The Rocket Docket

U.S. District Court for the Eastern District of Virginia

[Including Local Procedures for Patent Infringement/Invalidity Cases]

DiMuroGinsberg PC

ATTORNEYS AT LAW

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DiMuroGinsberg is a litigation firm located in Alexandria, Virginia. The firm practices in the areas of corporate and commercial law, business torts, business disputes, RICO, criminal law, securities fraud, employment law, professional liability & ethics, intellectual property and patent cases (local counsel only). The firm also has a strong complementary corporate and business law practice. The litigation experience of the attorneys of DiMuroGinsberg and their continued service to the legal community has brought the firm local and national recognition. Their regular practice in the court and frequent appearances before the judges of the Alexandria Division of the Eastern District of Virginia enable the firm to serve as a valuable resource for out-of-state counsel unfamiliar with the local rules and practices of the Court.

The information in this booklet reflects general guidelines and is not intended to constitute legal advice.

Overview

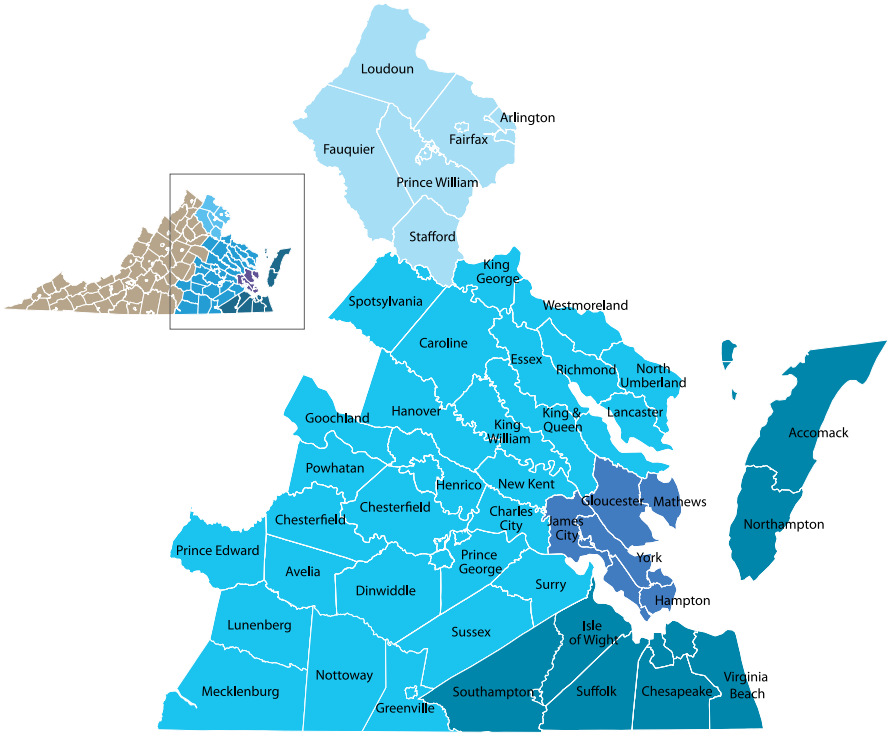
So, you are about to litigate an important case in federal court in the Eastern District of Virginia, home of the **"Rocket Docket"**. DiMuroGinsberg welcomes you to our home State with this caution: be prepared, be very prepared, because there are no trial courts like those in the Eastern District where in civil cases the median time from filing a Complaint to trial is 11.3 months, which is the fastest in the country, and where parties are usually expected to complete discovery in three months regardless of how complicated the case. This booklet will familiarize you with the truly unique nature and challenges of the Rocket Docket.

Virginia is divided into two Districts, the Eastern District of Virginia and the Western District of Virginia. Except in patent cases, appeals from both Districts are heard in the Fourth Circuit Court of Appeals, which is located in Richmond, Virginia. The Eastern District has jurisdiction over six million people, which comprises approximately 85% of the State's population.

The Eastern District is divided into four Divisions: Alexandria, Newport News, Norfolk, and Richmond. The Eastern District has its own Local Rules that apply across the Divisions for both civil and criminal cases. The Local Rules can be found at: **www.vaed.uscourts.gov/localrules/LocalRulesEDVA.pdf**.

In addition to the Local Rules, each Division in the Eastern District also has its own practices which are not necessarily written anywhere. For instance, each Division and sometimes individual Judges within the Divisions issue their own preferred scheduling Orders and procedures for motions. It is important to be familiar with the procedures of the Division in which a case is filed because regardless of the Division, the Eastern District of Virginia is the **"Rocket Docket,"** unlike any other court in the United States.

This booklet primarily focuses on Eastern District procedures as applied in the Alexandria Division as well as an overview of procedures in all Divisions in patent infringement/invalidity cases.



