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Litigating Patent Infringement Cases in the "Rocket Docket" of the Eastern District of Virginia

By Dabney J. Carr, IV, and Robert A. Angle

The US District Court for the Eastern District of Virginia (the EDVA) remains a popular forum for litigating patent infringement cases, particularly in technology and pharmaceutical matters. In the wake of several headline catching cases—including the $612 million settlement in *NTP v. RIM* over the popular BlackBerry device, the groundbreaking *eBay v. MercExchange* case, and several other significant patent trials—patentees and accused infringers looking for accelerated justice have continued to flock to the EDVA. The EDVA does not have a reputation for being particularly plaintiff-friendly or defense-oriented, and it is not known for extremely high damages awards. Thus, the primary reason for the EDVA's popularity appears to be its unwaveringly speedy docket, particularly as the dockets of other patent-friendly venues, such as the Eastern District of Texas, have slowed down. The EDVA is the original "rocket docket," and consistently has the shortest docket time of any court in the country. Fully embracing the "Justice Delayed, Justice Denied" motif etched into the Alexandria Division's Albert V. Bryan Courthouse, the EDVA averages less than five months from filing to disposition and just nine months from filing to trial for all civil cases, including complex cases such as patent cases. These averages are no flash in the pan; they are consistent with the EDVA's performance for the past several decades.

Although the docket speed throughout the EDVA is relatively uniform, the Alexandria, Richmond, and Norfolk divisions operate quite differently from each other.[1] Each division, and even some judges in the same division, employs differing practices and procedures, resulting in idiosyncrasies that create traps for the unwary. This article identifies some of these pros and cons and provides guidance on the common pitfalls of patent litigation in the EDVA.

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The EDVA as a "Patentee's Forum"?

To achieve its rapid pace, the EDVA employs Local Rules[2] and pretrial orders that compress the time for trial preparation and bar continuances in all but the most extreme circumstances. The EDVA's speed would appear at first to burden all parties equally. In practice, however, the accelerated schedule tends to favor most (or burden least) patentees asserting infringement claims. This "advantage" to plaintiff-patentees can be seen in the context of:

- Pretrial scheduling;
- Discovery;
- Consideration of dispositive motions;
- Pretrial preparation; and
- Trial.

Pretrial Scheduling

A party's first contact with the court in the EDVA is usually the court's initial scheduling order and scheduling conference, which occur soon after appearances have been made for all parties. The scheduling procedure, however, differs greatly among the three divisions of the EDVA.

In Alexandria, the court will issue a standard one-page pretrial order setting a discovery deadline and a date for the final pretrial conference at which the trial date will be set (usually eight weeks after the final pretrial conference), and the

parties are responsible for submitting a discovery plan that meets the court's deadline. In Norfolk, the court will issue an order setting an initial pretrial conference, usually held before a scheduling clerk, at which pretrial deadlines and a trial date will be set according to the Norfolk Division's standard schedule. In Richmond, the initial pretrial conference is before the district judge assigned to the case, who will set the trial date and enter his own unique pretrial order setting discovery and pretrial deadlines.[3]

Regardless of the division or judge, the primary purpose of the initial pretrial conference is the same: to set a discovery schedule and pretrial timetable that result in a trial within six to nine months after the initial scheduling conference. For better or worse, many of the EDVA judges treat patent cases like any other civil case and enter standard scheduling orders without any modification. Some judges have been willing to tailor their pretrial orders to patent cases, but even then they will not agree to any significant extension of the EDVA's accelerated trial schedule. Thus, plaintiff-patentees hoping to get an early (and unmovable) trial date that restricts defendants' ability to investigate infringement contentions and invalidity defenses have found the EDVA a very receptive forum.

Discovery

The discovery process is often the most difficult and contentious aspect of a patent case. In the EDVA, the usual tensions are exacerbated by the parties' often asymmetrical discovery obligations and the compressed pretrial schedule. Moreover, all of the procedures that are unique to patent cases—the exchange of infringement contentions, prior art statements, proposed claim construction briefing, and *Markman* hearings—must also occur during the same short period as discovery. This creates a timetable with overlapping deadlines and conflicting obligations that often gives rise to efforts to gain a tactical advantage through discovery motions practice.

