

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
GENERAL ORDER 13 - 0004**

The full Court met in executive session on Thursday, February 21, 2013 and approved amendments to the Local Patent Rules. The proposed amendments were published with comments due on December 3, 2012. Two Comments were received.

At its meeting on December 11, 2012, the Rules Advisory Committee on Local Rules and Procedures reviewed the proposed amendments and the comments received. The Rules Advisory Committee suggested some modifications.

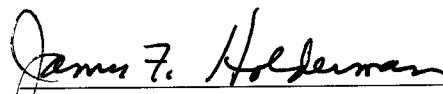
The Court's Rules Committee discussed the proposals and recommendations from the Rules Advisory Committee at the Rules Committee meeting of February 12, 2013. It recommended that the full Court adopt the proposed amendments with additional modifications.

The full Court considered the recommendation of the Rules Committee at its meeting on Thursday, February 21, 2013 and agreed to modify the Local Patent Rules. Therefore,

By direction of the full Court, which met in executive session on Thursday, February 21, 2013,

IT IS HEREBY ORDERED that the Local Patent Rules are amended as attached (additions shown thus, deletions shown ~~thus~~):

ENTER:
FOR THE COURT



Chief Judge

Dated at Chicago, Illinois this 25th day of February, 2013

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

LOCAL PATENT RULES

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

LOCAL PATENT RULES

PREAMBLE

These Local Patent Rules provide a standard structure for patent cases that will permit greater predictability and planning for the Court and the litigants. These Rules also anticipate and address many of the procedural issues that commonly arise in patent cases. The Court's intention is to eliminate the need for litigants and judges to address separately in each case procedural issues that tend to recur in the vast majority of patent cases.

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, 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.

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.

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.

1. SCOPE OF RULES

LPR 1.1 Application and Construction

These Rules ("LPR") apply to all cases filed in or transferred to this District after their effective date in which a party makes a claim of infringement, non-infringement, invalidity, or unenforceability of a utility patent. The Court may apply all or part of the LPR to any such case already pending on the effective date of the LPR. The Court may modify the obligations and deadlines of the LPR based on the circumstances of any particular case. If a party files, prior to the Claim Construction Proceedings provided for in LPR Section 5, a motion that raises claim construction issues, the Court may defer the motion until after the Claim Construction Proceedings.

LPR 1.2 Initial Scheduling Conference

In their conference pursuant to Fed. R. Civ. P. 26(f), the parties must discuss and address those matters found in the form scheduling order contained in LPR Appendix "A." A completed proposed version of the scheduling order is to be presented to the Court within seven (7) days after the Rule 26(f) conference or at such other time as the Court directs. Paragraphs 4(c), 7(c) and 7(d) of the form scheduling order shall be included, without alteration, in this proposed scheduling order.

LPR 1.3 Fact Discovery

Fact discovery shall commence upon the date for the Initial Disclosures under LPR 2.1 and shall be completed twenty-eight (28) days after the date for exchange of claim terms and phrases under LPR 4.1. Fact discovery may resume upon entry of a claim construction ruling and shall end forty-two (42) days after entry of the claim construction ruling.

Comment

The Rule states that resumption of fact discovery upon entry of a claim construction ruling "may" occur. The Rule does not provide that discovery shall automatically resume as a matter of right. It is intended that parties seeking further discovery following the claim construction ruling shall submit a motion explaining why further discovery is necessitated by the claim construction ruling.

LPR 1.4 Confidentiality

The protective order found in LPR Appendix B shall be deemed to be in effect as of the date for each party's Initial Disclosures. Any party may move the Court to modify the Appendix B protective order for good cause. The filing of such a motion does not affect the requirement for or timing of any of the disclosures required by the LPR.

LPR 1.5 Certification of Disclosures

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 (or by the party if unrepresented by counsel) and are subject to the requirements of Federal Rules of Civil Procedure 11 and 26(g).

LPR 1.6 Admissibility of Disclosures

The disclosures provided for in LPR 2.2, 2.3, 2.4, and 2.5 are inadmissible as evidence on the merits.

Comment

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.

LPR 1.7 Relationship to Federal Rules of Civil Procedure

A party may not object to mandatory disclosures under Federal Rule of Civil Procedure 26(a) or to a discovery request on the ground that it conflicts with or is premature under the LPR, except to the following categories of requests and disclosures:

- (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.

Federal Rule of Civil Procedure 26's requirements concerning supplementation of disclosure and discovery responses apply to all disclosures required under the LPR.

