

## The Tundra Docket: Western District Of Wisconsin

*Wednesday, Mar 12, 2008* --- Word is getting around. Patent owners are beginning to realize that the frozen tundra of Wisconsin is home to the fastest federal court in the country.

While federal courts in the Eastern District of Texas and the Eastern District of Virginia have obtained the patent litigation equivalent of rock star status in recent years, the U.S. District Court for the Western District of Wisconsin has quietly built a record as among the nation's most efficient and patent-friendly venues.

Patent owners are taking notice. As IP Law360 recently reported, in 2007 the Western District of Wisconsin for the first time ranked among the 25 most popular courts for patent litigation, beating the Eastern District of Virginia in the number of patent cases filed.

The court's speed is one of its biggest draws. The latest Federal Court Management Statistics published by the Administrative Office of the U.S. Courts show that, in 2007, the Western District of Wisconsin was the country's fastest district court in terms of the length of time from case filing to final disposition, and ranked 2nd for length of time from filing to trial. The median time to disposition was just 4.4 months, and the median time to trial was 10.4 months.

By comparison, the Eastern District of Texas ranked 42nd and 14th nationally for time to final disposition and time to trial, with median times of 9 months and 18 months, respectively. The Eastern District of Virginia held its own, ranking 2nd and 1st nationally for time to disposition and trial, with median times of 4.8 months and 9 months.

The speed of the Wisconsin court's docket has created some interesting tactical opportunities for litigants. In February 2007, a client of one of the authors was sued by a competitor for patent infringement in the Eastern District of Texas.

After efforts to resolve the dispute failed, the client commenced its own infringement action in the Western District of Wisconsin against the competitor in August.

Even though the Wisconsin case was filed six months later than the Texas case, it was set for trial ten months earlier, with a Markman hearing scheduled eight months earlier.

This relative speed of dockets had a significant effect on the dynamics of the

two cases, and likely contributed to their subsequent favorable resolution.

The Wisconsin court's "rocket docket" status is nothing new. For the past ten years, the court has consistently ranked between the first and fourth-fastest courts in the country in time to trial.

In all but one of the last ten years it has been among the top five district courts in time to disposition.

And no case lingers in the Western District of Wisconsin. The court ranks 1st in the nation in the percentage of cases over three years old – it has none. The Eastern District of Texas and the Eastern District of Virginia rank 9th and 2nd, respectively. The Wisconsin court has ranked 1st in this category every year since 1999.

Even more significant for patent owners, recent studies by PricewaterhouseCoopers have found that the Western District of Wisconsin has among the highest overall success rates for patent litigation plaintiffs.

In its "2007 Patent and Trademark Damages Study," Pricewaterhouse ranked the court 1st in the nation in terms of average plaintiff win rates both at trial and on summary judgment.

In Pricewaterhouse's newly-released 2008 study, the court continues to rank 1st for plaintiffs' success on summary judgment, but slipped slightly to 5th place in terms of overall plaintiff success rate.

According to Pricewaterhouse, plaintiffs in the Western District of Wisconsin were successful on summary judgment 36.4% of the time, compared to just 18.9% nationally, and were successful at trial 66.7% of the time, compared to 57% nationally.

The Western District of Wisconsin has other virtues making it a favorable venue for patent litigation. The jury pool in the district is relatively well-educated. More than 45% of Dane County's (the county in which Madison is located) adults over age 25 have at least a bachelor's degree or higher, and more than 50% of the population is employed in white-collar professions.

The court is based in Madison, Wis., home to the University of Wisconsin and the Wisconsin Alumni Research Foundation (owner of the famous stem-cell patents). The UW is one of the largest research universities in the United States, ranking 3rd in the nation in total research expenditures. Its large and well-respected science and engineering departments make the university a good source for expert witnesses.

To the outsider, procedures in the Western District of Wisconsin may seem mysterious at first, because the court has almost no local rules. However, the court has only two judges and one magistrate judge, and their practices are well-established. All of the judges are well-versed in patent law, having

handled scores of patent infringement actions during their tenures.

Judge Barbara B. Crabb was appointed to the court by President Carter in 1979. Prior to her appointment she served as the court's Magistrate Judge after starting her career in private practice.

