

2 Years Of Waco: How Patent Case Distribution Has Changed

By **David Dyer** (August 16, 2024, 5:12 PM EDT)

As of July 25, the U.S. District Court for the Western District of Texas randomization order was issued two years ago.[1]

Per the order, patent cases filed in the Waco Division are randomly assigned between a number of Western District of Texas judges.[2]

Below, we analyze how this order has affected patent cases within the district, including the size and growth of each judge's patent docket over the last two years, how individual judges on the Waco wheel approach their patent dockets, specific judges' standing orders, referrals to senior and magistrate judges, and the recent issuance of an updated randomization order.



David Dyer

Much has already been written regarding the impact of the Waco wheel on the patent dockets of other judicial districts around the country.

Specifically, the Western District of Texas is no longer the most popular venue for new patent case filings, falling behind the U.S. District Court for the Eastern District of Texas in 2023 — compare 629 cases filed in the Eastern District of Texas[3] to 522 cases filed in the Western District of Texas — and year-to-date in 2024 as of July 25, compare 604 to 228.

While these external trends are important, an analysis of how the judges of the Western District of Texas adjudicate cases assigned pursuant to the Waco wheel provides additional insights that may aid patent practitioners.

The Wheel Starts Spinning

In its initial randomization order, issued July 25, 2022, then-Chief U.S. District Judge Orlando Garcia listed 12 judges to which patent cases filed in the Waco Division would be randomly assigned.[4]

Beyond U.S. District Judges Lee Yeakel and Robert L. Pitman, who had nonnegligible packet dockets already, the order rapidly created patent dockets for the other judges on the Waco wheel. The number of newly filed cases assigned to each judge beginning in 2021 is shown in the table below.

In 2021, the last full year before the Waco wheel was created, U.S. District Judges Fred Biery, Alia Moses, Kathleen Cardone and David Counts were not assigned any patent cases, while U.S. District

Judges Luis Garcia, Frank Montalvo, Xavier Rodriguez, Jason Pulliam and David Alan Ezra saw only single-digit new patent cases added to their dockets.

In 2022, all but one judge on the Waco wheel added at least 10 patent cases to their dockets. And, in 2023, all but one judge added at least 20 patent cases.

Mirroring the overall decrease in patent case filings in the Western District of Texas since the randomization order was entered, each judge on the Waco wheel is on pace to add at least 14 cases to their docket in 2024.

Judge ^v	2021	2022 ^{vi}	2023	2024 (YTD)	2024 (Est.)
Garcia	2	25 (1)	35	14	24
Biery	0	19	25	9	16
Moses	0	14	21	9	16
Yeakel	29	38 (10)	15 ^{vii}		
Cardone	0	17	22	8	14
Montalvo	1	6 ^{viii}			
Rodriguez	3	19	33	11	19
Pitman	15	58 (14)	88	46	80

Standing Orders on Patent Cases

In response to their increasing patent dockets, some Western District of Texas judges adopted rules and procedures for patent cases in their courts.

These are briefly addressed below and compared to U.S. District Judge Alan Albright's standing order, which practitioners may be more familiar with.[9]

Judge Counts

Judge Counts adopted a standing order on Aug. 2, 2022.[10] Judge Counts' order includes procedures that are fairly similar to those included in Judge Albright's order governing proceedings.

Schedule

Judge Counts' order includes a proposed scheduling order, which largely tracks the schedule included in Judge Albright's OGP.

Judge Counts' order requires the parties to submit a scheduling order within 30 days of the court entering an order for scheduling recommendations, and the pre-Markman deadlines are set based off the scheduling order submission deadline.

Thus, unlike Judge Albright's OGP, Judge Counts' order does not include rules regarding a notice of readiness, including the case readiness status report, or that a case management conference is "deemed to occur 14 days after the filing of the CRSR."

The relative pacing of deadlines set out in Judge Counts' order, both before and after the Markman hearing, are the same as in Judge Albright's OGP.

