Eastern District of Virginia Pretrial Procedures

There have been calls by a number of respected groups and individuals to examine litigation in the 21st century to see whether civil procedure and methods for resolving civil disputes need to be tweaked to deal with e-discovery and other advances (or declines, depending on the viewpoint).

As discussed below, The United States District Court for the Eastern District of Virginia seems to have found a way to move cases forward relatively quickly using the existing Federal Rules of Civil Procedure and its own local rules, standing orders and practices.

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The Eastern District of Virginia is functionally divided into three divisions, Alexandria, Richmond and Norfolk/Newport News.

Although each division operates somewhat differently, and each judge has a slightly different procedure, the overall pretrial procedures and the results are roughly the same.

Local Rule provisions

The Court's Local Civil Rules, applicable in all three divisions, provide that:

- "as promptly as possible after a complaint or notice of removal has been filed, the Court shall schedule an initial pretrial conference to be conducted in accordance with Fed. R. Civ. P. 16(b). In addition thereto, or in lieu thereof, not later than ninety (90) days from first appearance or one hundred and twenty (120) days after service of the complaint, the Court shall enter an order fixing the cut-off dates for the respective parties to complete the processes of discovery, the date for a final pretrial conference and, whenever practicable, the trial date, and providing for any other administrative or management matters permitted by Fed. R. Civ. P. 16 or by law generally."

- "The parties and their counsel are bound by the dates specified in the court's initial pretrial order and no extensions or continuances shall be granted in the absence of a showing of good cause. Mere failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause for an extension or continuance."

- "Before endeavoring to secure an appointment for a hearing on any motion, it shall be incumbent upon the counsel desiring such hearing to meet and confer in person or by telephone with his or her opposing counsel in a good-faith effort to narrow the area of disagreement." LCR 7(E). (This directive is

repeated in more or less the same form in LCR 37(E) dealing with discovery motions.)

- For motions, unless otherwise directed by the Court, the opposing party shall file its reply (of no more than 30 pages) within 11 days after service of the motion and the moving party may file a rebuttal (limited to 20 pages) within three days of the reply brief.

- A party is required to notice the motion for hearing on a specific date. The court will then hear the motion and promptly decide it (or decide it on the papers, also promptly).

- Any requests for an extension of time relating to motions must be in writing and, in general, will be looked upon with disfavor.

- "Motions for continuances of a trial or hearing date shall not be granted by mere agreement of counsel. No continuance will be granted other than for good cause and upon such terms as the Court may impose."

- Unless otherwise ordered by the Court, an objection to any interrogatory, request, or application under Fed. R. Civ. P. 26 through 37, shall be served within 15 days after the service of the interrogatories, request, or application. Any such objection shall not extend the time within which the objecting party must otherwise answer or respond to any discovery matter to which no specific objection has been made.

- After the Court has ruled on a discovery motion, any answer, production, designation, inspection, or examination required by the Court shall be completed within 11 days after the entry of the order on the motion, unless otherwise ordered by the Court.

- As a general rule, 11 days in advance of the contemplated taking of a deposition shall constitute reasonable notice of the taking of a deposition in the continental United States, but this will vary according to the complexity of the contemplated testimony and the urgency of taking the deposition of a party or witness at a particular time and place.

- No motion for summary judgment shall be considered unless it is filed and set for hearing or submitted on briefs within a reasonable time before the date of trial, thus permitting a reasonable time for the Court to hear arguments and consider the merits after completion of the [normal] briefing schedule specified in Local Civil Rule 7(F)(1) [for motions].

Local Civil Rule 37(F) provides that:

> Depending upon the facts of the particular case, the Court in its discretion may, upon appropriate written motion by a party, allow an extension of time in excess of the time provided by the Federal Rules of Civil Procedure, these Local Rules, or previous Court order, within which to respond to or complete discovery or to reply to discovery motions. Any agreement between counsel relating to any extension of time is of no force or effect; only the Court, after appropriate motion directed thereto, may grant leave for any extension of time. Unless otherwise specifically provided, such extension will be upon the specific condition that, regardless of what may be divulged by such discovery, it will not in any manner alter the schedule of dates and procedure previously adopted by the Court in the particular case.

Alexandria Division procedures

In Alexandria, the court clerk's office will routinely send out a standard form of pretrial order shortly after a case is filed. For example, in *Netscape Communications Corp. v. Valueclick, Inc.,* Civil Action No. 1:09-cv-00225-TSE-TRJ, the complaint was filed on February 27, 2009. It was assigned to Judge Ellis.