ALEXANDRIA*	NEWPORT NEWS*	NORFOLK*	RICHMOND*
City Alexandria **Counties** Arlington Fairfax Fauquier Loudoun Prince William Stafford	**Cities** Newport News Hampton Williamsburg **Counties** Gloucester James City Mathews York	**Cities** Cape Charles Chesapeake Franklin Norfolk Portsmouth Suffolk Virginia Beach **Counties** Accomack Isle of Wight Northampton Southampton/ Stafford	**Cities** Colonial Heights Fredericksburg Hopewell Petersburg Richmond **Counties** Amelia Brunswick Caroline Charles City Chesterfield Dinwiddie Essex Goochland Greensville Hanover Henrico King and Queen King George King William Lancaster Lunenburg Mecklenburg Middlesex New Kent Northumberland Nottoway Powhatan Prince Edward Prince George Richmond Spotsylvania Surry Sussex and Westmoreland

* Also includes any other city or town geographically within the exterior boundaries of said counties.

Venue Within the Eastern District of Virginia

Local Rule 3(C) requires that civil actions for which venue is proper in the Eastern District be brought in the proper Division as well.

The Alexandria Division is a popular venue to bring a civil case because of its speedy resolution of cases and because some of the most prominent internet-related companies and domain name registries are located within the geographic scope of the Alexandria Division.

Patent cases have often been filed in the Alexandria Division, most notably due to the prospect of a quick resolution. However, it is now the practice that although a patent case is filed in the Alexandria Division, it may be administratively assigned to other Divisions to equalize the burden. This procedure as well as some of the procedures for patent cases that have been applied in each Division is discussed below.

As provided in Local Rule 3(C), the venue rules stated in 28 U.S.C. § 1391 *et. seq.* are applied by the Courts to determine the proper Division in which an action should be filed. The term "judicial district" and "district" in 28 U.S.C. § 1391 are replaced with the term "Division." With that modification, practitioners should look to 28 U.S.C. § 1391 in deciding where to file a case.

So long as a Complaint is otherwise in proper form, a Complaint filed in the wrong Division is deemed filed for all purposes and forwarded to the Division where venue properly lies.

Why "The Rocket Docket"?

The Motto for the Eastern District of Virginia has long been:

Justice Delayed Is Justice Denied

In *United States v. Ferguson*, 432 F. Supp. 2d 559, n. 10 (E.D. Va. 2006), Judge Gerald Bruce Lee of the Alexandria Division explained the origins of the Rocket Docket.

The Eastern District of Virginia has been referred to as the "Rocket Docket" since Judge Walter E. Hoffman, in 1954, pursued a 12-year regimen of putting in long hours, cutting the traditional 2-hour lunch, and holding Court on Saturdays and holidays. *See* Emilee Hines, The "Rocket Docket" Judge Bans Continuances, Lawyers Monthly, May 1989, at 8. Judge Hoffman also initiated the practice in this district of fining lawyers who were late and establishing "firm trial dates." *Id.* Hoffman was quoted as saying that "[t]he lawyers for both sides know there will be no continuances", and that in this District "continuance" is an obscene word. *Id.*

Of the 94 federal district courts in the United States, the Eastern District has traditionally been the fastest docket in the country. According to the Federal Judicial Caseload Statistics compiled by the Administrative Office of the United States Courts, for the 12-month period ending March 31, 2011, the median time interval from filing to disposition of a civil case in the Eastern District was five months as compared to 7.9 months nationally. Further, in civil cases, the median time from filing a Complaint to trial is 11.3 months, which is the fastest in the country. Nationally, the median time to trial is 23.2 months, over twice that of the Eastern District. *See* **http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C05Mar11.pdf**

Delay is Seriously Discouraged and Rarely Occurs

The judicial philosophy for the Rocket Docket has long been that an early and fixed trial date is the best motivator for parties to settle their differences. This philosophy is found within the Local Rules, where delay is not only discouraged, but virtually banned.

- "Motions for continuances of a trial or hearing date shall not be granted by the mere agreement of counsel. No continuance will be granted other than for good cause and upon such terms as the Court may impose." **Local Civil Rule 7(G).**

There are two orders issued at the beginning of every case that control the conduct of the litigation and establish the critical deadlines; the initial Standard Order and the Rule 16(B) Scheduling Order.

The dates established in the initial Standard Order and the Scheduling Order and other Orders of the Court are firm. They cannot be changed by agreement of the parties. Leave of Court is required to make any changes. Critical dates, such as the date of the close of discovery or trial, will not be changed absent extraordinary circumstances.

Adherence to this philosophy is reflected in the statistics regarding the Eastern District. According to the Civil Justice Reform Act of 1990 Semi-Annual Report compiled by the Director of the Administrative Office of the United States Courts, on March 31, 2011, in the Eastern District there were only three civil cases pending for more than three years, as compared to the 15,661 civil cases pending nationally. In terms of motions, there were only 13 motions that had been pending for more than six months (eight were attributed to one Judge), as compared to 5,319 motions nationally. *See* **www.uscourts.gov/uscourts/statistics/cjra/2011-03/CJRAMarch2011.pdf**

The Expanded Role of Local Counsel in the Eastern District

Many jurisdictions require local counsel participation in cases pursued by counsel not admitted to practice in the jurisdiction. However, unlike most jurisdictions, the responsibilities of local counsel in the Eastern District are substantial. Local counsel must file and are responsible for all pleadings and must be present for all court appearances.

