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NORTHERN DISTRICT OF ILLINOIS ADOPTS LOCAL PATENT RULES

JUDGE MATTHEW F. KENNELLY AND EDWARD D. MANZO

## ABSTRACT

The Northern District of Illinois took a proactive step in addressing procedural issues that commonly arise in patent litigation by enacting the Court's Local Patent Rules. These Rules provide a uniform structure to pretrial procedures in patent cases involving claims of infringement, non-infringement, invalidity, or unenforceability of utility patents. The Rules will enable greater predictability and planning for the Court, counsel, and clients by requiring parties to identify and focus upon outcome-determinative or otherwise significant disputes. This article offers insight on the Rules from two members of the committee of district court judges and experienced lawyers that initially drafted them. The authors outline an estimated schedule for a patent case to be trial-ready in just under two years by providing a step-by-step guide in applying the Rules.

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## NORTHERN DISTRICT OF ILLINOIS ADOPTS LOCAL PATENT RULES

JUDGE MATTHEW F. KENNELLY\* AND EDWARD D. MANZO\*\*

On September 24, 2009, the judges of United States District Court for the Northern District of Illinois approved a set of local patent rules that took effect on October 1, 2009.<sup>1</sup> This article offers some comment on those Rules by two members of the committee that initially drafted them. The Rules include their own comments. Nothing stated in this article has any official imprimatur.

### I. BACKGROUND TO THE LOCAL PATENT RULES

The Northern District of Illinois is one of the most active jurisdictions in the United States for patent litigation.<sup>2</sup> On average, however, patent cases in the Northern District in recent years have remained pending longer than in nearly every other district, including districts with far more patent cases per judge.

Prior to 2008, a number of federal district courts—some with greater and some with lesser numbers of patent infringement cases—had adopted local patent rules.<sup>3</sup>

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\*\* Edward D. Manzo is a co-founder of Cook Alex Ltd., an intellectual property law firm in Chicago. He is President-Elect of IPLAC, an adjunct professor of law (teaching patent law), and editor-in-chief of *Claim Construction in the Federal Circuit* (Thomson West 2006–date) and *Patent Claim Interpretation—Global Edition* (Thomson West 2008–date). He served on the committee that drafted the Local Patent Rules of the Northern District of Illinois. He also served on the subcommittee that drafted the pattern instructions for patent infringement cases adopted in 2008 for use throughout the Seventh Circuit.

<sup>1</sup> See Press Release, U.S. Dist. Court for the N. Dist. of Ill., N. Dist. of Ill. Local Patent Rules Effective October 1, 2009 (Oct. 1, 2009) [hereinafter Press Release, Local Patent Rules Effective October 1, 2009] (on file with The John Marshall Review of Intellectual Property Law), available at [http://www.ilnd.uscourts.gov/home/\\_assets/\\_news/Local%20Patent%20Rules.pdf](http://www.ilnd.uscourts.gov/home/_assets/_news/Local%20Patent%20Rules.pdf). Federal Rule of Civil Procedure 83 provides for the adoption of local rules by District Courts. FED. R. CIV. P. 83(a).

<sup>2</sup> See David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 246 tbl.2 (2008). The Northern District of Illinois, with federal courts in both Chicago and Rockford, Illinois, is allocated 22 active judges making it the third most populous bench in terms of active judges. See 28 U.S.C. § 133(a) (2008). The Southern District of New York is allocated 28 judges, the Central District of California is allocated 27 judges, and both the Northern District of Illinois and the Eastern District of Pennsylvania are allocated 22 active judges. *Id.* As of October 1, 2009, the Northern District of Illinois had 33 district judges (including senior judges) along with 11 magistrate judges. Northern District of Illinois Judges, <http://www.ilnd.uscourts.gov/home/Judges.aspx> (last visited Nov. 13, 2009).

<sup>3</sup> See, e.g., E.D. TEX. P.R.; N.D. GA. PATENT L.R.; see also LEXISNEXIS COURTLINK NATURE OF SUIT STRATEGIC PROFILE (Dec. 31, 2002–Dec. 31, 2007) (on file with The John Marshall Review of

The Northern District had no such rules, but a handful of judges had posted their own procedures concerning claim construction proceedings and other procedures for handling some parts of patent cases.<sup>4</sup> As a result, there was wide variation in the procedures that individual judges in the Northern District used to manage such cases and in the relative length of time a patent case would remain pending prior to disposition.

Many members of the local bar perceived the absence of a uniform set of rules for patent litigation as a deficiency leading to serious uncertainty for litigants and lawyers about how patent litigation would progress when conducted in the Northern District of Illinois.<sup>5</sup> The procedural progression of a case was unpredictable, and time to trial was both unpredictable and distant.<sup>6</sup> Clients wanted a greater degree of certainty so that they could better manage litigation budgets.<sup>7</sup>

One bar association closely concerned with patent litigation in the Northern District, the Intellectual Property Law Association of Chicago (“IPLAC”), undertook a project to encourage the adoption of local patent rules. IPLAC is the oldest intellectual property bar association in the United States, and one of the largest—having over 1,000 members.<sup>8</sup> In the spring of 2008, IPLAC’s Litigation Committee approached Chief Judge James F. Holderman to propose that the Court consider adoption of a set of local patent rules. Chief Judge Holderman was receptive to studying the matter. He appointed a working group consisting of himself and Judges James B. Zagel (the chair of the Court’s Rules Committee), Matthew F. Kennelly, and Amy E. St. Eve to work with IPLAC’s Litigation Committee.

IPLAC’s Litigation Committee formed a local patent rules subcommittee and, at the request of the Court’s working group, polled IPLAC’s non-judicial members on whether they favored some form of local patent rules.<sup>9</sup> Nearly ninety percent of those who responded favored some form of local patent rules. IPLAC received comments that a uniform set of local rules for patent litigation would provide consistency,

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Intellectual Property Law) (ranking the Eastern District of Texas third, the Northern District of Illinois fourth, and the Northern District of Georgia thirteenth among the top twenty-four most active judicial districts by the number of patent lawsuits filed).

<sup>4</sup> See, e.g., JUDGE VIRGINIA KENDALL, JUDGE KENDALL’S STANDING ORDER FOR PATENT CLAIM CONSTRUCTION PROCEEDINGS, available at [http://www.ilnd.uscourts.gov/JUDGE/KENDALL/VK\\_PatentClaim.pdf](http://www.ilnd.uscourts.gov/JUDGE/KENDALL/VK_PatentClaim.pdf); JUDGE AMY ST. EVE, JUDGE ST. EVE’S STANDING ORDER FOR PATENT CLAIM CONSTRUCTION PROCEEDINGS, available at [http://www.ilnd.uscourts.gov/JUDGE/ST\\_EVE/pdf/ajs\\_claimconstruction.pdf](http://www.ilnd.uscourts.gov/JUDGE/ST_EVE/pdf/ajs_claimconstruction.pdf).

<sup>5</sup> See Jerry Crimmins, *New Rules Could Boost Patent Filings*, 155 CHI. DAILY L. BULL. 214, Nov. 2, 2009, at 1 (“The biggest advantage . . . [is the local patent rules] give[] the attorneys and clients a much more solid foundation on which to base budgets and scheduling.” (quoting Allan J. Sternstein of Dykema, Gossett PLLC)).

<sup>6</sup> See *id.* at 1–2 (“The time to trial in the Northern District of Illinois for a patent cases was really, really, really long, just way out of kilter with other cases in the Northern District of Illinois . . . .” (quoting Bradford P. Lyerla of Marshall, Gerstein & Borun LLP)).

<sup>7</sup> See *id.*; see also Mark L. Levine & Alan E. Littmann, *Managing Patent Litigation: Successful Results at Reasonable Cost*, in PAT. LITIG. 2009, at 293, 295 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. 19028, 2009), available at WL, 982 PLI/Pat 293 (stating that reducing uncertainty of patent litigation allows parties to “value their case and determine whether remaining litigation costs exceed the probable return.”).

<sup>8</sup> Intellectual Property Law Association of Chicago, History of the Intellectual Property Law Association of Chicago, <http://www.iplac.org/History/history.shtml> (last visited Nov. 13, 2009).

<sup>9</sup> Over 30 federal judges are honorary members of IPLAC.

uniformity, and predictability in patent cases and thereby promote fairness, improved case management, and improved client relations. Clients would be able to plan litigation schedules and budgets, an increasingly important concern given the significant expense associated with patent infringement litigation. To be sure, there were contrary comments along the lines that the Court already had too many rules and that more rules and layers of complexity were not needed. Based on the results of the survey, IPLAC determined as a bar association to proceed with the local patent rules project and to assign the subcommittee's members to work with the Court on writing those rules.