On April 16, 2009 the clerk sent out a standard-form initial Pretrial Order that did the following:

- It set an initial pretrial conference before a Magistrate Judge for May 13, 2009, at which the parties were to arrange for Rule 26(a)(1) disclosures and develop a discovery plan that would complete discovery by July 10, 2009.

- It ordered any party required to file an answer to do so "within twenty (20) days or as otherwise ordered or required under the federal and local Rules."

- It provided that "Discovery may begin upon receipt of this order."

- It specified that "A party may not exceed five (5) non-party, non-expert witness depositions."

- It set a final pretrial conference for July 16, 2009, at which the parties were required to file their Rule 26(a)(3) disclosures, lists of witnesses and exhibits and a written stipulation of uncontested facts.

- It also directed that "The trial of this case will be set for a day certain within 4-8 weeks of the final pretrial conference."

The result is that, in a typical case:

- The initial pretrial conference will be held roughly six top eight weeks after the case is filed.

- A final pretrial conference will be held roughly two months later.

- Summary judgment motions must be filed sufficiently before the trial date for the court to consider them.

- Trial will be held four to eight weeks later.

The bottom line is that, from start (when the complaint is filed) to finish (when trial begins), the case will be set for trial 18 to 22 weeks (roughly five to six months) after the case is filed.

Richmond and Norfolk/Newport News Division procedures

In Richmond and Norfolk/Newport News, each judge has his or her own particular form of initial pretrial order.

W.A.K. II v. Wachovia Bank N.A., Civil Action No. 3:09CV575-HEH, is typical. The case was removed to federal court on September 14, 2009 and assigned to Judge Hudson.

On October 2, 2009, the clerk's office sent out a standard form "Order Setting Pretrial Conference."

- It set a five-minute initial pretrial conference for November 5, 2009, at which the parties were directed to report orally on the discovery plan required by Rule 26(f).

- It stated that "The Court will set a trial date which will be within ninety (90) to one hundred twenty (120) days after the pretrial conference except for complex litigation or in other unusual circumstances."

- And "Counsel attending shall be prepared to provide available dates for trial and motions for all counsel of record. In any event, counsel shall be knowledgeable of the facts and legal issues in the action and shall be prepared to set a firm trial date."

Contemporaneously with the "Order Setting Pretrial Conference" Judge Hudson also issued a "Scheduling Order" that provided:

> 1. Any party which has not filed an Answer to the Complaint shall do so within eleven (11) days after entry of this Scheduling Order. Filing of an

Answer shall not waive any previously filed motions or properly presented objections to jurisdiction or service of process.

2. Within fifteen (15) days after entry of this Order, motions for joinder of additional parties or amendment of pleadings shall be filed. Any such motions filed thereafter will be entertained only upon a showing of good cause.

3. A settlement conference referral will be made at the time of the Initial Pretrial Conference. Counsel for each party, and a representative of each party with authority to conclude a settlement of this action, shall meet in person with the undersigned district judge or, if directed, with another district or magistrate judge to discuss settlement. The representative for a business entity (corporation, partnership or otherwise) must be an officer or employee not employed in the business entity's law department or general counsel's office, although such lawyers are welcome to attend with the other representative. Each counsel shall be prepared to present a cogent, brief summary of the issues of liability and damages. Counsel for each party shall be responsible to assure that the settlement conference is conducted as herein prescribed.

Attached to the "Scheduling Order" was a "Pretrial Schedule A" that provided that

Because they govern events incident to trial and the control of the Court's docket, the Scheduling Orders and Pretrial Orders issued by the Court and this Schedule A shall control over any perceived conflicting Local Rule or Federal Rule of Civil Procedure, unless the party perceiving a conflict shall raise it by motion, brief it in the manner required by the Local Rules and demonstrate therein why the perceived conflicting provision of a Pretrial Order, a Scheduling Order or Schedule A should not control.

Counsel are expected to resolve discovery disputes without filing pleadings or involving the Court. In the unusual event that resolution of a discovery dispute requires the filing of motions, they shall be filed, briefed and heard in sufficient time to allow completion of the requested discovery by the discovery cut-off date, taking into account the time allowed for responses and replies under the Federal Rules of Civil Procedure, the Local Rules, or any other Order of the Court. Any discovery-related issues not raised within five (5) calendar days before the discovery cutoff will be deemed waived.

All motions for summary judgment shall be filed at the earliest possible date consistent with the requirements of the Federal Rules of Civil Procedure, but such motions shall be filed no later than fifty (50) calendar days before the scheduled trial date. Unless otherwise ordered by the Court, the parties may file only one (1) summary judgment motion, consolidating all issues,

consistent with Local Rule 7(F)(3). A hearing, if desired, shall be scheduled to take place no later than fifteen (15) calendar days before trial.

