

Building on Successful Judicial Assignment Reform in Texas

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More than 16 months ago, the two ranking members of the Senate Judiciary Committee asked Chief Justice John Roberts to direct the Judicial Conference of the United States to study forum shopping in patent litigation, particularly in the Waco Division of the U.S. District Court for the Western District of Texas, where U.S. District Judge Alan Albright is the sole judge.^[1]

A month later, the chief justice did as the senators asked, instructing the issue to be put before the Judicial Conference's Committee on Court Administration and Case Management, or the CACM.^[2]

Despite the senators' deadline of May 1, 2022, the Judicial Conference has reported little progress in the intervening months.

In April 2022, the Judicial Conference responded to the senators that the patent subcommittee of the CACM had begun to study the topic,^[3] and in September, the CACM issued a vague statement that it had discussed data from the patent subcommittee "and formulated appropriate next steps."^[4]

Since then, however, neither the CACM nor the Judicial Conference, which last met in March, has made any public statement on the study's progress.

The concerns about parties "judge shopping" by filing suit in court divisions with only one judge hearing civil cases are not limited to Judge Albright or to patent litigation.

As in Waco, all of the patent cases filed in the Marshall Division of the Eastern District of Texas are assigned to U.S. District Judge Rodney Gilstrap, and so a plaintiff filing in that district can effectively choose its judge simply by selecting the Marshall Division in a drop-down box when filing suit.^[5]

Similarly, parties regularly file cases challenging government regulations and mandates in districts where the case assignment procedures allow parties to know before filing which judge will hear their case, allowing them to effectively choose a judge who will be favorable to their position. For example, cases involving hot-button political issues such as contraception and immigration,^[6] the Affordable Care Act^[7] and challenges to climate change

regulations^[8] are routinely filed in federal courts where a single judge hears at least 85% of civil cases filed in that division.

Two law professors cited in the senators' letter, J. Jonas Anderson and Paul R. Gugliuzza, have recently published an article analyzing the various incentives for judges to attract cases and how their case-seeking behavior shapes judicial procedures in ways favorable to the party who chooses the forum.^[9]

As they point out, judicial competition for particular types of cases leads judges to provide procedural advantages to encourage parties to file their cases in their court.^[10] The professors found that all of the examples of court competition they analyzed shared one thing in common — courts successful in attracting cases offered the ability to judge shop,^[11] leading to harmful effects on the judicial system.^[12]

In a June 2022 Law360 guest article, I recommended random districtwide assignment of patent cases, a measure within the authority of the Judicial Conference.^[13]

On July 25, 2022, then-Chief Judge Orlando Garcia of the Western District of Texas entered an order directing that all patent cases filed in the Waco Division be randomly assigned among 12 district judges.^[14] In November, shortly before taking senior status, Judge Garcia appeared to reverse course, ordering that all civil cases in the Waco Division be assigned to Judge Albright effective on Dec. 1.^[15] Just two weeks later, though, new Chief Judge Alia Moses clarified that patent cases filed in the Waco Division would be randomly assigned among 11 of the 12 active district judges.^[16]

Since Judge Garcia's July 25 order, the Western District of Texas has shown that random districtwide assignment of patent cases works, as the number of patent cases filed in the Western District of Texas and those assigned to Judge Albright have gone down dramatically.

According to Lex Machina, in just over eight and a half months since Judge Garcia's July 25 order, the number of patent cases filed in the Western District of Texas fell by almost a third as compared to the same time period before the order.^[17] Similarly, in the eight and a half months before July 25, Judge Albright received 95% of the patent cases filed in the district, but he has received less than half of the cases filed since the order.^[18]

The number of patent cases assigned to Judge Albright since Judge Garcia's order has also dropped by approximately 66%,^[19] although Judge Albright continues to be assigned more than his share of new patent cases filed in the district — likely because he is automatically assigned all the cases marked as a “related case” to cases he is already overseeing.^[20] As time goes by, the number of new cases that qualify as related cases can be expected to go down, and so the number and percentage of patent cases assigned to Judge Albright should continue to decrease.

Sens. Patrick Leahy, D-Vt., and Thom Tillis, R-N.C., Chief Justice Roberts and commentators have all expressed the same concern: The lack of rules regulating judicial assignment within a district, especially where a division has only one district judge, can effectively enable a plaintiff to select a particular judge to hear its case.

But the Western District of Texas, though, shows that random districtwide assignment will dilute the influence of any single judge and limits, if not eliminates, such so-called judge shopping. Random assignment also has the

benefit of spreading the burden of complex cases more evenly and promotes the Judicial Conference's long-standing policy in favor of random assignment of cases and generalist district judges capable of handling the full range of legal issues.^[21]

A comprehensive rule adopted by the Judicial Conference requiring random districtwide assignment of patent cases — and perhaps in other types of cases as well — appears to be the most effective measure for reducing judicial competition and judge shopping in the foreseeable future.

