Patent Litigation on the Rocket Docket After *Markman v. Westview Instruments, Inc.*

by Dana D. McDaniel

In recent years, the United States District Court for the Eastern District of Virginia has experienced an "explosion of intellectual property cases," including patent cases.[1] The dramatic rise in the number of intellectual property cases filed here reflects an increased awareness of the value of intellectual property assets and, apparently, a greater willingness on the part of intellectual property owners to litigate to enforce those rights. At the same time, the increase in patent cases in the Eastern District is no doubt also driven by the court's proximity to the Patent and Trademark Office and the nation's capital, as well as its national reputation as the home of the "rocket docket."[2] On the rocket docket, typically, "all cases, including patent and other intellectual property cases, proceed from birth to death, start to finish, in 6–8 months."[3] Many plaintiffs, and especially patentees, believe that this "rapid disposition . . . would likely be to [their] advantage."[4] Consequently, the Eastern District has become a preferred forum for patent infringement plaintiffs.[5]

Although patent infringement litigators may disagree whether a patent case can be fully and fairly litigated in the timeframe allowed on the rocket docket, patent cases are generally held to the same trial schedule as other civil cases. While the pace of case disposition in the Eastern District has always "require[d] discipline, preparation and skill on the part of the lawyers involved,"[6] especially in complex patent cases, the Supreme Court's ruling in *Markman v. Westview Instruments, Inc. (Markman II)*,[7] has made litigating patent cases in the Eastern District even more demanding. In *Markman II*, the Supreme Court affirmed the Federal Circuit's ruling that patent claim construction is a matter exclusively for the trial judge, not the jury. Before *Markman*, "[patent] claim interpretation issues were typically left to the jury on the basis of the parties' conflicting expert testimony."[8] Judge Timothy S. Ellis, III, of the Alexandria Division, has described *Markman II* as "a watershed event in patent litigation[.]"[9] *Markman* has substantially affected the course of patent infringement litigation, adding to the pretrial process a new, and potentially dispositive, step that requires briefs with supporting record evidence, affidavits and legal authority, oral argument, and in some cases, an evidentiary hearing.

The purpose of this article is to familiarize the reader with the post-*Markman* claim construction process and to review the claim construction practice and procedure in the Eastern District gleaned primarily from the published claim construction opinions in this district since *Markman*. The observations and suggestions presented here, while taken largely from published claim construction opinions, are strictly my own and not the court's. Notably, even though *Markman I* was decided almost seven years ago, courts continue to adjust and refine their claim construction procedures based on experience. It is risky to draw any broad conclusions from the published opinions and the procedures underlying them; rather, as discussed below, claim con-

struction issues should be addressed early in every patent case and an appropriate claim construction procedure incorporated into the pretrial schedule.

The Holding in *Markman v. Westview Instruments*

Markman involved a patent on a dry-cleaning inventory control system. Markman's patent covered an automated system that tracked articles of clothing through the dry cleaning process.[10] The case turned on the meaning of the word "inventory" in claim 1 of Markman's patent.[11] Markman asserted that "the term 'inventory' as used in claim 1 means 'articles of clothing' *or* 'dollars' *or* 'cash' *or* 'invoices,' and is not necessarily limited to a construction that always includes 'articles of clothing.'"[12] The defendant, Westview, on the other hand, argued that the term "inventory" as used in claim 1 always included articles of clothing, which Westview's system did not track.[13] At the conclusion of Markman's case in chief, Westview moved for a directed verdict. The court deferred ruling on the directed verdict motion, and the case was submitted to the jury.[14]

The jury returned a verdict finding that Westview's system infringed Markman's patent.[15] The court then heard argument on Westview's motion for judgment as a matter of law (JMOL). In deciding the JMOL motion, the court, stating that claim construction is a matter of law for the court, proceeded to construe the term "inventory" to mean articles of clothing and not just transaction totals or dollars.[16] Finding "that Westview's device does not have the 'means to maintain an inventory total' as required by claim 1, and cannot 'detect and localize spurious additions to inventory as well as spurious deletions therefrom,'" the court directed a verdict of noninfringement.[17] Markman appealed, arguing that the jury's implicit construction of the term "inventory" was entitled to "highly deferential review by both the trial court on motion for JMOL and by [the Federal Circuit] on appeal from the grant or denial of JMOL."[18]