Local Rule 83.1 (D) requires local counsel to:

- Sign ALL pleadings or notices.
  - The Local Rules make clear that local counsel not only sign all pleadings and notices, but local counsel "will have such authority that the Court may deal with local counsel alone in all matters connected with a case."
  - It is not uncommon for the Court to deny a continuance or change of date merely because foreign counsel is not available to argue a motion. Local counsel is expected to step in for foreign counsel at any time.
- Accompany foreign counsel in all appearances before the Court.

The Court depends upon local counsel to ensure compliance with all Local Rules and procedures. Local counsel is ultimately held responsible for all issues before the Court. As stated by the Court, "[t]he purpose of this rule is to give the Court effective control of Court business by ensuring that attorneys involved in litigation will be available and subject to the Court's authority." *Willis v. Semmes, Bowen & Semmmes*, 441 F. Supp. 1235, 1246 (E.D. Va. 1977) (commenting on the predecessor to Local Rule 83.1(D)).

Given the demanding deadlines established by the initial Standard Order and Scheduling Order, motions are heard every Friday. Continuances are rarely granted because of conflicts in the schedule of out of town counsel. The Court looks to local counsel to appear and argue motions to keep the case on schedule.

The decision to become local counsel in an Eastern District case involves a serious commitment. Local Rule 83.1(b)(3) prohibits local counsel from withdrawing from a case without leave of Court. Experienced local counsel know that such leave is infrequently granted.

Schedule for Civil Cases

Cases move very quickly in the Eastern District. For example, a typical civil case filed on January 3, 2012, in the Alexandria Division proceeds on the following schedule:

DATE	EVENT	RULE
1/3/12	Complaint filed and summons issued	Fed. R. Civ. P. 8
2/3/12 to 3/3/12	Service accomplished	Assuming no waiver of service under Rule Fed. R. Civ. P. 4(d)
2/24/12	Answer/Rule 12 motions filed	Fed. R. Civ. P. 12 (21 days after 2/3/12 service, assuming no waiver)
3/19/12	Initial Standard Order issued – discovery begins	Initial Standard Order. Typically issued 30 days after Answer/Rule 12 motions filed
4/11/12	Rule 26(f) Discovery Plan filed	Initial Standard Order
4/16/12	Plaintiff's Rule 26(a)(2) Expert Disclosures Due	This is the default date under Local Rule 26(D) (60 days before the close of discovery). However, the Local Rule encourages the parties to agree upon the sequence and timing of expert disclosures.
4/18/12 10:00 a.m.	Rule 16(b) Pretrial Conference	Initial Standard Order
4/30/12 26(a)(1)	Initial Disclosures	Due 14 days after Rule 16(b) conference unless altered by the Discovery Plan. Fed. R. Civ. P. 26(a)(1)(C). The practice is to include the specific date agreed upon by counsel in the Discovery Plan.
5/16/12	Defendant's Rule 26(a)(2) Expert Disclosures	This is the default date under Local Rule 26(D) (30 days after Plaintiff's disclosures). However, the Local Rule encourages the parties to agree upon the sequence and timing of expert disclosures.
5/15/12	Last Day to serve written discovery (in order to allow timely responses)	Initial Standard Order
5/31/12	Plaintiff's Rule 26(a)(2) Expert Rebuttal Disclosures	This is the default date under Local Rule 26(D) (15 days after Defendant's disclosures). However, the Local Rule encourages the parties to agree upon the sequence and timing of expert disclosures.
6/15/12	Discovery period completed	Initial Standard Order
6/21/12	Exhibit and witness lists filed	Initial Standard Order: 26(a)(3) Disclosures, Exhibit and Witness Lists and Written Stipulations to be e-filed on or before the Final Pretrial Conference
6/21/12 10:00 a.m.	Final Pretrial Conference	Initial Standard Order
7/2/12	Objections to Exhibits	Initial Standard Order: Due 10 days after Final Pretrial Conference
5 days before trial	Jury Instructions and Proposed Voir Dire	Local Rule 51 and Scheduling Order: Due 5 days before trial
1 day before trial	Original Exhibits (original and 2 copies)	Local Rule 79(A): Filed with the Court 1 day before trial with Exhibit List, bound and tabbed
7/16/12 to 8/17/12	Trial Date	Initial Standard Order: Within 4-8 weeks of Final Pretrial Conference.

Initial Standard Order

Local Rule 16(B) provides that the Court shall, not later than 90 days from the first appearance, enter an Order fixing cut-off dates for discovery. Typically, this initial Standard Order is issued by the assigned Judge within one to two weeks after defendant files a responsive pleading. The standard Alexandria Division initial Standard Order provides that discovery may begin immediately. Counsel needs to be especially aware of this variance from the Federal Rules which require a Rule 16 pretrial conference and the submission and approval of the Rule 26(f) discovery plan before discovery may be served.

> ***Practice Point:*** *In the Eastern District, experienced counsel know to be ready to issue discovery the day the initial Standard Order is received. With the limited time available for discovery in this District, it is critical to not fall behind your adversary in pursing discovery.*

The initial Standard Order will set the specific date for the conclusion of discovery, which is typically 90 days from the date of the Order.