In the EDVA, parties generally have only three to five months to complete all fact and expert discovery. This timeline is challenging even in simple civil cases and is particularly difficult in patent cases. For example, parties must serve expert disclosures before completing fact discovery and sometimes before receiving a claim construction ruling. The short schedule seems to favor plaintiff-patentees who can gather relevant documents, retain expert witnesses, and fully investigate their cases even before filing suit. Conversely, the schedule works against an accused infringer who must identify and investigate possible defenses, locate and collect information (often from far-flung third parties), and identify and retain experts all within a few months after first learning of the infringement claims. This disadvantage is compounded in many patent cases in which the parties have asymmetrical discovery obligations, with the accused infringers having to collect and produce a far greater quantity of information than the patentees.

These multiple factors tend to subject accused infringers to aggressive (perhaps exploitative) discovery motions practice, which can be used to distract an adversary from preparation of its case and portray an alleged infringer as recalcitrant. Patentees need to be careful not to be too aggressive in discovery, as judges in the EDVA dislike discovery disputes and will not hesitate to sanction losing parties. Many patentees, however, find that the rewards outweigh the risks of such tactics.

Significantly, the audience for discovery motions varies by division. In Alexandria, magistrate judges handle almost all discovery motions at a weekly motions docket, thus largely insulating the district judges who will try the cases from the rancor of such disputes. In the Richmond Division, discovery motions are usually handled by the district judge assigned to the case (although the district judges each tend to handle discovery disputes differently). In the Norfolk Division, discovery motions are sometimes handled by magistrate judges and sometimes by the district judge. Given these differences and the judges' general dislike of discovery disputes, both parties are well served to reach agreement on discovery issues wherever possible.

Dispositive Motions

Judges in the EDVA are receptive to dispositive motions and will not hesitate to dispose of a case on summary judgment. In most cases, however, the compressed pretrial schedule and the EDVA's tight briefing limitations give a significant advantage to a plaintiff patentee opposing a dispositive motion.

For many years, the EDVA has employed an economical briefing regimen. All summary judgment motions must be accompanied by a

supporting brief no longer than 30 pages that must include (within the 30-page limit) a statement of undisputed material facts with supporting citations to the record. Any opposition brief (up to 30 pages) must be filed 11 days after service of the motion, and any reply brief (up to 15 pages) must be filed within three days of the opposition brief. Further, the Local Rules limit parties to only one summary judgment motion without leave of court. While the judges may allow longer briefs and extended schedules, they are unlikely to vary far from the limitations in the Local Rules.

In addition, under the EDVA's schedule, there is only a short window of time—usually six to eight weeks—between the end of discovery and trial during which parties often must litigate summary judgment motions, motions *in limine*, and sometimes claim construction issues, as well as prepare for trial. As a result, a summary judgment motion filed at the deadline usually will not be fully briefed until just a few weeks before trial. Given the complex issues that usually arise in patent cases, motions for summary judgment can overwhelm a district judge, who must understand often complex technology, determine whether any disputed issues of material fact exist, *and* issue a ruling in a few weeks. These factors inhibit an accused infringer's ability to present clear issues for summary judgment and impinge upon the court's ability to give full consideration to such motions, giving plaintiff-patentees a greater chance of avoiding summary judgment before trial.

Pretrial Preparation

In a patent case in the EDVA, the parties arrive at the end of discovery only to find that they face myriad motions and deadlines marking the final weeks before trial. Under the Local Rules and the scheduling orders used in the EDVA, the parties must file lists of witness, exhibits, jury instructions, and proposed *voir dire* (as well as objections to the opposing party's filings) soon after the close of discovery. On top of these standard pretrial filings, the parties must litigate multiple issues in the six to eight weeks leading up to trial, including summary judgment motions, lingering discovery disputes, and numerous motions *in limine* on evidentiary issues. While typically short, each of motion *in limine* must be briefed and argued, further distracting counsel from trial preparation. Moreover, because the parties often file motions *in limine* in the final days before trial, the court may not give full consideration to such motions or even allow oral argument, and sometimes judges make decisions on these motions in the final days before (and even during) trial that can have a significant impact on a party's case. This confluence of multiple pretrial filings and motions in the midst of final trial preparation creates significant pressures, often resulting in the most frenzied and chaotic portion of a case in the EDVA.

