

Skilled in the Art: Judge Gilstrap: Don't Get Exceptional on Me, Judge Davis

By Scott Graham

U.S. District Judge Rodney Gilstrap doesn't seem like a big fan of fee shifting in patent cases. His former Eastern District of Texas colleague, Leonard Davis, wasn't either.

But this week Gilstrap felt compelled to warn a Fish & Richardson team featuring Davis that it could be headed down an exceptional case path if it can't resolve minor pretrial differences without running to his courtroom.

"Should these parties ignore the guidance going forward, they may find themselves in a position where the court feels compelled to issue sanctions and ultimately, they may push this case into a posture of being exceptional," Gilstrap warned in *EnerPol v. Schlumberger*.

Though Gilstrap's wording applies to both parties, his ire seemed directed more toward a Fish team headlined by Davis and partner Ruffin Cordell. Gilstrap didn't appreciate their bringing an "emergency motion" that accused Schlumberger of trying to slip a new claim term into its tutorial briefing.

The claim term wasn't new, Gilstrap concluded, and the situation was far from an emergency.

"The court analogizes the current situation to Schlumberger striking a match to light its cigar while sitting in the balcony of a crowded theater, with EnerPol in response jumping to its feet and screaming, 'Fire!'" Gilstrap wrote. "There is no emergency here. The court cautions these parties and all practitioners

to carefully consider whether or not the issue is truly an emergency ... before filing an emergency motion."

Schlumberger is represented by its own Eastern District legend—former Judge T. John Ward of Ward, Smith & Hill— plus a **Latham & Watkins** team that includes partner **Max Grant**.

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