Unless otherwise ordered by the Court, the claim of privilege or protection shall be waived unless the inventory and description [*i.e.,* a privilege log] are served with the objections to the request for production in the time required by the Local Rules.

All fact discovery, including all supplementation, shall be concluded no later than fifty-five (55) calendar days before trial.

Pretrial Schedule A also set forth a detailed list of dates for events leading up to trial.

The result is that, in a typical case:

- The initial pretrial conference will be held six weeks after the case is filed.
- Trial will be set three to four months after the initial pretrial conference.

From start (when the complaint is filed) to finish (when trial begins), the case will be set for trial 18 to 22 weeks (roughly five to six months) after the case is filed.

The E.D. Va. permits the parties to ask for additional time if necessary

The May 6, 2009 "Joint Proposed Discovery Plan" in the *Netscape Communications Corp. v. Valueclick, Inc.,* case is fairly typical for a complex patent case. It reflects cooperation among counsel and an understanding of what kind of timetable the court expects the parties to follow.

On July 13, 2009, the court reset the final pretrial conference date to September 17, 2009.

On July 31, 2009, the court entered the following order:

ORDERED that the parties are to proceed in accordance with the following schedule:

1. the claim construction hearing, which is currently scheduled for 10AM 8/7/09 is RESCHEDULED for 2PM 9/25/09;

2. the final pretrial conference, which is currently scheduled for 11AM 9/17/09 is RESCHEDULED for 2PM 9/25/09;

3. the parties are DIRECTED, in the event summary judgment motions are filed to notice any such motions for a hearing at 2PM 9/25/09;

This Order does not affect or amend any other dates or deadlines previously set in this case.

On September 4, 2009, the defendants moved for summary judgment, noticing the hearing for September 25, 2009.

On October 1, 2009, the court entered an order setting a claim construction hearing for October 16, 2009.

A review of the docket sheet shows that the parties and the court moved the case forward.

The E.D. Va.'s procedures comport with the 2009 Civil Caseflow Management Guidelines of the Institute for the Advancement of the American Legal System

The Institute for the Advancement of the American Legal System and the American College of Trial Lawyers prepared a Final Report on Civil Litigation (Mar. 11, 2009).

In conjunction with that report the IAALS prepared a set of Civil Caseflow Management Guidelines:

1. Caseflow management should be tailored to the specific circumstances of the case and the parties.
2. Judges should manage civil cases so as to ensure that the overall volume and type of discovery and pretrial events are proportionate and appropriate to the specific circumstances of the case.
3. Judicial involvement in the management of litigation should begin at an early stage of the litigation and should be ongoing.
4. A single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.
5. Judges should be consistent in the application and enforcement of procedural rules and pretrial procedures, particularly within the same types of cases, and within the same courts.
6. Unless requested sooner by any party, the court should set an initial pretrial conference as soon as practicable after appearance of all parties.
7. Additional pretrial conferences should be held on request by one or more parties or on the court's own initiative.
8. In the initial pretrial order, or at the earliest practicable time thereafter, the court should set a trial date, and this date should not be changed absent extraordinary circumstances.

9. Judges should play an active role in supervising the discovery process and should work to assure that the discovery costs are proportional to the dispute.
10. Judges should rule promptly on all motions.
11. When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation or other form of alternative dispute resolution at the appropriate time, unless all parties agree otherwise.

As outlined above, the ED Va's procedures track each of these case management guidelines, with one exception: in the Alexandria Division and in some of the other judges' cases, the court will set the date for a final pretrial conference, rather than trial itself, with the trial to take place within four to eight weeks (or some similarly short period of time) after the final pretrial conference.

The E.D. Va.'s procedures also comport with the ABA Section of Litigation 2009 survey of its members.

In the fall of 2009, the ABA Section of Litigation conducted a survey of its members, 3,300 of whom responded. Although plaintiffs' and defendants' lawyers did not always agree, there seems to be a consensus that:

- Early case management by judges helps to narrow the issues and limit discovery.

- When lawyers are collaborative and cooperative the case costs less for clients.

- Lawyers and judges could more often avail themselves of existing means to set limits on discovery that is unduly burdensome or costly.

- Initial disclosure and discovery, particularly e-discovery, is often disproportional to the benefits obtained from it.

- Over 65 percent of plaintiffs' lawyers and 87 percent of defense and mixed practice lawyers believe litigation is too expensive.

- Shortening the time to final disposition reduces costs.

- All groups cited the time required to complete discovery as the biggest cause of delay.

