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The last thing anyone should think about WDTX is that it is patent plaintiff friendly, says Albright

Yesterday we ran the **first part** of our exclusive interview with Judge Alan D. Albright who, in less than two years on the Western District of Texas bench, has become one of the US's busiest patent judges. Today we publish Part Two of the interview. In this, Albright offers his views on some of the thorniest issues affecting the US patent system, including the PTAB and 101. He also reveals where his penchant for listening to audio recordings of briefs came from and picks his favourite Supreme Court argument.

RL: You're one of the judges who hears a lot of patent cases who has tended not to stay cases pending a PTAB decision – why is that?

JA: You know, I have done that because I think that people have a constitutional right to assert their patent. I mean, patents are in the Constitution, the right to a jury trial is in the Constitution. I am not taking away anyone's right to go to the PTAB, but I think people ought to have a jury trial.

Would you rather that more questions of validity were handled in district court rather than at the PTAB?

I don't have any problem with the idea of the PTAB handling validity issues, but I will say this: I think juries are very wise and I think we can count on them to make the right decisions if they are provided with the right evidence. So, I have great faith in the juries on every issue.

One of the things you are becoming known for is liking your briefs in audio file format as well as hard copies. Are you a big audiobook fan or a radio fan? Why audio in particular?

So, what happened is this: when I was going through the process to become a judge, one of the steps you go through is you sit in front of the Senate Judiciary Committee, and the Committee can ask you some tough questions. You know, occasionally, they would get a lawyer in there and they would say, what about this legal issue such as "what do you think about a Pullman abstention?" Well, no lawyer has dealt with Pullman abstentions recently. And so, I was afraid someone would say to me: "How do you feel about the 19th Amendment?" Given my nature, I probably would say: "It's my favourite." But I thought I ought to know a little about all of them.

So, what I did was for each Constitutional amendment, I went and listened to two or three of the leading Supreme Court audio arguments that had to do with that Constitutional amendment in some way, and so if they asked me a question on the spot in front of everybody, I would at least be able to say, "The 19th amendment had to do with a women's right to vote," and know what it was. And so, I found that I got hooked and literally, since 2016, I have listened to every Supreme Court argument that they have. And I found that I learn pretty well that way.

I also commute once a week between Austin and Waco and so, if I am commuting back home to Austin on Thursday before a Markman on Friday, I have found that if I have an audio version of the brief, I would have read the brief already but then, if I listened to the audio version on the drive home, number one, it makes the drive home more pleasant, but also, the next day, it is like I have had a double scoop of the learning. And I just felt like I am more familiar with the case by doing it that way

Is there any Supreme Court case that you particularly recommend to listen to, be it a patent case or anything else?

Oh boy! I'll tell you, for sure, one of the most amazing ones was from 2018, I believe. It was the one that had to do with whether or not states should be able to charge taxes on internet sales [*South Dakota v Wayfair*]. I guarantee you, if you listen to that, at the end of each lawyer's arguments, you are going to think that's absolutely right, there is no possible way the other guy can win. That one is a pretty amazing case. And there is a lawyer at Kirkland & Ellis named Paul Clement who has now done 100 arguments and I have listened to every one of those that is available on tape. And he and [Gibson Dunn's] Ted Olson are probably my two favourites.

You are probably aware from your days as a trial attorney that some districts get a reputation as being plaintiff friendly. Would you worry if you were to be seen in that way?

I am glad you asked me that. In every single talk I have ever given since the first time I started talking about this, I have tried to make it as clear as possible that the last thing anyone should think about this venue is that it is plaintiff friendly. Not only because I just generically don't like that idea but, you know, we are in an era when defendants can have a lot of reasons to try and transfer cases, and I never saw that it was very beneficial to me in wanting to get a lot of good quality patent cases to get a reputation of being plaintiff friendly in such a way that every defendant who got sued in my court would file a motion to try and get out of it.

I thought that was the worst possible thing that could happen. So, every single time I have ever given a talk to anybody, I have tried to stress that what I am hoping the people are going to get from my court is someone who had 20 years of experience handling patent cases and handled a fair number of patent trials to verdict - but also handled them on both sides of the docket. I want every party that comes out of my court to feel like I was scrupulously fair.

Again, the way I put together the [procedures] committee in the beginning, when I was asking people to be on it, I went crazy trying to make absolutely sure that every conceivable type of patent litigant would be represented. I don't know what the breakdown is anymore between big firms and little firms but everything I do, I run by them. Every conceivable interest is involved to make sure that whatever I do is fair to everybody

figure out ways of slightly improving this or that. If something comes up and I am, like, oh wow, that didn't work as well as I was hoping it would, my way of dealing with that is to pop it over to the committee and if we make a change, then the change is broadcast to everyone that is on the email list.

Patent law is big business for a lot of companies in terms of jury awards and settlements and it can lead to a high profile for district judges like yourself. We saw that five or six years ago particularly in regard to some judges in East Texas who had a huge share of the universe of patent cases before them and it became a point of policy discussion in DC. Would you be concerned if there were greater scrutiny, for example, of how you were managing your docket, and if it were to continue to grow a senator saying, "How can it be right? Some judge in Western Texas who's got 800 patent cases? How does this make sense? We've got to do something."

I would invite anyone who is interested in that to call me or look at everything I have put online or all the effort that I have put in. I don't know that I've ever worried about that specific issue happening but I can tell you that I think, again, that is why every single thing I have ever done in terms of anything with my patent docket has been making every effort I can to ensure that no party would ever feel like they were advantaged or disadvantaged to being here.

Now, I am not naïve, I think if I were an average plaintiff, would I prefer a docket that at least currently could get me to trial in under two years? Yeah, I think if I were a plaintiff, I think that is something I'd like. And so, I think how quickly I get to trial certainly makes this a place that is attractive for people to file cases in. But if someone wants to criticise a federal judge for trying to get cases to trial too quickly, then I guess I'll just have to live with that.

I have tried to be realistic. For example, an 18-month to 20-month window from filing to trial, I personally don't think of that as a rocket docket. I mean, people have a full six months to prepare for the Markman, it is not like you are going to trial in six months after filing. And, by the way, I make it very clear to everyone that in a case that, for example, has 19 patents I would certainly be wide open to any number of discussions about how to proceed. That is not a normal patent case as it were, right? And so, that kind of case might get broken up into smaller cases with families of patents and we would set different trial dates. I am not for putting form above fairness.

But, obviously, as a plaintiff I think having a trial in under 20 months, is a good thing. If I were in a company that was a defendant, I would think that having almost absolute predictability about every phase of what is going to happen between filing and the trial, which you get in my court, would also be a good thing. You know, I could take any garden-variety case I have right now and you can tell in X number of months about where the case should be in terms of getting ready for trial.

In patent circles, there is a lot of discussion at the moment about the state of case law around 101 and we see the Federal Circuit grappling with it on a regular basis. Do you think there is now clarity?

Let's just say if there is clarity, I'm still working to find it. Every 101 motion that is filed in my court, we carefully review but the great likelihood in my court is that I won't take up a Section 101 motion until after a Markman in the form of a motion for summary judgment.

You are still to have your first jury trial in a patent case, right?

You know, I've had to reschedule at the parties' request everything I have had and I am no longer overly optimistic that my May trial will hold with this situation. I would sure like to get one under my belt. We have a trial set in July, that we are pretty certain is going to go forward. So, that's the most likely first patent trial I think we have.

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