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Judge-Shopping Guidance Unlikely To Affect Patent Hot Spots

By **Ryan Davis**

Law360 (March 27, 2024, 10:15 PM EDT) -- Recent guidance by the policymaking body for U.S. courts aimed a deterring "judge shopping" likely won't disrupt patent cases in Texas, experts say, since the suggestions are not mandatory and can be viewed as already being in place in popular patent districts.

The **guidance** from the Judicial Conference of the United States encourages district court chief judges to adop practices to prevent litigants from being able to effectively choose who will oversee their case by filing suit in a court with only a single federal judge.

The conference suggested that is especially important when suits seek to block nationwide enforcemen of a law, as has happened with hot-button issues like immigration and abortion, although the guidance states that it "applies to all civil cases, including patent cases."

However, attorneys said judge shopping has mostly been an issue in patent suits filed in the Western District of Texas and Eas ern District of Texas, and those courts have adopted policies that are at least partly in line with the guidance, which courts aren't required to follow.

"I don't think it will in the short term impact patent cases," said Sarah Brooks of Venable LLP. "The way I read the guidance was more as a kind of warning," with the Judicial Conference saying, "Let's not let what happened in West Texas happen again."

The Western District of Texas became a focal point for concerns about judge shopping after U.S. District Judge Alan Albright, a former patent litigator who is the sole judge in the Waco division, encouraged litigants to file suit in his court.

That invitation resulted in him getting 23% of all patent cases in the country in 2021, spurring criticism **from senators** and in U.S. Supreme Court Chief Justice John Roberts' **annual report**. The following year, the Western District of Texas **changed its rules** and began assigning patent cases filed in Waco among other judges in the district to "equitably distribute" them.

Judge Albright was assigned 937 patent cases in 2021, nearly all of those filed in the district. Following the change, he got 207 cases **last year**, about 40% of the district's 519 patent cases.

Attorneys said the district's policy reflects the Judicial Conference's suggestion that courts use practices that "avoid the likelihood that a case will be assigned to a particular judge," like distributing certain types of cases among all judges in the district.

The guidance includes a footnote stating that a Judicial Conference committee prepared a report on patent case assignments last year, which concluded that the "most effective tools" for promoting random case assignment are policies dividing cases "in a way that best serves the district."

"I think that was implicitly indicating that after the Western District of Texas issued that order, they didn't really think there was an issue to weigh in on beyond that," said Michael Smith of Scheef & Stone LLP.

Timothy Hsieh, a professor at Oklahoma City University School of Law, said the footnote suggests that "it was almost settled in that context, where they said, 'Look at this, it's a perfect example of

TOYOTA EXHIBIT 1017
TOYOTA v. EMERGING AUTO
IPR2024-00786

how maybe it should be done.'"

Across the State

The only other busy patent district where the guidance could come into play is the Eastern District of Texas. Many suits are filed before Chief U.S. District Judge Rodney Gilstrap of the Marshall division, who is known for having patent experience, and that number has grown after the Western District of Texas order.

Judge Gilstrap was assigned 451 of the district's 627 patent cases last year, by far the most of any judge in the country. In 2021, he got 328 of 448 patent cases in the Eastern District of Texas.

Judge Gilstrap is the only judge in the Marshall division, but he shares 10% of his civil cases with U.S. District Judge Robert W. Schroeder III of the Texarkana division, who shares 10% of his division's civil cases with Judge Gilstrap. Smith, whose office is in Marshall, said that seems to be in line with the Judicial Conference's recommendation to assign additional judges to one-judge divisions.

"The Eastern District has had that since long before this was proposed," Smith said. The court could adjust the split from 90%-10% to 60%-40% or something else, he added, but "that would be the only change that would be necessary if they wanted to do anything."

Some observers said that although Judge Gilstrap isn't assigned every suit filed in Marshall, adjusting the case distribution would better reflect the guidance, so patent litigants don't have a 90% chance of drawing him.

The current Eastern District of Texas policy technically follows the Judicial Conference recommendation, "but I think the policy's drafters probably had a ratio smaller than 9:1 in mind," said Brian Love, a professor at Santa Clara University School of Law.

Paul Gugliuzza, a professor at Temple University's Beasley School of Law, said he believes a 90%-10% split "definitely runs afoul of the guidance," so "in my mind at least, the biggest question immediately is whether the Eastern District will change how Judge Gilstrap is assigned cases."

As the district's chief judge, Judge Gilstrap would play a role in any policy changes that impact how his patent cases are assigned. A representative for the judge did not respond to a request for comment about whether any changes based on the guidance are being considered.

Changes Optional

While the Texas court could alter its patent procedures based on the recommendations, that is not required. The guidance repeatedly stressed that courts have "wide latitude to establish case assignment systems."

When the Judicial Conference first **announced the guidance**, it was interpreted as a binding rule, spurring **pushback** from lawmakers and others who viewed it as targeting lawsuits by conservatives. Days later, the conference provided **more details** and made clear that courts could decide whether to follow the recommendations.

The rollout was "sort of a fiasco," but the final document turned out to be "very advisory, very high-level guidance," Oklahoma City University's Hsieh said.

"It's not something that compels courts to do any particular thing, but it's a suggestion of what they should do," Love said. "And it's a suggestion that I think a lot of chief judges will take very seriously."

But after judge shopping was initially framed in political terms, "I think the worry is that all of the controversy that the Judicial Conference has created runs the risk of torpedoing reform in case assignment across the board," Gugliuzza said.

Attorneys said that if the courts choose to adopt changes, some that could affect patent litigation include adjusting case distribution in the Eastern District of Texas or more clearly explaining case

assignments in the Western District of Texas.

The guidance said that "public confidence in the case assignment process requires transparency," and suggested that courts adopt formal rules that they post online. The Western District of Texas order on Waco patent cases is on its website and states that they will be "randomly assigned" to judges in the district.

However, the process is not truly random, since Judge Albright gets about 40% of Waco patent cases, evidently because he is assigned cases that are related to those already on his docket.

"You have to follow the breadcrumbs to try to figure out what's going on," Santa Clara University's Love said. "It would be nice, when it comes to public accountability of the court system, to have case assignment rules spelled out very clearly in a way that the public can see exactly what's going on."

A representative of Western District of Texas Chief Judge Alia Moses did not respond to a request for comment about whether the district is considering any changes based on the guidance.

Scheef & Stone's Smith said courts might choose to make changes, but that after the blowup, they could be "more willing to tell the Judicial Conference, 'Thanks for the guidance,' and then drop it in the trash can."

"Are they going to decide to reallocate their dockets based on ... the guidance? We'll just have to wait and see," he said.

--Editing by Kelly Duncan and Jay Jackson Jr.

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