2. PATENT INITIAL DISCLOSURES

Comment

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

LPR 2.1 Initial Disclosures

The plaintiff and any defendant that files an answer or other response to the complaint shall exchange their initial disclosures under Federal Rule of Civil Procedure 26(a)(1) (“Initial Disclosures”) within fourteen (14) days after the defendant files its answer or other response, provided, however, if defendant asserts a counterclaim for infringement of another patent, the Initial Disclosures shall be within fourteen (14) days after the plaintiff files its answer or other response to that counterclaim. As used in this Rule, the term “document” has the same meaning as in Federal Rule of Civil Procedure 34(a):

a) ~~(a)~~ A party asserting a claim of patent infringement shall produce or make the following available for inspection and copying along with its Initial Disclosures, to the extent they are in the party’s possession, custody or control.

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(1) all documents concerning any disclosure, sale or transfer, or offer to sell or transfer, of any item embodying, practicing or resulting from the practice of the claimed invention prior to the date of application for the patent in suit. 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;

(2) all documents concerning the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the date of application for the patent in suit or a priority date otherwise identified for the patent in suit, whichever is earlier;

(3) all documents concerning communications to and from the U.S. Patent Office for each patent in suit and for each patent on which a claim for priority is based; and

(4) all documents concerning ownership of the patent rights by the party asserting patent infringement.

The producing party shall separately identify by production number which documents correspond to each category.

b) ~~(b)~~ A party opposing a claim of patent infringement shall produce or make the following available for inspection and copying, along with its Initial Disclosures:

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(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.

LPR 2.2 Initial Infringement Contentions

A party claiming patent infringement must serve on all parties “Initial Infringement Contentions” containing the following information within fourteen (14) days after the Initial Disclosure under LPR 2.1:

(a) identification each claim of each patent in suit that is allegedly infringed by the opposing party, including for each claim the applicable statutory subsection of 35 U.S.C. § 271;

(b) separately for each asserted claim, identification of each accused apparatus, product, device, process, method, act, or other instrumentality (“Accused Instrumentality”) of the opposing party of which the party claiming infringement is aware. Each Accused Instrumentality must be

identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;

(c) a chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including for each element that such party contends is governed by 35 U.S.C. § 112(6), a description of the claimed function of that element and the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;

(d) identification of whether each element of each asserted claim is claimed to be present in the Accused Instrumentality literally or under the doctrine of equivalents. For any claim under the doctrine of equivalents, the Initial Infringement Contentions must include an explanation of each function, way, and result that is equivalent and why any differences are not substantial;

(e) for each claim that is alleged to have been indirectly infringed, an identification of any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement. If alleged direct infringement is based on joint acts of multiple parties, the role of each such party in the direct infringement must be described;

(f) for any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled;

(g) identification of the basis for any allegation of willful infringement; and

(h) if a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own or its licensee’s apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted patent, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim, including whether it is marked with the patent number.

LPR 2.3 Initial Non-Infringement, Unenforceability and Invalidity Contentions

Each party opposing a claim of patent infringement or asserting invalidity or unenforceability shall serve upon all parties its “Initial Non-Infringement, Unenforceability

and Invalidity Contentions” within fourteen (14) days after service of the Initial Infringement Contentions. Such Initial Contentions shall be as follows:

(a) Non-Infringement Contentions shall contain a chart, responsive to the chart required by LPR 2.2(c), that identifies as to each identified element in each asserted claim, to the extent then known by the party opposing infringement, whether such element is present literally or under the doctrine of equivalents in each Accused Instrumentality and, if not, the reason for such denial and the relevant distinctions.

(b) Invalidity Contentions must contain the following information to the extent then known to the party asserting invalidity:

(1) (i) identification, with particularity, of each item of prior art that allegedly

anticipates each asserted claim or renders it obvious. Each prior art patent shall be identified by its number, country of origin, and date of issue. Each prior art publication must be identified by its title, date of publication, and where feasible, author and publisher. Prior art under 35 U.S.C. § 102(b) shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s);

(2) a statement of whether each item of prior art allegedly anticipates each asserted claim or renders it obvious. If a combination of items of prior art allegedly makes a claim obvious, each such combination, and the reasons to combine such items must be identified;

(3) a chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found, including for each element that such party contends is governed by 35 U.S.C. § 112(6), a description of the claimed function of that element and the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and

(4) a detailed statement of any grounds of invalidity based on indefiniteness under 35 U.S.C. § 112(2) or enablement or written description under 35 U.S.C. § 112(1).