Experienced lawyers from Chicago's patent litigation community participated on the working group. Allan J. Sternstein<sup>10</sup> chaired IPLAC's subcommittee, which also included Bradford P. Lyerla,<sup>11</sup> Dean A. Monco,<sup>12</sup> Michael P. Padden,<sup>13</sup> Marshall Seeder,<sup>14</sup> Paul K. Vickrey,<sup>15</sup> and Edward D. Manzo.<sup>16</sup> Some of these lawyers typically represented defendants, at least one generally worked as a plaintiff's contingent fee lawyer, and others were patent litigators representing both plaintiffs and defendants of varying sizes.<sup>17</sup>

The working group of lawyers and judges began by collecting and reviewing the local patent rules adopted by other district courts. These included local rules for the Northern and Southern Districts of California, the Northern District of Georgia, the District of Minnesota, the Eastern District of North Carolina, the Western District of Pennsylvania, and the Eastern and Southern District of Texas.<sup>18</sup> The Committee

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<sup>10</sup> Allan J. Sternstein is Director of the Intellectual Property and Intellectual Property Litigation Department at Dykema Gossett PLLC and is in the firm's Chicago office. Dykema Professional – Allan Sternstein, <http://www.dykema.com/bio/display.asp?empID=512> (last visited Nov. 13, 2009). Allan is also an Adjunct Professor at the University of Illinois, teaching Patent Litigation. *Id.*

<sup>11</sup> Bradford P. Lyerla is with Marshall, Gerstein & Borun LLP in Chicago. Marshall, Gerstein & Borun LLP: Professionals, <http://www.marshallip.com/professionals-51.html> (last visited Nov. 13, 2009). Brad served on the IPLAC Board at the time the local patent rules were being drafted and currently chairs the IPLAC Antitrust Committee. *Id.*

<sup>12</sup> Dean A. Monco is with Wood, Phillips, Katz, Clark & Mortimer in Chicago. Dean A. Monco People Wood Phillips, [http://www.woodphillips.com/people/080-Dean\\_A\\_Monco.php](http://www.woodphillips.com/people/080-Dean_A_Monco.php) (last visited Nov. 13, 2009). Dean chaired the IPLAC Litigation Committee during the time the local patent rules were drafted.

<sup>13</sup> Michael P. Padden is with Howrey LLP in the Chicago office. Howrey – People – Michael P. Padden, <http://www.howrey.com/paddenm/> (last visited Nov. 13, 2009).

<sup>14</sup> Marshall Seeder is with Reed Smith LLP in its Chicago office. Seeder, Marshall, [http://www.reedsmith.com/our\\_people.cfm?cit\\_id=12361&widCall1=customWidgets.content\\_view\\_1](http://www.reedsmith.com/our_people.cfm?cit_id=12361&widCall1=customWidgets.content_view_1) (last visited Nov. 13, 2009).

<sup>15</sup> Paul K. Vickrey is with Niro, Scavone, Haller & Niro, Ltd. in Chicago. Niro, Scavone, Haller & Niro, <http://www.niroscavone.com/document.php?Id=74> (last visited Nov. 13, 2009).

<sup>16</sup> Edward D. Manzo is with Cook Alex Ltd. in Chicago and is IPLAC's President Elect. Cook Alex Profiles Edward D. Manzo, <http://www.cookalex.com/Profiles/Bios/manzoEdward.html> (last visited Nov. 13, 2009); *see supra* note \*\*.

<sup>17</sup> Judge Kennelly chaired the subcommittee of the Seventh Circuit Jury Instruction Committee that worked for over two years preparing pattern jury instructions, which the court adopted in 2008 for use throughout the Seventh Circuit. *See* COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2, *available at* [http://www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/7th\\_civ\\_instruc\\_2009.pdf](http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf). Edward D. Manzo also served on that committee. *Id.*

<sup>18</sup> *See* N.D. CAL. PATENT L.R., *available at* [http://www.cand.uscourts.gov/cand/localrul.nsf/fec20e529a5572f0882569b6006607e0/5e313c0b7e4cd680882573e20062dbcf/\\$FILE/Pat3-08.pdf](http://www.cand.uscourts.gov/cand/localrul.nsf/fec20e529a5572f0882569b6006607e0/5e313c0b7e4cd680882573e20062dbcf/$FILE/Pat3-08.pdf);

also considered the procedures posted by Judges Amy E. St. Eve and Virginia Kendall of the Northern District of Illinois and by Judge Shaw of the Eastern District of Missouri, along with proposed rules for the Western District of Washington.<sup>19</sup> During the course of the work of the working group, the District of New Jersey also adopted local patent rules.<sup>20</sup> The Committee noted the trends in these rules and sought to draft a set of rules that would eliminate the need to litigate procedural matters that commonly recur in patent infringement cases and reduce the time patent cases remain pending prior to disposition in a way that would be acceptable to the judges within the Northern District.

The working group worked for approximately six months to produce a set of rules, which the Court posted for public comment in March 2009.<sup>21</sup> A number of lawyers and bar associations submitted comments, which the working group and the judges of the Court considered in full. The working group and the Court's Rules Committee made several adjustments to the draft set of rules before presenting them for adoption by the full Court. As a result of the efforts of the lawyers and judges in the working group, the full Court readily embraced the proposed rules.

## II. OVERVIEW OF THE RULES

The Rules are designated as Local Patent Rules, abbreviated "LPR." They apply to all cases filed in or transferred to the District after October 1, 2009 involving a claim of infringement, non-infringement, invalidity, or unenforceability of a utility patent.<sup>22</sup> The Rules deal with the most common types of patent cases; they do not try to address every possible type of patent case. Among other things, the Rules do not expressly cover cases involving design patents, plant patents, or cases arising under

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S.D. CAL. PATENT L.R., *available at* <http://www.casd.uscourts.gov/uploads/Rules/Local%20Rules/LocalRules.pdf>; N.D. GA. PATENT L.R., *available at* <http://www.gand.uscourts.gov/pdf/NDGARulesPatent.pdf>; D. MINN. PATENT LR, *available at* [http://www.mnd.uscourts.gov/local\\_rules/pdfdoc/local\\_rules.pdf](http://www.mnd.uscourts.gov/local_rules/pdfdoc/local_rules.pdf); LOCAL PATENT RULES, EDNC, *available at* [http://www.nced.uscourts.gov/PDF\\_Files/LR06-2009.pdf](http://www.nced.uscourts.gov/PDF_Files/LR06-2009.pdf); W.D. PA. LPR, *available at* <http://www.pawd.uscourts.gov/Documents/Forms/LocalPatentRules.pdf>; E.D. TEX. P.R., *available at* <http://www.txed.uscourts.gov/Rules/LocalRules/Documents/Appendix%20M.pdf>; S.D. TEX. P.R., *available at* <http://www.txs.uscourts.gov/district/rulesproc/patent/rules.pdf>.

<sup>19</sup> See W.D. WASH. PROPOSED LOCAL PATENT RULES, *available at* [http://www.wawd.uscourts.gov/documents/ProposedLocalRules/Patent%20\(Redline\).pdf](http://www.wawd.uscourts.gov/documents/ProposedLocalRules/Patent%20(Redline).pdf); JUDGE VIRGINIA KENDALL, JUDGE KENDALL'S STANDING ORDER FOR PATENT CLAIM CONSTRUCTION PROCEEDINGS, *available at* [http://www.ilnd.uscourts.gov/JUDGE/KENDALL/VK\\_PatentClaim.pdf](http://www.ilnd.uscourts.gov/JUDGE/KENDALL/VK_PatentClaim.pdf); JUDGE AMY ST. EVE, JUDGE ST. EVE'S STANDING ORDER FOR PATENT CLAIM CONSTRUCTION PROCEEDINGS, *available at* [http://www.ilnd.uscourts.gov/JUDGE/ST\\_EVE/pdf/ajs\\_claimconstruction.pdf](http://www.ilnd.uscourts.gov/JUDGE/ST_EVE/pdf/ajs_claimconstruction.pdf); Charles A. Shaw – United States District Judge, Judge Charles A. Shaw Patent Rules, <http://www.moed.uscourts.gov/judges/cas.html> (last visited Nov. 13, 2009).

<sup>20</sup> D. N.J. L. CIV. R. 9.3 (Local Patent Rules), *available at* <http://www.njd.uscourts.gov/rules/completeRules-1-1-09.pdf>.

<sup>21</sup> See Press Release, U.S. Dist. Court for the N. Dist. of Ill., N. Dist. Ill. Judges Propose Local Patent Rules (Mar. 23, 2009) (on file with The John Marshall Review of Intellectual Property Law), *available at* [http://www.ilnd.uscourts.gov/home/\\_assets/\\_documents/Rules/Patent%20Rls%20Press.pdf](http://www.ilnd.uscourts.gov/home/_assets/_documents/Rules/Patent%20Rls%20Press.pdf).

<sup>22</sup> N.D. ILL. LPR 1.1; Press Release, Local Patent Rules Effective October 1, 2009, *supra* note 1.

paragraph 4 of the Hatch-Waxman Act.<sup>23</sup> These should be addressed by the trial judge on a case-by-case basis.

