

The Rocket Docket

(U.S. District Court, Eastern District of Virginia)

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WHITHAM, CURTIS, CHRISTOFFERSON & COOK, P.C.

The Rocket Docket

- ◆ U.S. District Court for the Eastern District of Virginia
 - Divisions: Alexandria, Newport News, Norfolk, and Richmond
- ◆ Average time from filing of complaint to trial: 9.4 months
 - This is achieved by setting a tight discovery schedule and making the parties stick to it



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◆ Comparisons (Complaint to Trial):

- E.D. Va.: 9.4 months, No. 1 nationwide
- E.D. Tex.: 15.9 months, No. 8 nationwide
- S.D.N.Y.: 22.0 months, No. 36 nationwide
- N.D. Ill.: 27.0 months, No. 59 nationwide
- N.D. Cal.: 28.0 months, No. 63 nationwide
- Source: 2005 Federal Court Management Statistics,
<<http://www.uscourts.gov/cgi-bin/cmsd2005.pl>>



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◆ Comparisons (Trials per Judgeship):

- E.D. Va.: 25 trials, No. 25 nationwide
- E.D. Tex.: 21 trials, No. 38 nationwide
- S.D.N.Y.: 15 trials, No. 66 nationwide
- N.D. Ill.: 13 trials, No. 75 nationwide
- N.D. Cal.: 10 trials, No. 85 nationwide
- Source: 2005 Federal Court Management Statistics,
<<http://www.uscourts.gov/cgi-bin/cmsd2005.pl>>



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◆ Delay Discouraged

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



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◆ Rule 12 Motions Do Not Impose Delay

- Enlargement orders may expressly indicate that discovery will not be delayed
- Court may authorize the commencement of discovery and require answer to be filed even if there are outstanding Rule 12 Motions



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- ◆ Rule 12 Motions Do Not Impose Delay
 - First pretrial conference and discovery cutoff date are to be ordered “not later than ninety (90) days from first appearance or one hundred and twenty (120) days after service of the complaint” (Local Civil Rule 16(B))



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◆ Scheduling Order

- Alexandria Division uses standard order
- Other Divisions may not use standard order but provide only slightly more flexibility



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◆ Scheduling Order

- Alexandria Division uses standard order
 - ◆ Nondispositive motions automatically assigned to Magistrate
 - ◆ Magistrate handles Initial Pretrial Conference
 - ◆ Close of discovery may be only 5 months after return of service of summons



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◆ Scheduling Order

- Alexandria Division uses standard order
 - ◆ Final Pretrial Conference approximately 1-2 weeks after close of discovery
 - ◆ Trial date 4-8 weeks after Final Pretrial Conference



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◆ Discovery of Confidential Material

- Rule 16(b) Pretrial Order may provide for confidential discovery materials to be produced on “outside counsel only” basis
 - ◆ Allows discovery to take place even if the parties cannot reach agreement on a protective order
 - ◆ Eliminates lack of protective order as a basis for delaying discovery



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- ◆ Use of Confidential Material in Motions
 - Fourth Circuit case law requires motions to seal to be made on a document-by-document basis and in open court
 - ◆ Orders to seal may not be issued *in camera*
 - Protective orders cannot make blanket provision for filing of confidential discovery material under seal (Local Civil Rule 5)



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- ◆ Discovery Objections Due Early
 - Discovery objections must be made within 15 days, even when the discovery response is not due for 30 days
 - ◆ Otherwise, the objections are waived (Local Civil Rule 26(C))
 - ◆ Accelerates motions to compel



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◆ Streamlined Deposition Practice

- Pretrial order may:
 - ◆ Limit depositions to 5 per party
 - ◆ Eliminate the 7-hour rule on depositions
- Plaintiffs and Counterclaimants must ordinarily make deponents available within the District (Local Civil Rule 30(A))
 - ◆ May discourage some counterclaims



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◆ Motion Practice

- Brief must accompany motion
- Responsive brief due 11 calendar days after motion is filed
- Rebuttal brief due 3 business days after response is filed
- Same timetable for dispositive motions, unless otherwise ordered by the Court



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- ◆ The Eastern District has a reputation as eager to dismiss or transfer cases on grounds of jurisdiction or venue, but:
 - The Virginia long-arm statute is broad and
 - Plaintiff's choice of venue and the time to bring the case to trial are significant factors in weighing motions to transfer



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◆ Virginia Long-Arm Statute

- Only as restrictive as “minimum contacts” requires
- “Transacting business” test may be met by a single transaction (if the cause of action arises from that contact)
- Virginia law supports jurisdiction where contacts entirely by fax, phone, or email



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◆ Virginia Long-Arm Statute

■ Distinctive Provision:

◆ “Using a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth.”
(Va. Code § 8.01-328.1(B))

■ E.g., spammers and hackers working through Internet infrastructure (AOL, Verizon) located in Virginia



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- ◆ Application of 28 U.S.C. § 1404(a):
 - Plaintiff's choice of venue
 - Convenience of parties and witnesses
 - Cost of obtaining attendance of witnesses
 - Interest in deciding local controversies at home
 - Ease of access to sources of proof
 - Interests of justice (including time to bring the action to trial)



The Rocket Docket

- ◆ Application of 28 U.S.C. § 1404(a)
 - Interests of justice (including time to bring the action to trial)
 - ◆ While this may be a trump card in the Eastern District, anyone playing it would be poorly advised to ask the Court to make significant departures from the normal accelerated schedule



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◆ Venue Within the Eastern District

- “[T]he venue rules stated in 28 U.S.C. § 1391 et seq. shall be construed as if the terms ‘judicial district’ and ‘district’ were replaced with the term ‘division.’”
(Local Civil Rule 3)



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- ◆ Venue Within the Eastern District
 - Case may be transferred to another division if venue is not properly alleged
 - In the past, the Court sometimes silently reassigned patent cases from Alexandria to other divisions to balance the workload
 - ◆ Practice is said to have stopped
 - ◆ Highlights the importance of properly alleging venue within the Division



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◆ Takeaway Points

- The Eastern District puts the parties on a tight schedule and holds them to it
- Do not file a complaint without first having thought through a discovery plan
 - ◆ And who will testify
- Assume the case is going to trial, because there will not be time to put a trial case together if settlement efforts fall through



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- ◆ Prior to Filing in the Eastern District:
 - Clearly define jurisdiction and local venue
 - Have the first round of discovery drafted
 - If expert testimony is required, make sure the contours of the expert report are well established before the complaint is filed
 - The Court will be fair, but there is no patience for anything perceived as delay



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◆ Electronics-Free Zone

- Cell phones and other electronic equipment may not be brought into the courthouse unless prior arrangements are made with the Court and the Marshal's office
- Expect Eastern District courtrooms to be electronically equipped
 - ◆ Also expect the Court to disfavor the extensive use of electronics



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