

Change Could Be Coming to Patent Suit Volume in Texas

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The Texas federal courts have long reigned as among the most popular venues for patent litigation. According to Lex Machina, about a third of all patent cases filed in the United States last year were filed in just two federal courts, both of which are in Texas.

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, received 23% of all patent cases filed nationwide, and the U.S. District Court for the Eastern District of Texas, particularly U.S. District Judge Rodney Gilstrap in the Marshall Division, received approximately 11% of all patent cases.

Thus, just about a third of all patent cases filed in the U.S. last year were filed in just two federal courts, both of which are in Texas. The trend hasn't changed in 2022. Even though patent filings are down overall nationwide, roughly a third of those cases have been filed in the Waco Division of the Western District of Texas, which received 22% of the filings, and the Eastern District of Texas, which received 10%.

And when cases are filed in these districts, they largely remain there. Judge Albright and Judge Gilstrap rarely grant motions to transfer venue in patent cases, despite numerous U.S. Court of Appeals for the Federal Circuit decisions on mandamus ordering transfer.^[1]

That may be about to change. Last fall, in a rare showing of bipartisanship, the two ranking members of the Senate Judiciary Committee, Sen. Patrick Leahy, D-Vt., and Sen. Thom Tillis, R-N.C., wrote U.S. Chief Justice John Roberts in his role as presiding officer of the Judicial Conference of the United States to express their concern about forum shopping in patent litigation.^[2]

The senators' letter focused on Judge Albright and the Waco Division and his practice of soliciting cases to be filed in his court. The problem, according to the senators, was the absence of adequate rules regulating judicial assignment within a district. The lack of such rules allowed all cases filed in the Waco Division to be assigned to Judge Albright, allowing a plaintiff to "effectively choose a particular judge to hear their case."^[3]

The senators asked the chief justice to direct the Judicial Conference "to conduct a study of actual and potential abuses that the present situation has enabled ... and [to] consider and implement appropriate reforms."^[4]

The senators' concerns were not ignored. Each year, the chief justice provides a year-end report on the federal judiciary. It is one of the few occasions on which Justice Roberts speaks publicly on the federal courts. In his 2021 year-end report, the chief justice flagged three issues that would receive "focused attention" from the Judicial Conference in 2022.[5]

One of those issues was the "important matter" of judicial assignment of venue for patent cases in the trial courts.[6] The Judicial Conference, the chief justice noted, "has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues." [7]

He also referenced the senators' concern that case assignment procedures may allow a party filing a case to select a division of a district court that would, in effect, enable the plaintiff to select a particular judge to hear its case.[8] In response, he directed the issue to be put before the Judicial Conference's Committee on Court Administration and Case Management to review the issue and report back to the full conference.

The senators' letter cited extensively to a law review article by professors J. Jonas Anderson and Paul R. Gugliuzza addressing "judge shopping" in the federal courts, particularly focusing on patent litigation and the Waco Division.[9]

Anderson and Gugliuzza pointed out that there is no legal requirement that cases filed in the federal courts be assigned randomly.[10] Thus, a party filing in a court division with a single judge, like Waco, can be guaranteed their choice of judge.[11] Likewise, all of the patent cases filed in the Marshall Division of the Eastern District of Texas are assigned to Judge Gilstrap.[12]

The ability to know, before filing, the judge assigned to a case eliminates much uncertainty from the litigation process, and, Anderson and Gugliuzza found, was one of the primary factors attracting patent plaintiffs to these forums.[13] Such judge shopping, they concluded, arguably suggests a partiality to patent plaintiffs and has the potential to compromise public confidence in the judiciary[14] and creates questionable incentives for both judges and litigants.[15]

There is a straightforward solution to the problem of judge shopping — random, districtwide assignment of patent cases. Such a measure is within the authority of the Judicial Conference, which sets the rules of practice and procedure in the federal courts.

Instead of guaranteeing that a case would be assigned to Judge Albright, a patent suit filed in the Western District of Texas could be assigned to any of 12 active district judges in the district. Likewise, a case filed in the Eastern District of Texas could be assigned to any of eight active judges, effectively diluting the influence of any single judge and eliminating judge shopping.

If there is a concern about cases filed in a large division being transferred to a small, faraway division, the rule could allow for random assignments within a division, as long as the division had three or more active judges. Divisions with fewer than three active judges can also be paired with larger divisions for random assignment of patent cases, such as pairing Waco with Austin, to ensure that a plaintiff cannot guarantee their choice of judge.

Such random assignment policies are already in place in some districts, such as in the U.S. District Court for the

Eastern District of Virginia, where patent cases are assigned randomly throughout all three divisions of the district.

Random assignment eliminates a plaintiff's ability to choose the judge who will hear its case and spreads the burden of patent cases, which are typically more complex than the average civil case, among the district's judges. It also promotes the Judicial Conference's long-standing policy in favor of random assignment of cases and the desire that all district judges be generalists who can handle the full range of legal issues.

Leahy and Tillis had set a May 1 deadline for the Judicial Conference to complete its study of case-assignment practices and propose potential reforms.^[16] The Judicial Conference did not meet that deadline, but the director of the conference reported on April 29 that the patent subcommittee of the Court Administration and Case Management Committee was in the process of studying the issues raised by the senators.^[17]

The high-profile support from Congress and the chief justice provides significant momentum to the prospects for judicial assignment reform in patent cases. The Judicial Conference has responded quickly and could soon recommend changes to ensure that patent cases are assigned randomly to a pool of district judges.

While plaintiffs may still choose to bring their cases in Waco and Marshall, such a change would likely severely curtail the volume of patent filings in the Texas federal courts, spreading those cases to other forums throughout the country

[1] Two recent examples are *In re: Apple Inc.*, No. 2022-137 (Fed. Cir. May 26, 2022) (ordering transfer from the Western District of Texas to the Northern District of California) and *In re Google LLC*, No. 2022-140 (Fed. Cir. May 23, 2022) (ordering transfer from the Eastern District of Texas to the Northern District of California).

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

[3] *Id.* at 2.

[4] *Id.*

[5] 2021 Year-End Report on the Federal Judiciary at 3.

[6] *Id.* at 5.

[7] *Id.*

[8] *Id.*

[9] Anderson & Gugliuzza, "Federal Judge Seeks Patent Cases," 71 *Duke Law Journal* 419 (2021).

[10] Id. at 432.

[11] Id. at 424.

[12] Id. at 440.

[13] Id. at 432-433, 454.

[14] Id. at 476.

[15] Gugliuzza, Anderson and Rantanen, “Who Escapes Texas? And Where Do They Go? Mandamus Petitioners and Transferee Courts in Patent Venue Disputes,” *PatentlyO* June 17, 2022, <https://patentlyo.com/patent/2022/06/mandamus-petitioners-transferee.html>.

[16] Corres. from Leahy and Tillis to Roberts at 2.

[17] 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).

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