



Hon. Alan D Albright

District Judge, Western District of Texas

by David R. Schleicher



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With a father who was a Marine and a mother who was a nurse, it is no shock that the arc of Alan D Albright's career has bent toward public service. What is surprising is that as many new patent suits are now being filed in the Western District of Texas as in Delaware federal courts, with some 95 percent of those on Judge Albright's docket as the sole district judge for the Waco Division.

A review of parties to new patent case filings assigned to Judge Albright in February 2020 reveals a who's who of modern commerce: Amazon, Apple, Best Buy, Google/YouTube, Intel, Microsoft, Samsung, Sony, Uber and, yes, even Victoria's Secret. In his short time on the bench since September 2018, Judge Albright's court has seen more new patent cases than are known to have been heard in the entire prior history of the Waco Division.

Waco, with a Metropolitan Service Area of about 275,000, is best known in recent years for its residents Chip and Joanna Gaines. While their *Fixer Upper* show and Magnolia™ brand bring about 2.7 million visitors a year to town, the increase in patent filings means that law firms are also visiting and setting up shop in Waco. Among these are Carstens & Cahoon, LLP; Gray Reed & McGraw, LLP; and Patterson + Sheridan, LLP, all due to Judge Albright's willingness—really, eagerness—to take on patent and other intellectual property litigation.

Other firms, such as Tindel and Thompson, LLP—with headquarters in the historic patent haven of the Eastern District of Texas—are joining with local firms (in this case, Haley & Olson) to operate Waco-based patent litigation offices. Existing Waco firms, such as Naman Howell Smith & Lee, have added patent lawyers. Given that Dallas is 100 miles to the north on Interstate 35 and Austin the same distance in the other direction, many patent firms in those cities are handling the Waco cases from their existing offices.

With Austin also part of the Western District of Texas, Judge Albright has been holding *Markman* (patent claim construction) hearings in that city for the convenience of counsel who are flying in from out of state. He uses the hour-and-a-half Waco to Austin drive to listen to audio of briefs in his cases—welcoming but not requiring such submissions from counsel appearing before him. This reflects his overall



approach to his docket: innovate where appropriate and give each case the attention it deserves. (Beyond supplementing briefs with audio versions, he also prefers additional copies of briefs and motions to be emailed in Word to the law clerk.)

What else should a lawyer trying a patent case before Judge Albright expect? (1) Discovery will be limited until the *Markman* hearing. (2) The *Markman* hearing typically will occur within six months from the filing of the suit. (3) Judge Albright will be readily available by phone to resolve discovery disputes and other pre-trial matters. (4) Settings will tend not to get bumped, and rulings on intermediate matters will be issued promptly. (5) A jury trial will be held within about 18 months from the case filing, as compared to a national average of around 2-1/2 years.

Judge Albright prefers cases to be focused on the lawyers rather than the judge. He wants the parties to know that his decisions will be made without regard to whether one is plaintiff or defendant, David or Goliath. His ability to achieve this is in no small part attributable to his own experience trying cases, where he ended up in roughly even proportions representing plaintiffs versus defendants.

Some judges begrudge lawyers bringing disputes to them that they feel should be resolvable by agree-

ment, such as how many lines of code to produce during discovery in a software patent case. Judge Albright takes a more tolerant view, accepting that lawyers sometimes simply need a decision to be made so that they and their clients can move on to the next issue in the case. Clients, he realizes, sometimes are more willing to accept a ruling from an independent third party than they are to allow their lawyers to agree to a compromise.

Having spent seven years as a magistrate judge in Austin (and years after that litigating intellectual property cases for firms such as Bracewell, LLP), Judge Albright is no stranger to the courtroom. He has found, however, that service as a district judge can be a very different experience than as a magistrate judge—in the best of ways. The lifetime appointment frees him to innovate and handle his docket in the most efficient manner possible without having to fear he will be second-guessed or overruled as to matters of process. He has assembled an ad hoc patent lawyer group to ensure this results in improvements, not merely change for change's sake.