Rule 16(b) Conference and Discovery Plan: The initial Standard Order will also set the time for a Rule 16(b) pretrial conference which is typically within 30 days of the Order. Pretrial conferences are typically held on Wednesday mornings before the assigned Magistrate Judge.

The initial Standard Order provides that the parties' Rule 26(f) Discovery Plan must be submitted a week prior to the Rule 16(b) pretrial conference.

> ***Practice Point:*** *Typically, if the elements of the Discovery Plan are agreed upon by the parties, the pretrial conference will not be held and the Magistrate Judge will enter the Discovery Plan Order.*

The proposed Discovery Plan should address the following issues:

- What changes should be made in the timing, form or requirement for disclosures under Fed. R. Civ. P. 26(a), including a statement as to when disclosures under Fed. R. Civ. P. 26(a)(1) were made or will be made.
- The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues.
- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.
- Any issues relating to claims of privilege or protection as trial-preparation material, including whether the parties agree on a procedure to assert such claims after production and whether to ask the Court to include their agreement in an Order.
- The need and time required for foreign discovery.
- What changes should be made in limitations on discovery imposed under the Federal Rules or by Local Rule, and what other limitations should be imposed.
- Any other Orders that should be entered by the Court under Fed. R. Civ. P. 26(c) or under Fed. R. Civ. P. 16(b) and (c).
- Whether the parties consent to trial before a Magistrate Judge.

The Rule 26(f) Discovery Plan is critical. Given the compressed discovery period (three months), the timing of certain discovery must be carefully considered.

> ***Practice Point:*** *The timing of Rule 26(a)(2) expert disclosures is critical. The default timing under Local Rule 26(D)(2) is that Plaintiff's disclosures are due no later than 60 days before the close of discovery. Usually, this means that the Plaintiff's expert disclosures are due within weeks of the Rule 16(b) conference. Unless Plaintiff has experts lined up with their reports prepared in advance of filing the Complaint, this default deadline must be changed. The Local Rule encourages the parties to agree "upon the sequence and timing of the expert disclosures... ."*

This agreement must be reflected in the Discovery Plan to be approved by the Court. If an agreement cannot be reached, this will be addressed during the conference and a date will be set by the Court.

Deposition Limitations: The initial Standard Order will provide that a party may not exceed five non-party, non-expert depositions. The parties may not agree to alter the terms of the Scheduling Order regarding depositions without obtaining leave of Court. For good cause, a Magistrate Judge will permit additional depositions. However, a party should anticipate this issue and be prepared to address it at the pretrial conference because obtaining leave of Court thereafter will be more difficult and will require motions practice.

Interrogatories: The initial Standard Order also increases to 30 the number of interrogatories a party may issue, as opposed to the limit of 25 under Fed. R. Civ. P. 33.

Final Pretrial Conference: The initial Standard Order also will set the date for the final pretrial conference which is typically the Thursday following the close of discovery. The final pretrial conference will be held in Chambers. Some Judges include the following language in the initial Standard Order: "Counsel who appear at the final pretrial conference must be the person who will try the case." Even if this language is not in the Order, the attorneys who will be trying the case should attend.

Practice Point: *The primary purpose of the final pretrial conference is to set a trial date. The date will be set between four to eight weeks following the date of the conference. Do not expect dates beyond eight weeks and do not expect the trial date to be continued.*

If a motion for summary judgment has not yet been filed, a schedule for summary judgment is often set at this conference. The Judge also will ask the parties about the status of any settlement negotiations and often will recommend a settlement conference with a Magistrate Judge.

The parties must electronically file on or before the final pretrial conference the Fed. R. Civ. P. 26(a)(3) disclosures and a list of the exhibits to be used at trial, a list of the witnesses to be called at trial, and a written stipulation of uncontested facts. The exhibits themselves or a copy should be exchanged with opposing counsel before the final pretrial conference. Objections to exhibits must be filed within 10 days after the conference; otherwise the exhibits shall stand admitted in evidence. The original exhibits must be placed in a binder, properly tabbed, numbered, and indexed, and the original and two copies must be delivered to the Clerk, with copies in the same form to the opposing party one business day before trial. The submitting party may substitute photographs for demonstrative or sensitive exhibits. Local Rule 79(A).

The initial Standard Order will include the following:

Non-expert witnesses and exhibits not so disclosed and listed will not be permitted at trial except for impeachment or rebuttal, and no person may testify whose identity, being subject to disclosure or timely requested in discovery, was not disclosed in time to be deposed or to permit the substance of his knowledge and opinions to be ascertained.

Trial Date: The initial Standard Order informs the parties that trial will be set for a date certain within four to eight weeks following the final pretrial conference.

The Scheduling Order

Each of the Magistrate Judges in the Alexandria Division use a slightly different Rule 16(B) Scheduling Order. Although different in form, the Orders address common issues.

Discovery Plan: The Scheduling Order will address the proposed Discovery Plan, typically approving it and providing that it shall control discovery. However, even when the parties are in agreement, they should not expect the Court to automatically approve changes to critical dates in the initial Standard Order such as the date for the close of discovery or the date of the final pretrial conference. Even with agreement, counsel must justify any changes in order to obtain Court approval. Changes in the default timing of expert disclosures will be addressed in the Scheduling Order.

