

# SYMPOSIUM ON EMERGING INTELLECTUAL PROPERTY ISSUES

*Eastern District of Texas and Patents*

Intellectual Property Symposium focused on the impact of the Eastern District of Texas (EDTX) on patent law, patent reform and innovation, as well as the history and development of EDTX as one of the Rocket-Docket jurisdictions for patent litigation.



XUAN-THAO NGUYEN, *Professor of Law, SMU Dedman School of Law, Symposium Organizer*



MIKE MCKOOL, *McKool Smith*; THE HONORABLE LEONARD DAVIS, *District Judge, U.S. District Court, Eastern District of Texas*; THE HONORABLE T. JOHN WARD, *District Judge, U.S. District Court, Eastern District of Texas*; THE HONORABLE DAVID FOLSOM, *Chief Judge, U.S. District Court, Eastern District of Texas*



BART SHOWALTER, *Baker Botts LL.P.*



MICHAEL SHORE '90, *Shore Chan Bragalone DePumpo LLP*



ELIZABETH THORNBURG, *Professor of Law, SMU Dedman School of Law*

Attorneys, academics, jurists, and industry leaders gathered at SMU Dedman School of Law on February 18, 2011, to discuss the latest theories and practices important to the development of intellectual property law and the central role of the Eastern District of Texas to that area of the law. This year's symposium was presented by SMU Dedman School of Law and sponsored by The Ware Firm.

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The Honorable Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit presented the symposium keynote address, "EDTX and Transfer of Venue: Move Over Federal Circuit, Here is the Fifth Circuit's Law on Transfer of Venue." Judge Higginbotham was appointed to the U.S. District Court for the Northern District of Texas in 1975 and was the youngest sitting federal judge when President Ronald Reagan appointed him to the Fifth Circuit in 1982. He is also a noted writer on important legal topics and has taught at multiple law schools in the south.

Judge Higginbotham explained the current trends in venue transfer in terms of "perceptions and illusions." While some jurists are offended that transfers might be made to other districts, Judge Higginbotham does not see forum shopping to procure a relative advantage for one's client as troublesome. He stated, "There has been a change in the very culture of the federal courts; it is not a trial court. They don't try cases and don't set them for trial, which gives the perception of unfairness."

The Eastern District of Texas has recently become a popular choice for patent cases for a number of reasons—some based in fact, some based in illusion. One notable reason is that "the judges have decided to run the docket the old fashioned way—a track towards trial." By filing in "a district that follows the rules," attorneys shape their trial preparation to result in trial rather than summary judgment, which has



Keynote Address: **THE HONORABLE PATRICK E. HIGGINBOTHAM,**  
*U.S. Court of Appeals for the Fifth Circuit*

become much more common. On the other hand, some choose to file in the Eastern District of Texas based on the erroneous view that they will get better treatment. Regardless of the motivation, the issue of transfer will continue to play an important role in the future of patent litigation.

The panel on "The EDTX and Local District Courts: Advancing or Stifling Innovations?" discussed the industry implications of current patent law cases and trends. Panelists included Bart Showalter, Baker Botts LLP; Michael J. Crowley, Research in Motion; Michael W. Shore, Shore Chan Bragalone DePumpo LLP; Douglas E. Lumish, Kasowitz, Benson, Torres & Friedman LLP; and was moderated by Phillip B. Philbin, Haynes and Boone, LLP.

The panel opened by Mr. Showalter observing, "We have the best patent system in the world—the gold standard, the crucible." However, a key issue discussed was how to regulate the quality of existing and new patents in a system that is already overburdened. Mr. Lumish remarked, "The number of patents is going up because the system is awarding patents, but examiners are only spending eight hours per patent, which means they aren't even reading the specs. This is shifting the burden of sifting through the good and bad to the courts." Mr. Showalter added, "If we don't fix that, the system will lose credibility and that will cause legislators to change it and screw it up." The panel

agreed that more examiners are needed, however no one was optimistic that the government will make the investment. Other topics discussed included patent sale limitations, third-party financing, and admissibility of settlement agreements.

The symposium featured three additional panels composed of prominent judges and attorneys: Andrei Iancu, Irell & Manella; Michael Smith, Siebman, Burg, Phillips & Smith LLP; and Robert Conklin presented "The Jury in the EDTX: Unsophisticated American Peers or Idealists of Property Rights in Patents?" which was moderated by Professor Beth Thornburg, SMU Dedman School of Law.

"Tribalism or Customary Practices of the EDTX?" featured Samuel F. Baxter, McKool Smith; Otis W. Carroll, Ireland Carrol & Kelley, PC; and Michael E. Jones, Potter Minton. Professor Debra Lyn Bassett, Southwestern Law School, moderated the panel.

Professor Xuan-Thao Nguyen, SMU Dedman School of Law, moderated "History and Development of the EDTX as a Court with Patent Expertise: From TI Filing, First Markman Hearing to the Present," which was presented by the Honorable David Folsom, Chief Judge, U.S. District Court, Eastern District of Texas; the Honorable T. John Ward, District Judge, U.S. District Court, Eastern District of Texas; the Honorable Leonard Davis, District Judge, U.S. District Court, Eastern District of Texas; and Mike McKool, McKool Smith. ■