In its *en banc* opinion (*Markman I*), the Federal Circuit held that patent claim construction is an issue of law to be decided by the trial judge and reviewed de novo on appeal.[19] Upon its de novo review of the trial court's decision granting Westview JMOL, the Federal Circuit agreed "that 'inventory' in claim 1 includes within its meaning 'articles of clothing.'"[20] Accordingly, the Federal Circuit affirmed the district court's grant of judgment of noninfringement as a matter of law.[21] Markman appealed to the Supreme Court, which affirmed *Markman I*, ruling that "the construction of a patent, including terms of art within its claim, is exclusively within the province of the Court."[22]

It would be difficult to overstate the impact *Markman* has had on patent infringement litigation. As Judge Mayer predicted in his concurring opinion, *Markman I* "mark[ed] a sea change in the course of patent law[.]"[23] According to one study, since *Markman I*, the percentage of patent infringement cases decided on summary judgment has doubled from 12% to 24%.[24] The claim construction process has become a critical step in most patent infringement cases, one in which the evidence to be presented and the timing of the hearing are of paramount importance.

Sources of Evidence for Claim Construction

In *Markman I*, as part of its *de novo* review of the trial court's ruling on Westview's JMOL motion, the Federal Circuit identified the various sources of evidence trial courts may admit in the claim construction process and discussed the order in which such evidence is to be considered. First, the court is to consider the "intrinsic" evidence. "To ascertain the meaning of claims, we consider three sources: The claims, the specification, and the prosecution history."[25] The claims and specification are found in the patent document itself while the prosecution history (also referred to as the "file wrapper") contains the complete record of the proceedings in the Patent and Trademark Office (PTO) relating to the prosecution of the patent application. Together, these sources of evidence comprise the public record relating to the patent and are, therefore, considered "intrinsic" evidence. Within the intrinsic evidence, the court is first to consider the claims themselves, both disputed and undisputed.[26] If the claim language is clear on the face of the claims, the consideration of the remaining intrinsic evidence is "restricted to determining if a deviation from the clear language of the claims is specified."[27] If the meaning of a claim term is not clear from the claims themselves, the court next considers the specification. "The specification contains a written description of the invention . . . and is always highly relevant to the claim construction analysis."[28] Finally, if necessary, the court may consider the prosecution history.[29]

In those rare instances "when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence[,]"[30] courts may receive and rely on extrinsic evidence. "Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises."[31] While extrinsic evidence may always be received to "demonstrate the state of the prior art at the time of the invention . . . [and] 'to aid the court in coming to a correct conclusion' as to the 'true meaning of the language employed' in the patent,"[32] the Federal Circuit has strongly cautioned that extrinsic evidence is not to be used to vary or contradict the terms of the claims.[33]

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In a line of cases since *Markman I*, the Federal Circuit has clarified and refined the appropriate role of extrinsic evidence in the claim construction analysis.[34] In essence, these cases allow courts broad discretion over the types of extrinsic evidence they

may admit in a *Markman* hearing, while continuing to emphasize that courts may not *rely* on extrinsic evidence to vary or contradict a meaning discernable from the intrinsic evidence. Extrinsic evidence, therefore, is most often admitted only to "aid [the court in] understanding the general technology involved in the patent claims at issue[.]"[35]

