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Commentary on Patent Litigation Best Practices: Summary Judgment Chapter

A Project of The Sedona Conference
Working Group on
Patent Litigation Best Practices (WG10)

Public Comment Version

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The Sedona Conference Commentary on Patent Litigation Best Practices: Summary Judgment Chapter

A Project of The Sedona Conference Working Group on Patent Litigation Best Practices (WG10)

August 2014 Public Comment Version

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Preface

Welcome to the Public Comment Version of The Sedona Conference Commentary on Patent Litigation Best Practices: Summary Judgment Chapter, a project of The Sedona Conference Working Group on Patent Litigation Best Practices (WG10). This is one of a series of working group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others, at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together—in conferences and mini-think tanks called Working Groups—and engage in true dialogue, not debate, in an effort to move the law forward in a reasoned and just way.

WG10 was formed in late 2012 under the leadership of its now Chair Emeriti, the Honorable Paul R. Michel and Robert G. Sterne, to whom The Sedona Conference and the entire patent litigation community owe a great debt of gratitude. The mission of WG10 is "to develop best practices and recommendations for patent litigation case management in the post-[America Invents Act] environment." The Working Group consists of over 200 active members representing all stakeholders in patent litigation. To develop this Summary Judgment Chapter, the core drafting team held numerous conference calls over the past year, and the draft was a focus of dialogue at The Sedona Conference WG10 Annual Meeting in Washington, D.C. in September 2013 and the WG10 Midyear Meeting in San Francisco in April 2014.

The Summary Judgment chapter represents the collective efforts of many individual contributors. On behalf of The Sedona Conference, I thank in particular Gary Hoffman who has graciously and tirelessly served as the Editor-in-Chief for this and all Chapters for this Commentary on Patent Litigation Best Practices, and as the Chair of WG10. I also thank everyone else involved for their time and attention during the drafting and editing process, including: Henry B. Gutman, R. Eric Hutz, Richard D. Kirk, Douglas E. Lumish, W. Joss Nichols, Stephanie E. O'Byrne, and Steven R. Trybus. The Working Group was also privileged to have the benefit of candid comments by several judges with extensive patent litigation experience, including the Honorable Kent A. Jordan and the Honorable Kathleen M. O'Malley, who served as the Judicial Review Panel for this Chapter, the Honorable Barbara M.G. Lynn and the Honorable Ronald M. Whyte, who also reviewed and commented on the draft, and the Honorable Joy Flowers Conti and the Honorable Faith S. Hochberg, who are serving as the WG10 Judicial Advisors for this ongoing endeavor to draft all of the chapters of this Commentary. The statements in this Commentary are solely those of the non-judicial members of the Working Group; they do not represent any judicial endorsement of the recommended practices.

Working Group Series output is first published in draft form and widely distributed for review, critique, and comment, including in-depth analysis at Sedona-sponsored conferences. Following this period of peer review, the draft publication is reviewed and revised by the Working Group taking into consideration what is learned during the public comment period. Please send comments to info@sedonaconference.org, or fax them to 602-258-2499. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be.

Craig W. Weinlein
Executive Director
The Sedona Conference
August 2014

Foreword

Motions for summary judgment or partial summary judgment can be useful case management tools in patent litigation. Summary judgment motions can be helpful in eliminating or narrowing issues for trial where the truly relevant material facts are not in dispute. However, that utility is often lost due to the volume and the poor quality of some summary judgment motions filed today. For example, there have been a large number of cases where parties have filed numerous motions with declarations by experts (so as to create a battle of experts on both sides); these motions are often completely inappropriate to the purpose or spirit of summary judgment motions. Parties at times have also indicated that they filed the motions to "educate" the judge or as a discovery tool to "better understand" the opposing side's positions. Such motions are a significant burden on the courts and opposing counsel and result in a frustration and natural skepticism toward meritorious summary judgment motions.

Working Group 10 (WG10) has included this chapter on summary judgment, as part of its Commentary on Patent Litigation Best Practices, to help address this problem. Some motions for summary judgment or partial summary judgment conserve resources by eliminating unsupported claims and disposing of or streamlining the case before trial. Other summary judgment motions drain resources better spent on preparing cases for trial. The following best practices and associated commentary call for a fundamental rethink in patent litigation on the proper role for summary judgment motions by encouraging courts to take a greater gatekeeping role at an earlier stage of a case, and prevailing upon all counsel to give more consideration to merits and timing before filing any summary judgment motion.

