

The courthouse (left) near the town square in Marshall, Texas, is a hub of activity for patent litigation.



# TEXAS Hold 'Em

## 10 Tips for winning patent litigation in the Lone Star State

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If your Fortune 1,000 company is sued for patent infringement, there is an excellent chance the case will be filed in the Eastern District of Texas. At the rate of about one new case per business day, more patent lawsuits were filed last year in Marshall, Texas, than in New York, Chicago, or San Francisco. (Only the Central District of California sees more infringement cases.) But it hasn't always been this way.

The Eastern District's reputation as a plaintiff-friendly venue originated in the 1990s with a spate of Big Tobacco class actions. Dallas-based Texas Instruments took notice, filing a patent-infringement case in Marshall against Hyundai Electronics Industries in 1999 and winning a \$25 million jury award.

TI then began using the forum to fully exploit the value of its patent portfolio. And as the volume of cases increased, Judge T. John Ward—who was Hyundai's trial lawyer in 1999—adopted detailed court rules that created the district's now-famous “rocket docket” for patent-infringement cases.

When the Texas Legislature capped pain-and-suffering damages in medical malpractice suits in 2003, IP officially replaced PI as the bread-and-butter practice in the Eastern District. According to LegalMetric, which tracks federal litigation, the number of patent-infringement suits there climbed to 159 in 2005 and reached 263 in 2006—a large majority of them filed in Marshall (population 25,000) near the Louisiana border. Whether or not its perception as favorable terrain is accurate, the chance to join battle there has attracted some top-notch members of the plaintiffs bar.

The flood of new filings has slowed the docket a bit, but a case still gets to trial on average in just over two years—significantly less time than in other jurisdictions. And though other popular federal districts have used venue transfers to cull their dockets, the Eastern District of Texas has not: Once your case is in the district, expect it to stay there.

For patent holders, Marshall's attraction lies as much in the attitudes of its jury pool as in the efficiency of its courts. Local jurors are famous for respecting private property—in this case, usually presuming that a patent is valid if the U.S. Patent and Trademark Office issued it. According to LegalMetric, patent holders win 83 percent of the time at trial in the Eastern District, compared with 59 percent nationwide, on average.

It's true that Texans admire courage in the face of long odds. Even though the Union prevailed in the Civil War, the last battle was fought and won by Confederate Texans. And the legend of the vastly outnumbered Texas forces besieged at the Alamo is still taught today. So is the creed of the Texas Rangers: “No man in the wrong can stand up against a fellow that's in the right and keeps a-comin'.” Consequently, jurors are likely to extend some sympathy—perhaps unconsciously—to a small inventor or a small company taking on a big company.

East Texans are not afraid to award big damages for patent infringement if their sense of justice has been offended. In April 2006, for instance, juries in the Eastern District returned verdicts of \$74 million in damages against EchoStar

Communications Corporation, and \$133 million against Microsoft and Autodesk combined.

One result is that patent litigation in the district has become somewhat entrepreneurial. Some plaintiffs counsel manage risk like venture capitalists: They know that because the stakes are high and the results uncertain, defendants will be under great pressure to settle. Viewed against the backdrop of a five-out-of-six loss rate for defendants at trial, even marginal cases may yield dividends.

Of course, plaintiffs do not always emerge victorious. (Having the facts and the law on your side certainly helps.) But for defense counsel to succeed in Marshall, they must bring their A-game to trial and understand local customs and practices.

Our firm has represented a variety of clients that have sued, or been sued, for patent infringement in the various towns composing the Eastern District—Beaumont, Lufkin, Marshall, Sherman, Texarkana, and Tyler. Though most of those cases settled, we have won both summary judgments and voluntary dismissals and recently participated in one trial. If your company is sued for patent infringement in an Eastern District courtroom, here are a few things to remember.

## ★ 10 LESSONS FROM MARSHALL, TEXAS ★

### **1. Buckle up! The deadlines are fast and furious, so don't fall behind.**

To promote efficiency, the court has promulgated a strict set of scheduling rules for IP cases. Judges expect trial counsel to adhere to these rules. So as soon as your company is sued, you should assemble a team from the legal, technology, finance, and marketing divisions to gather facts and documents. If you are not responsive to the demands of the court, bad things will happen. Your trial counsel could lose credibility, face large sanctions, or—worse—wind up committed to an unfavorable legal position that it need not have taken.

### **2. Don't be afraid of going to trial, but work hard to win earlier.**

For defendants, the paramount goal is victory by summary judgment. This means you must devise a winning theory of the case early, beginning with claim-construction issues. Your objective during discovery should be to *prove* your favorable

theory to the judge, not to find out what happened to give rise to the claim. You must have a strategy for convincing the judge that your opponent's case should be thrown out.