Trial

No stage of litigation in the EDVA moves more swiftly or places as much pressure on litigants as the trial. The trial itself will be short—usually measured in days and rarely more than a week—and will move quickly. Jury *voir dire* is conducted by the judge and is very swift. Typically, the jury will be chosen within a few hours, and opening statements, usually less than an hour per side, follow soon thereafter. Witnesses examination also moves quickly, as the EDVA judges encourage brief and pointed examinations and will interrupt examinations (and exclude witnesses) that they feel are repetitive. More freedom is allowed on cross examination, but judges will still interrupt if they feel that a point has been covered. Redirect examination must be brief and is often cut off at the first hint of repetition. Parties are limited to only one expert in any discipline and usually no more than a few experts per side. This encourages parties to use fewer witnesses who can cover more issues and who are skilled at explaining technical matters to a lay jury. In all events, the court strongly, sometimes forcefully, encourages a tight, condensed trial presentation.

Statistics suggest that patentees in the EDVA have a decided advantage in front of a jury. Perhaps this is because juries often identify more with individual inventors than corporate defendants or because juries tend to defer to the Patent Office's decision to issue a patent. At least one factor, however, may be that a speedy trial forces truncated presentations and "high level" trial themes that favor the broad infringement claims of plaintiff-patentees more than the detailed, multifaceted defenses presented by many accused infringers.

In short, the EDVA's "rocket docket" tends to benefit patentees that use the accelerated schedule and strict procedures to their greatest advantage.

The Best Defense: Level the Playing Field

Though the EDVA procedures may give plaintiff-patentees certain advantages, there are measures that an accused infringer can take to survive and turn the tide. From the beginning of the case, a defendant must embrace the mandate to move quickly. The successful defendant must remain focused on its key defenses, choose its battles carefully, and not allow itself to be distracted by ancillary issues. This strategy requires a commitment to devote significant time and resources to preparing a complex patent trial in less than nine months. This is particularly true in the areas of:

- Responding to discovery;
- Pursing affirmative discovery;
- Obtaining an early *Markman* ruling; and
- Positioning the case for early dispositive motions.

Responding to Discovery

One of the first steps that a defendant must take after getting notice of litigation is to preserve and begin to collect relevant documents, even before responding to the complaint. One of the common errors that defendants make in the EDVA is to squander the time between receipt of the complaint and the Rule 26(f) conference. Counsel should sit down with clients as soon as possible after receiving the complaint to begin locating and assembling the documents that the plaintiff is sure to seek.[4] If not specified in the complaint, a defendant should consider contacting the plaintiff at the outset to request identification of the products accused of infringement[5] and the categories of documents that it will request. Such a request, regardless of how the plaintiff responds, can pay dividends in terms of reducing or eliminating discovery motions practice, serving as evidence of a defendant's good faith, and putting the plaintiff on the defensive in the discovery process.

The penalty for failing to quickly gather and produce documents is often time and resources wasted opposing motions to compel and the loss of credibility that occurs when a party produces relevant documents late in discovery. Judges in the EDVA generally allow a broad scope of discovery in patent cases, and so a defendant is better served by avoiding disputes and responding promptly to discovery requests. This approach requires more upfront time and cost for the client, but in the end it produces far less cost and impact on the case than protracted motions practice. A defendant should hesitate to withhold production of documents on any grounds other than privilege. In short, a defendant should choose its discovery battles carefully, and when it decides to oppose a discovery request, it is almost always better for a defendant to bring its objections to the court through a motion for protective order before the plaintiff moves to compel.

Affirmative Discovery

To regain and maintain some initiative in the litigation, defendants should develop and implement an aggressive affirmative discovery plan. An accused infringer should push the plaintiff-patentee to produce documents and information promptly under the discovery deadlines. This strategy can prove an effective counter balance in discovery motions practice if the plaintiff's responses are inadequate or untimely. Moreover, the defendant typically has a greater need for documents from the plaintiff-patentee to help support certain affirmative defenses and thus cannot afford to let the plaintiff drag its feet in producing documents. Under the EDVA's Local Rules, discovery objections are due 15 days after discovery requests are served. Defendants should move quickly after receiving these objections to resolve the objections and pave the way for document production on or soon after the 30th day.