The working group strove to develop a procedural schedule that would enable a patent infringement or declaratory judgment case to be ready for trial 102 weeks (just under two years) after service of summons. This is significantly less than the nearly four years that patent cases in the District currently require on average. The Rules do not seek to have the fastest time to trial in the country nor to create a “rocket docket.” The Court has, however, made it clear that it wants to encourage the prompt disposition of patent litigation in the District.<sup>24</sup> The Court is highly mindful of the admonitions of Rule 1 of the Federal Rules of Civil Procedure, which calls for the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>25</sup>

The Rules adopt a procedural framework that differs from many of the local patent rules that exist in other districts.<sup>26</sup> This includes the following steps:

- early “preliminary” disclosures of key infringement, non-infringement, and invalidity contentions by each side, for the purpose of focusing discovery;<sup>27</sup>
- a period of fact discovery, followed by the making of final infringement, non-infringement, and invalidity disclosures;<sup>28</sup>
- claim construction, followed by a brief period of additional fact discovery to address additional issues prompted by the Court’s claim construction ruling;<sup>29</sup> and
- expert discovery beginning after claim construction.<sup>30</sup>

Because patent litigation almost always involves confidential or secret information, a standard protective order is deemed to be automatically in effect in cases that fall within the scope of the Rules.<sup>31</sup> The automatic entry of a protective order facilitates the early preliminary disclosures that are one of the key features of the Rules. The Rules also include a standardized, fill-in-the-blanks report to be submitted to the Court after the parties conduct their initial planning meeting pursuant to Federal Rule of Civil Procedure 26(f).<sup>32</sup>

The Local Patent Rules, together with the standardized protective order and the initial planning meeting report, are available on the Court’s website.<sup>33</sup>

An estimated timetable for patent litigation under the Rules appears as an Appendix to this article.

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<sup>23</sup> At least one other federal district court mentions Hatch-Waxman litigation in its local patent rules. *See, e.g.*, D. N.J. L. PAT. R. 3.6 (providing a specific provision that applies to all patent cases “arising under 21 U.S.C. § 355 (commonly referred to as ‘the Hatch-Waxman Act’)”).

<sup>24</sup> *See* N.D. ILL. LPR pmb1.

<sup>25</sup> FED. R. CIV. P. 1.

<sup>26</sup> *See* APPENDIX A: CHART COMPARING THE LOCAL PATENT RULES, [http://www.jenner.com/files/tbl\\_s18News/RelatedDocuments147/5370/Local\\_Patent\\_Rules\\_Chart.pdf](http://www.jenner.com/files/tbl_s18News/RelatedDocuments147/5370/Local_Patent_Rules_Chart.pdf) (last visited Nov. 13, 2009).

<sup>27</sup> *See* N.D. ILL. LPR 2 cmt.; N.D. ILL. LPR 2.1–2.6 (“Patent Initial Disclosures”).

<sup>28</sup> *See* N.D. ILL. LPR 3.1–3.6 (“Final Contentions”).

<sup>29</sup> *See* N.D. ILL. LPR 4.1–4.3 (“Claim Construction Proceedings”).

<sup>30</sup> *See* N.D. ILL. LPR 5.1–5.3 (“Expert Witnesses”).

<sup>31</sup> N.D. ILL. LPR 1.4; N.D. ILL. LPR app. B.

<sup>32</sup> N.D. ILL. LPR 1.2; N.D. ILL. LPR app. A.

<sup>33</sup> *See* United States District Court for the Northern District of Illinois, Local Rules, <http://www.ilnd.uscourts.gov/home/LocalRules.aspx?rtab=patentrules> (last visited Nov. 13, 2009).

### III. SPECIFIC RULES PROVISIONS: PRE-CLAIM CONSTRUCTION

In this section of the article, we have estimated how long each step will take after service of summons. The Rules do not use that concept; rather all time periods are based on certain prior events, beginning with the date on which the defendant responds to the complaint by answer or motion.<sup>34</sup> In our time estimate, we have assumed that a defendant will receive a one-month extension of time to respond to the complaint. The Rules, however, do not provide for an automatic extension, and we do not intend by this assumption to suggest that a one-month extension should be considered the norm. Where the section titles in this article refer to the number of weeks that have passed from the service of summons, they assume that the litigants will use the full time periods allocated to them under the Rules and that there will be a one-month extension of time to respond to the complaint.

#### *A. The Complaint and Answer*

The Rules contain no specific provisions regarding the complaint in a patent infringement action. As previously noted, LPR 1.1 makes the Local Patent Rules applicable to cases involving a claim of infringement, non-infringement, invalidity, or unenforceability of a utility patent.<sup>35</sup> It matters not whether such a claim is first asserted in the complaint or in an answer, reply, cross-claim, or counterclaim.

The Rules do not specify the time for responding to the complaint but do use the date of response as the basis for calculating the due date of the Initial Disclosures, discussed below.

#### *B. Initial Scheduling Conference and Joint Scheduling Order (LPR 1.2)*

The Rules provide a form scheduling order as Appendix A to the Rules.<sup>36</sup> This is due one week after the Rule 26(f) conference or such other time as the Court may set.<sup>37</sup>

#### *C. Week 9: Initial Disclosures (LPR 2.1)*

The Rules include a Comment to Part 2 of the LPR, stating as follows:

LPR 2.2 – 2.5 supplements the initial disclosures required by Federal Rule of Civil Procedure 26(a)(1). As stated in the comment to LPR 1.6, the purpose of these provisions is to require the parties to identify the likely issues in the case, to enable them to focus and narrow their discovery requests. To accomplish this purpose, the parties' disclosures must be

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<sup>34</sup> See N.D. ILL. LPR 2.1.

<sup>35</sup> N.D. ILL. LPR 1.2.

<sup>36</sup> N.D. ILL. LPR app. A.

<sup>37</sup> N.D. ILL. LPR 1.2.

meaningful – as opposed to boilerplate – and non-evasive. These provisions should be construed accordingly when applied to particular cases.<sup>38</sup>

LPR 2.1 calls for initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) within fourteen days after the answer or other response to the complaint.<sup>39</sup> The tentative schedule puts this nine weeks after the complaint is filed.<sup>40</sup> Both the plaintiff and any defendant that responds to the complaint must make initial disclosures.<sup>41</sup> LPR 2.1 does not contemplate that the deadline for initial disclosures be delayed if there are multiple defendants who respond to the complaint at different times. Rather, LPR 2.1 makes the plaintiff's and each defendant's reciprocal disclosures due fourteen days after the particular defendant has responded to the complaint.<sup>42</sup> A party may, of course, move the Court to coordinate the deadlines in a multiple-defendant case<sup>43</sup> but should get such a motion on file promptly, before the disclosures are due, as the pendency of such a motion does not serve to stay or defer any of the Rules' disclosure requirements.<sup>44</sup>

The Rules do not contemplate a stay of the initial disclosures if the defendant does not answer the complaint but instead moves to dismiss, to transfer, or for some other form of relief. In the event that a defendant files a counterclaim for infringement of a different patent, LPR 2.1 extends the initial disclosures to fourteen days after the plaintiff replies to the counterclaim.<sup>45</sup>

The working group and the Court followed the lead of other local patent rules and adopted a rule that requires a party asserting patent infringement (sometimes also called the “patent proponent” or the “patent asserter” in this article) to produce or make available, as part of the initial disclosures under Federal Rule of Civil Procedure 26(a)(1), several categories of documents to the extent that they are within that party's possession, custody, or control.<sup>46</sup> These are enumerated in LPR 2.1(a)(1)–(4).<sup>47</sup> The first category concerns disclosures and sales or offers for sale prior to the patent application filing date.<sup>48</sup> This requires the candid disclosure of various documents that might constitute prior art under 35 U.S.C. § 102.<sup>49</sup> The Rule makes clear that “Production of a document pursuant to this Rule is not an admission that the document evidences or is prior art under 35 U.S.C. § 102.”<sup>50</sup>

Another category of documents the party asserting infringement must produce includes pre-application filing documents that concern conception, reduction to practice, design and development.<sup>51</sup> The remaining categories of documents that a

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<sup>38</sup> N.D. ILL. LPR 2 cmt.

<sup>39</sup> N.D. ILL. LPR 2.1.

<sup>40</sup> *See infra* app.

<sup>41</sup> N.D. ILL. LPR 2.1.

<sup>42</sup> *Id.*

<sup>43</sup> *See* N.D. ILL. LPR 1.1

<sup>44</sup> *See* N.D. ILL. LPR 1.4

<sup>45</sup> N.D. ILL. LPR 2.1.

<sup>46</sup> N.D. ILL. LPR 2.1(a)(1)–(4).