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Summary Judgment Best Practices "At a Glance"

I. Summary Judgment as a Case Management Tool

Summary judgment motions are expressly provided for in the Federal Rules of Civil Procedure: "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1]

The commentary accompanying various revisions to Rule 56 provides additional guidance regarding the proper role of summary judgment. For example, the 1937 commentary accompanying Rule 56's adoption explained that the procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. Similarly, the 1963 commentary to the revisions to subsection (e) noted that the "very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." In 2007, the "shall" language was replaced with "should"; but "shall" was restored in 2010. The accompanying commentary specifically noted that "shall" was restored to make clear that granting summary judgment when there is no *genuine* dispute as to any *material* fact is required; it is not a matter left to the district court's discretion.

The Supreme Court has recognized that the plain language of Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[2]

A. The Role of Court and Counsel as Gatekeepers

Under Rule 56, summary judgment motions can be an effective case management tool providing a mechanism to eliminate the need for trial of weak or unsupported claims or defenses. This, in turn, allows the courts and counsel to avoid the waste of public and private resources. However, the potential benefits of motions for summary judgment or partial summary judgment may be lost due to a fundamental tension between the expectations and understandings of the courts and counsel regarding the proper role of summary judgment motions in patent litigation. Counsel are sometimes thought to file too many questionable and/or premature summary judgment motions, perhaps for purposes outside of those contemplated by Rule 56. Such ill-considered motions waste, rather than save, public and private resources, occupy valuable court time, delay preparation of the case for trial, and add to the litigation costs of the parties.

The complexity associated with most patent litigation, and the varying caseloads existing in different districts, contribute to the difficulty of developing universal best practices on this subject. When managed properly, however, motions for summary judgment or partial summary judgment can and should be a valuable tool for reaching the merits of certain claims and defenses in a prompt and efficient manner, and disposing of, or at least narrowing, cases without unnecessary and costly trials.

The following Best Practices are intended to assist the courts and counsel in identifying suitable procedures to ensure, to the extent possible, that meritorious motions with a reasonable chance of success are filed at the appropriate stage of the case, and that meritless motions are not filed, or at least any time wasted on such motions is minimized. They are also intended to assist in ensuring that, when summary judgment motions

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1 Fed. R. Civ. P. 56(a) (emphasis added).

2 *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

are filed, the supporting papers focus on the key issue(s) without burdening the court with unnecessary or irrelevant arguments and evidence. These Best Practices recognize that no single approach will be applicable in all cases, and that flexibility is needed to address the unique circumstances of each case and any limitations with respect to the court's resources, while recognizing the important purpose of Rule 56. Finally, these Best Practices recognize the responsibility of counsel to help ensure that the underlying purpose of Rule 56 is met without unduly burdening the courts or opposing parties.

Best Practice 1 – Counsel should exercise sound judgment in determining whether and when to file motions for summary judgment or partial summary judgment, and file motions only when counsel truly believes it can demonstrate that there are no genuine material facts in dispute and only to eliminate trial or to narrow significantly the scope of issues for trial.

This Best Practice is self-explanatory. Counsel is responsible for starting the summary judgment process by filing a motion, along with its supporting papers and exhibits, demonstrating that there are no genuine and material facts in dispute. Counsel should always be mindful when doing so of the underlying purpose of Rule 56 and the burden on the court to review and rule on the motion. A summary judgment motion is not intended to "educate" the judge about the case, to be a discovery tool, to "smoke out" the other side's position on a claim or defense, to gain settlement leverage, to be a substitute for a *Daubert* motion, to show that the opposing party is "the bad actor" in the case, or to disrupt the other side's preparation of its case. Such goals are contrary to the purpose of Rule 56 and motions filed for those purposes place an enormous and unnecessary burden on the courts and opposing counsel. Moreover, premature and ill-founded motions often have multiple adverse consequences, including: (1) the moving party losing credibility in the case; (2) the court being less likely to consider future meritorious motions; and (3) the court restricting its summary judgment practices.

Best Practice 2 – The court should retain control over the timing and number of summary judgment motions filed.

