

VIA ELECTRONIC TRANSMISSION

July 5, 2022

The Honorable Chief Justice John Roberts
Presiding Officer
Judicial Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Dear Chief Justice Roberts:

We appreciate your attention to our last letter, of November 2, 2021, regarding forum shopping in patent litigation. We look forward to an answer to that letter as soon as possible. We write you today to raise concerns about the abusive appointment of special masters which is occurring in a single federal district court. Our understanding—raised by a witness in a recent hearing for the Senate Intellectual Property Subcommittee—is that a single judge is unilaterally appointing special masters in patent cases to act in the capacity of “technical advisors” and has delegated a major portion of his patent caseload to these private attorneys.

As you know, the use of private attorneys as special masters in civil litigation has long been an object of scrutiny and concern. As a U.S. Court of Appeals noted 80 years ago, “it is a matter of common knowledge that references [to special masters] greatly increase the cost of litigation and delay and postpone the end of litigation.”¹ In addition, there is “greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge”² rather than a special master.

Because of these concerns, Rule 53 restricts the appointment of special masters for trial proceedings to “exceptional condition[s],” and it restricts such references for pre-trial proceedings to issues “that cannot be effectively and timely addressed by an available district court judge or magistrate judge.” As the Advisory Committee notes make clear, Rule 53 embraces the understanding that appointment of a special master “shall be the exception and not the rule.”

Similarly, the U.S. Court of Appeals for the Federal Circuit, which exercises exclusive review over patent cases, has emphasized that district courts should use their authority to appoint technical advisers in patent cases “sparingly and then only in exceptionally technically complicated cases.”³ The court noted that there is a risk that some of the judicial decision-making function will be delegated to the technical advisor, and that “district court judges need to be extremely sensitive to this risk and minimize the potential for its occurrence.”⁴

¹ *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942).

² *Id.*

³ *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1378 (Fed. Cir. 2002).

⁴ *Id.* at 1379.

According to press accounts, in this single federal district court, one of these technical advisors—who is also a former clerk to this judge—was assigned to at least 29 separate matters and earned over \$700,000 in just the first half of 2021.⁵ Under the rules governing special masters, these amounts are billed directly to the parties to the cases. In one case in this court, the technical advisor has billed the parties over \$100,000.⁶

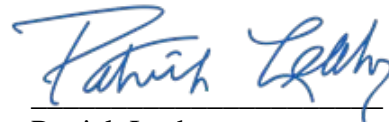
This district court’s practices appear to clearly exceed the boundaries of Rule 53. It is plain that the court’s use of technical advisors is not “the exception rather than the rule” and that judicial functions are being broadly delegated to private attorneys. It is also clear that these appointments are not driven by the “exceptional technical complexity” of particular cases. In fact, one technical advisor is appointed frequently to cases involving many different technologies and cannot actually be an expert in the technology relevant to each particular case. Rather, the frequent use of technical advisors appears to be necessitated by this single court’s open solicitation of a massive patent caseload.

The rules governing the use of special masters seem clear to us. We ask that you investigate abuses relating to the appointment of technical advisors, particularly in the practices described above. We ask that you address whether the rules permit this frequent use of technical advisors. If so, we ask that you amend or clarify the rules to avoid this practice. If not, we ask that you address any judge’s misapplication of the rules. Thank you for your prompt attention to this very important matter. If you have any questions, please do not hesitate to contact us.

Sincerely,



Thom Tillis
United States Senator



Patrick Leahy
United States Senator

Cc: Chief Judge Orlando Luis Garcia, Chief Judge, U.S. District Court for the Western District of Texas

⁵ See Scott Graham, *How a Former Law Clerk Earned \$700K This Year as a Court-Appointed Technical Adviser*, National Law Journal (Aug. 26, 2021).

⁶ See *id.*