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## Considering a Move to Texas? Here's What You Need to Know About Patent Litigation

California-based tech companies have increasingly been moving their operations to Texas over the last two years, a trend that has only accelerated as remote and hybrid work have become a fact of life. Whether your company has moved all or some of its operations to Texas, or is considering a move, it's essential to understand how local laws and practices differ in Texas. One area in which Texas's laws and practices differ greatly from other jurisdictions is patent litigation. King & Spalding Austin partner **Steven Zager**, who has tried patent cases in several states and is considered among the country's top trial lawyers, offers his insights on some of the most critical things companies need to know about patent litigation in Texas:

### **Q: WHAT SHOULD COMPANIES THAT TYPICALLY LITIGATE IN THE NORTHERN DISTRICT OF CALIFORNIA OR DELAWARE KNOW ABOUT PATENT LITIGATION IN TEXAS COURTS?**

A: The Texas courts in the Western District of Texas (WDTX) and Eastern District of Texas (EDTX) are very experienced in patent matters and the cases move quickly. The EDTX in Marshall has tried more patent cases than anywhere else in the country. Most of the law clerks have technical backgrounds. Trials are usually limited to one week no matter the number of patents or the complexity of the technology. In the WDTX, Judge Alan Albright was assigned the most patent cases in the country in 2020.

### **WDTX**

Most of the patent litigation in the WDTX is handled by Judge Alan Albright in Waco. Waco is about 100 miles from Austin. It is home to Baylor University. The Brazos River runs through downtown Waco and the deeply religious nature of the area has earned Waco the nickname "Bethlehem on the Brazos." Waco is also home to Chip & Joanna Gaines and their TV show about home remodeling. About 136,000 people live in Waco. The jury pool is very conservative. The Waco court is now the busiest patent



jurisdiction in the country. Before taking the bench, Judge Albright practiced patent litigation with a large law firm. Very few patent cases are filed in the Austin Division which only has two judges. Most patent cases in Austin are assigned to the senior judge Lee Yeakel. Judge James R. Nowlin is senior status and he does not handle patent cases. Judge Sam Sparks is retiring.

There is very little likelihood of early motion to dismiss on 101 or any substantive grounds. Trial will be scheduled before Inter Partes Reviews so there will not be a stay granted. Motions to transfer are very rarely granted. Significant discovery costs do not begin until after the Markman ruling because the Court stays all merits discovery until after the Markman hearing. Most claim terms are likely to be afforded plain and ordinary meaning. If the Court does not use the plain and ordinary meaning of claim terms, then the Plaintiff's interpretation is favored about four times as often as the Defendant's position. Summary judgment is available but the motion must be slam dunk and brevity is favored. The conventional view is that juries will generally favor the patent holder but they are conservative on damages in Waco. Sanctions or attorneys' fees are unlikely unless the conduct is so egregious any court in country would award fees. The WDTX at Waco has a permanent technical advisor with a technical background and large law firm experience.

## **EDTX**

Most of the patent litigation in the EDTX is handled by Judge Rodney Gilstrap in the Marshall Division. Marshall is a very small town. There are about 23,000 residents. The closest airport of any significance is Shreveport which is about an hour away. The Marshall Division has one federal judge and one magistrate judge. Both have a tremendous amount of patent experience. Patent litigation is a significant component of the local economy. Jurors are more liberal than those in Waco, especially when it comes to damages.

The EDTX is the same as WDTX except discovery costs start from the beginning of a case because merits discovery is permitted before the Markman hearing. Trial in most cases will not be scheduled before IPRs but stays pending IPR's are rarely granted. Claims are construed more often than in the WDTX. Litigants may need to seek court permission to file summary judgment motions. Sanctions may be available in cases where they would not be granted in the WDTX. The EDTX at Marshall uses the Magistrate Judge there to handle most pretrial motions in the case. The magistrate judge has experience trying patent lawsuits with the agreement of the parties. If you plan to conduct jury research, you may not do so in any location from which the Court draws its jurors. For instance, if you have a trial in Texarkana, you may need to do your jury research in Longview. This is because jurors were showing up for service and saying that they had already been involved in a jury research project in the same case.

### **Q: IS THE EDTX STILL THE PLAINTIFF-FRIENDLY JURISDICTION THAT IT HAS BECOME KNOWN AS?**

Yes. Jurors in the EDTX tend to respect the patent(s). They also award large damage amounts. The Judge is unlikely to overturn a jury verdict so the possibility of post-trial relief is remote. About 5% of patent cases filed in Marshall go to trial and the plaintiff wins in about 78% of them.

### **Q: HOW DOES A COMPANY MOVING OPERATIONS TO TEXAS AFFECT ITS LIKELIHOOD OF GETTING SUED IN EDTX? WDTX?**

For most companies with nationwide operations and sales, there is probably no real impact in moving operations to Texas because the company is probably already subject to jurisdiction in the EDTX and/or the WDTX and motions to transfer are rarely granted in either court.



For companies that do not do business in Texas or sell product in Texas, moving operations to Texas will make them subject to jurisdiction in the EDTX or WDTX if they meet the requirements for venue in those jurisdictions. In some rare cases, the business connections to these jurisdictions may be so minimal that another forum is more appropriate. Only about ten percent of transfer motions are granted.

**Q: IF SUED IN THE EDTX, WHAT ARE ANY OTHER UNIQUE ISSUES THERE THAT COMPANIES SHOULD BE AWARE OF (BESIDES THE FACT THAT THE EDTX IS PLAINTIFF-FRIENDLY)?**

Judges who try patent cases, particularly Judge Gilstrap in Marshall, are very knowledgeable about patent law. From a practical standpoint, most of the courts in the EDTX are not in locations that are easy to reach—Texarkana, Lufkin and Marshall all require some driving and you should plan on substantial travel time if you need to go to the courthouse.

**Q: JUDGE ALAN ALBRIGHT IN THE WDTX IS KNOWN FOR HIS UNIQUE APPROACH TO PATENT CASES. IF SUED IN THE WDTX, WHAT STRATEGIC CONSIDERATIONS (SUCH AS ALBRIGHT’S PROCESS) SHOULD COMPANIES TAKE INTO ACCOUNT? ISSUES RELATED TO MOTIONS TO TRANSFER? STAYS PENDING IPR? ANYTHING ELSE?**

It is advantageous to hire a firm who knows and has experience with the unique proceedings in Judge Albright’s Court. They are different from the EDTX in several respects. Interplay and strategizing between Judge Albright’s process and IPRs is important as both proceedings will be ongoing simultaneously, e.g., if it is the defendant’s strategy to avoid discretionary denials. It is important to understand claim scope issues early on to identify any claim terms that may be amenable to construction and impact the outcome under the assumption that most terms will carry plain and ordinary meaning. If a case involves source code, you need to seek the source code or other information that is uniquely in the possession of one party. It is important to be prepared to make sure the information needed is known to the other party early on because the fact discovery time frame is very short.

For more information on King & Spalding’s patent litigation practice, please visit our [Intellectual Property](#) page.

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Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

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