Courts must strike a balance between the broad provisions of Rule 56 ("a party may file a motion for summary judgment at any time until 30 days after the close of all discovery")[3] and other provisions of the Federal Rules that give the courts tools to manage litigation, including Rule 16 ("At any pretrial conference, the court may consider and take appropriate action on . . . determining the appropriateness and timing of summary adjudication under Rule 56.").[4] In this balancing process, a guiding principle is always to seek "the just, speedy, and inexpensive determination of every action and proceeding."[5]

Currently, the Federal Rules permit the filing of a virtually unlimited number of summary judgment motions with almost no time limit. Whatever utility such a Hobbesian state of nature might have in litigation generally, it is not useful in patent litigation. Patent cases typically involve multiple patents, multiple claims asserted within each patent, multiple accused products, multiple theories of liability for infringement, alternative damage theories, and numerous statutory and common law defenses. Without some framework set by local rules or individual case scheduling orders, because of Rule 56's broad language, courts can find themselves beset by a series of motions for partial summary judgment filed at the convenience of the parties, not of the court. The Rules Commentary to the 2009 Amendments acknowledge the need for court control:

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3 Fed. R. Civ. P. 56(b).

4 Fed. R. Civ. P. 16(c)(2)(E).

5 Fed. R. Civ. P. 1.

> The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages—including separation of expert witness discovery from other discovery.

Courts in patent cases should follow this lead and use the Rule 16(a) pretrial conference as the occasion (among other things) to confer meaningfully with the parties about summary judgment procedures. These can include the timing of summary judgment and thresholds to meet prior to filing for summary judgment. The Rule 16(b) order can then specify the timing, sequence, and procedure for summary judgment motions in each case. Courts should also consider reevaluating these issues as the case proceeds through periodic status conferences or other suitable procedures.

Best Practice 3 – When considering thresholds or controls governing the filing and the timing of summary judgment motions, the court should remain mindful of the parties' right to summary judgment when the requirements of Rule 56 are met.

Although the court should exercise its discretion to retain control over the timing and number of summary judgment motions, the court should also take care about requiring a threshold determination before a summary judgment motion may be filed. Such procedures might be viewed as prohibiting summary judgment motions altogether. Courts should balance, among other things, their limited resources in view of their docket responsibilities against the limited resources of parties who rely on the legal system to dispose of appropriate cases through summary judgment to avoid unnecessary litigation costs.

A number of courts have experimented with procedures designed to limit or minimize summary judgment motions. For example, some courts, particularly those with a high volume of patent cases, have established procedures that require litigants to seek leave of the court before filing summary judgment motions, such as by an exchange of short letter briefs setting forth the issue in question and delineating why there are (or are not) material issues of fact. Some courts require a pre-motion conference prior to filing any papers, while others have a pre-motion hearing in conjunction with short letter briefs. Some courts have established rules that preclude the filing of summary judgment motions in certain contexts (e.g., based on the kind of case, such as ANDA litigation, or on the kind of issue, such as inequitable conduct, where generally there is no right to a jury trial). Some courts have established rules that preclude filing summary judgment motions at an early stage of a case and/or specifically limit the number of motions that a party can file.[6]

Courts using threshold procedures should identify on the record factors that lead the court to deny leave to file a motion. While certain contexts (e.g., when the issue or entire case will be tried to the bench) may inform a court's discretion on "the appropriateness . . . of summary adjudication,"[7] even when a bench trial

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[6] *See, e.g.*, N.D. Tex. L.R. 56.2; E.D. Va. L.Civ.R. 56(C); The Honorable Chief Judge Leonard P. Stark, Patent Scheduling Order (non-ANDA) 17.a, *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/PatentProcs/LPS-PatentSchedOrder-Non-ANDA.pdf and Patent Scheduling Order (ANDA) 16, *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/LPS/PatentProcs/LPS-PatentSchedOrder-ANDA.pdf (each last visited July 24, 2014); The Honorable Judge Sue L. Robinson, Briefing Guidelines in Complex Cases III.(a), *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/Briefing_Guidelines-Complex_Cases-12-3-13.pdf (last visited July 24, 2014); The Honorable Judge Richard G. Andrews, Rule 16 Scheduling Order – Patent 11, *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/RGA/Forms/Rule16_Scheduling_Order-Patent.pdf (last visited July 24, 2014).

[7] Fed. R. Civ. P. 16(c)(2)(E).

is imminent, courts should not ignore the potential savings to be gained (for themselves and the parties) by considering issues on summary judgment. For example, it may be sufficiently clear that there are certain claims or defenses that can be disposed of on summary judgment, thereby reducing the time needed for the bench trial.