The reported claim construction opinions in the Eastern District confirm that the need to resort to extrinsic evidence to construe patent claims is quite rare. Of seven reported opinions between 1998 and 2001, the court appears to have relied on extrinsic evidence only once, in which the court referred to a dictionary definition of the term "enable" to confirm its ordinary and customary meaning.[36] From these opinions, it appears the court will be more receptive to receiving extrinsic evidence, particularly expert testimony, as an aid to help the court understand the underlying technology. For example, in *Rambus, Inc. v. Infineon Technologies AG*, which involved four patents and 57 claims directed to Dynamic Random Access Memory (DRAM) devices and technology, Judge Robert E. Payne allowed expert testimony during the *Markman* hearing.[37] In its claim construction opinion, however, the court noted that "[t]he claim construction here has been accomplished largely without resort to extrinsic expert evidence . . . the Court found [the expert testimony] useful mostly in understanding the meaning of technical terminology other than the disputed terms, as that terminology is used in the claims and specification."[38] In *NEC Corporation v. Hyundai Electronics Industries Co., Ltd*., a case involving 20 patents covering semiconductor circuitry devices and fabrication methods, Judge Ellis noted, "[t]hroughout the pretrial phases of these actions, the parties' experts have skillfully elucidated the relevant technology[.]"[39] In construing the disputed claims of one of the patents-in-suit, however, the court relied only on intrinsic evidence and a single dictionary definition.[40]

Consistent with the Federal Circuit teaching, while the court may receive extrinsic evidence, including expert testimony, at the *Markman* hearing, it is unlikely to *rely* on extrinsic evidence to determine the meaning of a patent claim. Given the very limited role of extrinsic evidence, particularly expert testimony, in the claim construction process, it is essential that proposed claim constructions find their support in the intrinsic evidence. If counsel offers extrinsic evidence at all, it should be limited to educating the court on the general technology involved in the case and confirming the meaning derived from the intrinsic evidence.

Deciding When to Address Claim Construction Issues

Chief Judge Marilyn Hall Patel of the Northern District of California quipped, "*Markman* is like sex. Timing is everything."[41] That statement is especially true on the rocket docket. The Eastern District has not adopted any special Local Rules for patent cases,[42] and the Federal Circuit has made it clear that individual trial courts have broad discretion over *Markman* procedure.[43] A review of the published claim construction opinions in the Eastern District since *Markman I* indicates that *Markman* hearings have typically been held fairly late in the case, most typically after the close of discovery and in connection with summary judgment motions. Scheduling an earlier *Markman* hearing in appropriate cases, however, has some clear advantages.

In *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc*., for example, the outcome of the case turned on the meaning of the term "bonus points" in the patent-in-suit. The defendant filed a summary judgment motion just 2 months after the complaint was filed. Judge Jerome B. Freidman, of the Norfolk Division, noting that the claim construction issue was a narrow one, construed the meaning of the term "bonus points" from the intrinsic evidence, determined that the defendants did not infringe the plaintiff's patent as construed, and entered summary judgment of noninfringement.[44] In similar cases in which either the claim construction dispute is narrow or the technology is relatively simple or straightforward, it may be possible to dispose of all or part of a case through an early claim construction. The benefits of early claim construction, even when not dispositive, include enabling the parties' expert witnesses to "predicate their opinions on a correct interpretation of the patent,"[45] and allowing the parties to better focus their pretrial discovery and dispositive motions.[46] Because claim construction is a matter of law subject to *de novo* review, however, counsel must be sensitive to the fact that the Federal Circuit is free to reject both the parties' and the court's proposed claim constructions. Consequently, even with an early *Markman* ruling, it may be necessary to take discovery, prepare expert reports, and submit arguments based on alternative claim constructions to preserve the record for appeal.[47]

In more complex cases, parties may need to conduct discovery to identify and develop claim construction issues. They may also need time to educate the court on the underlying technology. In such cases, parties must take discovery of alternative constructions and their experts must render opinions "based on alternative assumptions about the meaning of disputed claim terms."[48] Additionally, when the *Markman* briefs and hearing are scheduled for the period after close of discovery, counsel faces the challenge of preparing for both the *Markman* hearing and summary judgment concurrently which, even in simple cases, can be a daunting task.

The published claim construction opinions from the Eastern District since *Markman I* reveal that, while the court is flexible in scheduling the *Markman* hearing to reflect the needs of the particular case, *Markman* hearings are often held in connection with a summary judgment motion.[49] However, the court may be trending toward earlier hearings in appropriate cases. Judge Ellis recently commented that, in many cases, an effective *Markman* hearing can be held during the last one-third of the discovery period.[50] In some cases, particularly cases involving apparatus claims, Judge Ellis has scheduled the *Markman* hearing even earlier. If the meaning of a claim remains in doubt after the early *Markman* hearing, Judge Ellis will direct the parties to take discovery on two alternative constructions, reserving a final ruling until later in the case.

