

## Albright Says He'll Very Rarely Put Cases On Hold For PTAB

By Ryan Davis

Law360 (May 11, 2021, 6:50 PM EDT) -- Western District of Texas Judge Alan Albright on Tuesday detailed the unusual situations in which he'd stay a patent case to await a Patent Trial and Appeal Board decision, but said that even amid the pandemic, he believes he can finish cases faster than the board.

Speaking at the American Intellectual Property Law Association's virtual spring meeting, Judge Albright, the nation's busiest patent judge, said that during his two and a half years on the bench, he has only put "one or two" cases on hold so the PTAB can review the patent.

While some other judges routinely stay patent cases until the board determines whether the patent at issue is invalid, Judge Albright said he sees no reason to do so in most instances, since he schedules trials so quickly that they'll likely be over before the board rules.

"We look at every request carefully," he said, and litigation will be put on hold "if there's a situation where it would make really good sense to stay a case."

However, Judge Albright said to date he has only done that when the plaintiff has first sued other companies over a patent in a different district, and the defendant in that case has initiated a PTAB review that is well underway by the time another company is sued in the Western District of Texas.

In that scenario, where "the PTAB process is already down the road and it looks like that would be the most prudent way to do it, that's fine and I would defer" to the board, Judge Albright said in response to questions from moderator Sharon Israel of Shook Hardy & Bacon LLP, a former AIPLA president.

In just about every other case, though, Judge Albright said he has scheduled cases to go to trial within 24 months of when the complaint is filed. As a result, he said he doesn't see the need to wait for the PTAB to rule on a defendant's challenge to the patent, since the board typically makes decisions in 18 months.

He noted that while "COVID has certainly interrupted our trial process," he's still scheduling trial dates for two years out, as he said in **prepandemic times** was his goal.

Noting that his docket currently has 1,250 civil cases, about 60% of which are patent cases, he added that "my belief is that if someone files a patent case, they're entitled to have a jury trial," but that the quick trial dates also encourage parties to reach settlements.

Judge Albright said his impression is that the PTAB was created by the America Invents Act in 2011 due to concerns that patent cases in district court were taking too long and that there needed to be a faster forum. He said that is what he's trying to provide in his court.

"It seems to me that it's beneficial to all parties to have a docket where the case gets resolved in the same manner it would in the PTAB, meaning in a relatively sane period of time," he said. "I've never heard anyone who's said in any civil case, 'Gosh, I wish this judge would spend another three years working on this case.'"

Judge Albright alluded to the possibility that his current practice could be challenged at the Federal Circuit.

"I may get guidance from the people who grade my papers at some point that that's not the right approach, but as of right now, I haven't gotten that guidance," he said.

He also noted that he has no reservations about the PTAB system itself, saying that "everyone I know who sits as a PTAB judge is a thousand times smarter than me. They're great lawyers and I think it's a very good system."

One of those judges, PTAB Chief Judge Scott Boalick, was on the panel with Judge Albright and fielded questions about the board's current practice of exercising its discretion not to review patents when a trial is looming in district court, often in Judge Albright's courtroom.

Judge Boalick said he was constrained about what he can say about the policy, which is the subject of **pending litigation** by Cisco, Apple and other technology giants who say it unfairly limits the ability of accused infringers to challenge patents at the board. He said the board is currently reviewing the practice and the more than **800 public comments** that were submitted about it last year.

"We've read through all of them and we're currently pondering our next steps," Judge Boalick said. "I don't have definitive next steps for you right now, but we are looking at a whole range of options."

--Editing by Alanna Weissman.

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