Working Group 10 does not endorse any specific screening mechanism, but it does encourage the active involvement of the courts to improve the quality and efficiency of the summary judgment process and of counsel to file only summary judgment motions which are meritorious. It is understandable that some courts, who time and again receive summary judgment motions that lack merit, are poorly written, or obfuscate the underlying merits, constrain the filing of all summary judgment motions. The greater responsibility to control costs and improve efficiency lies with the bar to file only motions that are warranted by law and the truly undisputed material facts.

The Working Group supports efforts to limit burdens and ensure that summary judgment motions comply with the purpose of Rule 56. However, care must be taken to ensure that a party's right to summary judgment when the requirements of Rule 56 are met is not unduly or arbitrarily restricted.

Accordingly, these Best Practices are intended as a flexible approach that balances the case management benefits of summary judgment with the potential burdens on the court and the litigants.

B. Implementing Reasonable Limits on the Number and Timing of Summary Judgment Motions

Best Practice 4 – The court may consider imposing reasonable limits on the number of summary judgment motions filed, while recognizing circumstances where multiple summary judgment motions are appropriate. In suitable cases, the court may consider permitting multiple motions at different stages of the case.

Best Practice 5 – Counsel should proactively work with opposing counsel to identify those instances where multiple motions at different stages would be appropriate and only request the court to permit multiple motions when counsel believes it is truly warranted, considering the exceptional amount of time that each summary judgment motion requires of the courts.

These Best Practices recognize that the potential burden associated with summary judgment motions can be a disincentive for courts to even entertain summary judgment motions, much less permit multiple motions during the course of a case. This potential burden can lead a court to impose automatic restrictions on the number and timing of summary judgment motions to protect the court's already limited resources. However, such automatic restrictions may end up precluding summary judgment even in cases when it would be an effective case management tool. These Best Practices recognize that counsel should be careful to seek the opportunity to file multiple summary judgment motions infrequently and only in appropriate circumstances, and the courts should be open to the possibility of multiple motions in suitable cases. There may be instances where eliminating or narrowing issues at different stages of the case will benefit the court and the parties by reducing unnecessary effort and expense in continuing to litigate those issues. These benefits may not be limited to case-dispositive motions; the grant of even partial summary judgment can, in certain circumstances, provide an alternative avenue for disposing of the entire case, for example, by encouraging early settlement when a partial summary judgment impacts the potential economic value of the case. These Best Practices do not suggest that multiple number of motions during the case should be the norm. Instead, they try to balance the need for reasonable restrictions while encouraging flexibility in appropriate circumstances.

Best Practice 6 – In evaluating whether to implement an expedited procedure for early summary judgment motions, the court should consider whether the benefit of that process in the particular case warrants entertaining such motions.

Best Practice 7 – Counsel should proactively work with opposing counsel to establish suitable procedures to assist the court in evaluating the merits of having an early summary judgment process, and only request the court to permit such early motions when warranted.

As noted previously, summary judgment briefing is a taxing and expensive process for counsel, and consideration of summary judgment motions is a time-consuming and potentially diversionary process for courts. Often the process results in a denial of the motion because the court concludes that there are material facts in dispute, but such a conclusion often comes only after considerable and unnecessary burden and expense have been incurred. These Best Practices recognize that there are instances where an early summary judgment motion might be a beneficial case management tool.[8] Therefore, a procedure for evaluating the merits of such an early motion is helpful for both the court and counsel.

One such procedure involves the court holding a hearing or conference to discuss the timing of summary judgment proceedings. A pre-motion hearing or conference can be held to replace or to supplement written submissions on the timing issue. Such a proceeding potentially allows for an efficient and cost effective method of assessing the relative merits of early or multiple summary judgment motions. The issue of timing can be addressed as part of the initial Rule 16 conference, during subsequent status and scheduling conferences, or in any other manner the court permits. Counsel need to meet and confer about the timing issues and only raise with the court early summary judgment motions or multiple summary judgment motions when such a process is warranted. Requesting conferences and hearings when there is only a strategic point to be made is wasteful of judicial resources. The goal is to permit the orderly evaluation (and reevaluation) of the appropriate use of motions for summary judgment or partial summary judgment.

C. Practical Limits on the Moving Papers

Best Practice 8 – Counsel should meet and confer about the length of summary judgment briefs, the number of statements of undisputed fact, and the number of exhibits, and request only reasonable limits on the submissions. The court should impose appropriate limits on these submissions as warranted in an individual case.

Best Practice 9 – Counsel should exercise restraint in the number of motions and volume of supporting papers filed.