To date, however, the published *Markman* decisions in the Eastern District indicate that *Markman* hearings have most often been held after the close of discovery. In *Rambus, Inc. v. Infineon Technologies AG*, for example, fact discovery closed

January 26, 2001, and expert discovery closed February 9. The parties exchanged disputed claim terms January 29, and the *Markman* hearing was held February 26–28.[51] In *Knorr-Bremse Systems Fuer Nutzfahrzeuge GMBHH v. Dana Corporation*, the *Markman* hearing was held November 27–28, 2000, and the trial took place on January 8–11, 2001.[52] The published opinions in *Knorr-Bremse* do not disclose the discovery cutoff date, but judging from the January trial date and the court's practice of scheduling trial four to six weeks after the final pretrial conference, the *Markman* hearing appears to have taken place very near or immediately after the close of discovery. These cases highlight the importance of trial counsel addressing the need for and timing of the *Markman* hearing early in the case and proposing a claim construction procedure and *Markman* hearing date to the court.

Conclusion

Although *Markman* practice creates new demands on patent trial counsel, it also encourages counsel to identify claim construction issues early in the case and to incorporate the *Markman* process into the discovery plan and pretrial schedule. The Rule 26(f) conference, a relatively new development in the Eastern District in which the parties are required to "confer to consider the nature and basis of their claims and defenses . . . and develop a proposed discovery plan,"[53] provides an excellent opportunity for counsel to identify potential claim construction disputes and incorporate the *Markman* process into a comprehensive discovery plan and pretrial schedule. Counsel should be prepared to discuss with the court at the initial scheduling conference the need for and timing of a *Markman* hearing. In scheduling the *Markman* hearing, counsel in the Eastern District must be mindful that the trial date is effectively immovable, and they must allow sufficient time to prepare for and conduct the *Markman* hearing, brief and argue dispositive motions, and complete the myriad other pretrial tasks. It is, therefore, in all parties' interest to identify claim construction issues early and provide for timely claim construction in the pretrial schedule.

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Endnotes

1 Judge T.S. Ellis, III, Quicker and Less Expensive Enforcement of Patents: United States Courts, Presentation at the Proceedings of the 1999 Summit Conference on Intellectual Property, University of Washington, Seattle (July 5, 2000), *in* CASRIP Publication Series: Streamlining Int'l Intellectual Property No. 5, July 5, 2000, at 14. Recently, Judge Ellis commented that the patent infringement filings in the Alexandria division have been as high as 60 in a single month. In response to this overwhelming caseload, the court began assigning patent cases filed in Alexandria to judges in other divisions on a random, rotating basis. Since the court adopted this practice, the number of new patent cases filed there has fallen. Comments of the Honorable Timothy S. Ellis, III, Seventh National Advanced Forum on Litigation Patent Disputes (February 5, 2001).

2 The rocket docket system has been in effect in the Eastern District "since the 1950s, largely as a result of the efforts of Judge Albert Bryan[.]" *Id.* at 13-14.

3 Judge T. S. Ellis, III, Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects, Symposium of the International Judges Conference, *in* 9 Fed. Circuit B. J. 541 (2000).

4 Quicker and Less Expensive Enforcement of Patents: United States Courts, n. 1, *supra* at 14.

5 *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?* 79 N.C. L.Rev. 889, 903 (May 2001).

6 Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects, n. 4, *supra* at 543.

7 517 U.S. 370, 38 U.S.P.Q. 1461 (1996).

8 Quicker and Less Expensive Enforcement of Patents: United States Courts, n. 1. *supra* at 18.

9 *Id.; Surety Technologies, Inc. v. Entrust Technologies, Inc.*, 71 F.Supp.2d 520, 525 (E.D. Va. 1999).

10 *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 971-972 (Fed.Cir. 1995)(*en banc*), *aff'd* 517 U.S. 370, 38 U.S.P.Q. 1461 (1996).

11 Claim 1 of the Markman patent, U.S. Reissue Patent No. 33,054, recited an "inventory control and reporting system, comprising" a number of elements.