The E.D. Va. tracks the ABA Standards for Final Pretrial Submissions and Orders (August 2008)

The E.D. Va.'s procedures also track those in the ABA Standards for Final Pretrial Submissions and Orders (August 2008):

1. (a) As soon as practicable after the complaint is filed, the court will set a date for an initial conference at which it will enter an order setting the dates for milestones in the case. The order may (i) include the dates for motions to dismiss, the close of fact and expert discovery, motions for summary judgment (subject to Standard 2), final pretrial submissions and the final pretrial conference and/or (ii) set the dates for certain of these events followed by further conferences.

   (b) If the court does not hold an initial conference, the court will set these dates by order as soon as practicable after the complaint is filed.

   (c) Where discovery is stayed pending resolution of motions to dismiss, the court will not set subsequent dates until the motions are decided.

2. The parties' final pretrial submissions will not be due until a reasonable time after the court has ruled on all pending summary judgment motions.

3. Trial should be held reasonably soon but normally no more than four to six weeks after the final pretrial conference (in some courts referred to as the "docket call").

4. Counsel who will try the case will confer sufficiently in advance of the final pretrial conference to be able to prepare their final pretrial conference submissions.

   (a) In their conference(s), counsel will exchange:

   (i) a list and copies of the exhibits to be used at trial;
   (ii) objections to the other side's exhibits;
   (iii) a list of witnesses they genuinely expect to call (either in person or through deposition testimony), including a short description and estimate of the length of each witness' testimony;
   (iv) (1) designations of any deposition testimony they anticipate offering as part of their respective cases in chief, (2) counter-designations of deposition testimony and (3) objections to an opponent's designated testimony;
   (v) a brief description of any anticipated *in limine* motions (*e.g.,* to strike proposed experts under *Daubert* or similar state law standards); and

(vi) the parties' disclosures, admissions, interrogatory answers or other written discovery responses they intend to offer into evidence.

(b) Counsel should also try to agree on (i) proposed stipulations of uncontested facts and (ii) the anticipated length of the trial.

5. At a date at least five days before the final pretrial conference, to be agreed or set by the court, the parties will file with the court their:

(a) list of witnesses they genuinely expect to call (either in person or through deposition testimony) in their respective cases in chief, including a short description and estimate of the length of each witness's testimony;

(b) designations of all deposition testimony they anticipate offering as part of their respective cases in chief, (ii) counter-designations of deposition testimony and (iii) objections to an opponent's designated testimony, with objections not made being waived;

(c) list of all proposed exhibits in their respective cases in chief;

(d) written objections to proposed exhibits, with any objections not made being deemed waived and any exhibits not objected to being deemed admissible at trial;

(e) anticipated *in limine* motions that have not already been filed or required by previous court order to be filed at a set time (including motions addressed to experts under Daubert or similar state law standards);

(f) admissions, interrogatory answers or other written discovery responses they intend to offer into evidence, together with any objections to these materials;

(g) stipulations of uncontested facts; and

(h) brief statements of the parties' respective claims and defenses and the relief sought, including (i) each element of damages and, other than for intangible damages (e.g., pain and suffering, mental anguish or loss of consortium), the monetary amount, including prejudgment interest, punitive damages and attorneys' fees, and (ii) other requested relief.

6. At a date at least two days before the final pretrial conference to be agreed or set by the court, the parties will submit any additional

objections or points pertinent to the court's consideration of the submissions listed in Standard 5 above.

7. (a) The court will enter an order reciting the actions taken at the final pretrial conference, including (i) any tentative or final rulings based on the parties' submissions, (ii) date(s) for submitting any additional matters, including *in limine* motions and (iii) a date and time to begin trial and its anticipated length and daily schedule (*e.g.,* from 9:00 a.m. to noon and 1:30 to 5:00 p.m., with one 20 minute break in the morning and afternoon).

   (b) The court's order also should provide that:

      (i) only witnesses or exhibits listed will be permitted at trial, except for impeachment or rebuttal;

      (ii) any objection to an exhibit not made will be deemed waived, any exhibit not objected to will be deemed admissible at trial and any party may introduce into evidence or otherwise use any other party's exhibits;

      (iii) no person may testify whose identity, being subject to disclosure or timely requested in discovery, was not disclosed in time to be deposed;

      (iv) any facts stipulated to by the parties will be deemed established; and

      (v) the parties will identify to the opposing parties the witnesses they expect to testify on a given day no later than one hour after the conclusion of trial on the day before that testimony.

   (c) If the court sets time limits on the parties' trial presentations, the order will also set those limits and provide how they are to be determined.