These Best Practices recognize the need for reasonable limitations on the papers submitted in support of, or in opposition to, a summary judgment motion. Counsel sometimes err on the side of overinclusion, for various reasons unrelated to improving the likelihood of the motion's success. As a result, courts are too often confronted with voluminous materials that are not necessary or relevant.

This leads some courts to establish general limitations on the papers associated with summary judgment motions. While such limitations can be justified, they should be reasonably tailored to a given case. The purpose of any limits should be to focus on the proper presentation of the relevant evidence that supports meritorious motions while reducing or eliminating the burden caused by the submission of irrelevant information. Suitable limits allow the court and counsel to focus on the key issues and merits raised by the motion and to address them in a fair and efficient way. These procedures potentially benefit: (a) the court by

[8] For full discussion, *see infra*, Section II.

minimizing the need to review unnecessary information; (b) the moving party by, for example, keeping the focus on what is important (avoiding potential denial based on the existence of an immaterial issue of fact); and (c) the nonmoving party by, for example, reducing the time and expense of evaluating and responding to irrelevant and immaterial arguments and facts. These limits benefit both the court and counsel by focusing motions on specific, dispositive issues.

Best Practice 10 – The court should consider requiring the movant to include a statement of undisputed facts supported by the record, and requiring the opposing party to respond with a counter-statement of facts pointing to the record to show genuine issues of material fact.

Some courts have adopted rules that require a party seeking summary judgment to identify with specificity the facts of record that underlie a decision on the proffered issue and show that those facts are not in dispute. Some courts require a statement of undisputed facts to accompany the motion and require the opposing party to submit a point-by-point counter-statement identifying the facts in dispute and the supporting record evidence.[9] Some courts include limits on the number of separately-numbered paragraphs that can be submitted.[10] Additional variations include requiring the opposing statements be combined in a single document and implementing page limits.

Best Practice 11 – Lead counsel should carefully review any summary judgment motion prior to filing to verify that the motion is timely and well founded.

Best Practice 12 – The court should consider requiring the movant to submit a certification from lead counsel verifying that counsel has carefully reviewed the motion prior to filing and believes no genuine material issues are in dispute and the motion is well founded.

These Best Practices are intended to require greater involvement by lead counsel in supervising both the timing and merits of a summary judgment motion and the accompanying papers. Ideally, lead counsel should have this level of involvement in all significant court filings—with or without a separate certification requirement. However, summary judgment motions are often drafted by junior attorneys who might feel it necessary to include multiple issues, arguments, and exhibits, regardless of how tenuous, to avoid being criticized for missing something. This raises the question of whether there is sufficient oversight by lead counsel to ensure the filing is well-founded and that the supporting materials are relevant to the issues raised by the motion. These Best Practices are intended to curb premature and ill-advised motions by requiring lead counsel to be fully involved in the decisions of whether to file the motion and what to include in the supporting papers. Requiring a certification would help ensure such involvement. In cases involving multiple plaintiffs or defendants represented by separate lead counsel, these Best Practices should be followed by counsel taking the lead role, either on behalf of one party or multiple parties.

Many of the participants, including several of the judges, on the team drafting this chapter felt that this procedure would help in limiting the number of improper or unfounded summary judgment motions. A few members, including one judge, while not generally opposed to this proposal, raised questions about whether it would actually reduce the inappropriate use of the summary judgment process.

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9 *See, e.g.,* D.N.J. L.Civ.R. 56.1(a); E.D. Tex. Civ. R. 56.1(a)(2) and (b)(2); W.D. Pa. R. 56 B.1; The Honorable Joy Flowers Conti (W.D. Pa.), Rules For Pretrial and Trial Matters, Rule 3.F.c (i), (ii) and (v), *available at* http://www.pawd.uscourts.gov/documents/judge/conti_pp.pdf (last visited July 9, 2014).

10 *See, e.g.,* N.D. Ill. R. 56.1 ("Absent prior leave of Court, a movant shall not file more than 80 separately-numbered statements of undisputed material fact.").

<u>Best Practice 13</u> – Counsel should meet and confer about whether oral argument for a summary judgment motion is necessary and should only request argument when necessary. The court should hold an oral argument on summary judgment motions when requested to do so absent compelling reasons for not doing so.