Other proposed solutions, such as congressional action,^[22] a system of specialized patent trial courts,^[23] or local district court rules or standing orders requiring random assignment,^[24] are far less certain.

Congress has shown little interest in legislative solutions, and a previous legislative attempt to foster specialized patent courts — the Patent Pilot Program, which expired in 2021 — appears unlikely to be revived.

Changes in local rules or standing orders, such as Judge Garcia's July 25 order, will make a difference only if adopted in district courts across the country — otherwise, judge shopping will continue to occur in districts without such rules. Moreover, the process for enacting local procedural rules and standing orders lacks transparency and differs from district to district, and standing orders can be reversed at any time.

In addition, the local rules process is entirely within the control of the judges in each district.^[25] The same incentives and case-seeking behavior that foster judicial competition for cases will discourage districts from adopting rules which would curb judge shopping.

Only prompt action by the Judicial Conference seems likely to curtail the type of judge shopping seen in patent cases — as well as in other types of federal court litigation — and is needed to improve the efficiency and procedural fairness of the federal courts in such cases.

[1] Correspondence from Sen. Patrick Leahy and Sen. Thom Tillis to Chief Justice John Roberts (November 2, 2021).

[2] 2021 Year-End Report on the Federal Judiciary at 5.

[3] Correspondence from Roslynn R. Mauskopf, Director of the Administrative Office of U.S. Courts to Senator Thom Tillis and Patrick J. Leahy (April 29, 2022).

[4] Report of the Proceedings of the Judicial Conference of the United States, September 20, 2022, at 11-12.

[5] Gugliuzza, Paul R. and Anderson, J. Jonas, "Why Do Judges Compete for (Patent) Cases?," at 27-28 (January 19, 2023). University of Utah College of Law Research Paper No. 535, Available at SSRN: <https://ssrn.com/abstract=4331055> or <https://dx.doi.org/10.2139/ssrn.4331055>.

[6] See Caroline Kitchener and Ann Marimow, "The Texas Judge Who Could Take Down the Abortion Pill," Washington Post, 25, 2023 (citing cases filed in the Amarillo Division involving contraception and immigration).

[7] See Steve Vladeck, “Texas Judge’s Covid Mandate Ruling Exposes Federal ‘Judge Shopping Problem,’” (Jan. 11, 2022) <https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324>. (citing cases challenging Obamacare and covid mandates in the Wichita Falls Division of the Northern District of Texas).

[8] See Lydia Wheeler & Madison Alder, “Western Louisiana Becomes GOP Home Court for Suits Against Biden,” Bloomberg Law (Dec. 20, 2022). <https://www.bloomberglaw.com/bloomberglawnews/iplaw/BNA%2000000184ce92d0dfaba4dfd2ce460001> (citing cases challenging environmental regulations and vaccine mandates in the Monroe and Lake Charles Divisions of the Western District of Louisiana).

[9] Gugliuzza & Anderson, n. 5 at 8, 34-56.

[10] at 18.

[11] at 61.

[12] at 57-66.

[13] Carr, Dabney, “Change Could Be Coming to Patent Suit Volume in Texas,” Law360 (June 29, 2022).

[14] Order Assigning the Business of the Court as it Relates to Patent Cases (W.D. Tex. July 25, 2022) (Garcia, C.J.).

[15] Amended Order Assigning the Business of the Court (W.D. Tex. Nov. 15, 2022) (Garcia, C.J.) at 3.

[16] Amended Order Assigning the Business of the Court (W.D. Tex. Dec. 16, 2022) (Moses, C.J.) at 4.

[17] From November 4, 2021, to July 25, 2022, 709 patent cases were filed in the Western District of Texas, compared to 479 filed between July 25, 2022 and April 14, 2023.

[18] From July 25, 2022, to April 14, 2023, 232 of 479 patent cases filed in the Western District of Texas have been assigned to Judge Albright.

[19] From November 4, 2021, to July 25, 2022, 709 patent cases were assigned to Judge Albright, compared to 232 between July 25, 2022 to April 14, 2023.

[20] Quinn Emanuel Urquhart & Sullivan, “Patent Litigation Update – February 2023” (Feb. 28, 2023); Dennis Crouch, “Throwing Some Chill Back on WDTex,,” [PatentlyO.com](https://www.patentlyo.com) (Dec. 16, 2022).

[21] 2021 Year-End Report on the Federal Judiciary at 5.

[22] See Vladeck, n. 7 (advocating that Congress require that no judge be assigned more than one-third of a division’s cases); Wheeler & Alder, n. 8 (citing proposals for three-judge panels in cases seeking nationwide

injunctions).

[23] Gugliuzza & Anderson, n. 5 at 68.

[24] Gugliuzza & Anderson, n. 5 at 66.

[25] Gugliuzza & Anderson, n. 5 at 57-58.

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