Speed is also important to accused infringers because they often must look to third parties for evidence of invalidating prior art and other affirmative defenses. The process of obtaining documents and testimony from third parties is inevitably more time consuming than discovery from parties. If not pursued from the start, many avenues for helpful evidence quickly become impossible to pursue because of the lack of time.

Finally, a defendant should interview and retain experts early in the case. Not only can experts assist in the development of noninfringement and invalidity defenses, but the production of expert reports comes at a time when there will be many conflicting discovery tasks to complete. Thus, it is best to begin expert reports early to allow time to refine and adjust opinions as discovery proceeds.

Early *Markman* Hearing

While some EDVA judges recognize the complexity and importance of the claim construction process and incorporate a *Markman* hearing into their pretrial schedule, this is not true of every judge, some of whom do not conduct *Markman* hearings at all or consider claim construction only in the context of summary judgment. When before a judge who does not typically schedule an early *Markman* hearing, both parties are well advised to discuss the issue at the Rule 26(f) conference and to consider making a joint request for a *Markman* hearing in advance of the initial pretrial conference. Because of the EDVA's rapid docket, an early *Markman* hearing benefits both parties. It provides a plaintiff an opportunity to educate the judge, and a favorable claim construction can lead to an early settlement or to summary judgment. For the defendant, an early *Markman* hearing allows the defense to focus the court on the patent rather than on the accused product, and a favorable ruling can limit the reach of the claims or lead to an early resolution of the case.

Conversely, delaying claim construction in an EDVA patent case raises multiple problems. Unless the court agrees to begin the *Markman* process early in the case, the *Markman* hearing ends up occurring at the close of discovery (sometimes coincident with summary judgment) or on the very eve of trial. Such a delay in the *Markman* process forces expert reports to be drafted without the benefit of a ruling on claim construction, often requiring the experts to take alternative positions and to provide supplemental reports after a *Markman* ruling. This complicates the completion of expert discovery, which, in turn, may delay the filing of summary judgment motions, thus backing up any hearing on summary judgment motions to just a few weeks before trial.

Positioning the Case for Summary Judgment

One of the hallmarks of the EDVA is the availability of summary judgment. As a general proposition, the judges of the EDVA will not hesitate to grant summary judgment in appropriate cases. The time and briefing constraints discussed above, however, make it difficult to present summary judgment motions in a complex patent case early enough for careful consideration by the court. Thus, defendants should start working early in the case to gather the evidence necessary to position its case for filing for summary judgment as early as possible. If a defendant can identify an invalidity or other legal defense that can be presented early in the case, it is well served to file for summary judgment early and seek leave of court to file an additional summary judgment motion later in the case.

Conclusion

Given its location and the relative success of plaintiff-patentees in its courts, the EDVA is likely to continue as a popular forum for patent infringement lawsuits. Plaintiff-patentees can take advantage of the EDVA's unique procedures to get before a jury, and they have had success once they have reached the jury. Conversely, to turn the "rocket docket" procedures to their favor, defendants must commit themselves and their clients to an aggressive and proactive litigation posture.

Notes

1. The EDVA employs a random assignment of patent cases to judges across the divisions. A case filed in Alexandria is just as likely to proceed in Richmond or Norfolk as in Alexandria. The EDVA's fourth courthouse in Newport News is covered by the judges in Norfolk and, thus, is not considered a separate division for purpose of patent infringement cases.
2. *See* the court's Web site, *www.vaed.uscourts.gov.*
3. In 2009, the EDVA considered adoption of a new Local Rule and model Pretrial Order specific to patent cases that was supported by numerous EDVA patent litigation practitioners. Although the EDVA declined to adopt the proposed Local Rule and model Pretrial Order, several EDVA judges indicated a willingness to adopt some aspects of the model Pretrial Order.
4. The EDVA has not yet issued any Local Rules or implemented any required procedures or protocols with respect to electronically stored information, but parties should issue a litigation hold notice and take such other steps as are necessary to comply with the obligations imposed by the rules governing the preservation, collection, and production of electronically stored information.
5. Arguably, this identification of the accused products is required under *Twombly* and *Iqbal.*