12 52 F.3d at 974 (emphasis in original).

13 *Id.*

14 52 F.3d at 973.

15 *Id.*

16 *Id.*

17 *Id.*

18 52 F.3d at 974.

19 52 F.3d at 979.

20 52 F.3d at 988.

21 52 F. 3d at 989.

22 *Markman II,* 517 U.S. at 372. After determining that "evidence of common-law practice at the time of the framing [of the United States Constitution] does not entail application of the Seventh Amendment's jury guarantee to the construction of [patent] claim documents," *Id.* at 588, and that "precedent provide[s] no answers, *Id.* at 591, the Court turned to "functional considerations," *Id.* in deciding whether judges or juries should define patent terms. In holding that claim construction is a matter for the court, the Court noted, *inter alia,* that "judges, not jurors, are the better suited to find the acquired meaning of patent terms." Unfortunately, the empirical evidence thus far does not support this assumption. *See Cybor Corporation v. FAS Technologies, Inc.,* 138 F.3d 1448, 1476 (Fed.Cir. 1998)(Rader, J. dissenting)(noting that since *Markman I*, the Federal Circuit had reversed almost 40% of all claim constructions).

23 52 F.3d at 989(concurring opinion).

24 Robert Weiss, *Markman Practice, Procedures and Tactics*, 619 PLI/Pat 117, 148 (September 2000).

25 52 F.3d at 979 *quoting Unique Concepts, Inc. v. Brown,* 939 F.2d 1558, 1561 (Fed.Cir. 1991)(other citations omitted).

26 *See Harris Corporation v. Atmel Corporation,* 14 F.Supp.2d 821, 825 (E.D.Va. 1998) *citing Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

27 *Interactive Gift Express, Inc. v. Compuserve Inc.,* 256 F.3d 1323, 1331 (Fed. Cir. 2001).

28 *Vitronics Corporation v. Conceptronic, Inc.,* 90 F.3d 1576, 1582 (Fed.Cir. 1996).

29 *Id.*

30 *Id.* at 1332 *quoting Bell & Howell Document Mgt. Prods. Co. v. Altek Sys.,* 132 F.3d 701, 706 (Fed.Cir. 1997)(other citations omitted).

31 *Markman I,* 52 F.3d at 980.

32 *Id. quoting Seymour v. Osborne,* 78 U.S. (11 Wall.) 516, 546, 20 L.Ed. 33 (1871).

33 *Id.* at 981 (citations omitted).

34 *See Vitronics Corporation v. Conceptronic, Inc*., 90 F.3d 1576, 1582-83 (Fed.Cir. 1996) (establishing that the court must look first to the intrinsic evidence, the patent claims, the specification (the written description an drawings), and the prosecution history (the record of the patent application process in the Patent and Trademark Office) before relying on extrinsic evidence, i.e. evidence other than the intrinsic evidence, such as dictionaries, treatises, expert and inventor testimony); *Pitney Bowes, Inc. v. Hewlett-Packard Co.,* 182 F.3d 1298, 1308 (Fed. Cir. 1999) (clarifying that *Vitronics* does not prohibit courts from examining extrinsic evidence, even when the patent document is clear; rather, *Vitronics* warned courts not to *rely* on extrinsic evidence to contradict the clear meaning discernible from the intrinsic evidence); *Interactive Gift Express, Inc. v. Compuserve, Inc*., 256 F.3d 1323, 1331 (Fed. Cir. 2001) (confirming the order of preference of claim construction evidence).

35 *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corporation,* 133 F.Supp.2d 833, 839 (E.D.Va. 2001).

36 *See NEC Corp. v. Hyundai Electronics Industries Co., Ltd.,* 30 F.Supp.2d 561, 568 (E.D.Va. 1998).

37 *Rambus, Inc. v. Infineon Technologies AG*, 145 F.Supp.2d 721, 723 (E.D.Va. 2001). The Court's thorough *Markman* ruling may be found at *Rambus, Inc. v. Infineon Technologies AG*2001 U.S. Dist. LEXIS 10990 (E.D.Va. March 15, 2001).

38 *Id.* at *27.

