A Guide To West Texas Patent Cases Before Albright: Part 1

By **Greg Lantier, Ben Ernst and Wenbo Zhang** (July 1, 2020)

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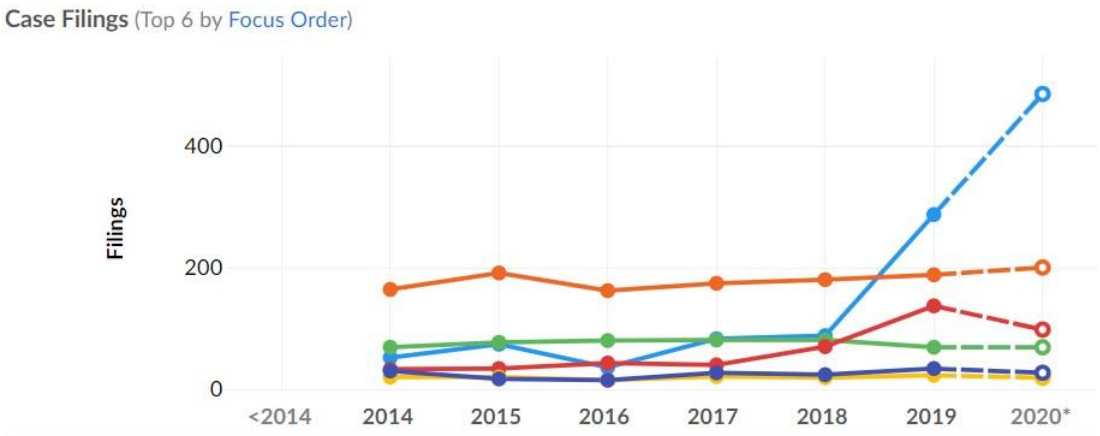
On Sept. 24, 2018, Alan Albright was sworn in as a U.S. district court judge — and the only U.S. district court judge — for the Waco Division of the U.S. District Court for the Western District of Texas.

A former U.S. magistrate judge in the Austin Division, veteran patent litigator and member of the prestigious American College of Trial Lawyers, Judge Albright quickly transformed Waco into a patent infringement litigation center.

Less than two years later, the Waco Division has become the most popular U.S. district court for new patent infringement actions in the nation, surpassing the U.S. District Court for the District of Delaware, the U.S. District Court for the Eastern District of Texas, and the California district courts in new filings in 2020.[1]

The rapidity of the the Waco Division's rise to become a patent litigation hotbed is impressive. In 2017, there were just 84 patent infringement cases filed in the entire Western District of Texas. In 2019, 288 patent infringement cases were filed in that forum—an approximately 243% increase over 2017.

What's more, the numbers appear to be increasing. Not even halfway through 2020, plaintiffs had already filed over 325 new patent infringement complaints before Judge Albright — that is more than the total number in patent cases filed before the judge in 2019. If the pattern holds, he could see more than 600 new patent cases in 2020. Nationwide, 18% of all new patent infringement cases were filed before Judge Albright this year. That is more cases than any other judge in the country by a wide margin.



	<2014	2014	2015	2016	2017	2018	2019	2020*
Patent	239	53	75	37	84	89	288	372
Contracts	1,004	165	192	163	175	181	189	100
Trademark	362	70	78	81	82	82	70	29
Copyright	215	34	35	44	41	71	138	38
Torts	156	21	21	16	22	20	24	8
Trade Secret	103	31	18	16	28	25	35	11

* 2020 numbers are year-to-date. Open dots are full-year estimates.

The implication for patent litigation plaintiffs, defendants and patent litigators is clear: If you are not yet familiar with Judge Albright's courtroom, you should be. This three-part article series seeks to provide a brief introduction to the court's established practices and procedures.

Patent Practice Before Judge Albright — Standing Orders and Orders Governing Proceedings in Patent Cases

Judge Albright has issued a series of standing orders and procedures that aim to promote speed and efficiency in patent litigation. Engaging counsel familiar with these orders is essential for parties and practitioners who find themselves litigating in Waco.

