

## Waco's New Judge Primes District For Patent Growth

By **Michelle Casady**

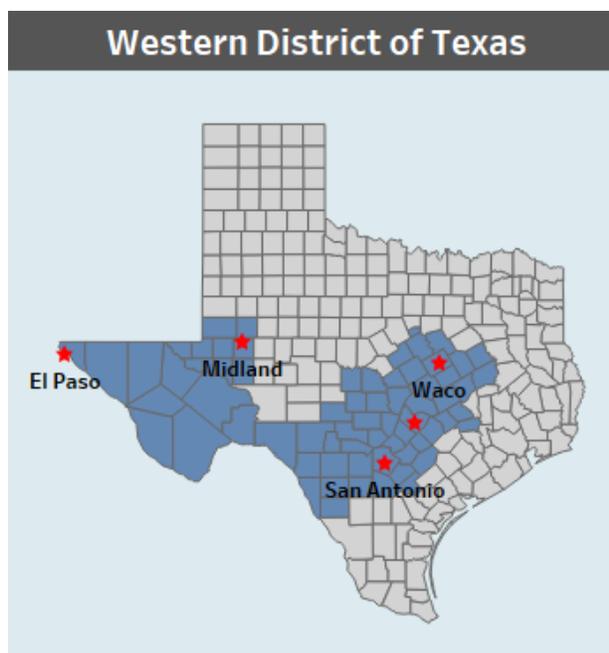
*Law360 (February 12, 2019, 7:26 PM EST)* -- A former Bracewell LLP patent litigator who recently took the federal bench in Waco, Texas, has caused a major stir for the state's intellectual property bar, with some firms betting the new judge could grow the Western District of Texas into a patent hotbed that could rival the state's Eastern District.

U.S. District Judge Alan Albright, who was sworn in in September, is a former Austin-based Bracewell litigator whose background includes defending Microsoft Inc. and winning a \$115 million judgment for Syntrix Biosystems Inc. The judge hit the ground running, drafting local rules for patent cases and making it known he is willing and able to hear those disputes.

The bar responded quickly: In the first week after he took the bench, 10 patent cases were filed in the Waco division, and 32 cases have been filed there since September. Some of the cases are targeting major tech companies with operations in Austin, like Roku Inc., Dropbox Inc., Apple Inc., PayPal Inc. and Dish Network Corp.

Previously, patent cases only occasionally trickled into Waco, which hears a lower volume of civil cases in the Western District than the Austin, San Antonio and El Paso divisions. The Waco division handled about 10 percent of civil cases in the Western District in fiscal year 2017, just 355 cases, according to the most recently available court statistics.

The buzz the new patent docket has generated has been difficult to ignore, said David Henry, head



of Gray Reed & McGraw LLP's patent prosecution group and an adjunct professor who teaches patent and trademark courses at Baylor Law School in Waco.

"The trend and the curve is unmistakable," he said.

Gray Reed, a full-service firm with offices in Dallas and Houston, and the IP-focused Patterson & Sheridan LLP both opened offices in Waco last month to capitalize on the patent growth they have seen since Judge Albright took the bench and the future growth they expect to see. Although Judge Albright's patent experience is a big part of the draw, they say equally important is Waco's location.

After the U.S. Supreme Court's 2017 *TC Heartland LLC v. Kraft Foods Group Brands LLC* ruling reshuffled venue options for litigants, the Western District became more attractive because it encompasses Austin's booming technology scene and business hubs in San Antonio and El Paso. Waco is about halfway between Austin and Dallas, a 90-minute drive from either city, so it is geographically easier for lawyers to access than the patent-heavy courtrooms in the Eastern District of Texas. And patent litigators say they expect the jury pool for the Waco area to have a lot in common with the Eastern District juries who have gotten a reputation for being plaintiff-friendly and property rights-oriented — which could entice more plaintiffs to file there in the hopes of landing a major verdict.

After Judge Albright was appointed, he put the word out to bar associations that he wanted to see more intellectual property cases on his docket and worked diligently to come up with local rules to make patent cases move smoothly, said Eric Tautfest, who chairs Gray Reed's IP practice group.