Dispositive Motions: The Scheduling Order will provide that "ten working days' notice is required for motions to dismiss, for summary judgment, for patent claim construction, and for judgment on the pleadings."

Non-dispositive Motions: The Scheduling Order will provide that non-dispositive motions (which include discovery motions) must be filed by 5:00 p.m. on the Friday before the Friday for which the motion is noticed. Responses must be filed by 5:00 p.m. on the Wednesday before the hearing. Some versions of the Scheduling Order permit the filing of a reply brief as early as possible on Thursday. Further, some versions of the Scheduling Order and the ECF policies and procedures require that paper copies of non-dispositive motions be delivered directly to the Chambers of the Magistrate Judge.

Discovery Requests/Responses: The Scheduling Order will provide that initial disclosures, depositions, discovery requests and responses thereto "shall not be filed except on order of the court, or for use in a motion or at trial."

Sealing of Documents: The Scheduling Orders specifically provide that, "[f]ilings under seal are disfavored and discouraged." Protective Orders that provide for filings under seal must be docketed for a hearing in open Court. Further, any motion to file a document under seal must be docketed for hearing in open Court. All sealing motions must state sufficient facts to support the basis for the request and must include the required specific findings set forth in *Virginia Department of State Police v. The Washington Post, et al.*, 386 F.3d 567, 575-76 (4th Cir. 2004).

Jury Instructions and Voir Dire: The Scheduling Order will require that proposed jury instructions and voir dire be filed five days before trial as required by Local Rule 51. The Order also warns that: "[v]iolation of this Rule will constitute a waiver of objections to any instructions given."

> ***Practice Point:*** *The Judge conducts voir dire. Typically, counsel will not be permitted to directly question potential jurors.*

Significant Local Rules and Practices

Complaint

The Complaint must be filed in the Clerk's office with Civil Cover Sheet Form, JS 44(a), and the filing fee. At the time of filing, a Judge and Magistrate Judge will be randomly assigned to the case.

Subsequent filings with the Court, with a few exceptions, are filed electronically. All electronic filings must be made by an attorney admitted to practice in the Eastern District who has registered for electronic filing. Attorneys admitted *pro hac vice* are not permitted to file pleadings with the Court. Local Rule 83.1(D)(3).

Also, Local Rule 7.1 requires all corporate parties to file Financial Disclosure Statements to enable the Judges to evaluate possible disqualification or recusal. The disclosures are required to be filed upon the party's first appearance. The Court has developed a form to be used for the disclosures which is available on the Court's website at **www.vaed.uscourts.gov/courtdocs/civil-forms/Financial_Interest_Disclosure_Statement.pdf**.

Service

Service must be completed within 120 days. Requests to withhold service, except for *in rem* process, may not be granted by the Clerk without prior leave of Court. Local Rule 4(B).

Discovery Practice

Objections to discovery (Local Rule 26(c)): Objections to any interrogatory, request, or application under Fed. R. Civ. P. 26 through 37, shall be served within 15 days of service. Local Rule 26(c). The 15 day objection deadline is unique and causes significant potential problems for the unwary. Failure to timely serve objections may result in their waiver.

The timely filing of objections does not otherwise extend the time for the objecting party to respond to discovery to which no objection was made. Local Rule 26(c).

The 15-day objection deadline and the fact that motions are heard on a weekly basis permit the propounding party to attempt to resolve objections informally, and in the event agreement cannot be reached, a motion to compel may be filed and heard before the 30-day response deadline.

Depositions (Local Rule 30): The Local Rule provides that generally 11 days advance notice of a deposition shall constitute reasonable notice. Local Rule 30(H).

Plaintiffs and Counterclaimants must ordinarily make deponents available within the Division where the case is pending. Local Civil Rule 30(A).

> ***Practice Point:*** *Counsel defending depositions in the Alexandria Division should be familiar with the Fourth Circuit's opinion in Ralston Purina Company v. McFarland, 550 F.2d 967, 973 (1977), which discusses proper objections during a deposition: "The action of plaintiff's counsel in directing [a witness] not to answer questions posed to him was indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure." The Magistrate Judges in the Alexandria Division are well familiar with this case.*

Subpoenas (Local Rule 45): Subpoenas issued for depositions shall not be served later than 11 days before the date of the deposition.

Motions Practice

General (Local Rule 7): "All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought." Local Rule 7(A).

Briefs are required for all motions, with three limited exceptions: (a) definitive statement; (b) extension of time to respond to pleadings, unless the time already has expired; and (c) default judgment. Local Rule 7(F).

Personal identifiers must be redacted from all filings. Local Rule 7(C). It is the responsibility of counsel to make the redactions and failure to properly redact the identifiers may result in sanctions. *Id.*

Motions must be noticed for hearing. Local Rule 7(E). If a motion is not noticed for hearing within 30 days of its filing, it will be deemed to be withdrawn. *Id.* Typically, counsel will receive an ECF notification within a day after filing if a notice is not filed with the motion.