Another area in which he experiences the benefits (and gravity) of a lifetime appointment is in sentencing criminal defendants. Judge Albright appreciates the ability to tailor prison terms to the facts of each case and the potential for rehabilitation. He wants no one to walk into a sentencing hearing assuming they are certain of the outcome before the facts are reviewed and the defendant and the government have both had an opportunity to speak to the court.

Attorney Jim Dunnam, of Waco's Dunnam & Dunnam law firm, has tried two civil bench trials before Judge Albright, one of them involving complex intellectual property issues that resulted in a judgment for over \$3.5 million. He advises attorneys considering filing in the Waco Division that their experience will be that Judge Albright does his homework and comes to trial fully knowing the details of the case; he gives lawyers latitude to try their cases as they see fit but also flags issues of particular interest to his decision during questioning; and he conducts court cordially and with humility.

But, adds Dunnam, don't mistake his amiability for a willingness to tolerate violations of the rules and his orders. Dunnam says that the bottom line is that practice in the Waco Division is a refreshing experience for trial attorneys and a place you want to be for complex litigation.

Austin-based John J. "Mike" McKetta III (Graves Dougherty Hearon & Moody) had a similar experience in two trials (one bench; one jury) before Judge Albright. McKetta describes Albright as a very experienced patent lawyer who is cordial but always in good control of his courtroom, giving the lawyers lots of latitude to try their cases. He says counsel will find Judge Albright "smart, very quick, and always very gracious."

Coming to the Waco bench from out of town, Judge Albright was not certain what to expect from the Waco community. It turns out, he says, that people who don't know who he is are very nice to him and "those who do know who I am are even nicer." Albright has turned to Waco's Baylor School of Law for interns, giving them

meaningful work to do under the supervision of his law clerks. He recounted how some lawyers around the state had wondered aloud how happy he would be serving in Waco after having practiced in Austin his entire career, but he believes that his appointment to the bench as the only federal district judge in Waco has allowed him to create an environment in the entire courthouse that is reflective of his personality and philosophy with respect to how justice should be administered.

He clearly considers himself unbelievably lucky. He loves Waco and enjoys serving as its sole district court judge. He declares that he is in Waco for the long haul and looks forward to seeing attorneys from around the country in his courtroom. On a given weekend he can be found taking a run along the Brazos River from Baylor to downtown or on a weeknight at a reception for the opening of the Waco offices for a patent law firm. Last fall he participated in the Waco Half-Ironman and hopes to do it again in the future. For attorneys who have not yet made the journey to Waco, he explains that he has observed the jury pool to be unlikely to award enormous damages on a whim but still quite willing to punish a wrongdoer when the facts and law justify it.

Some lawyers may wonder how one ends up filing a patent case in the Waco Division of the Western District of Texas. The city has major operations for Space X, defense contractor L3 Harris Technologies, M&M Mars, and Coca-Cola, among others. But how do Google or Uber end up before Judge Albright? The answer lies in the Supreme Court's *TC Heartland LLC v. Kraft Foods Group Brands, LLC*¹ decision.

The decision limited venue for most patent cases to the location where the defendant was incorporated or had a place of business. Numerous tech companies have operations in the Western District of Texas, which includes not only Waco to the north but also Austin in the middle, San Antonio to the south, and even El Paso to the west. For a patent defendant located anywhere in those cities, suit can be filed in the Waco Division and Alan Albright will be the judge assigned.

In a 2019 case, Judge Albright found that the law justified denial of a motion to transfer a patent case from the Western District of Texas to the Northern District of California. As attorneys become more familiar with the Waco venue and how Judge Albright manages his docket, one can predict that such motions to have intellectual property cases heard elsewhere will decline.

Judge Albright is doing his part to see that patent litigants know they will receive justice if their cases happen to be heard in the Waco Division of the Western District of Texas and receive it promptly. Few could have predicted Waco could be as well-known for patent lawsuits as Chip and Joanna Gaines or its Balcones Whisky, but that day has arrived, thanks to Judge Albright. ☺

Endnote

¹ — U.S. —, 137 S. Ct. 1514, 197 L.Ed.2d 816 (2017).