<sup>47</sup> *Id.*

<sup>48</sup> N.D. ILL. LPR 2.1(a)(1).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> N.D. ILL. LPR 2.1(a)(2). The Committee considered whether to require the patent asserter also to identify its *current* products or processes practicing the invention but ultimately decided

party asserting infringement must produce includes communications with the United States Patent and Trademark Office and documents concerning ownership of the patent rights.<sup>52</sup>

LPR 2.1 also imposes upon the alleged infringer or party challenging a patent requirements for production of documents as part of the initial Rule 26(a)(1) disclosures.<sup>53</sup> These include:

- (1) documents sufficient to show the operation and construction of all aspects or elements of each accused apparatus, product, device, component, process, method or other instrumentality identified with specificity in the pleading of the party asserting patent infringement; and
- (2) a copy of each item of prior art of which the party is aware that allegedly anticipates each asserted patent and its related claims or renders them obvious or, if a copy is unavailable, a description sufficient to identify the prior art and its relevant details.<sup>54</sup>

During the drafting process, the working group discussed the burden that the first of these requirements might impose on an accused infringer. At one point, the proposal was directed only to the most current version of the accused product or process, so as not to burden the defendant with having to unearth out-of-date documents. However, because the current version of a product might not be accused of infringing, the Rule as adopted focuses on each accused apparatus, etc., that is identified with particularity in the opposing party's pleading.<sup>55</sup> Hence, a patent owner facing a "black box" product, process, etc., is entitled to receive information sufficient to show the operation and construction of this accused instrumentality.<sup>56</sup>

A defendant that regards these initial production requirements to be overly burdensome is, of course, free to seek relief from the Court.<sup>57</sup> That said, the judges of the Court effectively determined, in adopting the Rules, that the initial production requirements on each side were fairly imposed and would not be unduly burdensome in the overwhelming majority of cases. The Rules seek to take into account the goal of prompt determination of disputes, and to that end, the initial disclosures are aimed at getting into each side's hands key documents they will need to conduct a preliminary assessment of the case and focus later discovery requests.

The party asserting infringement is also entitled to receive via the initial disclosures a copy of all prior art then known to the opposing party that allegedly anticipates any claim of the patent or renders it obvious.<sup>58</sup> As worded, the Rule does

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against this. Though it may bear on such issues as commercial success of the invention (non-obviousness) and whether the patent asserter would be entitled to an injunction if infringement is determined, the burden of requiring the plaintiff to make this disclosure at this time was not believed to be warranted.

<sup>52</sup> N.D. ILL. LPR 2.1(a)(3)–(4).

<sup>53</sup> N.D. ILL. LPR 2.1(b).

<sup>54</sup> *Id.*

<sup>55</sup> N.D. ILL. LPR 2.1(b)(1).

<sup>56</sup> *See id.*

<sup>57</sup> *See* N.D. ILL. LPR 1.1 ("The Court may modify the obligations and deadlines of the LPR based on the circumstances of any particular case.").

<sup>58</sup> N.D. ILL. LPR 2.1(b)(2).

not contain any exceptions or limitations for cases involving a patent with numerous claims in which fewer than all of the claims may be at issue. A defendant that considers the disclosure requirement unduly burdensome may, of course, apply to the Court to limit the prior art disclosures to less than all of the claims.<sup>59</sup> Any such motion should be made well in advance of the disclosure requirement, because the pendency of a motion does not automatically stay any disclosure requirement under the Rules.

Confidentiality. It is fair to anticipate that parties to patent litigation will assert that some of the initial disclosures involve information that the producing party considers to be confidential or proprietary. Because legitimate confidentiality requirements exist in virtually every patent case, the Rules include a “default” protective order that is *automatically* deemed to be in place as of the date of each party’s initial disclosures.<sup>60</sup> The purpose of automatic entry of the protective order is to avoid the delays in making initial disclosures that likely would occur if the disclosures had to await the party’s negotiation and the Court’s entry of a case-specific protective order. Appendix B to the LPR sets forth the terms of the automatic protective order.<sup>61</sup> “Any party may move the Court to modify the Appendix B protective order for good cause.”<sup>62</sup> Consistent with the Rules’ provision for prompt initial disclosures, however, the pendency of a motion to modify the default protective order is not a basis to delay the making of any of the early disclosures required by the Rules.

The automatic protective order has two levels of confidentiality—“confidential” information and “highly confidential” information.<sup>63</sup> The latter category is reserved for current or future business or technical trade secrets and plans that are more sensitive or strategic than ordinary “confidential” information, the disclosure of which is likely to harm significantly the producing party’s competitive position or contravene an obligation of confidentiality.<sup>64</sup> If a party objects to an opposing party’s designation of material as highly confidential, the producing party has the burden to move the Court within fourteen days after a meet and confer session and also has the burden to justify the confidentiality level that it seeks.<sup>65</sup>

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<sup>59</sup> See N.D. ILL. LPR 1.1.

<sup>60</sup> See N.D. ILL. LPR 1.4.

<sup>61</sup> N.D. ILL. LPR app. B.

<sup>62</sup> N.D. ILL. LPR 1.4. The Preamble to the Local Patent Rules explains as follows:

Finally, the Rules provide for a standardized protective order that is deemed to be in effect upon the initiation of the lawsuit. This is done for two reasons. First, confidentiality issues abound in patent litigation. Second, early entry of a protective order is critical to enable the early initial disclosures of patent-related contentions that the Rules require. Absent a “default” protective order, the making of initial disclosures, and thus the entire schedule, would be delayed while the parties negotiated a protective order. The parties may, either at the outset of the case or later, seek a revised protective order that is more tailored to their case. Because, however, the Rules provide for automatic entry of the default protective order, the desire to negotiate a more tailored version is not a basis to delay the disclosure and discovery schedule that the Rules contemplate.

N.D. ILL. LPR pmbl.

<sup>63</sup> N.D. ILL. LPR app. B(2)(b)–(c).

<sup>64</sup> N.D. ILL. LPR app. B(2)(c).

<sup>65</sup> N.D. ILL. LPR app. B(3)(f).

The recipient of information designated as confidential may disclose it only to outside counsel of record, inside counsel, officers and employees directly involved in the case and whose access to the information is reasonably required to supervise, manage, or participate in the case, as well as experts and consultants (subject to certain requirements, including the signing of a confidentiality undertaking by the proposed recipient).<sup>66</sup> “Highly confidential” information may be provided to the same group, except for in-house counsel and the party’s officers and employees.<sup>67</sup>

The fact that a document is designated as confidential or highly confidential under the protective order does not, by itself, authorize the filing of any documents under seal.<sup>68</sup> Consistent with standard practice in the Northern District, a party must obtain leave of court before filing any document or portion of a document under seal.<sup>69</sup>

#### *D. Week 11: Initial Infringement Contentions (LPR 2.2)*

Complaints and counterclaims in patent infringement cases typically take a bare-bones approach, alleging infringement, non-infringement, validity, or invalidity in a relatively conclusory fashion.<sup>70</sup> This makes it difficult for a party to get a handle on its opponent’s contentions and their bases without conducting discovery. Given the jockeying for position that commonly takes place in the early stages of the discovery process, the result is twofold: there may be considerable delay before the parties are able to identify what is truly in dispute, and each party may incur undue expense simply to get to the core of its opponent’s contentions.

Under Federal Rule of Civil Procedure 11, an attorney who signs a pleading, including a pleading alleging patent infringement, non-infringement, validity, or invalidity, certifies (among other things) that based upon reasonable inquiry, the pleading’s factual contentions have or are likely to have evidentiary support and its legal contentions are warranted by existing law or a reasonable extension of existing law.<sup>71</sup> The overwhelming majority of lawyers take their Rule 11 obligations quite

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<sup>66</sup> N.D. ILL. LPR app. B(4)(b).

<sup>67</sup> N.D. ILL. LPR app. B(4)(c).

<sup>68</sup> N.D. ILL. LPR app. B(7)(a).

<sup>69</sup> *Id.*

<sup>70</sup> See FED. R. CIV. P. 84 app. Form 18 (entitled “Complaint for Patent Infringement”).

<sup>71</sup> FED. R. CIV. P. 11(b). Federal Rule of Civil Procedure 11(b) provides, in relevant part:

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

seriously. Accordingly, it is reasonable to believe that attorneys who file complaints, answers, and counterclaims in patent infringement cases have a reasonable basis for their contentions.

The Northern District's Local Patent Rules "initial contention" disclosure requirements obligate each party to disclose the basis for its allegations regarding the basic issues in most patent infringement cases.<sup>72</sup> The working group believed, and the Court agreed, that these disclosures will help to focus the litigation at an early stage and contribute to its prompt disposition.

Under LPR 2.2, approximately eleven weeks after service of summons (specifically, fourteen days after the initial disclosures under LPR 2.1), a party claiming patent infringement is required to serve its "Initial Infringement Contentions."<sup>73</sup> This requires the party to, among other things, identify the patent claims it contends are infringed and each accused instrumentality (product, process, etc.) and to provide a statement of whether each element is believed to be found literally or via the doctrine of equivalents.<sup>74</sup> If the latter, the party claiming infringement must explain the function, way, and result that is equivalent and why the differences are insubstantial.<sup>75</sup> Counsel of record must certify the initial contentions.<sup>76</sup>

The working group and the Court recognized that developments during the litigation may lead a party to alter its contentions regarding infringement or validity. Because the initial contentions are made at such an early stage of the litigation, the Local Patent Rules expressly provide that they are inadmissible as evidence on the merits.<sup>77</sup> The Rules contain a comment explaining that the purpose of initial disclosures is to promote and focus discovery:

The purpose of the initial disclosures pursuant to LPR 2.2 – 2.5 is to identify the likely issues in the case, to enable the parties to focus and narrow their discovery requests. Permitting use of the initial disclosures as evidence on the merits would defeat this purpose. A party may make reference to the initial disclosures for any other appropriate purpose.<sup>78</sup>

Additionally, a Preamble to the Local Patent Rules explains the Court's approach to initial contentions:

The Rules require, along with a party's disclosures under Federal Rule of Civil Procedure 26(a)(1), meaningful disclosure of each party's contentions and support for allegations in the pleadings. Complaints and counterclaims in most patent cases are worded in a bare-bones fashion,

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(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

*Id.*

<sup>72</sup> N.D. ILL. LPR 2.2.

