent Cases Actually Tried
Del., D.	73	451	16.2%
Wis., W.D.	13	118	11.0%
Wis., E.D.	13	137	9.5%
Tex., W.D.	10	115	8.7%
Or., D.	10	129	7.8%
Fla., M.D.	18	234	7.7%
Colo., D.	14	188	7.4%
Va., E.D.	22	345	6.4%
Minn., D.	13	356	3.7%
Ill., N.D.	27	740	3.6%
N.Y., S.D.	17	470	3.6%
Ohio, N.D.	10	282	3.5%
Tex., N.D.	11	317	3.5%
Cal., N.D.	28	842	3.3%
Mass., D.	11	405	2.7%
Cal., C.D.	14	1166	1.2%

The number of patent trials is based on the Cornell Judicial Statistics Database; the number of patent cases filed is from the U.S. Party/Case Index; and the percent of patent cases actually tried is the district's historical percentage, calculated by dividing the number of trials by the number of cases filed.

As shown by Table 5, Delaware has the highest percentage of patent cases reaching trial.

B. Infrequent Summary Judgment

Trials presumably occur so frequently in Delaware in part because summary judgment motions disposing of the entire case are rarely granted. For example, in 2003 there were sixty-four rulings on summary judgment motions. The vast majority (70.3%) were denied.

Of those granted, none disposed of the entire case. Similarly, from January to September 2004, there were forty-seven rulings on summary judgment motions. About 60% were denied, and none of the motions that were granted disposed of the entire case.

In particular, the judges rarely grant summary judgment in patent bench trials. It is the practice of some of the judges not to entertain summary judgment motions or claim construction hearings prior to a patent bench trial.[20] This type of schedule virtually ensures a trial, absent settlement, which can make settlement look more attractive to a defendant, who knows it cannot easily avoid trial or delay the case by the device of an inappropriate summary judgment motion. Such scheduling orders, however, are always subject to the parties' ability to convince the court that a case could be disposed of by motion before trial.

For patent jury trials, Judges Farnan and Sleet have put in place screening procedures for summary judgment motions. Judge Farnan, for example, requires a party filing a motion for summary judgment to include a "statement certifying that no genuine issues of material fact exist with regard to the facts argued in support of the motion." In lieu of an answering brief, the party opposing the motion may file a counter-statement "certifying that genuine issues of material fact exist and setting forth the material facts the party contends are disputed." The movant then files a response to the counter-statement. If the court decides that there are no factual disputes, the parties then submit answering and reply briefs.

Judge Sleet's procedures require submittal of short letter-briefs seeking permission to file a motion for summary judgment. Answering and reply letter-briefs are permitted. The court then holds a status conference to determine whether any of the proposed motions will be allowed. If so, briefing commences pursuant to the district's local rules. As with the prohibitions on summary judgment and claim construction in bench trials described above, these screening procedures for case-dispositive motions increase the likelihood that a case will reach trial.

V. HIGH WIN RATES AND HIGH DAMAGES

One reason Professor Moore expressed an inability to explain Delaware's popularity as a patent forum was her conclusion that patentees prevailed at trial (as opposed

20. *See, e.g.*, KAO Corp. v. Unilever U.S. Inc., C.A. No. 01-680-SLR (D.I. 65) (disallowing summary judgment motions and claim construction hearing); Original Creatine Patent Co. v. Muscletech Research & Development, Inc., C.A. No. 02-366-SLR (D.I. 29) (same); Astrazeneca AB v. Andrx Pharmaceuticals, LLC, C.A. No. 04-080-SLR (D.I. 21) (same); Merck & Co. v. Teva Pharms. USA, Inc., C.A. No. 00-035-JJF (D.I. 121) (disallowing claim construction hearing); Bayer AG v. Sony Electronics, Inc., C.A. No. 95-8-JJF (D.I. 494) (same); C.A. No. 01-294-RRM (D.I. 146), published in 209 F. Supp. 2d 348 (D. Del. 2002) (same).