(c) Unenforceability contentions shall identify the acts allegedly supporting and all bases for the assertion of unenforceability.

LPR 2.4 Document Production Accompanying Initial Invalidity Contentions

With the Initial Non-Infringement and Invalidity Contentions under LPR 2.3, the party opposing a claim of patent infringement shall supplement its Initial Disclosures and, in particular, must produce or make available for inspection and copying:

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(a) any additional documentation showing the operation of any aspects or elements of an Accused Instrumentality identified by the patent claimant in its LPR 2.2 chart; and

(b) a copy of any additional items of prior art identified pursuant to LPR 2.3 that does not appear in the file history of the patent(s) at issue.

LPR 2.5 Initial Response to Invalidity Contentions

Within fourteen (14) days after service of the Initial Non-Infringement and Invalidity Contentions under LPR 2.3, each party claiming patent infringement shall serve upon all parties its "Initial Response to Invalidity Contentions." The Initial Response to Invalidity Contentions shall contain a chart, responsive to the chart required by LPR 2.3(b)(3), that states as to each identified element in each asserted claim, to the extent then known, whether the party admits to the identity of elements in the prior art and, if not, the reason for such denial.

LPR 2.6 Disclosure Requirement in Patent Cases Initiated by Complaint for Declaratory Judgment

In a case initiated by a complaint for declaratory judgment in which a party files a pleading seeking a judgment that a patent is not infringed, is invalid, or is unenforceable, LPR 2.2 and 2.3 shall not apply unless a party makes a claim for patent infringement. If no claim of infringement is made, the party seeking a declaratory judgment must comply with LPR 2.3 and 2.4 within twenty-eight (28) days after the Initial Disclosures.

3. FINAL CONTENTIONS

LPR 3.1 Final Infringement, Unenforceability and Invalidity Contentions

A party claiming patent infringement must serve on all parties "Final Infringement Contentions" containing the information required by LPR 2.2 (a)-(h) within twenty-one (21) weeks after the due date for service of Initial Infringement Contentions. Each party asserting invalidity or unenforceability of a patent claim shall serve on all other parties, at the no later than the same time that the Final Infringement Contentions are ~~due~~deserved, "Final Unenforceability and Invalidity Contentions" containing the information required by LPR 2.3 (b) and (c). Final Invalidity Contentions may rely on more than twenty-five (25) prior art references only by order of the Court upon a showing of good cause and absence of unfair prejudice to opposing parties.

LPR 3.2 Final Non-infringement, Enforceability and Validity Contentions

Each party asserting non-infringement of a patent claim shall serve on all other parties "Final Non-infringement Contentions" within twenty-eight (28) days after service of the Final Infringement Contentions, containing the information called for in LPR 2.3(a). Each party asserting patent infringement shall serve, at the same time the "Final Non-Infringement Contentions" are ~~due~~deserved, Final Contentions in Response to any "Final Unenforceability and Invalidity Contentions."

LPR 3.3 Document Production Accompanying Final Invalidity Contentions

With the Final Invalidity Contentions, the party asserting invalidity of any patent claim shall produce or make available for inspection and copying: a copy or sample of all prior art identified

pursuant to LPR 3.2, to the extent not previously produced, that does not appear in the file history of the patent(s) at issue. If any such item is not in English, an English translation of the portion(s) relied upon shall be produced. The translated portion of the non-English prior art shall be sufficient to place in context the particular matter upon which the party relies.

The producing party shall separately identify by production number which documents correspond to each category.

LPR 3.4. Amendment of Final Contentions

A party may amend its Final Infringement Contentions; ~~or Final Non-infringement, Unenforceability and Invalidity Contentions; or Final Contentions in Response to any Unenforceability and Invalidity Contentions~~ only by order of the Court upon a showing of good cause and absence of unfair prejudice to opposing parties, made promptly upon discovery of the basis for the amendment. An example of a circumstance that may support a finding of good cause, absent undue prejudice to the non-moving party, includes a claim construction by the Court different from that proposed by the party seeking amendment. A motion to amend final contentions due to a claim construction ruling shall be filed, with proposed amendment(s), within fourteen (14) days of the entry of such ruling.

The duty to supplement discovery responses does not excuse the need to obtain leave of court to amend contentions.

LPR 3.5 Final Date to Seek Stay Pending Reexamination

Absent exceptional circumstances, no party may file a motion to stay the lawsuit pending reexamination in the U.S. Patent Office after the due date for service of the Final Contentions pursuant to LPR 3.2.