<sup>73</sup> *Id.*; see *infra* app.

<sup>74</sup> N.D. ILL. LPR 2.2.

<sup>75</sup> N.D. ILL. LPR 2.2(d).

<sup>76</sup> N.D. ILL. LPR 1.5.

<sup>77</sup> N.D. ILL. LPR 1.6.

<sup>78</sup> N.D. ILL. LPR 1.6 cmt.

necessitating discovery to flesh out the basis for each party's contentions. The Rules require the parties to provide the particulars behind allegations of infringement, non-infringement, and invalidity at an early date. Because Federal Rule of Civil Procedure 11 requires a party to have factual and legal support for allegations in its pleadings, early disclosure of the basis for each side's allegations will impose no unfair hardship and will benefit all parties by enabling a focus on the contested issues at an early stage of the case. The Rules' supplementation of the requirements of Rule 26(a)(1) and other Federal Rules is also appropriate due to the various ways in which patent litigation differs from most other civil litigation, including its factual complexity; the routine assertion of counterclaims; the need for the Court to construe, and thus for the parties to identify, disputed language in patent claims; and the variety of ways in which a patent may be infringed or invalid.

The initial disclosures required by the Rules are not intended to confine a party to the contentions it makes at the outset of the case. It is not unusual for a party in a patent case to learn additional grounds for claims of infringement, non-infringement, and invalidity as the case progresses. After a reasonable period for fact discovery, however, each party must provide a final statement of its contentions on relevant issues, which the party may thereafter amend only "upon a showing of good cause and absence of unfair prejudice, made in timely fashion following discovery of the basis for the amendment." LPR 3.4.<sup>79</sup>

*E. Week 13: Initial Non-Infringement, Unenforceability, and Invalidity Contentions (LPR 2.3)*

Two weeks after the party claiming infringement serves its initial contentions, LPR 2.3 requires the accused infringer to serve initial contentions explaining the basis for any claims of non-infringement, unenforceability, and invalidity.<sup>80</sup> The Rule requires the party to identify prior art upon which the party will rely for a claim of invalidity, including a statement of whether the party contends the prior art anticipates the patent claim or renders is obvious, and how.<sup>81</sup>

If the party accused of infringement asserts defenses of indefiniteness, lack of enablement, or insufficient written description, LPR 2.3 requires a detailed statement of the basis for the defense.<sup>82</sup> The same is true if a party asserts a defense of unenforceability.<sup>83</sup> Like the Initial Infringement Contentions, these "Initial Non-Infringement, Unenforceability and Invalidity Contentions" must be certified by counsel of record.<sup>84</sup> Along with this response, the alleged infringer must make a supplemental production of additional documentation showing the operation of

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<sup>79</sup> N.D. ILL. LPR pmb1.

<sup>80</sup> N.D. ILL. LPR 2.3.

<sup>81</sup> N.D. ILL. LPR 2.3(b)(1)–(3).

<sup>82</sup> N.D. ILL. LPR 2.3(b)(4).

<sup>83</sup> N.D. ILL. LPR 2.3(c).

<sup>84</sup> N.D. ILL. LPR 1.5.

aspects or elements of the accused instrumentality identified in the LPR 2.2 chart and the additional prior art identified pursuant to LPR 2.3.<sup>85</sup>

The party accused of infringement must serve its initial contentions just two weeks after service of the opposing party's infringement contentions.<sup>86</sup> This, however, is approximately thirteen weeks after service of summons and after the party has received considerable information regarding the details of the claim of infringement.<sup>87</sup> The defendant thus has over three months to develop its initial contentions which, like the parallel initial infringement contentions, cannot be used against the defendant as evidence on the merits.<sup>88</sup> The working group and the Court believed that under the circumstances, imposition of this preliminary disclosure requirement was reasonable and not unfairly burdensome. The timing of these disclosure obligations, however, requires the parties to get a handle on the case promptly and without undue delay.

It is not unusual for settlement discussions to begin soon after a patent infringement suit is filed, or even before suit is filed. Indeed, one purpose of the initial disclosure requirements is to require the parties to focus promptly on the contested issues, and the result may be to prompt early discussion regarding settlement. If the parties believe in good faith that settlement negotiations are serious and reasonably likely to result in an agreed disposition of the case, they may, of course, ask the judge presiding over the case to put the LPR schedule in abeyance.<sup>89</sup> It will be up to the judge to decide, in the context of the particular case, whether following the Rules' presumptive schedule and "keeping the heat on" or, instead, allowing a hiatus is more likely to produce the prompt and just resolution of the litigation.<sup>90</sup>

#### *F. Week 15: Initial Response to Invalidity Contentions (LPR 2.5)*

Two weeks later (approximately fifteen weeks after summons is served), the party claiming infringement is required by LPR 2.5 to serve a point-by-point response concerning the opposing party's initial invalidity and unenforceability contentions.<sup>91</sup> Like the earlier initial contention statements, this disclosure must be certified by counsel of record.<sup>92</sup>

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<sup>85</sup> N.D. ILL. LPR 2.4.

<sup>86</sup> N.D. ILL. LPR 2.3.

<sup>87</sup> See *infra* app.

<sup>88</sup> N.D. ILL. LPR 1.6; see *infra* app.

<sup>89</sup> N.D. ILL. LPR 1.1; see N.D. ILL. LR 16.1(a); N.D. ILL. STANDING ORD. ESTABLISHING PRETRIAL P. 5 ("Counsel and the parties are directed to undertake a good faith effort to settle that includes a thorough exploration of the prospects of settlement . . .").

<sup>90</sup> N.D. ILL. LPR 1.1; see N.D. ILL. LR 16.1(a); N.D. ILL. STANDING ORD. ESTABLISHING PRETRIAL P. 1 ("Parties should also be aware that there may be variances in the forms and procedures used by each of the judges in implementing these [pretrial] procedures.")

<sup>91</sup> N.D. ILL. LPR 2.5; see *infra* app.

<sup>92</sup> N.D. ILL. LPR 1.5 ("All disclosures made pursuant to LPR 2.2, 2.3, 2.4, 2.5, 3.1, and 3.2 must be dated and signed by counsel of record . . .").

*G. Weeks 9–42: Fact Discovery (LPR 1.3)*

The Rules impose a starting and ending point for fact discovery. Under LPR 1.3, fact discovery may not begin until the date for initial disclosures, and it comes to a hiatus twenty-eight days after the date for exchange of claim terms and phrases under LPR 4.1.<sup>93</sup> Because that exchange is scheduled to take place approximately thirty-eight weeks after summons is served, the initial period of fact discovery is to be completed approximately forty-two weeks after service.<sup>94</sup>

The Rules also place some limitations on the content of discovery. Because the Rules impose a particularized structure and sequence for disclosures regarding various key issues, they permit a party to object to certain discovery requests seeking position statements on those issues on the ground of prematurity.<sup>95</sup> The issues are:

- (a) requests for a party's claim construction position;
- (b) requests to the patent claimant for a comparison of the asserted claims and the accused apparatus, device, process, method, act, or other instrumentality;
- (c) requests to an accused infringer for a comparison of the asserted claims and the prior art;
- (d) requests to an accused infringer for its non-infringement contentions; and
- (e) requests to the patent claimant for its contentions regarding the presence of claim elements in the prior art.<sup>96</sup>

There are two reasons for the hiatus in fact discovery prior to claim construction and its brief resumption after claim construction. First, the working group and the Court considered it reasonable to require fact discovery to be largely completed prior to claim construction in order to enable the parties to identify the key claim terms that are likely to be dispositive. Second, because the Court may take significant time to rule on claim construction, there is no need to burden the parties with the expense of ongoing fact discovery during that indefinite period. For these reasons, fact discovery stops twenty-eight days after the parties exchange the claim terms that they contend need to be construed.<sup>97</sup>

In addition, a court's claim interpretation ruling may have a significant impact on the issues to be litigated. The working group and the Court believed that for this reason, the parties should have an opportunity to supplement fact discovery following the claim construction ruling. Accordingly, LPR 1.3 provides that fact discovery may resume upon entry of the claim construction ruling, and it "shall end" forty-two days (six weeks) after that ruling.<sup>98</sup>

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<sup>93</sup> N.D. ILL. LPR 1.3.

<sup>94</sup> See *infra* app.

<sup>95</sup> N.D. ILL. LPR 1.7.

<sup>96</sup> See *id.*

<sup>97</sup> N.D. ILL. LPR 1.3.

