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Catching Up On Patent Litigation With Judge Albright

By **Dani Kass**

Law360 (March 14, 2023, 1:33 PM EDT) -- U.S. District Judge Alan Albright's reputation as a go-to jurist for patent owners has been left in limbo as the Western District of Texas adjusts to a rule making it harder for any one judge to amass patent suits. In a wide-ranging recent interview with Law360, the former patent litigator discusses how that rule is playing out, what jury trials have been like and why his dog has an unusual name.

Alan Albright

Since joining the bench in 2018, Judge Albright has incited controversy by soliciting patent cases and building up a huge docket in a court where he's the sole district court judge, leading to an order last year that patent cases filed in Waco must be randomly assigned throughout the district.

Judge Albright's name also has become associated with the Federal Circuit repeatedly granting mandamus petitions overriding both his timeline for deciding transfer motions and his low bar for keeping cases in Waco. Those orders are sure to stick with him, especially because the judge got a Rhodesian Ridgeback two years ago and gave him the name Mandamus.

U.S. District Judge Alan Albright's Rhodesian Ridgeback, Mandamus. (Courtesy of Judge Albright)

"It was actually my wife who named him," the judge told Law360. "She just thought it was funny how much press I was getting about being mandamused."

The judge held his first patent trial in October 2020 and has now overseen around 20 such trials, mostly in Waco, where juries historically haven't been presented with them. He said jurors have been taking their job very seriously, and collectively, they haven't shown to be "runaway plaintiffs juries," as was speculated when Waco first became a hot spot for patent owners.

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"I've been unbelievably impressed with the quality of the juries. [Patent trials] are overwhelming, and there's an awful lot to take in," the judge said. "They're smart. They're listening. And I think they have a really good internal tuner to know when people are telling the truth and when they're not."

Judge Albright aims to have a jury trial set each week and gets "unhappy" if that's not the case.

"If I'm not in court, it's because something that week settled," he said. "Then my clerks are scrambling, because they know I'm unhappy, and they're backfilling trying to find hearings that I can conduct so that I have something to do."

Not that there isn't plenty of work to do. In fact, the workload was so large that he was granted a **second magistrate judge** in 2021. Former patent attorney **Derek Gilliland** was sworn in last April, and handles earlier stages of patent cases, like claim construction during Markman hearings and discovery hearings.

"I should go to church every day and light a dozen candles," the district court judge said in appreciation of his new colleague.

While Judge Albright said longtime U.S. Magistrate Judge Jeffrey C. Manske has been "working his tail end off" on his 500 non-patent cases and handling all but sentencing on criminal cases, Judge Gilliland has been able to take on some of the patent load.

Judge Albright is still doing some claim construction hearings and discovery hearings, but he said there are far fewer than before, which means he can focus his energy on trials.

"Anything you see on Derek's schedule — in the past, it would have been me," Judge Albright said. "Which has to mean, whether I like it or not, that if it's between the two of us, it's being done better."

Judge Albright's dog enjoys having Judge Gilliland around, too.

"He has a French bulldog [named Frankie], so during the day, my dog and his dog are up in our courthouse, and they just run back and forth between the chambers and play with each other," Judge Albright said.

When Judge Albright is not overseeing patent cases, his docket includes sentencing in criminal cases, a role he doesn't take lightly.

"Two weeks ago, I was in the middle of a patent trial where you have people beating each other up over what an expert's going to say, and then you spend the morning putting people in jail for 10 or 20 or 30 or 40 or 50 years," he said. "It's just a completely different skill set and a completely different emotional set."

One of the reasons Judge Albright has been able to amass so many patent cases — at one time **up to 25%** of newly filed cases in the U.S. — is that all cases filed in Waco were, until recently, automatically assigned to him.

In late 2021, the automatic assignment led to **concerns from Congress** and the **chief justice** about how courts in this situation could lead to plaintiffs shopping for their preferred judge. In July, the Western District of Texas' chief judge ordered that any patent cases filed in Waco be **randomly assigned** to one of 12 judges in the district.

Judge Albright said the decision has had "zero impact" on his immediate work.