8. Any party wishing to use a demonstrative exhibit (*e.g.,* a chart based on other evidence or exhibits in the case) will provide it to the opposing party or parties at least 48 hours in advance of offering or using it in evidence.

9. At a date reasonably close to but no less than seven days before trial, to be set by the court based on the complexity of the case, the parties will submit their preliminary proposed *voir dire* questions, jury instructions and verdict forms, along with a short proposed description of the case and the parties' respective claims. If the parties cannot agree on the

proposed jury instructions, they will submit separate jury instructions with supporting legal authority on any disputed issues.

How the E.D. Va. compares to other Districts

The U.S. Courts' Federal Court Management Statistics and Federal Judicial Caseload Statistics for the 12 Month Period Ending September 30, 2008 show the following median intervals for the E.D. Va. as compared to other major federal district courts[1]:

	EDVa	SDNY	SDTex	NDIll	CDCal
From Civil Case Filing to Trial:	9.8 mos	28 mos	18.8 mos	27.5 mos	22 mos
For Civil Nonjury Trials:	8 mos	28.5 mos	21 mos	30 mos	20 mos
For Civil Jury Trials:	11 mos	28 mos	18.9 mos	26 mos	23 mos
From Civil Case Filing to Disposition:	4.8 mos	8.4 mos	6.2 mos	6.2 mos	7 mos

The E.D. Va. also tries roughly the same number of cases as other courts. For the same period:

Number of trials total:	513	338	697	269	306
Civil trials:	63	175	141	136	162
Criminal trials:	450	163	556	133	144

As the 1991 Report of the Civil Justice Reform Act Advisory Committee for the Eastern District of Virginia (Sept. 19, 1991) pointed out, the E.D. Va. judges' commitment to fair and efficient case management and the bar's cooperation are the principal reasons for that court's consistent status as the most efficient and effectively-managed district court in the nation.

> The Reporter to the E.D. Va.'s CJRA Advisory Committee has noted that
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> . . . the court has significantly shorter disposition rates for civil cases than the national average. These shorter disposition rates include a shorter median time from filing to disposition, a shorter median time from issue to trial, and a shorter indexed average lifespan, than the national average. Judges in the Eastern District of Virginia try significantly more cases than the national per judgeship average. Civil cases filed in the Eastern District of Virginia are usually set for trial no longer than six months after the filing date, and most cases are tried approximately four to five months after filing.

Kim Dayton, Case Management in the Eastern District of Virginia, 26 U.S.F. L. Rev. 445, 488 (1992).

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[1] 2008 Annual Report of the Director, Judicial Business of the United States Courts, Table C-5 (U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2008).

Almost 20 years later, the E.D. Va. remains by a fair margin one of the most efficient and effectively-managed federal district courts in the nation. Everyone who practices in that court – on both sides of the "v.", including government lawyers as well as civil practitioners – likes the system.

Motions are heard and decided promptly. Discovery proceeds efficiently. Extensions of time are honored only if approved by the court and are sparingly given. Perhaps the most important factor, however, is that the court sets firm deadlines for completing discovery, having the final pretrial conference and then setting a trial date shortly thereafter. Every lawyer who practices in the E.D. Va. is aware of these procedures and knows that if she takes a case there she will have to abide by them.

As a practitioner in the court noted,

> With your trial date rapidly approaching and various deadlines whirling by, you will not be afforded the luxury of procrastinating or pursuing marginally relevant theories of the case. The Rocket Docket places a heavy premium on developing and executing a purposeful discovery plan. It is not unusual in complex cases, for example, for counsel to double- or triple-track depositions in various parts of the country while some team members are working simultaneously on written discovery and others are working on dispositive motions. Also, bear in mind that motions to expand the number of interrogatories will be granted sparingly, and you can expect only a modest increase in the number of permitted depositions.

Stephen E. Baril, *A Winning Motions Practice in the Rocket Docket*, ABA Section of Litigation, Committee on Commercial & Business Litigation newsletter, Vol. 10, No. 4 (Summer 2009).

There also seems to be a consensus that lawyers who practice in the court generally have less acrimony and contentiousness among themselves than in other courts.

What this means for resolving disputes

It tends to be axiomatic that most cases settle closer to trial than to the filing of the complaint. Where you have a court that expedites the trial date (or final pretrial conference date, followed shortly by trial), the case is going to be resolved, either by settlement, motion or trial, sooner rather than later.

This produces a result that is "just, speedy, and inexpensive" – because parties and their lawyers will resolve the case in the E.D. Va. on average within six months from the time the case is filed.

Assuming that the adage “time is money” is true, this saves the parties considerable amounts of both.

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March 2010