<sup>98</sup> *Id.*

*H. Week 32: Cross Filing of Final Infringement, Unenforceability, and Invalidity Contentions (LPR 3.1)*

Part 3 of the Rules addresses the parties' final contentions. The Rules contemplate simultaneous service of final contentions by the proponents (those bearing the burden of proof or making a claim) on the issue of infringement and on the issues of invalidity and unenforceability.<sup>99</sup> These contentions are due prior to claim construction by the Court and must be certified by counsel of record, and they are required approximately thirty-two weeks after service of summons.<sup>100</sup> Unlike the initial contentions, the final contentions may be used as evidence against a party.<sup>101</sup>

*I. Week 36: Cross Filing of Final Non-Infringement, Enforceability, and Validity Contentions (LPR 3.2–3.4)*

The next events to occur are the responses to the final contentions exchanged at approximately week thirty-two after service of summons. These responses are due twenty-eight days (four weeks) after each side's final contentions, *i.e.*, approximately thirty-six weeks after service of summons.<sup>102</sup> Under LPR 3.2, each alleged infringer must serve its final non-infringement contentions.<sup>103</sup> Simultaneously, the party claiming infringement must serve its final contentions in response to any final unenforceability and invalidity contentions served by the opposing party.<sup>104</sup> These contentions must be certified by counsel of record.<sup>105</sup>

The Rules require a document production with the Final Invalidity Contentions.<sup>106</sup> This production requires a translation of foreign language documents, within limits.<sup>107</sup>

Parties are not locked irrevocably into their final contentions. To amend them, however, a party must obtain leave of court on a showing of good cause and the absence of unfair prejudice to opposing parties.<sup>108</sup> Further, any request to amend must be made promptly upon discovery of the basis for the requested amendment.<sup>109</sup> This Rule contemplates that a subsequent claim construction ruling different from the one proposed by the party may constitute good cause, absent undue prejudice to the non-moving party.<sup>110</sup>

A party's duty to supplement discovery responses does not excuse the need to obtain leave of court in order to amend its final contentions.<sup>111</sup>

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<sup>99</sup> N.D. ILL. LPR 3.1.

<sup>100</sup> N.D. ILL. LPR 1.5, 3.1, 4.1; *see infra* app.

<sup>101</sup> *See* N.D. ILL. LPR 1.6.

<sup>102</sup> N.D. ILL. LPR 3.2; *see infra* app.

<sup>103</sup> N.D. ILL. LPR 3.2.

<sup>104</sup> *Id.*

<sup>105</sup> *See* N.D. ILL. LPR 1.5.

<sup>106</sup> N.D. ILL. LPR 3.3.

<sup>107</sup> *Id.*

<sup>108</sup> N.D. ILL. LPR 3.4.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

*J. Week 36: Final Date to Seek Stay Pending Reexamination (LPR 3.5)*

The exchange of the parties' final contentions under LPR 3.4 also forms a cutoff date to seek a stay pending a request for reexamination of a patent in suit.<sup>112</sup> The view of the Court and the working group was that this would, among other things, discourage parties from strategically requesting a stay in belated fashion.

#### IV. CLAIM CONSTRUCTION PROCEEDINGS

The working group that prepared the initial draft of the Rules debated at length when, during the course of the litigation, claim construction should take place. It considered the possibility of requiring early determination to facilitate settlement and focus infringement and invalidity discovery in light of the claim construction ruling. The consensus, however, favored conducting claim construction later in the litigation process, after fact discovery is largely complete. The primary rationale is that the discovery process will enable the parties to identify the critical claim terms whose disposition will control the litigation.

By way of background, beginning in 2006, the Federal Circuit clarified that its *en banc* precedent does not require a trial court to be blind to the accused product or process in connection with claim construction.<sup>113</sup> Indeed, the Federal Circuit has indicated that a trial court *should* consider the accused instrumentality in determining what aspects of the asserted patent claims should be construed, generally citing judicial efficiency as the reason.<sup>114</sup> One panel of the Federal Circuit in September 2006 seemed critical of the appellate record's failure to identify aspects of the accused product, taking the view that the Court should not operate in a vacuum when reviewing claim construction.<sup>115</sup> Proponents of conducting claim construction later in the litigation process generally argue that knowledge of the accused product or process sufficient to determine what is dispositive tends to be unavailable early in discovery, so that early claim construction tends to be premature and unfocused in most cases.<sup>116</sup>

Ultimately, the Northern District adopted a rule that sets the claim construction process to begin about eight to nine months after the initial disclosures and, as

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<sup>112</sup> N.D. ILL. LPR 3.5.

<sup>113</sup> *Compare* SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1118 (Fed. Cir. 1985) (*en banc*) ("A claim is construed in the light of the claim language, the other claims, the prior art, the prosecution history, and the specification, *not* in light of the accused device."), *with* Wilson Sporting Goods Co. v. Hillerich & Bradsby Co., 442 F.3d 1322, 1326–27 (Fed. Cir. 2006) ("[K]nowledge of [the accused] product or process provides meaningful context for the first step of the infringement analysis, claim construction." (citations omitted)).

<sup>114</sup> *Exigent Tech., Inc. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1309 n.10 (Fed. Cir. 2006); *Wilson Sporting Goods*, 442 F.3d at 1326–27, 1330–31 (court needed "context" of the accused product when construing claims); *Lava Trading, Inc. v. Sonic Trading Mgmt. LLC*, 445 F.3d 1348, 1350 (Fed. Cir. 2006); *Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.*, 459 F.3d 1311, 1319 (Fed. Cir. 2006).

<sup>115</sup> *Mass. Inst. of Tech. & Elecs. for Imaging, Inc. v. Abacus Software*, 462 F.3d 1344, 1350–51 (Fed. Cir. 2006).

<sup>116</sup> *See* N.D. ILL. LPR pmb1.; Edward Brunet, Markman *Hearings, Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93, 95–97 (2005).

discussed earlier, to allow fact discovery to reopen for a brief period following the claim construction ruling.<sup>117</sup> The Preamble to the Local Patent Rules describes the Court's rationale as follows:

The Rules also provide a standardized structure for claim construction proceedings, requiring the parties to identify and exchange position statements regarding disputed claim language before presenting disputes to the Court. The Rules contemplate that claim construction will be done, in most cases, toward the end of fact discovery. The committee of lawyers and judges that drafted and proposed the Rules considered placing claim construction at both earlier and later spots in the standard schedule. The decision to place claim construction near the end of fact discovery is premised on the determination that claim construction is more likely to be a meaningful process that deals with the truly significant disputed claim terms if the parties have had sufficient time, via the discovery process, to ascertain what claim terms really matter and why and can identify (as the Rules require) which are outcome determinative. The Rules' placement of claim construction near the end of fact discovery does not preclude the parties from proposing or the Court from requiring an earlier claim construction in a particular case. This may be appropriate in, for example, a case in which it is apparent at an early stage that the outcome will turn on one claim term or a small number of terms that can be identified without a significant amount of fact discovery.<sup>118</sup>

The Rules do not preclude referral of claim construction to a magistrate judge or master. Part 4 of the Rules addresses claim construction proceedings.

*A. Week 38: Only Ten Claim Terms to be Construed (LPR 4.1)*

Two weeks after service of the final non-infringement contentions of the accused infringer(s) and coincident service of the final enforceability and validity contentions by the party asserting infringement, each party must serve a list of the claim terms and phrases it wants the Court to construe.<sup>119</sup> The list may be lengthy. Along with these disclosures, a party must describe its proposed constructions of the terms and provide information about section 112(6) claim elements.<sup>120</sup> This is approximately thirty-eight weeks after service of summons.<sup>121</sup>

One week later, that is, approximately thirty-nine weeks after service of summons, the parties are required to meet and confer to agree upon no more than ten terms or phrases to submit for construction by the Court.<sup>122</sup> If the parties cannot agree on which ten terms to submit, the Rule allocates them evenly: five to "all

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<sup>117</sup> N.D. ILL. LPR 1.3; *see infra* app.

<sup>118</sup> N.D. ILL. LPR pmbl.

<sup>119</sup> N.D. ILL. LPR 4.1(a).

<sup>120</sup> *Id.*

<sup>121</sup> *See infra* app.

<sup>122</sup> N.D. ILL. LPR 4.1(b); *see infra* app.

plaintiffs” and five to “all defendants.”<sup>123</sup> The parties must certify whether each of the claim terms presented to the Court is outcome-determinative.<sup>124</sup> The limitation to ten terms may be expanded upon a showing of good cause.<sup>125</sup> The Rule gives one example of such good cause—the assertion of multiple, non-related patents “in an appropriate case.”<sup>126</sup>

The limitation to ten claim terms aims at requiring the parties to focus on terms that are likely to be outcome-determinative.<sup>127</sup> Most judges have experience with claim construction proceedings in which the parties and the Court spend enormous time and effort on claim terms that are highly unlikely to be dispositive. The goal is to avoid such situations.

