

Progressive Lawyers Engage In Actual Judge Shopping In Alabama

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March 20, 2024

From what I've gathered, the Judicial Conference's ill-fated policy is all-but-dead. What a blunder it was. Rather than focusing on areas of bipartisan agreement like patent and bankruptcy reform, the judges leaned into a contentious, hot-button issue. I worry that the well has now been poisoned for broad reform, though I'll share some thoughts in due course about how to improve things.

For now, I'd like to highlight some *actual* judge shopping in Alabama. And none of this judge shopping occurred in single-judge divisions. You see, Alabama has very few Democratic-appointed district court judges. By my rough count, in the entire state, there is one active Obama nominee, and two senior appointees from Clinton and Carter. The Carter appointee, Judge Myron Thompson in Montgomery (Middle District of Alabama), is well known for ruling in favor of progressive litigants. Unsurprisingly, if you are a progressive litigant in Alabama, you will do everything in your power to get the case assigned to Judge Thompson.

Which brings us to the present case. In 2022, Alabama enacted the Vulnerable Child Compassion and Protection Act, which prohibits certain medical procedures for minors. As could be expected, the law was subject to immediate challenges by all the usual suspects.

Their strategy, which was revealed in a [panel report](#), is striking. Here is the (rough) chronology.

1. 4/8/2022—*Ladinsky* complaint filed in NDAL by National Center for Lesbian Rights, GLBTQ Legal Advocates & Defenders, Southern Poverty Law Center, and Human Rights Campaign.
2. 4/11/2022—The NDAL case was randomly assigned to Judge Annemarie Axon (Trump appointee).
3. 4/11/2022—*Walker* complaint filed in MDAL by ACLU, Lambda Legal, and Transgender Law Center. The civil cover sheet marked the case as related to *Corbitt v. Taylor*. *Corbitt* was a challenge to an Alabama policy regarding the listing of gender on drivers' licenses. That case had been closed in January 2021. The only lingering issue was attorney's fees. Judge Thompson presided over *Corbitt*. The attorneys "marked *Walker* related to *Corbitt* because they wanted *Walker* assigned to Judge Thompson." The attorneys admitted that "they considered Judge Thompson a favorable draw because of his handling of *Corbitt* and that he ruled in favor of the plaintiffs who asserted transgender rights claims."

4. 4/12/2022 – *Walker* randomly assigned to Chief Judge Emily Marks (Trump appointee). *Walker* plaintiffs filed a motion to reassign to Judge Thompson. Counsel had also called Judge Thompson's chambers and spoke with the judge's law clerk to flag the pending motion for preliminary injunction. At that time, *Walker* had not been assigned to Judge Thompson. (The lawyer at first denied making such a call, but later admitted it; the panel found his testimony was "troubling.") The counsel never called Chief Judge Marks to flag the pending motion.
5. 4/13/2022—Chief Judge Marks entered an order to show cause why the case should not be transferred to the Northern District. The parties did not oppose the transfer.
6. 4/15/2022 – *Walker* reassigned to NDAL, and the case was randomly assigned to Judge Burke (a Trump appointee). That day, Judge Axon also transferred *Ladinsky* to Judge Burke. About two hours after *Ladinsky* was assigned to Judge Burke, the *Walker* and *Ladinsky* plaintiffs filed a notice of voluntary dismissal. This dismissal was made, "even though (as [counsel] admit) time was of the essence and their stated goal was to move quickly to enjoin what they viewed as an unconstitutional law, abruptly stopping their pursuit of emergency relief."
7. 4/16/2022—Counsel for *Ladinsky* plaintiffs tell the press that they plan to refile their case "immediately."
8. 4/18/2022—Judge Burke denied the TRO as moot because of voluntary dismissal, but noted the press reports that the Plaintiffs planned to refile. Judge Burke stated, "At the risk of stating the obvious, [p]laintiffs' course of conduct could give the appearance of judge shopping—a particularly pernicious form of forum shopping—a practice that has the propensity to create the appearance of impropriety in the judicial system."
9. 4/19/2022—A new group of plaintiffs, led by *Eknes-Tucker*, filed suit in the Middle District of Alabama signed by the same lawyers who filed *Ladinsky*. The lawyers found new plaintiffs, because were "concerned that they would be accused of judge shopping if they filed a new action with the same plaintiffs." The case was randomly assigned not to Judge Thompson, but to Judge Huffaker (Trump appointee).
10. 4/20/2022—Judge Huffaker transferred the case to Judge Burke.

The panel concluded, "Behind the scenes, counsel took surreptitious steps calculated to steer *Walker* to Judge Thompson even before filing their motion to have *Walker* reassigned to him." And the lawyers "made plans and took steps in an attempt to manipulate the assignment of these cases." Ironically, the panel noted, Judge Burke ruled for the *Eknes-Tucker* plaintiffs in part. A Trump judge!

This sequence of events, which was well known in Alabama, proves how pernicious *actual* judge shopping is. And this practice has *nothing* to do with single-judge divisions. Skilled lawyers know how to direct cases to favorable forums. Here, they made some ill-advised statements to the press, and got caught. But in many other cases, they are not caught. I will wait to see

breathless outrage on social media about this *actual* judge shopping. If ADF did something like this, they would be crucified.

How would the much-vaunted Judicial Conference have worked here? Who knows!?! There were so many assignments and reassignments, coupled with suits filed in competing divisions, all based on random draws. These choices were deliberately made by the plaintiffs to gum up the system. Plus, the coversheet and "Related Case" gambit throws a wrench in any assignment wheel. Often, staff in the clerk's office have to decide whether to reassign a "related" case. This case involved "two cases [that were] filed in the same district and there [was] a question about whether they should be consolidated or otherwise transferred so that the same judge presides over them." Resolving this issue is "not so much a rule as a practice." It is complex, and requires some judging. It would not surprise me if judges in the trenches looked at the Judicial Conference's policy and recognized that it would be impossible to actually apply in the real world—especially in light of potential gamesmanship. After all, parties can trigger reassignment just by seeking statewide relief. Or, a case could be dismissed and re-filed, as the plaintiffs did here. Or the same complaint can be filed in multiple districts, with the hopes of getting the best draw.

The attorneys in the Alabama case work at leading law firms and civil rights organizations. They have every interest in avoiding random draws in red states. For these reasons, I suspect they would quietly oppose the judicial conference's policy.

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