Generally, responsive briefs are due within 11 days of service, and reply briefs are due three days thereafter. *Id.* This does not apply to non-dispositive motions (*e.g.* discovery motions) which may be heard in one week as addressed by the Scheduling Order. No further briefs or communications are permitted without leave of Court. *Id.*

Opening and responsive briefs, exclusive of affidavits and exhibits, are limited to 30 pages, and rebuttal briefs are limited to 20 pages. *Id.*

Motions for Summary Judgment (Local Rule 56): The Local Rule alters the timing under Fed. R. Civ. P. 56(c)(1) for filing a motion for summary judgment. Local Rule 56(A) provides that motions for summary judgment must be filed and set for hearing within a reasonable time before trial.

Briefs in support of motions for summary judgment must contain a specifically captioned section listing all undisputed material facts with citations to the parts of the record to support the facts. Local Rule 56(B).

Briefs in opposition to summary judgment must contain a specifically captioned section listing all material facts contended to be in dispute, with citations to the parts of the record which support the existence of the dispute. *Id.* Failure to properly controvert a fact in the opposing brief may result in the fact being deemed admitted by the Court. *Id.*

Discovery Motions (Local Rule 37): "Counsel shall confer to decrease, in every way possible, the filing of unnecessary discovery motions." Local Rule 37(E). Letter writing or sending emails is not sufficient to satisfy the requirement to meet and confer. You must meet in person or speak with the other side in an effort to resolve disputes. *Id.*

The Court will not hear motions to compel that fail to contain a statement by counsel that a good faith effort has been made to resolve the issues. *Id.*

Failure to confer in good faith in an effort to resolve discovery disputes may result in the imposition of sanctions. Local Rule 37(H).

> ***Practice Point:*** *Compliance with discovery Orders can be short. Generally, compliance is due within 11 days unless otherwise specified in the Order. Local Rule 37(C).*

Trial

Jury Selection

Trials will begin on the date set at the final pretrial conference.

The first order of business will be the selection of a jury. A cardinal rule in the Eastern District is not to keep the jury waiting. Upon request, the Clerk will provide counsel with a list of the jurors who have reported to duty for that session of the Court. A jury list can typically be obtained three days before the trial date. The list will provide counsel with the name and county/city of residence of the juror, the juror's occupation, the spouse's name, and the number of children. At no time, either before or after trial, may counsel, the litigant or anyone on their behalf approach a juror or any member of his or her immediate family in an effort to secure information concerning the juror or with respect to the verdict or deliberations in the case.

Jurors in the Eastern District are perceived to be more educated and sophisticated than many other district courts. Because Alexandria is close to Washington D.C., often jurors will have ties to persons either working in the United States government, contracting with the federal government or have some other connection with the federal government. The same is true with jurors' connections to military service members.

Voir dire is conducted by the Court in the Eastern District.

Expect a jury to be empaneled by lunch on the first day of trial.

Trial

Trials are conducted Monday through Thursday. Fridays are reserved for motions.

The trial will proceed quickly.

Opening statement time allocations are usually shorter than many foreign attorneys are accustomed to experiencing.

A party must have its witnesses ready to be put on the stand because the Court will rarely delay a trial if a witness is not available. If there is a problem with a witness attending trial on time, be prepared to either put on a different witness or to put in additional evidence such as stipulations reached by the parties or an admissible deposition read to the jury. Local Rule 30.

Cumulative testimony is particularly frowned upon in the Eastern District. It is common that the second witness to testify on the same topic will be considered cumulative and counsel will be instructed to move on to a new topic, often *sua sponte* by the Court.

Examination of witnesses is always conducted by counsel from a standing position behind the lectern, and as a general rule no witness may be approached without first obtaining permission of the Court. Only one attorney for each party may participate in the examination or cross-examination of a witness. While re-direct examination will be permitted, sur-rebuttal examination is generally not permitted.

Closing Argument: Like opening statements, the time permitted for closing argument is generally shorter than in many other jurisdictions.

Courtroom Technology: Evidence Presentation System

The Alexandria courthouse has one of the most advanced evidence presentation systems in the country.

Use of Attorney's Notebook. The available courtroom systems enable attorneys from their notebook computer to present evidence simultaneously to everyone in the courtroom through a system of LCD display screens. Attorneys are responsible for using their notebook computer to present scanned documents and images and play audio and DVD/CDs. Court employees are not authorized to handle and operate the equipment for counsel. Notebook computer Wi-Fi and webcams must be disabled. Internet service is not authorized. Projectors and projection screens also are not authorized in the courtrooms. Attorneys must receive prior approval from the Judge presiding in their case one week before they intend to use the system by submitting a

written request to the Chambers of the trial Judge to attain permission to use their notebook computer and the Court's evidence presentation system.

The Court's evidence presentation systems consist of a digital document camera, notebook computer input audio and video connections, and LCD display screens for the Judge, witness, counsel and jury. The Court's system allows attorneys to: (1) show scanned documents, present animations, display graphics and play videos stored digitally on a notebook computer; (2) magnify portions of a paper document, a photo or a small piece of physical evidence with a digital document camera; and (3) use any third-party evidence presentation software installed on their notebook computer. No one is authorized to remove, relocate or reconfigure any of the Court's evidence presentation system.