Claim Construction

Judge Counts' proposed schedule includes an initial setting of the Markman hearing at 23 weeks after the scheduling order is submitted, and an initial trial setting 52 weeks after the Markman hearing.

Judge Counts' order also includes procedures similar to those in Judge Albright's OGP regarding claim construction briefing and hearing procedures. However, Judge Counts' order does not include the presumed limit on the number of terms to be construed from Judge Albright's OGP's claim construction provisions.

Rule 12(b)(1), (2) and (3) Discovery

Judge Counts' order establishes venue and jurisdictional discovery limits, but the proposed schedule does not set a deadline for the filing of venue-related motions.

Miscellaneous

Judge Counts' order also includes procedures similar to those in Judge Albright's OGP regarding infringement contentions, invalidity contentions, notice to the court when an inter partes review is filed, and discovery limits (including limitations on email-related ESI discovery).

Judge Cardone

Judge Cardone adopted a standing order on Sept. 14, 2022.[11]

Judge Cardone's order includes procedures that differ significantly from those in Judge Albright's OGP.

Schedule

The parties are required to submit a report of the parties' planning meeting within 45 days of a defendant's appearance, and Judge Cardone's order includes a template for this report.

The order also contains a proposed scheduling order with deadlines for motions to transfer, preliminary invalidity contentions, claim construction exchanges and briefing, the Markman hearing, fact discovery, expert discovery, dispositive or Daubert motions, and trial.

Infringement and Invalidity Contentions

Judge Cardone's order requires disclosure of preliminary infringement contentions and accompanying document production within 30 days of a defendant's appearance.

Judge Cardone's order includes requirements for preliminary invalidity contentions and accompanying document production, which are due 35 days from the parties' filing of the RPPM.

Claim Construction

Judge Cardone's order outlines claim construction procedures beginning with the exchange of proposed terms for construction 45 days after the RPPM is filed.

There is also a claim construction discovery period closing approximately two months after the exchange of constructions and extrinsic evidence. The Markman briefing schedule includes the plaintiff's opening brief — 140 days after the RPPM — the defendant's response two weeks later, and the plaintiff's reply one week after the response.

Fact Discovery

Judge Cardone's order states that, absent leave of court, discovery is stayed until after the Markman hearing. The proposed scheduling order sets discovery to open one business day after the Markman hearing, which tracks Judge Albright's OGP.

Judge Cardone's order does not include limits on written discovery and depositions, but the RPPM template requires that the parties discuss and agree on such limits or submit their disputed positions to the court. The proposed fact discovery period spans six months beginning after the Markman hearing.

Expert Discovery

The proposed expert discovery period spans two months beginning after the close of fact discovery, with opening reports due one week after the close of fact discovery and rebuttal reports due three weeks after opening reports.

Pretrial and Trial

Dispositive motions and Daubert motions are due one month after the close of expert discovery, and trial is scheduled four months after the dispositive or Daubert motion deadline.

Senior Judges and Magistrate Judges

In the two years since the randomization order was issued, the usage of magistrate judges and senior judges to handle the shifting patent dockets is noteworthy — in particular U.S. District Judge David Ezra in San Antonio and U.S. Magistrate Judge Derek Gilliland in Waco.

In addition to being one of the 12 judges on the Waco wheel, Judge Ezra has also frequently been referred patent cases initially assigned to other Western District of Texas judges, including Judges Pitman, Garcia, Montalvo and Yeakel.

All told, Judge Ezra's 44 newly filed patent cases in 2023 ranked him behind only Judges Albright, Pitman and Gilliland for such cases.

Prior to the randomization order, Judge Gilliland had the second-largest patent docket in the Western District of Texas behind only Judge Albright, with the vast majority of these cases coming via referral

from Judge Albright.

Since the issuance of the randomization order, Judge Gilliland continues to receive referrals from Judge Albright's docket, but he is now receiving referrals from the dockets of Judges Counts, Moses, Pulliam, Garcia, Pitman, Biery and Rodriguez.