This Best Practice recognizes that, in light of the complex nature of most patent cases, there are significant benefits derived from a summary judgment oral argument and that such arguments should be held when requested. The benefits include affording the court a chance to ask questions and to clarify important points raised in the motion papers, especially when the *Markman* and summary judgment proceedings are consolidated. An oral argument might also help narrow the dispute and further crystallize the relevant issues, as well as provide guidance on whether there are genuine issues of material fact that preclude summary judgment. However, there are also reasons for a court not to hear oral argument, such as where the court can determine from the briefing alone that disputed issues of material fact exist or that the motion was filed for an improper purpose. As alternatives, the court can hold a conference in advance to determine whether a full oral argument is necessary, or can consider whether a telephonic conference to address specific questions the court may have is an acceptable substitute for full oral argument.

II. Early Summary Judgment

When used properly, early summary judgment practice can eliminate baseless claims or defenses, reduce discovery and trial costs for theories that do not survive, and even dispose of cases entirely before any significant discovery occurs. Sophisticated plaintiffs and defendants alike should welcome resolution of critical and case-dispositive theories or defenses early in an action and before major investment is made for fact and expert discovery. Even the denial of motions may lead to quick settlements if a litigant's core theory is found to involve questions of fact and therefore not amenable to summary judgment.

A court that routinely permits early summary judgment motions, however, risks being subjected to motions that have no business being brought before all discovery is complete, and "shotgun" motions that throw up a number of theories in hopes that one will stick. At times, motions are filed not because the movant expects to win, but because the movant hopes to "educate the judge" about its theory of the case; this creates an unnecessary burden on the court and a significant wasted expense for the parties. There are many appropriate ways to assist the court without filing unwarranted summary judgment motions.

Working Group 10 recommends a number of best practices designed to balance these competing considerations.

Best Practice 14 – Early in the litigation, counsel should meet and confer to consider whether the court should be requested to entertain any case-dispositive, substantially narrowing, or immediately appealable issues requiring limited discovery that are suitable for early summary judgment or partial summary judgment. The court should not hesitate to grant such a request when warranted.

Rule 16 of the Federal Rules of Civil Procedure seeks to advance important policies of "expediting disposition of the action," ensuring a case "will not be protracted," "discouraging wasteful pretrial activities," and "facilitating settlement."[11] Summary judgment is one obvious tool available to counsel and the court to achieve these goals by resolving appropriate cases without the high costs of a trial, or by narrowing cases to reduce costs and to encourage settlement. Summary judgment motions can be brought "at any time until 30 days after the close of all discovery."[12]

A number of the district courts with the busiest patent dockets have enacted local rules or standing orders that require litigants to file joint case management statements, joint proposed scheduling orders, and other similar documents as part of their Rule 26(f) report in advance of a Rule 16 scheduling conference with the court.[13] As a result of these submissions and scheduling conferences, the district court will set a case schedule, impose limits on discovery, and may also put into place certain rules unique to a given case. For example, the court may place limits on asserted claims or accused products, or it may relate, coordinate, or consolidate cases involving similar claims of infringement.

While some courts have entertained requests for early summary judgment motions on an *ad hoc* basis, a best practice would be for courts to systematically require litigants to identify at the beginning of the case any issues that make a case a good candidate for early summary judgment. For example, the local rules in

11 Fed. R. Civ. P. 16(a).

12 Fed. R. Civ. P. 56(b).

13 *See, e.g.,* N.D. Cal. Civil L.R. 16-9(a); C.D. Cal. R. 26-1; The Honorable Leonard Stark (D. Del.), Patent Scheduling Order (non-ANDA) and (ANDA), *available at* http://www.ded.uscourts.gov/judge/chief-judge-leonard-p-stark (last visited July 9, 2014); The Honorable Amy J. St. Eve (N.D. Ill.), Form Status Report, *available at* http://www.ilnd.uscourts.gov/home/JUDGES/ST_EVE/initstatrpt.pdf (last visited July 9, 2014).

the Central District of California require parties to identify in their Rule 26(f) report "[t]he dispositive or partially dispositive motions which are likely to be made, and a cutoff date by which all such motions shall be made."[14] The mere raising of the issue in the report and conference does not mandate that the court allow any early summary judgment motions.

By further requiring a party to identify specific claims or defenses that may be resolved early and with minimal or no discovery, courts can consider opportunities for "expediting disposition of the action"—or at least a substantial portion of the action—and to avoiding "wasteful pretrial activities" that impose needless burden and expense on both the court and the parties.[15] In addressing opportunities to resolve a substantial portion of the action early, the court and the parties can consider whether early summary judgment motion might significantly reduce the number of accused products, asserted patents, or asserted prior art references.