Orientation sessions prior to use of the equipment are available and counsel are strongly encouraged to avail themselves of this opportunity. Attorneys are responsible for obtaining authorization from Chambers to bring their notebook computers to the scheduled orientation. Practicing presentations and preparing witnesses is not authorized in the orientation sessions.

Source: **http://www.vaed.uscourts.gov/resources/Court%20Technology/evidence_presentation_systems.htm**

Take Away Points

- The Eastern District puts parties on a very tight schedule and holds them to it.
- There are many procedural rules unique to the Eastern District.
- Assume the case is going to trial because there will not be time to put a trial together if settlement efforts fall through.
- Obtain experienced local counsel and work closely with them well before and after suit is filed.

Please let us know if you would like copies of sample Discovery Plans or Orders filed in the various Divisions of the Eastern District.

Local Procedures for Infringement/Invalidity Patent Cases

Patent Infringement/Invalidity Cases in the Eastern District

Introduction

Patent infringement/invalidity cases are different than other kinds of civil cases and should be treated differently. However, as discussed below, while there is a proposed Local Rule to address patent cases, that Rule has not been adopted by the Eastern District and there are no standing Orders specific to patent cases. Unfortunately, there is also little uniformity in how the Judges of the various Divisions of the Eastern District handle these cases. In fact, the various Divisions of the Eastern District handle patent cases differently. Below, we provide some examples of how the Divisions of the Eastern District, and certain Judges within those Divisions, have historically handled patent infringement/invalidity cases and how the handling of these cases is similar to and different from other civil actions in the Eastern District (discussed above).

Counsel must be mindful that, although patent infringement/invalidity cases are often factually and technically complicated and usually require claim construction and other patent-specific motions and procedures, the parties still will be subject to the very demanding deadlines set by the Eastern District. As set forth above, the median time from the filing of the Complaint to trial is 11.3 months in the Eastern District. In patent infringement/invalidity cases, the parties should expect to go to trial approximately 9-14 months from the date the Complaint is filed depending on the Division. It is likely that trial will be set earlier in the Alexandria Division than the other Divisions.

In each Division of the Eastern District, the Court will typically issue its initial Standard Order setting forth the Rule 16(b) initial pretrial conference, the close of discovery and the final pretrial conference. These initial Standard Orders are usually the same as those used in other civil cases in the respective Divisions and rarely address patent-specific issues.

As in other civil cases, and consistent with the timing and procedures set forth above, in each Division of the Eastern District the parties are required to meet and confer and submit a Rule 26(f) Discovery Plan prior to the Rule 16(b) conference. In addition to addressing the other issues set forth in Rule 26(f) (discussed above), the parties also should address and suggest dates for claim charts, prior art statements, proposed claim constructions, a Markman hearing, and any other patent-specific issues.

In the Alexandria Division, the Magistrate Judge assigned to the case holds the Rule 16(b) scheduling conference. In the Richmond Division, this conference is held before the Judge assigned to the case, and in the Norfolk and Newport News Divisions it is typically held before the scheduling Clerk.

Alexandria Division

In the Alexandria Division, following the Rule 16(b) scheduling conference, the Magistrate Judge will issue a Rule 16(b) Order. Some Magistrate Judges issue patent-specific Orders that set not only typical litigation deadlines, but also set dates for filing preliminary infringement disclosures, preliminary invalidity and non-infringement disclosures, claim charts or terms, prior art statements, proposed claim constructions, and/or a Markman hearing. *See, e.g., Netscape Communications, Corp. v. Valueclick, Inc., et al.*, 1:09-cv-225 (J. Ellis; M.J. Jones). Other Magistrate Judges issue a standard Rule 16(b) Order without patent- specific deadlines. *See, e.g., Kettler International, Inc. v. Razor USA, LLC*, 1:10-cv-708 (J. Ellis; M.J. Anderson); *Spansion LLC v. Samsung Electronics Co., Ltd., et al.*, 1:10-cv-881 (J. O' Grady; M.J. Anderson). Most Magistrate Judges in the Alexandria Division are open to adopting the schedules set forth in the parties' Discovery Plan in the Rule 16(b) Order so long as they do not delay trial. In *Kettler* and *Netscape*, the final pretrial conference was set in the Rule 16(b) Order, but the trial date was not. In *Kettler*, the final pretrial conference was set for six days after the close of all discovery. In *Netscape*, the final pretrial conference was set approximately two weeks before the close of expert discovery. *In Spansion*, the Court did not set the final pretrial conference in the Rule 16(b) Order. Because Alexandria District Judges are less involved in the beginning stages of litigation (because a Magistrate Judge is assigned to handle most discovery issues), they

normally prefer to delay claim construction until the summary judgment stage when discovery is complete. Claim construction often occurs less than two months before trial. Accordingly, trial preparation is more difficult.