to win rates based on pre-trial disposition) only 46% of the time. This percentage placed Delaware ninth among her top ten districts. She found that the highest-ranking district was the Northern District of California, at 68%.[21] Thus, Professor Moore concluded that Delaware is among the least favorable of her top ten districts for patentees[22] and that "either patent holders are selecting Delaware simply for its convenience ... or patent holders are inaccurately perceiving Delaware to be more favorable to them than it is."[23]

Professor Moore's calculation of a win rate, which comprises verdicts from both bench and jury trials, warrants careful examination. Generally, consistent with anecdotal data, the win rate for bench trials is lower than the win rate for jury trials.[24] Because patentees typically have the option to demand a jury trial, we recalculated win rate based on the number of jury verdicts where damages were awarded to the patentee. Our statistics show that Delaware is a more favorable forum for patentees who demand a jury trial than indicated by Professor Moore. Of the patent jury trials with verdicts occurring between 1997 and September 30, 2004 in which the jury was asked to award damages, thirty-eight of fifty-seven juries — or 67% — awarded damages to the patentee. Of the patent jury trials with verdicts in 2002 through September 30, 2004, about 80% of the juries awarded damages to the patentee.

The significance to litigants of the patentee win rate at trial may also depend on the probability that a case will reach trial in that jurisdiction, given the general view that summary judgment is a device for defendants. Thus, the probability of reaching trial should also be considered in determining how favorable a district is for patentees. A district with a lower win rate at trial (the measure used by Professor Moore) may in fact be more favorable to patentees if patent cases in that district have a higher probability of surviving summary judgment and reaching trial. Conversely, a district's apparently high win rate at trial may reflect a less patentee-friendly forum if patent cases in that district are rarely tried.[25]

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21. Moore, *Forum Shopping*, *supra* note 1, at 917.

22. *Id.*

23. *Id.* at 918.

24. *See generally* Kimberly A. Moore, *Judges, Juries and Patent Cases — An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365 (2000).

25. For example, suppose District X has a low 40% win rate at trial and a high 20% chance of getting to trial. The chance of a patentee getting to trial and winning is 8%. Alternatively, suppose District Y has a high 60% win rate at trial but a low 5% probability of getting to trial. The chance of getting to trial and winning is 3%.

In Table 6, we used Professor Moore's win rates from 1983-1999 and reordered her top ten jurisdictions based on the probability that a patentee will get to trial and win:

Table 6: Professor Moore's Top Ten Districts Ordered By Probability of Getting to Trial and Winning

District	Number of Patent Cases Filed 1983-1999	Number of Patent Trials 1983-1999	Percent of Patent Cases Going to Trial	Moore's Win Rate for Bench and JuryTrials	Probability of Getting to Trial and Winning
Del., D.	571	116	20.3%	46%	9.3%
Va., E.D.	445	41	9.2%	58%	5.3%
Ill., N.D.	1036	87	8.4%	48%	4.0%
Minn., D.	553	32	5.8%	67%	3.9%
Cal., N.D.	1191	67	5.6%	68%	3.8%
N.Y., S.D.	780	43	5.5%	63%	3.5%
Cal., C.D.	1511	77	5.1%	63%	3.2%
Fla., S.D.	516	25	4.8%	63%	3.0%
N.J., D.	632	30	4.7%	61%	2.9%
Mass., D.	657	35	5.3%	30%	1.6%

The probability that a patent case will get to trial is based on historical data of the number of patent cases that went to trial in the district. To determine the number of patent suits filed, we used the U.S. Party/Case Index. The number of patent trials is from the Cornell Judicial Statistics Database.

Even using Professor Moore's win rate at trial, the probability of a patentee's reaching trial and winning during 1983-1999 in Delaware is almost twice that of any of her top ten patent districts. Thus, there is a far higher probability of reaching trial and winning a patent case in this district than in any of Professor Moore's top ten patent districts.

We also extended Professor Moore's analysis by calculating the size of damages awards in patent cases, which provides another potential explanation for Delaware's popularity as a patent forum. Using the Cornell Judicial Statistics Database, we sampled the

damages awarded in patent jury trials over three time periods.[26] The District of Delaware consistently ranks in the top three jurisdictions having the highest damages awarded.