In many cases, construction by the Court of a limited number of key claim terms will lead to prompt disposition via settlement or summary judgment.<sup>128</sup> In cases in which this does not occur, further action may be required prior to trial, such as via motions *in limine*, to construe any disputed claim terms that remain.<sup>129</sup> The Rule includes a comment elaborating on the goals of the ten-term limitation:

In some cases, the parties may dispute the construction of more than ten terms. But because construction of outcome-determinative or otherwise significant claim terms may lead to settlement or entry of summary judgment, in the majority of cases the need to construe other claim terms of lesser importance may be obviated. The limitation to ten claim terms to be presented for construction is intended to require the parties to focus upon outcome-determinative or otherwise significant disputes.<sup>130</sup>

#### *B. Weeks 43, 47 & 50: Claim Construction Briefs (LPR 4.2)*

The Court opted to give the accused infringer(s) the right to submit the opening and closing claim construction briefs.<sup>131</sup> The Court considered and rejected the concept of simultaneous briefing, believing that sequential briefing is more likely to keep both parties focused on truly disputed issues. The Rules offer the following Comment to LPR 4.2:

The committee opted for consecutive claim construction briefs rather than simultaneous briefs, concluding that consecutive briefing is more likely to promote a meaningful exchange regarding the contested points.

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<sup>123</sup> N.D. ILL. LPR 4.1(b).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> N.D. ILL. LPR 4.1 cmt.

<sup>128</sup> *See id.*; e.g., *Terlep v. Brinkman Corp.*, No. 02-CV-5127, 2004 U.S. Dist. LEXIS 28453, at \*7–17 (W.D. Ark. Mar. 29, 2004) (granting summary judgment to defendant after construing five claim terms), *aff'd*, 418 F.3d 1379 (Fed. Cir. 2005).

<sup>129</sup> E.g., *Generation II Orthotics Inc. v. Med. Tech. Inc.*, 263 F.3d 1356, 1362 (Fed. Cir. 2001) (stating that after the district court denied defendant’s motion for summary judgment, defendant filed a “Motion in Limine And Request for Markman Hearing”).

<sup>130</sup> N.D. ILL. LPR 4.1 cmt.

<sup>131</sup> N.D. ILL. LPR 4.2(a), (d).

For the same reason, the committee opted to have the alleged infringer file the opening claim construction brief. Patent holders are more likely to argue for a “plain meaning” construction or for non-construction of disputed terms; alleged infringers tend to be less likely to do so.<sup>132</sup>

The opening brief for the party opposing infringement is due five weeks after the exchange of claim terms, *i.e.*, approximately forty-three weeks after service of summons.<sup>133</sup> The Court expanded its customary fifteen page limit to a limit of twenty-five pages, absent prior leave of court.<sup>134</sup>

If a party offers testimony of a witness in support of its proposed claim construction, it must include a sworn declaration by the witness with its initial claim construction brief.<sup>135</sup> The party must then make the witness available for deposition.<sup>136</sup>

The parties are required to file with the Court a joint appendix containing the patent(s) in dispute and their prosecution history.<sup>137</sup> Any party may file additional materials as a separate appendix to its claim construction brief.<sup>138</sup>

The patent proponent’s responsive claim construction brief is due four weeks later, *i.e.*, at approximately week forty-seven after service of summons.<sup>139</sup> This brief is likewise limited to twenty-five pages, and the party must provide a sworn declaration of any witness it offers to support its proposed claim construction and make that witness available promptly for deposition.<sup>140</sup> If this occurs, the accused infringer receives an extra week to file its reply brief.<sup>141</sup>

Absent any witness statement from the patent proponent, the accused infringer’s reply claim construction brief is due fourteen days after service of the opposing party’s brief, *i.e.*, at approximately week forty-nine after service of summons.<sup>142</sup> The Court opted not to have a fourth brief in the normal case, explaining as follows in a Comment to LPR 4.2:

The Rules provide for three briefs (opening, response, and reply), not four, due to the likelihood of a claim construction hearing or argument. The Court’s determination not to hold a hearing or argument may constitute a basis to permit a surreply brief by the patent holder. A judge may choose not to require a reply brief.<sup>143</sup>

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<sup>132</sup> N.D. ILL. LPR 4.2 cmt.

<sup>133</sup> N.D. ILL. LPR 4.2(a); *see infra* app.

<sup>134</sup> *Compare* N.D. ILL. LR 7.1 (restricting the page limit of briefs to fifteen pages absent prior approval of the court), *with* N.D. ILL. LPR 4.2(a), (c) (restricting the page limit of Claim Construction Briefs to twenty-five pages absent prior approval of the court).

<sup>135</sup> N.D. ILL. LPR 4.2(a).

<sup>136</sup> *Id.*

<sup>137</sup> N.D. ILL. LPR 4.2(b).

<sup>138</sup> *Id.*

<sup>139</sup> N.D. ILL. LPR 4.2(c); *see infra* app.

<sup>140</sup> N.D. ILL. LPR 4.2(c).

<sup>141</sup> *Id.*

<sup>142</sup> N.D. ILL. LPR 4.2(d); *see infra* app.

<sup>143</sup> N.D. ILL. LPR 4.2 cmt.

One week after the reply brief is filed, the parties must file a joint claim construction chart and a joint status report, nominally at approximately week fifty after service of summons.<sup>144</sup> Its contents are set forth in LPR 4.2(f).<sup>145</sup>

#### *C. Week 53: Claim Construction Hearing (LPR 4.3)*

Under LPR 4.3, oral argument or a hearing may be held, nominally twenty-eight days after the reply brief, i.e., at approximately week fifty-three after service of summons.<sup>146</sup> The Rule provides for the judge to enter an order describing the schedule and procedures.<sup>147</sup> Demonstrative exhibits are to be exchanged at least three days before the hearing.<sup>148</sup>

#### *D. Week 59 (Nominal): Claim Construction Ruling*

The Rules do not impose a deadline for the Court issuance of its claim construction ruling. Some variation is inevitable in the timing of such rulings after the claim construction hearing. Because the Rules aim to have a case ready for trial within two years of service of summons, the effect is to assume a six-week period for the Court to rule after the claim construction hearing—in other words, approximately fifty-nine weeks after service of summons.<sup>149</sup>

### V. POST CLAIM CONSTRUCTION

If a judge exercises his discretion to move the claim construction proceedings to an earlier time in the case, the remainder of the schedule likely will have to be adjusted accordingly. Though one would assume that any such adjustments would encompass the Rules' provisions protecting opinions of counsel from discovery for a reasonable term and holding expert witness discovery until after fact discovery,<sup>150</sup> the particulars of any such adjustments must be made on a case-by-case basis. The normally-contemplated schedule for post-claim construction events is discussed below.

#### *A. Weeks 59–65 (Nominal): Additional Fact Discovery (LPR 1.3)*

As discussed earlier, because a court's claim interpretation ruling may have a significant impact on the case, the Rules provide for reopening of fact discovery for a brief period after the claim construction ruling. Specifically, LPR 1.3 provides for a

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<sup>144</sup> N.D. ILL. LPR 4.2(f); *see infra* app.

<sup>145</sup> N.D. ILL. LPR 4.2(f).

<sup>146</sup> N.D. ILL. LPR 4.3; *see infra* app.

<sup>147</sup> N.D. ILL. LPR 4.3.

<sup>148</sup> *Id.*

<sup>149</sup> *See infra* app.

<sup>150</sup> *See* N.D. ILL. LPR 3.6(a), 5.1(b).

six-week period of further fact discovery beginning with entry of the claim construction ruling.<sup>151</sup> If the Court has ruled on claim construction six weeks after the hearing, the resumed period of fact discovery would conclude approximately sixty-five weeks after service of summons.<sup>152</sup>

*B. Week 60 (Nominal): Opinions of Counsel (LPR 3.6)*

When a party relies on an opinion of counsel in defense to an allegation of willful infringement, a waiver of the attorney-client privilege results.<sup>153</sup> The Rules defer, until after claim construction, any discovery regarding the substance of a claim of reliance on advice of counsel,<sup>154</sup> so that a party who may claim such reliance is not forced to make the choice to give up the attorney-client privilege until a relatively late stage of the litigation. Specifically, discovery into this is not permitted until thirty-five days (five weeks) prior to closing of the reopened period of fact discovery after the Court's claim construction ruling.<sup>155</sup> The timing of such discovery was slightly ambiguous in the Rules as initially approved, but the Court made a technical change that clarified the point around the time the Rules took effect.

Under LPR 3.6(b), on the day advice of counsel information becomes discoverable, a party claiming reliance on advice of counsel must disclose detailed information regarding the substance of its claim.<sup>156</sup> This allows the opposing party five weeks before the completion of the resumed period of fact discovery to complete its inquiry into this issue.<sup>157</sup>

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<sup>151</sup> N.D. ILL. LPR 1.3.

<sup>152</sup> See *infra* app.