By addressing potential early summary judgment motions during Rule 16 proceedings, the court can advise the parties of its preferences and expectations. For example, the court and the parties can consider at this initial stage whether summary adjudication of infringement or validity might appropriately encourage the parties to seek an appeal before the damages phase,[16] thereby allowing the court to avoid a trial on damages unless and until liability is confirmed. At the same time, courts have an opportunity to discourage motions that would better be brought after substantial discovery, or which are not well-taken for other reasons.[17]

Rule 16 proceedings are a convenient time to raise potential early summary judgment motions. Addressing potential summary judgment motions would be a natural adjunct to the issues of scheduling and discovery that already must be addressed by all involved, and need not add substantial work for litigants or the court.

Best Practice 15 – The court should consider permitting parties to file early summary judgment motions if they are focused and would dispose of or substantially reduce the scope of an action.

Determining whether to permit parties to file early summary judgment motions is not easily governed by hard-and-fast rules. Courts need to make such a determination based on a number of factors and, ultimately, the judge's instincts. Among these factors is the confidence the court has in the parties' representations that the motion will resolve or have a major impact on the action, the level of sophistication of the technological dispute underlying the motion, the extent of discovery needed, whether the issue is exclusively or primarily a matter of law, and whether the issue will devolve into a "battle of the experts."

These Best Practices are not an attempt to provide an exhaustive list of issues and there are too many variables to pre-decide the question reliably across all cases. But in general, some issues are likely to be more amenable to early summary judgment than others. For one, because patent eligibility under 35 U.S.C. § 101 is a question of law,[18] courts may often be able to resolve § 101 defenses early in an action before significant discovery and even, in appropriate cases, before claim construction.[19]

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14 C.D. Cal. L.R. 26-1(b).

15 Fed. R. Civ. P. 16 (a).

16 *See Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1317 (Fed. Cir. 2013) (en banc).

17 *See* Fed. R. Civ. P. 56(d)(2) (stating that courts may "allow time … to take discovery" when justified).

18 *In re Ferguson*, 558 F.3d 1359, 1363 (Fed. Cir. 2009).

19 *See, e.g., Ultramercial, LLC v. Hulu LLC*, 657 F.3d 1323, 1325 (Fed. Cir. 2011) ("Indeed, because eligibility is a 'coarse' gauge of the suitability of broad subject matter categories for patent protection … claim construction may not always be necessary for a § 101 analysis.") (internal citation omitted) (*citing Bilski v. Kappos*, 561 U.S. 593, 130 S. Ct. 3218, 3231 (2010) (finding subject matter ineligible for patent protection without claim construction).

Similarly, claim construction is also a matter to be decided by the court,[20] and when infringement or noninfringement may be easily determined by the construction of a small number of terms that cover all or most of the asserted claims, an early motion for summary judgment or partial summary judgment may be beneficial and, in some circumstances, even a partial summary judgment may be immediately appealable. Although infringement itself is not a pure legal question, there are instances in which resolution of the meaning of a key term or two will result in there being no *genuine* questions of fact, and so warrant early summary judgment. In these instances, courts may choose to permit limited discovery into whether the subject term(s) are practiced under the competing claim constructions, and employ abbreviated claim construction proceedings based only on the subject term(s).

As one illustrative example, the Eastern District of Texas addressed the construction of a single term—"display being pivotally mounted on said housing"—and then granted summary judgment of noninfringement because all of the defendants' accused devices were incapable of pivoting.[21] Given the binary claim construction issue (i.e., whether fixed displays were within the scope of the claims) and the relatively simple technology at issue, summary judgment was warranted once the disputed term was construed.

Closely aligned with claim construction, the legal question of indefiniteness is also one that may be conducive to early resolution on summary judgment, especially where evidence establishing the knowledge of a person of ordinary skill in the art is unnecessary or undisputed.[22] And, other issues that hinge largely on questions of law—such as, for example, standing, implied license, or interpretation of a license agreement—may be among the appropriate candidates for early summary judgment.

Best Practice 16 – For claim-construction-dependent summary judgment motions, parties should identify the term(s) that require construction, and demonstrate how construction of the term(s) would be case-dispositive.