Judge John C. Shabaz was appointed by President Reagan in 1981. Prior to his appointment he was the Republican minority leader of the Wisconsin Assembly, while also maintaining a private law practice. Judge Shabaz recently announced that he will take senior status when his successor is confirmed. His successor has not been nominated.

Magistrate Judge Stephen L. Crocker was appointed in 1992, after spending several years as an Assistant United States Attorney and in private practice. Magistrate Crocker handles a significant portion of the scheduling matters and non-dispositive motion practice for Judge Crabb.

The cardinal rule for all of the judges is that the trains run on time, and they run quickly. All of the judges hold scheduling conferences as soon as possible after a case has been filed. Judge Shabaz often schedules status conferences before a defendant has appeared.

Neither judge tolerates delays in serving defendants. Although Fed. R. Civ. P. 4 gives a plaintiff 120 days to serve the complaint, both judges are likely to set a hearing to show cause why the case should not be dismissed for lack of prosecution if the complaint is not served in 60 days.

The Western District of Wisconsin is not the court to choose if you want to file a complaint but delay service to gain leverage in negotiations.

Both judges typically issue case management orders within 60 days of filing. Their orders set forth firm dates for dispositive motions, discovery cutoffs and, most importantly, trial. Trial dates are rarely changed, regardless of the circumstance.

Because of the expedited trial schedule, the court places a premium on the parties' addressing their discovery demands and responses in a prompt and reasonable manner. Discovery disputes are resolved very quickly, typically by phone, and the court will not hesitate to sanction a party or counsel whom it believes is acting unreasonably in propounding or responding to discovery.

The judges' practices differ significantly regarding claim construction. Judge Shabaz rarely holds Markman hearings, and typically addresses claim construction issues as part of dispositive motion briefing.

Judge Crabb, by contrast, typically sets early deadlines for claim construction briefing and conducts a Markman hearing, with each side usually given no more than 90 minutes to present all evidence and argument. Recently, in an apparent effort to force parties to make their cases more manageable, Judge Crabb's case management orders for patent suits have included a statement

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that she will construe no more than 16 claim terms for all parties, regardless of the number of patents or claims at issue.

Both judges attempt to set summary judgment deadlines that are early enough to permit decisions well in advance of trial; something litigants must be prepared for, given the short time to trial.

Parties must begin planning for summary judgment at the outset of the case, and schedule their discovery accordingly. Briefing deadlines for summary judgment are rarely extended, even if all parties stipulate to the change.

And the briefing schedules are tight: 20 days and 21 days to file responses, for Judge Shabaz and Judge Crabb, respectively; and just 10 days for replies. Both judges have standing procedures setting forth their individual requirements governing motions for summary judgment.

The judges' trial procedures are equally efficient and geared to expedite proceedings. Both judges attempt to speed the introduction of evidence at trial by pre-marking all exhibits and addressing admissibility issues prior to trial to the extent possible.

In a fairly unique, but generally well-received practice, Judge Shabaz prohibits the reading of deposition transcripts for purposes other than impeachment, instead requiring parties to submit in advance of trial concise, written summaries of all deposition testimony that parties may attempt to read into evidence.

Both judges bifurcate all patent infringement trials into separate liability and damages phases, thus eliminating the need for unnecessary damages proof where appropriate. Allegations of inequitable conduct are typically tried to the court while the jury is deliberating on liability issues.

Trial days for both judges are typically long and intensive. If liability is found, the damages trial begins immediately before the same jury. Even the most complex trials rarely last more than two weeks.

The judges part ways dramatically when it comes to the use of technology in the courtroom. Judge Shabaz makes no apologies for preferring a "low tech" courtroom, and generally does not allow the use of video depositions, PowerPoint presentations, or other electronic visual aids, although he has never categorically ruled out their use if genuinely warranted.

Judge Crabb, by contrast, was an early enthusiast of using computers and other high-tech equipment in the courtroom. Trial counsel will find her courtroom to be among the easiest they've encountered when it comes to accommodating electronic trial aids.

Regardless of which judge a party draws, they will find litigating in the Western District of Wisconsin to be a lesson in quick and efficient case management. The court's speedy docket can present significant tactical and

financial advantages to parties bringing patent infringement suits, making it an attractive venue, as long as you are well-prepared for the ride.

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