LPR 3.6 Discovery Concerning Opinions of Counsel

(a) ~~(a)~~ The substance of a claim of reliance on advice of counsel offered in defense to a charge of willful infringement, and other information within the scope of a waiver of the attorney-client privilege based upon disclosure of such advice, is not subject to discovery until thirty-five (35) days prior to the close of the period of fact discovery that, under LPR 1.3, follows the court's claim construction ruling.

(b) ~~(b)~~ On the day advice of counsel information becomes discoverable under LPR 3.6(a), a party claiming reliance on advice of counsel shall disclose to all other parties the following:

- (1) All written opinions of counsel upon which the party will rely;
- (2) All information provided to the attorney in connection with the advice;
- (3) All written attorney work product developed in preparing the opinion that the attorney disclosed to the client; and

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- (4) Identification of the date, sender and recipient of all written and oral communications with the attorney or law firm concerning the subject matter of the advice by counsel.

~~(c)~~ ~~(e)~~ After advice of counsel information becomes discoverable under LPR 3.6(a), a party claiming willful infringement may take the deposition of any attorneys preparing or rendering the advice relied upon and any persons who received or claims to have relied upon such advice.

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(d) (i) This Rule does not address whether materials other than those listed in LPR 3.6(b)(1-4) are subject to discovery or within the scope of any waiver of the attorney-client privilege.

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4. CLAIM CONSTRUCTION PROCEEDINGS

LPR4.1 Exchange of Proposed Claim Terms To Be Construed Along With Proposed Constructions

(a) (a) Within fourteen (14) days after service of the Final Contentions pursuant to LPR 3.2, each party shall serve a list of (i) the claim terms and phrases the party contends the Court should construe; (ii) the party's proposed constructions; (iii) identification of any claim element that the party contends is governed by 35 U.S.C. § 112(6); and (iv) the party's description of the function of that element, and the structure(s), act(s), or material(s) corresponding to that element, identified by column and line number with respect to the asserted patent(s).

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(b) (b) Within seven (7) days after the exchange of claim terms and phrases, the parties must meet and confer and agree upon no more than ten (10) terms or phrases to submit for construction by the court. No more than ten (10) terms or phrases may be presented to the Court for construction absent prior leave of court upon a showing of good cause. The assertion of multiple non-related patents shall, in an appropriate case, constitute good cause. If the parties are unable to agree upon ten terms, then five shall be allocated to all plaintiffs and five to all defendants. For each term to be presented to the Court, the parties must certify whether it is outcome-determinative.

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Comment

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.

LPR 4.2 Claim Construction Briefs

(a) Within thirty-five (35) days after the exchange of terms set forth in LPR 4.1, the parties opposing infringement shall file their Opening Claim Construction Brief, which may not exceed twenty-five (25) pages absent prior leave of court. The brief shall identify any intrinsic evidence with citation to the Joint Appendix under LPR 4.2(b) and shall separately identify any extrinsic evidence the party contends supports its proposed claim construction. If a party offers the testimony of a witness to support its claim construction, it must include with its brief a sworn declaration by the witness setting forth the substance of the witness' proposed testimony, and promptly make the witness available for deposition concerning the proposed testimony.

(b) On the date for filing the Opening Claim Construction Brief, the parties shall file a Joint Appendix containing the patent(s) in dispute and the prosecution history for each patent. The prosecution history must be paginated, and all parties must cite to the Joint Appendix when referencing the materials it contains. Any party may file a separate appendix to its claim

construction brief containing other supporting materials.

(c) Within twenty-eight (28) days after filing of the Opening Claim Construction brief, the parties claiming infringement shall file their Responsive Claim Construction Brief, which may not exceed twenty-five (25) pages absent prior leave of Court. The brief shall identify any intrinsic evidence with citation to the Joint Appendix under LPR 4.2(b) and shall separately identify any extrinsic evidence the party contends supports its proposed claim construction. If a party offers the testimony of a witness to support its claim construction, it must include with its brief a sworn declaration by the witness setting forth the substance of the witness's proposed testimony and promptly make the witness available for deposition concerning the proposed testimony, in which case the date for the filing of a Reply Claim Construction brief shall be extended by seven (7) calendar days. The brief shall also describe all objections to any extrinsic evidence identified in the Opening Claim Construction Brief.

(d) Within fourteen (14) days after filing of the Responsive Claim Construction Brief, the parties opposing infringement shall file their Reply Claim Construction Brief, which may not exceed fifteen (15) pages absent prior leave of Court. The brief shall describe all objections to any extrinsic evidence identified in the Opening Claim Construction Brief.