We first analyzed the average amounts awarded in patent jury trials between 1978-2000 in districts with at least ten jury trials. Delaware ranks second to the Western District of Texas. A more recent sample of the seventeen districts that held at least ten patent jury trials between 1990-2000 produced the same result: Delaware is second to the Western District of Texas for highest average amount awarded. Of Professor Moore's top ten patent jurisdictions, Delaware has the highest average amount awarded in patent jury trials from 1995-1999 (the time period Professor Moore used to generate her top ten districts).

That damages awards in Delaware are, on average, among the highest in the country may help to explain why plaintiffs file patent litigation there, particularly when one considers that patentees who sue in Delaware have the highest probability of getting to trial and winning in patent cases of any jurisdiction.

VI. THE MEDIATION BONUS

Most patent cases in the District of Delaware are referred to Magistrate Judge Mary Pat Thynge for mediation. Indeed, Chief Judge Robinson's, Judge Sleet's, and Judge Jordan's standard patent scheduling orders all contain a referral to Judge Thynge. Mediation provides an opportunity to settle a case without the full expense and risks of litigation. Mediation in Delaware with Judge Thynge has the additional benefit of mediating before someone who is sophisticated with patent matters and is well respected.

In the ten years starting January 1, 1993, Judge Thynge mediated 893 cases. As of January 2003, twelve of these cases were still in various stages of mediation.[27] Of 893 cases, 203 were patent matters. Of those 203 cases, 136.5 (67.2%) settled at or after the mediation. About twenty-three patent matters settled before mediation.

According to the magistrate judge:

> [I]t seems that it was more common for non-patent matters to settle before mediation when it was first introduced in our jurisdiction. Now

26. Although Administrative Office of the Courts' data is widely used, it should be understood that there are certain limitations to the data's accuracy. For example, only damages awards up to $9,999,000 are recorded. So, a $200 million damage award is reported as a $10 million award. *See, e.g.*, Moore, *Judges, Juries and Patent Cases*, *supra* note 24, at 381.

27. As of January 2003, the magistrate judge had mediated 690 non-patent matters, of which 567.5, or 82%, settled via mediation.

> counsel appear to have more of a comfort level with our process. Local counsel's familiarity with mediation at that time had been limited to mediation in the state court, which due to the larger number of cases is more like a settlement conference with time limitations (usually 2-3 hours) and no follow up meetings, [telephone conferences] or emails.

From January 2002 to January 9, 2003, Judge Thynge mediated fifty-eight cases, in addition to handling former Judge McKelvie's caseload. Twenty of the fifty-eight were patent matters, and almost all of those settled (87.5%). Judge Thynge also presided as trial judge, by consent of the parties, over at least two patent cases — *Genzyme v. Atrium*[28] and *Honeywell v. Universal Avionics*[29] — and is expected to hear at least three more in 2004.[30]

CONCLUSION

Delaware has long been a top patent venue. Patentees continue to choose this district for several reasons relating to all aspects of their cases. The Delaware district judges have a history of receptivity to patent cases and have unparalleled experience given the district's record of having the most patent trials, both per district and per judge. The judges set predictable case schedules within the first few months of a complaint being filed, including a trial date, which is rarely moved. Patent cases are rarely transferred except in predictable circumstances and are infrequently disposed of by summary judgment. The Delaware judges experiment with new ways to handle patent litigation more efficiently and effectively. Of Professor Moore's top ten districts, Delaware has the highest probability of a patentee's reaching trial and winning. Moreover, patent juries in Delaware award higher damages, on average, than patent juries in most other districts in the country. Finally, patent litigants in Delaware can mediate with Magistrate Judge Thynge and take advantage of her patent litigation experience.

All of these reasons taken together, which comport with the authors' experience, demonstrate that the reasons for patentees' choice of the District of Delaware are rational, fully understandable, and legitimate. The mystery is solved.

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28. C.A. No. 00-958 (D.I. 213).

29. C.A. No. 02-359.

30. Inline Connection v. AOL Time Warner, Inc., C.A. No. 02-272 (D.I. 23); Inline Connection v. Earthlink, C.A. No. 02-477 (D.I. 14); Honeywell Int'l Inc. v. Universal Avionics, C.A. No. 03-242 (D.I. 10).