The first such order helps explain how the judge plans to handle the influx of patent litigation while still maintaining the ambitious time-to-trial goals discussed further below. Under Judge Albright's Aug. 5, 2018 standing order regarding Waco docket management, almost all nonintellectual property matters assigned to Judge Albright are automatically referred to a magistrate for disposition of all nondispositive pretrial matters and findings and recommendations on case-dispositive motions.

A June 8 revision to this order does not change this practice. Accordingly, Judge Albright's default docket management procedures allow him to devote maximum time to patent litigation and foster an environment where litigants can expect the court will have the bandwidth to assist with their intellectual property infringement matters.

On Aug. 7, 2019, Judge Albright issued another standing order requiring plaintiffs in patent cases to inform the court that the case is ready for an initial case management conference, or CMC, by submitting a notice identifying (1) any pending motions and (2) any related cases in the district. He allows defendants to submit the notice when plaintiffs fail to do so

within a reasonable time.

The centerpiece of patent practice in Judge Albright's court is his order governing proceedings for patent cases, or OGP. The OGP was first issued in January 2019. It lays out the court's default schedule from before the CMC until the date of trial, covering in detail the judge's rules for a telephonic CMC, instructions on how to handle discovery and resolve discovery disputes, what the judge expects during claim construction briefing and the Markman hearing.

On Feb. 25, Judge Albright updated the OGP to include even more detailed instructions for litigating patent cases in his court. In particular, the revised OGP now specifies a deadline and page limits for motions to transfer and adopts a tiered approach to page limits for Markman briefs to accommodate different numbers of disputed patents. It also provides further guidance on presenting live tutorials and submitting audio files for Markman briefs.

Case Management Conference

Judge Albright requires counsel for each side to meet and confer at least three business days before the case management conference to discuss, among other topics, the appropriateness of adopting a default scheduling order or discovery limits.

At the CMC, which is almost always held telephonically, lead counsel for each party and any unrepresented parties must be present. In-person attendance is permitted, but anyone who wishes to attend in person must notify Judge Albright's chambers at least two court days before the scheduled hearing. The parties should be prepared to discuss a number of topics at the CMC, such as case scheduling, claim construction and discovery issues.

After the CMC, Judge Albright requires the parties to submit either a joint scheduling order or move to submit separate orders within two weeks. In the revised OGP, motions to transfer are also due at this time.

Preliminary Contentions

Under the OGP, plaintiffs are required to serve their preliminary infringement contentions chart at least seven days[1] before the CMC, identifying where in the accused product(s) each element of the asserted claim(s) is found, and the priority date of each asserted claim.

The default schedule also has defendants' preliminary invalidity contentions due seven weeks after the CMC, which must identify: (1) where in the prior art references each element of the asserted claim(s) are found, (2) any limitations the defendants contend are indefinite or lack written description under Section 112, and (3) any claims the defendant contends are directed to ineligible subject matter under Section 101.

Initial Production Obligations for Parties

One of Judge Albright's unique practices is to stay all discovery other than that necessary for claim construction until after the Markman hearing. Therefore, before the hearing, parties only need to produce documents supporting their claim constructions and to make a production of basic case documents.

Along with its preliminary contents, the plaintiff is required to produce (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each patent in suit.

Along with its initial contentions, the defendant is required to produce (1) all prior art referenced in the invalidity contentions, (2) technical documents, including software where applicable, sufficient to show the operation of the accused product(s), and (3) summary, annual sales information for the accused product(s) for the two years preceding the filing of the Complaint.

Additionally, after the parties exchange claim terms and proposed constructions, they are required to disclose and produce (if already produced, identify by production number) "any extrinsic evidence, including the identity of any expert witness they may rely upon with respect to claim construction or indefiniteness."

Claim Construction

The OGP does not place a limit on the number of asserted claims or claim terms a party wishes to construe, but it encourages parties to "focus on their top ten claims in order of importance." If there are an unusually large number of patents or asserted claims, however, the court is willing to revisit this topic and take suggestions from the parties.