(e) The presence of multiple alleged infringers with different products or processes shall, in an appropriate case, constitute good cause for allowing additional pages in the Opening, Responsive, or Reply Claim Construction Briefs or for allowing separate briefing as to different alleged infringers.

(f) Within seven (7) days after filing of the Reply Claim Construction Brief, the parties shall file (1) a joint claim construction chart that sets forth each claim term and phrase addressed in the claim construction briefs; each party's proposed construction, and (2) a joint status report containing the parties' proposals for the nature and form of the claim construction hearing pursuant to LPR 4.3.

Comment

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. 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.

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.

LPR 4.3 Claim Construction Hearing

Unless the Court orders otherwise, a claim construction oral argument or hearing may be held within twenty-eight (28) days after filing of the Reply Claim Construction Brief. Either before or after the filing of claim construction briefs, the Court shall issue an order describing the schedule and procedures for a claim construction hearing. Any exhibits, including demonstrative

exhibits, to be used at a claim construction hearing must be exchanged no later than three (3) days before the hearing.

5. EXPERT WITNESSES

LPR 5.1 Disclosure of Experts and Expert Reports

Unless the Court orders otherwise,

(a) (a) for issues other than claim construction to which expert testimony shall be directed, expert witness disclosures and depositions shall be governed by this Rule;

(b) (b) within twenty-one (21) days after the claim construction ruling or the close of discovery after the claim construction ruling, whichever is later, each party shall make its initial expert witness disclosures required by Federal Rule of Civil Procedure 26 on issues for which it bears the burden of proof;

(c) (c) within thirty-five (35) days after the date for initial expert reports, each party shall make its rebuttal expert witness disclosures required by Federal Rule of Civil Procedure 26 on the issues for which the opposing party bears the burden of proof.

LPR 5.2 Depositions of Experts

Depositions of expert witnesses shall be completed within thirty-five (35) days after exchange of expert rebuttal disclosures.

LPR 5.3 Presumption Against Supplementation of Reports

Amendments or supplementation to expert reports after the deadlines provided herein are presumptively prejudicial and shall not be allowed absent prior leave of court 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.

6. DISPOSITIVE MOTIONS

LPR 6.1 Final Day for Filing Dispositive Motions

All dispositive motions shall be filed within twenty-eight (28) days after the scheduled date for the end of expert discovery.

Comment

This Rule does not preclude a party from moving for summary judgment at an earlier stage of the case if circumstances warrant. It is up to the trial judge to determine whether to consider an "early" summary judgment motion. *See also* LPR 1.1 (judge may defer a motion raising claim construction issues until after claim construction hearing is held).

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Northern District of Illinois

Local Patent Rules for Electronically Stored Information

LPR ESI 1.1 (Purpose)

These Local Patent Rules for Electronically Stored Information (“Rules”) supplement all other discovery rules and orders. The purpose of these Rules is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information (“ESI”) without Court intervention.

LPR ESI 1.2 (Cooperation)

(a) Counsel shall cooperate in all aspects of seeking and responding to discovery requests.

(b) The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses will be considered in cost-shifting determinations.

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LPR ESI 1.3 (Discovery Plan)

The standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the standard set forth in Fed. R. Civ. P. 26(b)(2)(C) in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

LPR ESI 1.4 (Privilege and Waiver)

~~(a) The receiving party shall not use ESI that the producing party asserts is attorney-client privileged or work product protected to challenge the privilege or protection.~~

(ba) Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of a privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding.

(eb) The mere production of ESI in a litigation as part of a mass production shall not itself constitute a waiver for any purpose.

~~(c) A producing party that requests the return of ESI on the ground that it is privileged or work product protected must provide the receiving party with the information~~

required by Federal Rule of Civil Procedure 26(b)(5)(A) within 7 days of the request for return.

(d) The receiving party must return, sequester, or destroy ESI that the producing party claims is privileged or work product protected as provided in Rule 26(b)(5)(B) and may use such ESI only to challenge the claim of privilege or protection.

LPR ESI 2.1 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Rules to their specific case.

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(b) If the parties have disputes regarding ESI that counsel for the parties are unable to resolve, the parties shall present those disputes to the Court at the initial status conference pursuant to Fed. R. Civ. P. Rule 16(b), or as soon as possible thereafter.