Ultimately, the size of Judge Gilliland's patent docket closely resembles that of Judge Albright's — in 2024, Judge Gilliland is on pace to be assigned 83 newly filed cases, which is over 85% of the number of cases that Judge Albright is estimated to add to his docket this year. During the last two years, Judge Gilliland has been referred newly filed cases at an increasing rate with respect to those assigned to Judge Albright, as shown in the table above.

Whether or not Judge Gilliland will proceed under his and Judge Albright's OGP for cases referred to him by judges on the Waco wheel other than Judge Albright appears to be an open question.

While many parties have proceeded under the OGP,[12] especially when the case is referred to Judge Gilliland relatively early — e.g., before a scheduling order is proposed by the parties — or when the parties agree that the OGP controls, at least some parties have raised a dispute.[13]

More recently — i.e., approximately since September 2023 — Judge Gilliland generally issues an order in cases referred to him by judges other than Judge Albright requiring the parties to submit a joint discovery and case management plan based on the Western District of Texas local rules three days before an initial pretrial conference.[14]

Judge Gilliland also requires the parties to submit a proposed scheduling order according to Judge Gilliland's OGP.[15] Where Judge Gilliland requires these submissions and holds the initial pretrial conference, this appears to be in lieu of the parties submitting a case readiness status report pursuant to the OGP.

The Waco Wheel 2.0

In the Western District's most recent update to the randomization order, issued May 30, 2024, Chief Judge Alia Moses listed 12 judges[16] to which Waco's patent cases would be randomly assigned.[17]

While the number of judges on the wheel remains the same, two of the initial judges are no longer listed. Judge Montalvo took senior status in 2022 and Judge Yeakel retired in 2023, while two judges have been added: U.S. District Judges Leon Schydlower and Ernest Gonzalez were appointed in 2024.[18]

Since being added to the wheel, U.S. District Judge Leon Schydlower has been assigned three cases filed in the Waco Division, two of which remain active, and Judge Gonzalez has been assigned four cases filed in the Waco Division, three of which remain active.

Given the recency of their appointments, it remains to be seen how Judges Schydlower and Gonzalez will approach patent cases, including whether they will adopt standing orders on patent cases or refer matters to any other judges.

Finally, the most recent randomization order addresses related cases in a second section not included in the initial order from 2022. The order states that "Parties seeking to consolidate patent cases

contending all cases are related shall file a motion with sufficient legal and factual justification in the court and with the judge presiding over the case sought to be removed."

However, to date, no case has been handled under this new provision and no party has filed such a motion. Thus, how this provision will affect the patent dockets for the judges on the Waco wheel is yet to be seen.

Conclusion

With two years of data, clear trends are emerging regarding how the Waco wheel is and will continue to function.

However, as evidenced by the most recent order's new list of judges and an additional section regarding related cases, further developments are to be expected.

David Dyer is senior counsel at Norton Rose Fulbright.

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[1] See Order Assigning the Business of the Court as it Relates to Patent Cases (Chief Judge Garcia Jul. 25, 2022).

[2] Other commentators have referred to this process of random assignment with reference to a "wheel", and the process will herein be referred to as "the Waco Wheel." See, e.g., David Crouch, Waco is Waning, Patently-O (Jul. 26, 2022), <https://patentlyo.com/patent/2022/07/waco-is-waning.html>.

[3] All statistics and data were pulled using Docket Navigator, including its Judge Profiles and various analytics tools (e.g., Judge Comparison Reports). The data included here is current as of July 25, 2024.

[4] Judge Orlando Garcia; Judge Fred Biery; Judge Alia Moses; Judge Lee Yeakel; Judge Kathleen Cardone; Judge Frank Montalvo; Judge Xavier Rodriguez, Judge Robert Pitman; Judge David Counts; Judge Alan Albright; Judge Jason Pulliam; Senior Judge David Ezra.

