

Patent Trial Judges Oppose Posner's Push For Neutral Experts

By Cara Salvatore

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Law360, New York (September 30, 2016, 10:12 PM EDT) -- Four federal judges said Friday that U.S. Circuit Judge Richard Posner's idea of using neutral expert witnesses more often in patent jury trials is a bad one.

In a wide-ranging discussion hosted by NYU Law's Civil Jury Project, U.S. District Judges William Conley of Wisconsin, William Young of Massachusetts, Rodney Gilstrap of Texas and Leonard Stark of Delaware all had rejoinders to a view Posner has espoused in a speech to the Seventh Circuit Bar Association, in his writings, and elsewhere: that neutral experts should be used more often in trials, even in jury trials.

"He's dead wrong," Judge Young said.

Judge Young's home district, Massachusetts, is No. 5 for patent trials in the nation, with two trials in 2015, though New Jersey surpasses it in number of patent suit filings.

It's not the use of a neutral party Judge Young objects to, but the idea of putting such a person in front of a jury.

"I had a judge tell me this is a great way to get rid of cases," Judge Young said. When an allegedly neutral party shows up and reveals which side they've landed on, the disfavored party "knows they're going down the drain." It could push them to settle even if they think they have an excellent case, he suggested.

Judge Conley agreed that juries may overweigh the authority of someone labeled by the court as neutral.

"I love the idea of neutral experts. I don't know that I'd use a neutral expert in front of a jury, because that'd give them the imprimatur of being

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the decision maker," he said.

Judge Stark said judges can also do themselves a huge service if they use neutrals in the right way.

He didn't know the right way until he visited the Eastern District of Texas and learned some of their hacks, he said, like the idea of using a technical adviser on some matters. Eastern Texas is, of course, the number-one spot in the nation for patent litigation. Now, Judge Stark has just completed the first year of an experiment in which he has one law clerk whose only role is to be an expert in Markman hearings, or claim-construction hearings.

At the end of that one year, "we've seen every argument there is to be made about Markman in 30 or 40 hearings," Judge Stark said. "I'm finding that a smart young lawyer who does it repeatedly" is extremely helpful.

Judge Gilstrap, sitting in the district that Judge Stark learned from, echoed the usefulness of technical advisers. He uses them on a per-case basis when he finds they're needed, however, keeping "a list of eight or 10 technical advisers whom I'm comfortable with their credibility, integrity, I'm comfortable with their intellect," Judge Gilstrap said.

The ABA Journal and Chicago Tribune have reported Judge Posner's affinity for neutral expert witnesses, and he spent a few pages discussing it in his 2013 book, "Reflections On Judging."

--Editing by Bruce Goldman.

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