<sup>153</sup> *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) ("Thus, when EchoStar chose to rely on the advice of in-house counsel, it waived the attorney-client privilege with regard to any attorney-client communications relating to the same subject matter, including communications with counsel other than in-house counsel, which would include communications with Merchant & Gould." (citing *Akeva L.L.C. v. Mizuno Corp.*, 243 F. Supp. 2d 418, 423 (M.D.N.C. 2003))). The scope of such a waiver generally does not extend to trial counsel communications:

In sum, we hold, as a general proposition, that asserting the advice of counsel defense and disclosing opinions of opinion counsel do not constitute waiver of the attorney-client privilege for communications with trial counsel. We do not purport to set out an absolute rule. Instead, trial courts remain free to exercise their discretion in unique circumstances to extend waiver to trial counsel, such as if a party or counsel engages in chicanery. We believe this view comports with Supreme Court precedent, which has made clear that rules concerning privileges are subject to review and revision, when necessary. See [*Jaffee v. Redmond*, 518 U.S. 1, 9 (1966)] (noting that federal courts are "to 'continue the evolutionary development of testimonial privileges.'" (quoting [*Trammel v. United States*, 445 U.S. 40, 47 (1980)])).

*In re Seagate Tech., LLC*, 497 F.3d 1360, 1374–75 (Fed. Cir. 2007).

<sup>154</sup> N.D. ILL. LPR 3.6(a).

<sup>155</sup> *Id.*

<sup>156</sup> N.D. ILL. LPR 3.6(b).

<sup>157</sup> N.D. ILL. LPR 3.6(a).

*C. Weeks 68, 73 & 78 (Nominal): Expert Witness Discovery (LPR 5.1–5.3)*

Mindful that claim construction rulings often have a significant impact on the issues to be decided in patent infringement cases, the Court opted to defer expert discovery until after a claim construction ruling.<sup>158</sup> The goal was to avoid the need for experts to revise their opinions, disclosed prior to claim construction, after a ruling or to word their opinions in an either-or format. As a result, expert witness disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2) are due “within twenty-one (21) days after the close of discovery after the claim construction ruling.”<sup>159</sup> Under LPR 1.3, the close of fact discovery occurs forty-two days (six weeks) after the claim construction ruling.<sup>160</sup> Assuming the Court issues its claim construction ruling six weeks after the claim construction hearing, i.e., at approximately week fifty-nine after service of summons, the resumed period of fact discovery would close at week sixty-five.<sup>161</sup> Adding three more weeks, expert witness reports would be due at approximately week sixty-eight.<sup>162</sup> Rebuttal expert reports are due five weeks later, in other words, at approximately week seventy-three after service of summons, under the scenario suggested.<sup>163</sup> The parties have five weeks after the submission of rebuttal reports to complete expert depositions, making that deadline fall at approximately week seventy-eight under this scenario.<sup>164</sup>

LPR 5.3 provides that amendment or supplementation of expert reports after the deadlines is presumptively prejudicial.<sup>165</sup> The Court may permit amendment or supplementation only upon a showing of good cause that the amendment or supplementation “could not reasonably have been made earlier and that the opposing party is not unfairly prejudiced.”<sup>166</sup>

*D. Week 82 (Nominal): Dispositive Motions (LPR 6.1)*

The Local Patent Rules set a deadline for filing any dispositive motion four weeks after the completion of expert discovery, nominally at approximately week eighty-two after service of summons.<sup>167</sup> The comment to this Rule states that the Rules do not preclude a party from filing a dispositive motion earlier in the case.<sup>168</sup> The Rules leave this up to the assigned judge.<sup>169</sup> If a party files an early summary judgment motion that raises a claim construction issue, LPR 1.1 allows the judge to defer consideration of the motion until after claim construction proceedings are completed.<sup>170</sup>

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<sup>158</sup> N.D. ILL. LPR 5.1(b).

<sup>159</sup> *Id.*

<sup>160</sup> N.D. ILL. LPR 1.3.

<sup>161</sup> *See infra* app.

<sup>162</sup> *See infra* app.

<sup>163</sup> N.D. ILL. LPR 5.1(c); *see infra* app.

<sup>164</sup> N.D. ILL. LPR 5.2; *see infra* app.

<sup>165</sup> N.D. ILL. LPR 5.3.

<sup>166</sup> *Id.*

<sup>167</sup> N.D. ILL. LPR 6.1; *see infra* app.

<sup>168</sup> N.D. ILL. LPR 6.1 cmt.

<sup>169</sup> *Id.*

<sup>170</sup> N.D. ILL. LPR 1.1.

The Rules do not impose a particular briefing schedule for dispositive motions. This is left up to the assigned judge to determine in the context of the particular case.

*E. Week 102 (Nominal): Case Ready for Trial (LPR 6.1)*

The Rules do not set a specific date on which a case is to be trial-ready. The goal of the rules, however, was to enable a case to be trial-ready just under two years after service of summons.<sup>171</sup> This assumes, as noted earlier, a period of approximately six weeks for the Court to issue a claim construction ruling after holding a claim construction hearing.<sup>172</sup> The two-year estimate also assumes a period of twenty weeks for the parties to brief and the Court to rule on any dispositive motions and for the parties to submit a final pretrial order, including proposed voir dire questions, jury instructions, witness lists, and the like.<sup>173</sup> If this estimate holds, it would result in a significant decrease in the amount of time that a typical patent infringement case is pending in the Northern District.

#### CONCLUSIONS

The Preamble to the Northern District's Local Patent Rules identifies the Rules' central goals: to provide a standard structure to permit greater predictability and planning for litigants and the Court, and to eliminate the need to litigate in each case procedural issues that recur in most patent infringement cases.<sup>174</sup> Consistent with these goals, the Rules are aimed at minimizing procedural disputes and requiring the parties to focus at an early stage on the significant substantive disputes.<sup>175</sup> The ultimate purpose is to reduce litigation expense and permit speedier resolution of patent litigation. Time will tell if the Rules accomplish this purpose.

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<sup>171</sup> See *infra* app.

<sup>172</sup> See *supra* text accompanying note 149.

<sup>173</sup> See *infra* app.

<sup>174</sup> N.D. ILL. LPR pmbl.

<sup>175</sup> *Id.*

## APPENDIX

## ESTIMATED PATENT CASE SCHEDULE FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Event	Scheduled Time	Total Time (Nominally) After Service of Summons
Service of Summons & Complaint		0
Answer or Other Response to Complaint	(Per Fed. R. Civ. P.)	7 weeks
Initial Disclosures of Both Parties (LPR 2.1)	<b>14 days (2 weeks)</b> after Answer or other responsive pleading	9 weeks
Fact Discovery – Part 1 (LPR 1.3)		weeks 9–42
Initial Infringement Contentions (LPR 2.2)	<b>14 days (2 weeks)</b> after Initial Disclosures	11 weeks
Initial Non-Infringement and Invalidity Contentions (LPR 2.3)	<b>14 days (2 weeks)</b> after Initial Infringement Contentions	13 weeks
Initial Response To Invalidity Contentions (LPR 2.5)	<b>14 days (2 weeks)</b> after Initial Invalidity Contentions	15 weeks
Final Infringement, Unenforceability, and Invalidity Contentions (LPR 3.1)	<b>21 weeks</b> after Initial Infringement Contentions	32 weeks
Final Non-Infringement, Enforceability, and Validity Contentions (LPR 3.2)	<b>28 days (4 weeks)</b> after the prior exchange	36 weeks
Last Date to Seek Stay Based on Reexamination (LPR 3.5)		36 weeks
Exchange of Claim Terms Needing Construction (LPR 4.1)	<b>14 days (2 weeks)</b> after Final Validity Contentions	38 weeks
Opening Claim Construction Brief (by alleged infringer(s)) (LPR 4.2(a))	<b>35 days (5 weeks)</b> after exchange of claims terms	43 weeks

Event	Scheduled Time	Total Time (Nominally) After Service of Summons
Responsive Claim Construction Brief (by patent infringement assenter(s)) (LPR 4.2(c))	<b>28 days (4 weeks)</b> after Plaintiff's Claim Construction Brief	47 weeks
Reply Claim Construction Brief (LPR 4.2(d))	<b>14 days (2 weeks)</b> after Responsive Claim Construction Brief(s)	49 weeks
Joint Claim Construction Chart (LPR 4.2(f))	<b>7 days (1 week)</b> after Reply Claim Construction Brief	50 weeks
Claim Construction Hearing (LPR 4.3)	<b>28 days (4 weeks)</b> after Reply Claim Construction Brief	53 weeks
Claim Construction Ruling (nominal)	<b>6 weeks (?)</b>	59 weeks
Discovery re Opinions of Counsel (LPR 3.6)	<b>35 days (5 weeks)</b> before final close of fact discovery	60 weeks
Close of Fact Discovery After Claim Construction Ruling (LPR 1.3)	<b>42 days (6 weeks)</b> after claim construction ruling	65 weeks
Expert Reports of Parties with Burden of Proof (LPR 5.1(b))	<b>21 days (3 weeks)</b> after close of discovery after the claim construction ruling	68 weeks
Rebuttal Expert Reports (LPR 5.1)	<b>35 days (5 weeks)</b> after initial expert reports	73 weeks
Completion of Expert Witness Depositions (LPR 5.2)	<b>35 days (5 weeks)</b> after rebuttal expert reports	78 weeks
Final Day for Filing Dispositive Motions (LPR 6.1)	<b>28 days (4 weeks)</b> after close of all discovery	82 weeks
Case Ready for Trial	<b>20 weeks</b> after filing dispositive motions	102 weeks