[5] Where cases are either transferred between or referred to these judges, the case is included in each judge's total number of newly filed cases.

[6] The number of cases filed prior to the issuance of the randomization order is indicated in parentheses. Where no number appears in parentheses, the judge had no patent cases assigned to them prior to the issuance of the randomization order.

[7] Judge Yeakel retired in May 2023, which largely accounts for this lower number of cases in 2023.

[8] Five of these six cases were reassigned to Judge Ezra in September 2022, and the sixth was voluntarily dismissed within a week of filing. Judge Montalvo took senior status in December 2022 and was officially removed from the Waco Wheel. See Amended Order Assigning the Business of the Court (Chief Judge Moses Dec. 16, 2022) at Item X.

[9] See Standing Order Governing Proceedings (OGP) 4.4—Patent Cases (Judge Albright Jan. 23, 2024) ("Judge Albright's OGP"). Judge Derek Gilliland has also adopted Judge Albright's OGP. See Standing Order Governing Proceedings (OGP) 4.4—Patent Cases (Judge Gilliland May 30, 2024).

[10] See Standing Order Governing Patent Proceedings (Judge Counts Aug. 2, 2022).

[11] See Standing Order on Patent Cases (Judge Cardone Sep. 14, 2022). On October 17, 2022, Senior Judge David Briones also adopted a standing order, in which he adopted Judge Cardone's Order. See Order to Adopt Standing Order on Patent Cases (Judge Briones Oct. 17, 2022). However, Judge Briones has not been involved in any patent case filed in the Waco Division before or since the initial randomization order was issued.

[12] Where a case is reassigned rather than referred to Judge Gilliland for pretrial matters or motions, the OGP may be more likely to control. See *VideoLabs Inc. v. HP Inc. f/k/a Hewlett-Packard Co.*, Case No. 6:23-cv-00641, Dkt. 60 (May 6, 2024) (motion to proceed before Judge Gilliland); see *id.*, Dkt. 64 (entry of Judge Gilliland's OGP).

[13] See *WirelessWerx IP, LLC v. Lyft, Inc.*, Case No. 6:22-cv-01058-DC-DTG, Dkt. 19 at 2 (W.D. Tex. Nov. 15, 2023) (noting defendant's position that Judge Counts' procedures should apply while plaintiff believed that the parties were required to file a notice of readiness under the OGP). See also *id.*, Dkt. 20. See also *id.*, Dkt. 22-1 at 1. See also *Greenthread, LLC v. Cirrus Logic, Inc.*, Case No. 1:23-cv-00369, Dkt. 28 at 1 (W.D. Tex. Aug. 16, 2023) (parties submitting a proposed agreed scheduling order according to Judge Counts' Order some two months after Judge Counts referred the case to Judge Gilliland for all pretrial matters); see also *id.*, Dkt. 21 (Jun. 12, 2023).

[14] See, e.g., *Elec. Scripting Prods., Inc. v. Andromeda Ent., Ltd.*, Case No. 6:23-cv-00649, Dkt. 15 (W.D. Tex. Jan. 12, 2024).

[15] *Id.*

[16] Judge Alia Moses; Judge Fred Biery; Judge Orlando Garcia; Judge Kathleen Cardone; Judge Xavier Rodriguez; Judge Robert Pitman; Judge David Counts; Judge Alan Albright; Judge Jason Pulliam; Judge Leon Schydlower; Judge Ernest Gonzalez; Senior Judge David Ezra.

[17] See Order Assigning the Business of the Court as it Relates to Patent Cases (Chief Judge Moses May 30, 2024). One day after the second randomization order was issued, Chief Judge Moses issued an amended order assigning all business of the court (i.e., patent and non-patent cases), which incorporates by reference the second randomization order. See Amended Order Assigning the Business of the Court (Chief Judge Moses May 31, 2024).

[18] Prior to his appointment, Judge Schydlower served as a Magistrate Judge in the El Paso Division for nearly nine years.