

LAW WEEK COLORADO

Patently Denver

By **Matt Masich**
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DENVER—A team of Denver intellectual property lawyers has lobbied for years to get the U.S. Patent and Trademark Office to open a satellite office here, and their efforts may be close to bearing fruit.

The U.S. Senate in March passed a bill freeing up millions of dollars for the patent office and authorizing it to open three to four satellite offices. The House is expected to act on the bill this summer. Denver is on the short list to get one of those potential offices, which could generate hundreds of jobs.

That Denver is in the running for the office is due largely to the persuasive powers of attorneys Michael Drapkin of Holland & Hart, Tom Franklin of Kilpatrick Townsend & Stockton and John Posthumus of Sheridan Ross.

The lawyers have marshaled the state's Congressional delegation and met frequently with key government officials in Washington, D.C., to make their dream a reality. But there's still a long way to go before Denver gets a satellite office.

"We can see the goal line, but the last 10 yards are the hardest," Posthumus said. "It's going to take a community effort to make it happen."

Though the city is close, it's too soon to guarantee anything. Denver had hoped to land the very first satellite office, but that ended up going to Detroit in December.

It's been a big effort, with the three Denver lawyers spending hundreds of hours over the last few years on the campaign to win a satellite office. Posthumus guesses he's spent as much as a thousand hours.

"It's been larger than I anticipated," he said.

A win-win

The concept of satellite offices is designed to fix a host of problems that arise from having the office in a single location in Alexandria, Va., Franklin said. Problems range from sloppy patents to a huge backlog in processing them.

The patent office should skim the top talent from candidate pools across the country, but instead it draws deep from the Washington pool while ignoring other markets, he said.

The office also has a hard time retaining examiners. Washington is a high cost-of-living city, and examiners make about two-thirds what they could in the private sector. The capital also tends to have a more transient population.

"People say it takes three to five years for an examiner to be trained, productive, and hitting on all cylinders," Franklin said. "The average patent examiner stays 30 months."

There is also inadequate space at the main patent office. It houses 8,000 patent examiners, but there's no room for the 3,000 more needed. The George W. Bush



Tom Franklin, John Posthumus and Michael Drapkin say legislation in the works could result in a Denver patent office. | LAW WEEK PHOTO JAMIE COTTEN

administration proposed to resolve the problem by having examiners telecommute. Franklin thinks examiners need to talk face to face with people filing patents.

"It's hard on paper to enunciate the novelty of something new," Franklin said. "The things that are new don't even have words to describe them."

Starting in earnest in 2008, the Colorado lawyers began to pitch the idea of satellite offices that could draw the brightest talent from more pools while having less turnover. And if satellite offices are the course the patent office wants to take, Denver is one the best options, Franklin said. The city has one of the highest per capita rates of people with science and technology degrees while being relatively affordable.

"It's a win-win for the patent office and for Colorado," Posthumus said. "It certainly brings jobs to Colorado that I think make a lot of sense based on our capacity to fill these positions that require either a science or engineering background."

Were an office to open, he estimates it could mean at least 100 openings for patent examiners. (Patent examiners are usually non-lawyer patent agents.) But it would also mean more demand for IP lawyers here.

"I think other law firms would be interested in opening in Denver because of the presence of the satellite patent office here," Posthumus said.

It would also boost Denver's profile in the eyes of technological companies nationwide, he said.

The campaign

The seeds of the lawyers' campaign were sown during the August 2008 Democratic National Convention. The Colorado Bar Association hosted a debate on patent reform between representatives for Barack Obama and John McCain. At the end, Franklin made a case for satellite offices and got a positive response from both camps.

Drapkin and Posthumus, respectively chair and vice-chair of the bar association's IP section, formed with Franklin a trio of advocates on Denver's behalf. They first took the case for a Denver satellite office to the state economic development office and the Denver Metro Chamber of Commerce, getting enthusiastic feedback.

"We were slowly moving up the food chain in terms of getting support," Posthumus said.

In July 2009, the three made the first of many trips to Washington to enlist support for the idea of satellite offices in general and more specifically the placement of one in Denver. They had meetings with all seven of Colorado's U.S. representatives, or their staff, and the two senators. The patent office didn't have an appointed director yet, but they talked with Deputy Director Sharon Barner and Commissioner Bob Stoll.

They also met with Department of Commerce General Counsel Cam Kerry and White House technology official Beth Noveck, who was enthused about the idea and asked them to submit a two- or three-page "roadmap" of how a satellite office system might work.

"Practically everyone was in complete agreement that they needed a nationwide workforce," and that the satellite office system was a good way to go, Franklin said. The only pushback happened at a meeting with the union that represents examiners.

"But it went a long way to people warming up to this that we met with the union," Franklin said.

In September 2009, one week after David Kappos took the reins as patent office director, the Colorado lawyers met with him for an hour in his Washington office. Posthumus met with him again that December.

In late 2009 and early 2010, Gov. Bill Ritter, Mayor John Hickenlooper and Colorado's Congressional sent the patent office letters supporting an office here. Not long after that, the lawyers teamed

with Accelerate Colorado, a public/private business development group, to host a reception for patent office officials at the Colorado Governor's Mansion. Hickenlooper, as Denver mayor, addressed the crowd of business leaders and legislators.

"It was a great show of support from the community," Posthumus said. "The patent office was impressed by the local support from everywhere, from the business community to the university community."

Momentum seemed to be building in 2010 toward a Denver satellite office. Not long after the reception, the signals from Washington were "changing from, 'I don't think so' to 'yes,'" Drapkin said. "It was just a question of where and when."

But then rumblings came that Detroit might be a top contender to help revive its depressed economy. The rumor was made official in December.

"We succeeded in convincing them that a satellite patent office is the way to go," Franklin said. "Unfortunately, they chose to open it in Detroit."

Legislative plan

But the idea of satellite offices had caught the imaginations of the patent office and the legislature. A bill pending in Congress is now Colorado's best chance at landing a patent office.

Senate Bill 23, which passed the Senate in March, would do two things vital to the success of the satellite system. First, it would end fee diversions at the patent office, dramatically boosting its resources. The patent office is a self-funded agency, raising all of its money through fees. But the office can't keep all of the fees it generates.

"Right now, they're stuck with whatever their budget was last year, and any overage doesn't go into a pot to examine patents down the road," Drapkin said.

Instead, extra money gets funneled from the patent office and into the general fund. The office has lost close to \$900 billion this way over the last two decades. The end of fee diversions would give the patent office the funds to open new offices.

Sens. Michael Bennet and Mark Udall added an amendment to the bill that would authorize the patent office to open three to four satellite offices over the next three years — though there's still no assurance one of these would be in Denver.

The provision for more satellite offices has already been incorporated into the House version of the bill, which should be acted on this summer. The Obama administration last week issued a letter urging the bill's passage.

Drapkin says he'll never forget the experience of seeing the satellite-office amendment go through.

"It was something that started as just an idea," he said. "We all had tears in our eyes: now it's really happening." •

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