### **3. Use local counsel as a bridge to the jury.**

Reputation counts for a lot in the small towns of the Eastern District. Having local counsel who implicitly vouch for your trial lawyer's credibility (and by extension, your company's credibility) is of great value. Your local counsel should pick the jury and, at least to some extent, participate in the trial.

### **4. Be mindful of your judge's style.**

Depending on the town where your case is filed, you may draw any of several judges. Judge Ward has a reputation as a hardworking, no-nonsense jurist. Judge David Folsom, based in Texarkana, is known for his graciousness. Before you appear, Judge Folsom likely will invite you to his chambers

and casually introduce himself. Other judges have their own style and idiosyncrasies.

Before any of the district judges, you will be expected to cooperate and act respectfully toward your opponent. Throwing a thousand pleadings at opposing counsel will exasperate the court—and also is likely to fail. You will need to give reasonable notice of motions to your opponent: Gamesmanship is seen as a breach of local decorum.

Keep in mind that should your company lose and the jury find that its infringement was willful, it is the judge who decides whether to enter an injunction and on what terms, and whether to award treble damages and attorneys fees. Indeed, Eastern District judges have refused to grant injunctions against infringing defendants in at least three recent cases, so defense counsel would be well advised not to alienate a potential ally through the use of sharp tactics.

### **5. The jurors take their job seriously, so respect their time.**

An East Texas jury will know that it is engaged in serious business. In our recent trial, most of the jurors wore suits or other formal attire. Despite the tedium of listening to testimony for hours at a time, day after day, they paid close attention throughout the proceedings.

You can make the jury's work easier by paring your case to its core. Even if the court does not put a tight time limit on your trial, you should impose one yourself. The pace should be quick. Regard the trial as a series of episodes for a prime-time TV drama, and tightly edit each segment to keep things moving. Setup and delivery of video testimony and other exhibits should be conducted with the efficiency of a NASCAR pit crew.

### **6. Don't cut and run from the technology—explain it.**

Even the most diligent juror may be anxious about assuming the role of fact finder in a complicated technology case. Your trial counsel's job is to educate the jury about highly technical subjects while maintaining his or her own authority. Be careful that counsel does not, in an attempt to be folksy, talk down to the jury. Jurors won't care if your trial counsel is not technically trained, but they will care if the lawyers undercut their credibility by seeming vague on the details. If your counsel starts with, "I'm not an engineer, and I don't understand this technology," your case is headed downhill.

### **7. Tell the jury about your witnesses' fine character.**

The people in an Eastern District jury box very likely have only a high school education, and yet they have been asked

to determine whether an advanced computer chip infringes a patent. If counsel fails to make complex technology clear, jurors may well resort to assessing the credibility of witnesses by judging their character. If your witness has led the local Red Cross blood drive for the past 25 years, for example, it says something about his or her sense of duty and community. If your witness has been married for 35 years, and your counsel brings that fact out on direct examination, at least some jurors will lean forward or write that down in their notebooks.

### **8. Use "Mayberry" manners.**

People from the South (and yes, East Texas is the South) expect polite and courteous behavior. They do not appreciate a big-city lawyer belittling his or her opponent in the courtroom. Jurors may also resent the making of objections as an attempt to impede the search for the truth. Of course, objections are sometimes necessary and proper. But your counsel should typically appear reluctant to make them, even to the point of apologizing. Avoid any attack on opposing counsel, and always use a neutral tone.

### **9. Keep in mind the region's social conservatism and populism.**

East Texans have heard stories since childhood celebrating small-town values. Drive down the main thoroughfare in Marshall, and you will see billboards with pictures of teenagers announcing their chastity pledges. The local paper, *The Marshall News Messenger*, commonly publishes op-ed columns written by local ministers. The town has a church located every few blocks. A jury's attention to, and acceptance of, an attorney's message can be seriously undercut if he or she signals a lack of respect for local values. In addition, the prevailing economy is blue-collar. Around here, company layoffs, outsourcing, and foreign manufacturing and trade are sensitive topics that must be handled with care.

### **10. Remember, the eyes of Texas are upon you.**

If your case goes to trial, you're likely to have a wonderful time (at least until you hear the verdict). People in Marshall are extremely friendly. "Is Judge Ward hearing the case?" a deacon asks after a church service. "I know him well." [No, not this time.] "Are you against Sam Baxter [a local counsel with McKool Smith]?" a waitress inquires. [No, Baxter was on our team.] If your trial counsel is arrogant, rude, or otherwise a jerk, you can bet word will get around fast. **CL**

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