At the same time, Judge Albright's OGP has very specific page limitations for Markman briefs, and they apply even to consolidated cases. It also asks parties not to include lengthy recitations of the underlying legal authorities in their briefs and instead focus on the substantive issues unique to each case. The default deadline for all simultaneous filings is 5:00 pm central time.

In the revised OGP, Judge Albright now encourages all Markman briefs—rather than just briefs over 10 pages—to be submitted via audio file. The revised OGP further requires the audio files to be "verbatim transcription[] without additional colloquy."

For Markman hearings, Judge Albright typically gives parties half a day but is willing to adjust the time. He also has an open attitude toward live tutorials and would be willing to entertain such a presentation "when they may be of benefit." As laid out in the revised OGP, such tutorials may be submitted in electronic form by the deadline for submission of the joint claim construction statement.

Judge Albright wants them to be only directed to the underlying technology and not serve as a vehicle to present the parties' infringement or validity-related arguments. He also limits the tutorials to 15 minutes per side at the start of the hearing. The tutorials may be recorded, but they are not made part of the record for the litigation.

When it comes to the order of argument at the Markman hearing, the default approach laid out in the OGP is to let the parties take turns in selecting the terms, with the plaintiff picking the first term. However, if one side proposes plain and ordinary meaning as its construction or makes an indefiniteness argument, the other side is expected to go first.

Post-Markman Discovery Schedule

Post-Markman, the OGP outlines a discovery schedule that requires, among other things, final infringement and invalidity contentions to be served eight weeks after the Markman hearing. The revised OGP further requires parties to seek leave of court to amend the contentions after this date. In addition, the revised OGP extends the close of fact discovery and all subsequent deadlines by six weeks, thus increasing the interval between the Markman hearing and trial to one year.[2]

Discovery Disputes

When there is a discovery dispute, the OGP does not permit parties to file a motion to compel discovery, unless (1) the parties have tried to resolve the dispute in meet-and-confers, and(2) the moving party has first arranged a teleconference with the court to explain the dispute.

Trial

Judge Albright's trial rules are separately laid out in a July 17, 2019 standing order on trial proceedings. The trial standing order informs parties to a patent litigation that first, trials usually begin at 9:00 am each day, and parties are expected to be in the courtroom at least an hour early, unless the court specifically orders otherwise.

Second, any party intending to use technology to present any evidence at trial must notify the court staff before trial starts, so that the court staff can assess its feasibility and allow the party to access the courtroom before trial to test the equipment and fix any issues. Third, counsel are required to bring physical copies of depositions for witnesses who will testify at trial.[3]

Conclusion

As the number of patent cases in the Western District of Texas rise to the top of the nation following Judge Albright's appointment, it is important for parties involved in such disputes to be informed of the judge's rules and practices. In this first installment, we have provided a general introduction to the current status of Judge Albright's docket, as well as his orders relating to patent cases. In future articles, we will examine in detail the judge's rulings on certain motions and his approach to claim construction.

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[1] Cases Filed by Year, U.S. District Court for the Western District of Texas, Lex Machina, https://law.lexmachina.com/cases/?pending-from=2009-01-01&pending-to=&court-include=txwd&filters=true&tab=summary&view=analytics&cols=475 (last visited Jun. 15, 2020).

[2] In the February 2020 revision, Judge Albright changed "7 business days" to "7 days."

[3] On April 9, 2020, Judge Albright issued two new standing orders in response to the hardship caused by the COVID-19 pandemic: one for Pre-Markman cases currently set for a hearing between before May 1, 2020, and another for Post-Markman cases. These orders

provide temporary flexibility to parties to adjust their litigation schedules both pre- and post-Markman.

[4] A further order on December 9, 2019 requires that, for all patent and trademark cases filed on or after that date, counsel must file the AO Form 120 electronically using the event "Notice of Filing of Patent/Trademark Form."