"How it will impact what it will look like in 2024, I don't know," he said. "We have fewer cases because other judges have gotten them — and I've been really very impressed about what a great response judges have had to getting those cases — but for me, my docket is so much more mature. I'm busy with that which was filed in 2021."

There were 867 patent cases filed in the Western District of Texas last year, down from 981 the year before, according to Lex Machina's latest **patent litigation report.** The report said the lower filings in 2022 appear to be a result of the chief judge's order. However, the Western District of Texas still had the largest percentage of new patent suits, with nearly 23%.

The Federal Circuit's reprimands of Judge Albright keeping his patent docket large while delaying or denying transfer motions peaked in the back end of 2021. Although the mandamus orders have **slowed down**, they haven't stopped.

In October and November 2021, the Federal Circuit issued mandamus orders overriding his decisions 10 times. The mandamus grants are more sporadic now, but he was **ordered** to rule on a transfer motion the first business day after this interview with Law360.

Judge Albright said he met several of the Federal Circuit judges at the end of last year, some for the first time, and that they were "warm and collegial." The district court judge said he believes things have calmed down now that he has more guidance from the appeals court, pointing out that the more recent mandamuses have been for "unique issues."

A key reason why Judge Albright has attracted so many cases was his stated goal of **getting to trial** within two years of a complaint being filed — which is only six months longer than the Patent Trial and Appeal Board's 18-month mandate to make decisions on patent invalidity. Unlike many of his peers, Judge Albright almost never stays proceedings to let the PTAB make its decision first.

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"My logic from the beginning was that there's no unfairness to either side by not staying a case for the PTAB when I can try the case as quickly as they can resolve it," he said. "And so far, I think that's proven to be true."

A Law360 review found that more than half of Judge Albright's patent cases reached verdict within his 24-month goal. His other patent cases lasted between 25 and 32 months. The one outlier is the last of three cases between VLSI and Intel, which ended in a mistrial due to a COVID-19 outbreak in April, and was **retried** in November.

When asked if he'd consider making plaintiffs release information like litigation funding as part of their suits — which is **causing** a **ruckus** in Delaware, where Chief U.S. District Judge Colm Connolly is requiring it — Judge Albright didn't hesitate.

"No," he said. "I'm not even slightly interested."

In addition to standard judge duties, Judge Albright also runs a class at his alma mater, the University of Texas at Austin School of Law, where students get firsthand experience litigating patent cases. Each week, students argue motions from real cases on the judge's docket, ranging from motions to dismiss to claim construction at Markman hearings to motions for summary judgment.

The proceedings are held in Senior U.S. District Judge James Nowlin's courtroom in Austin, in front of either Judge Albright or volunteers including magistrate judges and U.S. District Judge Robert Pitman.

"Last year, all 18 kids did three Markman hearings in a row," Judge Albright said. "They were so good at that point in the semester, that any of them could have appeared in my court the next day for a Markman hearing."

Before Judge Albright was made a federal judge, he worked as a patent litigator, with partner positions at Bracewell LLP, a predecessor to Eversheds Sutherland, Fish & Richardson PC, DLA Piper predecessor Gray Cary, and Thompson & Knight LLP. He also served as a magistrate judge for the Western District of Texas for much of the 1990s.

When asked what he wished he knew as a litigator, Judge Albright immediately said to cut everything in half.

"Whether I'd be arguing in front of a jury or arguing in front of a judge, whatever I think I want to argue, it would be better if I only did 50% of it," he said. "It's better to go into a hearing with your best argument and leave it at that and to do it as quickly as possible than to have five arguments."

Narrowed and well-developed arguments are what will keep the attention of a jury, and will make sure the judge doesn't have to race through motions or other filings, according to Judge Albright.

"If I were back in court, I would never file more than one Daubert motion on one thing, and on motions for summary judgment, [it's the] same deal," he said. "I think people lose credibility the more things that they present. It's almost like, 'Well, this one wasn't that great, so instead of having one great thing, we'll have 11 adequate things. That's the wrong way to approach, at least, me."

"Everyone could do less. Everyone should do less," he said.

--Editing by Nicole Bleier.

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