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(c) Prior to the presentation of disputes to the court, each party shall designate an individual as e-discovery liaison. The e-discovery liaison shall participate in the meet and confer held to resolve the dispute. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

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1. be prepared to participate in e-discovery dispute resolution;
2. be knowledgeable about the party's e-discovery efforts;
3. be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

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(d) The Court may modify the obligations and deadlines of these Rules based on the circumstances of any particular case. The parties shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil Procedure 16 conference. If the parties cannot resolve their disagreements regarding these modifications, the parties shall submit their competing proposals and a summary of their dispute.

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(e) If the Court determines that any counsel or party in a case has failed to cooperate and

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participate in good faith in the meet and confer process or is impeding the purpose of these Rules, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

LPR ESI 2.2 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Rules. Vague and overly broad preservation requests do not further the goals of these Rules and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

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(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

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- (1) names of the parties;
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
- (4) relevant time period; and
- (5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

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- (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

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- (2) identifies any disagreement(s) with the request to preserve; and;
- (3) identifies any further preservation issues that were not raised.

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(d) Nothing in these Rules shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

LPR ESI 2.3 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

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(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

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(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

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(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

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- (1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;
- (2) random access memory (RAM) or other ephemeral data;

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- (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
- (4) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and
- (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

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(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

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LPR ESI 2.4 (Identification of ESI)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

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(b) Topics for discussion may include, but are not limited to, any plans to:

- (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;
- (2) filter data based on file type, date ranges custodian, search terms, or other similar parameters; and
- (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

LPR ESI 2.5 (Production Format)

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

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(c) The general presumption is that meta-data is not requested and need not be produced, unless a special request is made.

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(d) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

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(e) Generally, if a party requests production in a format other than the one most convenient for the producing party, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

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LPR ESI 2.6 (Email Production Requests)

(a) General ESI production requests under Federal Rules of Civil Procedure 34 and 45 shall not include email or other forms of electronic correspondence (collectively "email"). To obtain emails parties must propound specific email production requests.

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(b) Email production requests shall be phased to occur after the parties have exchanged initial disclosures and basic documentation about the patents, the prior art, the accused instrumentalities, and the relevant finances. While this provision does not require the production of such information, the Court encourages prompt and early production of this information to promote efficient and economical streamlining of the case.

(c) Email production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms and proper timeframe.

(d) Each requesting party shall limit its email production requests to a total of five custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for up to five additional custodians per producing party, upon showing a distinct need based on the size, complexity, and issues of this specific case. Should a party serve email production requests for additional custodians beyond the limits agreed to by the parties or granted by the Court pursuant to this paragraph, the requesting party shall bear all reasonable costs caused by such additional discovery.

(e) Each requesting party shall limit its email production requests to a total of five search terms per custodian per party. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for up to five additional search terms per custodian, upon showing a distinct need based on the size, complexity, and issues of this specific case. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive combination of multiple words or phrases (e.g., "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (e.g., "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they are variants of the same word. Use of narrowing search criteria (e.g., "and," "but not," "w/x") is encouraged to limit the production and shall be considered when determining whether to shift costs for disproportionate discovery. Should a party serve email production requests with search terms beyond the limits agreed to by the parties or granted by the Court pursuant to this paragraph, the requesting party shall bear all reasonable costs caused by such additional discovery.

APPENDIX A

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF ILLINOIS

<Name(s) of plaintiff(s)>,)
)
 Plaintiff(s))
)
)
)
) Civil Action No. <Number>
<Name(s) of defendant(s)>,)
)
 Defendant(s))
)

REPORT OF THE PARTIES' PLANNING MEETING

1. The following persons participated in a Rule 26(f) conference on <Date> by <State the method of conferring>:

 <Name>, representing the <plaintiff>
 <Name>, representing the <defendant>
2. Initial Disclosures. The parties [have completed] [will complete by <Date>] the initial disclosures required by Rule 26(a)(1).
3. Disclosures and Discovery Pursuant to Local Patent Rules. The parties acknowledge that the requirements of the Local Patent Rules apply to this case.
4. Additional Discovery Plan. The parties propose the following in addition to the discovery plan and schedules addressed in the Local Patent Rules:
 - (a) <Maximum number of interrogatories by each party to another party, along with the dates the answers are due.>
 - (b) <Maximum number of requests for admission, along with the dates responses are due.>
 - (c) <Maximum number of factual depositions by each party.>
 - (d) <Limits on the length of depositions, in hours.>
 - (e) Discovery is permitted with respect to claims of willful infringement and defenses of patent invalidity or unenforceability not pleaded by a party, where the evidence needed to support these claims or defenses is in whole or in part in the hands of another party.