"He spent a lot of time considering and consulting with other federal judges and former federal judges on how the local rules worked in their court — what did work and didn't work," Tautfest said. "He spoke with IP practitioners, he was very inclusive and really trying to get it right. I think that invites or creates the atmosphere that this will be a venue where patent cases will be handled properly."

Patterson & Sheridan's Waco office is the firm's seventh location and its third in Texas. The firm's founding partner, Todd Patterson, said the *TC Heartland* decision means the Western District is a "target-rich environment" and Waco is primed to see an influx of litigation.

In *TC Heartland*, the court held patent lawsuits must be filed where the alleged infringer has a regular and established place of business. The list of companies with regional headquarters or offices in Austin and San Antonio is extensive, and includes big names like IBM, Dell, Facebook and Samsung alongside a seemingly endless list of tech startups.

"Having the tech firms in Austin opens up the Waco division," Patterson said.

He speculated it is possible for one judge, like Judge Albright, to take a district not at all known for patent litigation and turn it into a sought-after venue.

"We saw that with Judge [T. John] Ward in East Texas," he said. "Just having a venue that was receptive to those patent cases really allowed the business to flourish there."

In 1999, Judge Ward attended a seminar in the Northern District of California and brought home many of that court's local rules governing patent litigation. Word spread slowly but surely until the early 2000s had brought a steady stream of patent infringement cases to the district. By 2011, it was part of a federal patent pilot program, and in 2015, new patent cases there had skyrocketed — accounting for a stunning 45.5 percent of all patent lawsuits filed in the U.S.

The Eastern District has been on a downswing since the TC Heartland decision restricted where patent suits can be filed. According to a year-in-review report from Lex Machina, in the first full year after the ruling, the District of Delaware usurped the Eastern District of Texas as the most popular venue for patent suits. Suits filed in Delaware jumped from 454 in 2016 to 878 in 2018 while filings in the Eastern District dropped from 1,665 in 2016 to 505 in 2018.

Longtime Eastern District of Texas litigator Clyde Siebman was skeptical that the Western District would be able to eclipse the number of patent cases filling the Eastern District's dockets.

"I'll profess my bias, but I think with our local rules and speed to trial and competence of our judges, we're going to hold our own when it comes to people deciding whether to file here or in Waco," he said.

Siebman said he doesn't expect to see a flurry of new offices opening in Waco, especially not from major national firms.

"History is a predictor of the future," and that is certainly not what happened in Marshall or Sherman or Plano, Siebman said.

In most patent-heavy jurisdictions like the Eastern District of Texas and Delaware, local firms who have expertise with the judges and familiarity with the local jury pool partner with BigLaw firms, and there is no reason to expect that to be different in Waco, Ted Stevenson, a trial lawyer with McKool Smith PC who focuses on patent cases, said

"You don't see the national firms opening a satellite office," Stevenson said.

Yet both Siebman and Stevenson, veterans of many an Eastern District patent fight, said Judge Albright's past experience with patents, his aptitude for the subject and his apparent appetite for the cases will undoubtedly steer more of the litigation toward his district.

"On a predictability front, Alan Albright was a top-tier patent litigator for years," Stevenson said. "I think he knows patents and he knows discovery, and I think everyone is comfortable that he will be doing high-quality work."

Siebman tried his first case alongside Judge Albright when he was a lawyer in private practice in the early 2000s and remembers him as a hardworking attorney.

The judge has worked on both sides of the aisle in patent litigation, with highlights including a \$115 million judgment he helped win in Syntrix Biosystems' bid to enforce its patent for DNA technology and defending Microsoft against claims it infringed two MP3 patents.

From 1992 until 1999, Judge Albright served as a U.S. magistrate judge in the Western District of Texas.

"He's raised his hand and wants to do this," Stevenson said. "That's always huge because there are a fair number of judges around the country who don't like these patent disputes."

You can't undersell the value of getting your patent dispute before a judge who actually enjoys those types of cases, Siebman said.

"If you've got a one-judge division, where if you file there you know who you're going to get, he likes them, has a set of patent rules, then that's something that's going to get some people's attention," he said. "I say no doubt it will draw some cases to Waco."

--Editing by Aaron Pelc.

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