Richmond Division

In the Richmond Division, after the initial pretrial conference is held, the Judge will issue his/her own initial pretrial Order that sets pretrial deadlines, discovery deadlines, the final pretrial conference and the trial date. Initial pretrial Orders vary. In addition to the trial date and discovery deadlines, sometimes these Orders will include dates specific to patent cases (*i.e.*, tutorial hearing, claim construction hearing, claim construction briefing deadlines, etc.). *See, e.g., Fred Hutchinson Cancer Research Ctr., et al., v. Branhaven, LLC,* 3:11-cv-00710 (J. Gibney); *Hamilton Beach Brands, Inc. v. Sunbeam Products, Inc.*, 3:11-cv-00345 (J. Spencer). In other instances, the Judge enters a standard initial pretrial Order and then the Order is later amended or a subsequent scheduling Order is entered which includes patent case-specific dates. *See, e.g., Sunbeam Products, Inc. v. Hamilton Beach Brands, Inc., et al.*, 3:09-cv-00791 (J. Payne); *LucidMedia Networks, Inc. v. Augme Tech., Inc.*, 3:11-cv-00282 (J. Hudson). In general, Judges in the Richmond Division are more involved in patent cases early on because they participate in the initial pretrial conference and often hear non-dispositive and discovery motions. Hence, the question of whether a Markman hearing will be necessary is usually addressed at the initial pretrial conference and often occurs three to four months after responsive pleadings have been filed, before expert reports are filed, and well in advance of trial. A review of recent Richmond Division patent cases reveals Markman hearings occurring anywhere from 56-158 days after the initial pretrial conference.

Norfolk and Newport News Divisions

In the Norfolk and Newport News Divisions, following the Rule 16(b) initial pretrial conference, the Court will issue a Rule 16(b) scheduling Order that sets forth the trial date, expert disclosures, discovery timelines, an attorneys' conference and final pretrial conference. In the past, some Rule 16(b) scheduling Orders have not provided for patent case-specific dates. Parties have generally requested claim construction deadlines in subsequent scheduling and/or pretrial Orders. However, in at least one recent case (*Monsanto Co., et al. v. Mills Bros. Farms, et al*., 2:11- cv-581 (J. Jackson)), the Rule 16(b) Scheduling Order provided dates for a claim construction hearing (approximately six months after the entry of the Rule 16(b) Order) and related briefing schedule. Markman hearings are not scheduled unless requested by the parties. The timing of Markman hearings in the Norfolk and Newport News Divisions varies from relatively early in the case to just a few weeks before trial. If the parties want to schedule an early Markman hearing, they should make the request early in the litigation.

Consistent with the practices outlined above for other civil cases, the various Divisions of the Eastern District will handle discovery, protective orders, expert reports, motions, trial and post-trial motions in accordance with their Orders, those parts of the Discovery Plan adopted by the Court, and the Local Rules of the respective Divisions.

Proposed Model Local Rule

As mentioned above, a group of intellectual property attorneys who practice in the Eastern District drafted a proposed Local Rule, a model patent pretrial schedule, and a model pretrial Order for patent infringement/invalidity cases. These materials reflect the reality that these cases are different than other civil cases and are intended to provide uniformity as to how patent cases are handled in all Divisions of the Eastern District. A draft of these materials was submitted to former Chief Judge Spencer in 2009, but has not been adopted. Judge O'Grady of the Alexandria Division was asked to provide comment. Some highlights include:

Preliminary Infringement Disclosures – a plaintiff would be required to serve on the defendant (but not file) a claim chart within 21 days after the defendant files an Answer to the Complaint.

Preliminary Invalidity and Non-Infringement Disclosures – the defendant would be required to serve (but not file) its preliminary invalidity and non-infringement disclosures within 30 days after service of the plaintiff's preliminary infringement disclosures.

Scheduling Order – the initial pretrial scheduling conference in cases involving claims of patent infringement would result in a specially tailored scheduling Order.

Initial Scheduling Conference – at the initial pretrial conference, in addition to the topics outlined above for other civil cases, the parties would address:

(1) Whether claim construction is necessary;
(2) The timing of and procedure for the claim construction hearing;
(3) The need for tutorials on the relevant technology;
(4) The identification of dispositive issues that may lead to early resolution of the case; and
(5) Whether a claim construction Order before the close of expert discovery and prior to the filing of dispositive motions would encourage resolution of the litigation.

The proposed model pretrial schedule in patent cases is as follows (based on the number of days after the Rule 16 conference):

■ Parties' Stipulated Protective Order Entered	5-10
■ Motions for Protective Order if Parties Fail to Agree	10-14
■ Exchange of Claim Terms	14-21
■ Opening Claim Construction Brief	28-35
■ Reply Claim Construction Brief	42-49
■ Joint Claim Construction Statement	56-63
■ Exchange of Technology Tutorial Information	66-69
■ Claim Construction/Markman Hearing	70-80
■ Fact Discovery Cut-off	113-123
■ Disclosure of Experts	113-123
■ First Expert Report	120-130
■ Rebuttal Expert Report	141-151
■ Close of Expert Discovery	155-160
■ Dispositive Motion Cut-off	162-167
■ Final Pretrial Conference	205-215
■ Trial	230-245

Although this Local Rule has not been adopted, it should be considered when parties are drafting their Discovery Plan.

Please let us know if you would like copies of sample Discovery Plans or Orders for patent cases filed in the various Divisions of the Eastern District or the proposed Local Rule, model patent pretrial schedule, and/or model pretrial Order.

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