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VENUE

The Central District of California now offers patent litigators many of the advantages they have long enjoyed in the Eastern District of Texas.

The Central District of California: Effectively Navigating the New Home for Patent Litigation



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Introduction

In recent months, the U.S. District Court for the Central District of California has seen a marked increase in patent cases. This district has long ranked in the top five in the nation in terms of patent litigation, but it now sits in the number one slot with more patent cases than any district in the country. This shift comes on the

heels of changes occurring in the Eastern District of Texas, which has long been an attractive forum to plaintiffs in patent cases, as well as a sudden increase in the number of plaintiffs' firms in the Los Angeles area filing suit close to home.

The Central District of California brings about new issues and a different way of operating for many attorneys who have become comfortable with the rules, the judges, and the certainty of the Eastern District of Texas. Attorneys must be prepared to operate within a new set of guidelines and get to know a new group of judges, each with their own preferences, expectations, and interpretations of the rules.

The Move From California to Texas—A Brief History

California has a rich history of patent litigation. With many of the high-tech companies that sprang up in the 1990s based on the West Coast (either in the L.A. Basin or the Bay Area), the Northern and Central Districts of California became a preferred venue for the growing number of patent cases that accompanied the high-tech boom.

In fact, the Northern District sensed the coming surge of patent cases and began adopting special-purpose rules to more effectively handle their expanding caseload. Those rules required mandatory disclosures along a particular schedule and led to a consistency in the Northern District with regard to the management of patent cases. This put the Northern District on the map as an example of an innovative and interesting model of patent case management.

Around 2004, the Eastern District of Texas emerged as an attractive alternative forum for patent cases. The appeal of this district centered on the rules it adopted to govern patent cases, similar to those instituted in the Northern District of California years earlier; however, the rules governing the Eastern District of Texas allowed for a faster litigation process.

What would take 60 days in California would now take 30 days in East Texas. Additionally, there was also a notion that juries in East Texas were more likely to side with patent holders due to a perception that they had more trust in government and would have more respect for a patent issued by a government-run entity. This perception, coupled with the speed the rules provided, led to a growing number of plaintiffs filing suit in this district to ensure a faster, more successful trial.

Patent Litigation Has No Permanent Address

Perhaps one of the most interesting aspects of patent cases is that they can literally occur in any state and district in America. Because products entered into the stream of commerce in the United States can end up in any state, there is no bar against filing a patent lawsuit in any district of the United States, as long as there can be personal jurisdiction.

Any court can have subject matter jurisdiction, and the only measure available to regulate this is the non-conveniens motion under 28 U.S.C. § 1404, which allows for petitions to move a patent trial to a more convenient location. However, courts have a great deal of latitude when it comes to transferring cases, and it is ultimately up to the discretion of the court whether or not to transfer a case.

The Eastern District of Texas became legendary for never transferring cases, and over time, attorneys sim-

ply stopped attempting a petition for transfer because they were almost guaranteed a denial. Recent action by the Federal Circuit, however, is changing that trend. In *In re TS Tech USA Corp.*, 551 F.3d 1315, 89 USPQ2d 1567 (Fed. Cir. 2008) (77 PTCJ 243, 1/9/09), the fears of many patent case litigants came true as the appellate court cited the reasoning in a non-patent case and transferred a case out of the Eastern District of Texas.

Courts in that district have relied on *TS Tech* in granting an increasing number of transfer motions. See, e.g., *S.E.C. v. Rizvi*, No. 4:09cv00371, 2010 WL 2949311 (E.D. Tex. July 2, 2010); *Orinda Intellectual Property USA Holding Group Inc. v. Sony Corp.*, No. 2:08cv00323, 2009 WL 3261932 (E.D. Tex. Sept. 29, 2009); and *Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995 (E.D. Tex. 2009).

In fact, there is now a somewhat greater chance that if your case is filed in the Eastern District of Texas, and there is no real connection to that forum, the court may grant a motion to transfer to a more convenient location.

The Move Back to California

The shift in transfer decisions in the Eastern District of Texas has coincided with a docket in that district that is increasingly jammed. With only three judges throughout the district, all with full dockets, the speed that was once such an appealing aspect of the district is no longer its biggest draw. Attorneys are now more likely to get a case transferred out of East Texas, and plaintiffs are more likely to look elsewhere in their attempt to ensure a speedy trial.

While the Eastern District of Texas has decreased in patent case popularity, the Central District of California is experiencing a clear upward trend in the number of patent cases filed. It is now first in the nation with the most patent cases filed.

Led by the growing number of plaintiffs firms that have opened in the Los Angeles area over the past few years, this district has seen a rising number of patent cases filed by attorneys more comfortable with the Los Angeles courts that are close to home.

Navigating Patent Litigation's New Home

Whereas the Eastern District of Texas and the Northern District of California have a defined set of rules that govern their patent cases, the Central District of California does not. Each case that is tried is unique, and judges have more flexibility surrounding what rules they choose to adopt.

Judges in the Central District fall into three broad categories: 1) those who choose to adopt the rules of the Northern District of California on a consistent basis; 2) those who will adopt those rules upon request of the parties involved; and 3) those who prefer the flexibility of no specific patent rules. One of the most important things to be aware of when facing patent litigation in the Central District is which category your judge falls within.

There are certainly advantages and disadvantages to each category. For example, if a court adopts the rules of the Northern District, there is a greater sense of certainty about how the case will proceed. On the other hand, for courts giving you the option of whether or not to operate within those rules, you must make sure that those rules will work to the greatest benefit of your client before proceeding.

Courts operating independently of the rules can often provide a flexibility that does not commonly accompany patent cases. This can lead to more creative litigation and provides an opportunity to make things happen earlier than you could in a district governed by strict schedules.

So if you are before a judge that doesn't adopt the patent rules, you have the flexibility to try to bring about some leverage early in the case. Examples of this include trying to get the court to rule on summary judgment early in the case by doing a partial construction of some of the claim terms or attempting to get the court to look at issues such as inventorship early on.

Another important note is that there are between 20 to 30 judges in the Central District (compared to three in the Eastern District of Texas). While this leads to a faster schedule than other districts, with trial dates set a year and a half to two years out, this also makes it impossible to predict where your case will land—making it essential to take the time to familiarize yourself with each judge.

Know their temperament, their expectations of counsel, and what rules govern their courtroom. This is a fairly strict district, with high expectations for counsel and a firm respect for the rules. Being prepared and informed will help you to operate effectively here.

Attorneys facing patent litigation in the Central District should also be aware of the difficulty that discovery motions pose. There is an elaborate and detailed meet and confer process that makes it more difficult to succeed on a discovery motion, and working with opposing counsel is essential.

More cooperation is required between the parties, and a strong working relationship with opposing counsel must be established early on. For example, you must file a joint statement that identifies the discovery dispute, and both sides must submit portions of the joint statement. This requires working on the filing together. Accordingly, a professional relationship with opposing counsel will be of great service to your client.

Conclusion

The Central District of California offers attorneys facing patent litigation numerous advantages as long as they are fully prepared and informed before they enter the courtroom. Flexibility, speed of schedule, more creative litigation, and a larger pool of judges all make this an attractive district for patent cases, and its popularity will likely continue to expand in the coming months and years.

If this trend is maintained over the long term, patent litigation may ultimately find a new district to call home.