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Profs Spar Over Fed. Circ. Interfering With Albright

By **Dani Kass**

Law360 (October 29, 2021, 6:21 PM EDT) -- As the Federal Circuit continues to grant mandamus petitions overriding Judge Alan Albright's transfer refusals, law professors on a panel Friday were torn between whether the appeals court was "overstepping" or reacting rationally to a judge who does not always take the court's direction.

Catholic University of America law professor Megan M. La Belle — on a virtual panel at the Southern Methodist University Dedman School of Law — said the Federal Circuit's repeated granting of mandamus petitions over the same issue from the Western District of Texas judge shows the court is "overstepping" on a concern more appropriate for Congress to handle.

But Illinois Tech Chicago-Kent College of Law's Greg Reilly said the patent court was doing what's appropriate when dealing with someone who won't get in line.

"It feels a little bit like blaming the kid who slaps away the other kid's hand after the other kid's been poking them repeatedly for two minutes," Reilly said. "If you have a judge who is undercutting or taking the very narrowest grounds of this supervisory oversight, I'm not sure that it's inappropriate for the Federal Circuit to use mandamus."

But he also said that mandamus is not the ideal path, calling it a "whack-a-mole format" to problem-solving, and that judges instead must show more restraint.

"What we're seeing is essentially judicial activism," Reilly said, pointing to examples in the Eastern and Western Districts of Texas. "There is a sense of judges thinking they know how to handle patent litigation better than other people."

Judge Albright oversees **about a quarter** of the country's newly filed patent litigation and has been repeatedly clear that he wants patent cases filed in his court and does not intend to let them go. His **regular refusal** of transfer motions has led to his **being told off by** the Federal Circuit **repeatedly**, and he has **started granting** more of these motions than in the past, which the professors acknowledged positively.

The panel's final member, American University law professor Jonas Anderson, claimed that the Federal Circuit had granted mandamus petitions undoing Judge Albright's orders 14 times in the last three years, which he called "an incredible number."

"Ideally, we would have district court judges that do their best, when they get corrected from an appellate court, [to] change course in accordance with the court," Anderson said. "We haven't seen that very much with Judge Albright. We might be seeing it now. The Federal Circuit has done a rare thing, but I think it might have been needed in this case because [the transfer rulings were] out of control."

Some of these mandamus orders are **precedential**, and La Belle raised concerns that targeting rulings against an outlier judge will affect district courts around the nation.

She also said that, in this forum shopping dispute, people should not look only at what court defendants are trying to leave, but also at where they're trying to go: often the more friendly Northern District of California.

Among his other controversial policies, Judge Albright **won't stay his cases** for review at the Patent

Trial and Appeal Board, which became especially controversial when the PTAB started looking at district courts' trial schedules to decide whether to review a challenged patent.

But La Belle said that, at least in regard to PTAB stays, Judge Albright is sticking within the bounds of what Congress allows.

"If people don't like the fact that Judge Albright doesn't grant stays with respect to the PTAB, well then Congress shouldn't have left it up to trial judges to decide whether to grant stays," she said.

Echoing La Belle's concerns about tailoring the system to address Judge Albright, Reilly pointed to a bill in Congress that aims to cut down on discretionary denials at the PTAB, and expressed concern that Congress is issuing national **legislation** based on how the Waco, Texas, court is **affecting** PTAB reviews.

"Congress could have created a specialized district court in Waco, Texas, to handle patent cases if it had wanted to," Reilly said. "Congress chose instead to introduce expertise through other means into the patent system, and a single judge in a single district doesn't have the authority or legitimacy to overturn that decision."

--Editing by Peter Rozovsky.

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