39 *NEC Corporation v. Hyundai Electronics Industries Co., Ltd.,* 30 F.Supp.2d 561, 568 (E.D.Va. 1998).

40 30 F.Supp.2d at 568.

41 *Control Resources, Inc. v. Delta Electronics, Inc.,* 133 F.Supp.2d 121, 126 n. 7 (D.Mass. 2001) *citing* Chief Judge Marilyn Hall Patel, Northern District of California, Address at the Legal and Regulatory Forum for Patenting Genomics and Proteomics at the Next Frontier (Feb. 26, 2001).

42 The United States District Court for the Northern District of California has adopted comprehensive Local Rules of Practice for Patent Cases establishing, *inter alia*, the procedure to be followed with respect to patent claim construction. These Local Rules, which took effect January 1, 2001, are a helpful resource for counsel preparing a *Markman* schedule.

43 *See, e.g. Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.,* 103 F.Supp.2d 886, 891 n. 2 (E.D.Va. 2000)(observing that the Federal Circuit has given courts discretion to set the time for claim interpretation) *citing Sofamor Danek Group, Inc. v. DePuy-Unitech, Inc.*, 74 F.3d 1216, 1221 (Fed. Cir. 1996); *Vivid Techs. Inc. v. American Science & Eng'g, Inc.,* 997 F.Supp . 93, 95 (D.Mass. 1997)(holding that claim construction prior to discovery was appropriate, reasoning that claim construction early in the management of a case may enable the parties and the court to focus discovery is a way the makes more efficient use of party and court resources as the case proceeds).

44 *See, e.g. Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.,* 103 F.Supp.2d 886 (E.D.Va. 2000)(granting summary judgment just six month after suit was filed upon a construction of the sole disputed claim term).

45 Quicker and Less Expensive Enforcement of Patents: United States Courts, n. 1. *supra* at 19.

46 *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.,* 103 F.Supp.2d at 891 n. 2.

47 *See e.g., Exxon Chem. Patents v. Lubrizol Corp*., 77 F.3d 450, 451 (Fed.Cir. 1996)Federal Circuit claim construction differed from that of the parties and the court); *J. T. Eaton & Co v. Atlantic Paste & Glue Co*., 106 F.3d 1563, 1576-77 (Fed.Cir. 1997)(Federal Circuit rejected constructions of experts, parties and court).

48 Quicker and Less Expensive Enforcement of Patents: United States Courts, n. 1. *supra* at 19. For an example of the risks of failing to obtain expert opinions based on alternative claim constructions, see *Rambus, Inc. v. Infineon Technologies AG*, 145 F.Supp.2d 721, 732 (E.D.Va. 2001) (in precluding expert testimony on an alternative claim construction submitted after the deadline for expert witness reports, the court noted, "It would seem to be an equally obvious proposition that the expert reports, therefore, needed to respond to the possibility that the claim construction opinion might reject the interpretations advanced by Rambus. Rambus chose not to acknowledge that possibility.").

49 *See, e.g. Harris Corporation v. Amtel Corporation*, 14 F.Supp.2d 821 (E.D.Va. 1998)(Ellis, J.)(claims construed in ruling on cross motions for summary judgment); *NEC Corporation v. Hyundai Electronics Industries Co., Ltd*., 30 F.Supp.2d 546 (E.D.Va. 1998)(Ellis, J.); *NEC Corporation v. Hyundai Electronics Industries Co., Ltd*., 30 F.Supp.2d 561 (E.D.Va. 1998)(Ellis, J.); *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc*., 103 F.Supp.2d 886 (E.D.Va. 2000)(Friedman, J.); *Beam Laser Systems, Inc. v. Cox Communications, Inc*., 144 F.Supp.2d 475 (E.D.Va. 2001)(Smith, J.).

50 Comments of Timothy S. Ellis, III, Seventh National Advance Forum on Litigating Patent Disputes, n. 1 *supra.*

51 145 F.Supp.2d at 723.

52 133 F.Supp.2d 833, 836 n. 2 (E.D. Va. 2001).

53 Fed. R. Civ. Pro. 26(f); *see also* United States District for the Eastern District of Virginia, Local Rules of Practice (December 1, 2000).