A summary judgment motion that depends on the outcome of claim construction often may be less amenable to early motion practice than other candidate motions. Litigants will frequently disagree as to whether a proposed construction will be case- or issue-dispositive, and courts often fashion their own constructions instead of adopting those proposed by the parties, thus adding uncertainty into the analysis. On the other hand, there are often cases in which the determination of the meaning of a single term, or a small number of terms, will clearly be case- or issue-dispositive.

To assess early on whether the claim construction dispute(s) might resolve an action in whole or large part, it is a best practice for courts to require litigants requesting an early motion to identify in advance the specific term or terms that require construction and how the proposed construction will dispose of or narrow the action. Courts can then evaluate whether the term to be construed is found in all asserted claims, whether the dispute over its meaning is binary between the parties and so likely to have a major impact on the case, and whether the construction of the term is likely to have that impact without the need for substantial discovery.

The fact pattern in *Nystrom v. Trex* provides a useful example.[23] In that case, the asserted claims recited a flooring "board" with certain characteristics. All of the accused products included boards made of a composite of wood fibers and recycled plastic; none were pure wooden boards. After the district court construed the term "board" to be limited only to wooden boards, the plaintiff conceded noninfringement. These facts were good

[20] *Cybor Corp. v. FAS Techs., Inc.,* 138 F.3d. 1448, 1455 (Fed. Cir. 1998) (en banc); *Lighting Ballast Control LLC v. Philips Elecs. N. Amer. Corp.,* 744 F.3d.1272, 1277–78 (Fed. Cir. 2014) (en banc).

[21] *See Raylon, LLC v. Complus Data Innovations, Inc.,* 700 F.3d 1361 (Fed. Cir. 2012).

[22] *See Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1302 (Fed. Cir. 2005).

[23] *Nystrom v. Trex Co., Inc.*, 424 F.3d 1136 (Fed. Cir. 2005).

ones for early summary judgment. If a court is able to determine early on that a construction of a single core term—like "board" in *Nystrom*—has a reasonable chance of resolving the case, it can choose to permit an early summary judgment motion with an attending *Markman* proceeding only on this term, and potentially resolve the action before significant discovery costs are incurred.

Best Practice 17 – The courts should consider employing "countermeasures" against improper summary judgment filing practice, including, for example, fee shifting, required stipulations, and limits on future summary judgment motions.

To protect against summary judgment motions being brought early for delay or other improper tactical purposes, the court can utilize a number of techniques.

For one, the court can require formal stipulations that ensure the issue is case-dispositive. One example of this would be requiring stipulations about how an accused product does or does not meet the claims in relation to the competing proposed constructions. A court can hold a pre-motion conference in which the parties stipulate that the accused product functions in a certain way or includes a specific composition that will or will not fall within the claims under a given construction—e.g., the pivoting display in *Raylon* and the wooden "board" in *Nystrom*—and that little or no discovery is required to show this function or composition. Then, after an early *Markman* determination for that term, the court may be in a position to enter summary judgment depending on how the core term was construed.

Fee shifting would be another way to discourage premature or meritless motions. A court can caution a party seeking to bring an early motion for summary judgment that should the court ultimately find the motion clearly lacking in merit, prematurely brought before necessary discovery could take place, or not sufficiently focused for an early motion, the court might consider awarding fees to the nonmovant.

Many courts limit the number of summary judgment motions that can be brought by a party. These limits can be used to safeguard against ill-timed summary judgment motions; the court can permit an early summary judgment motion, but warn the movant that, like potential fee shifting, if the motion is ultimately one that should not have been brought, then the party will not be permitted to file later motions.

These "countermeasures" against improper early motions can all be discussed at the Rule 16 conference, at which courts can question counsel to agree on the implications of an early motion, or may uncover equivocation that makes the motion suspect.

Best Practice 18 – The court should not stay discovery on issues unrelated to early summary judgment motions unless both parties agree the issue is dispositive.

Once a court decides to permit an early summary judgment motion, it faces the questions whether to permit discovery related to the motion, and whether to tailor the schedule to stay all unrelated discovery or other proceedings until the motion is decided. A general rule or practice of staying an action completely before deciding an early summary judgment motion is not advised because such a standard practice would all too frequently cause prejudicial delay if the motion is denied.

For the most part, if both parties genuinely believe that an early summary judgment motion will be case-dispositive, they are likely to self-regulate and limit discovery on their own (either by agreement or simply by their conduct) until the motion is resolved. Having recognized that, should the circumstances warrant, or if the parties both stipulate, limiting the first phase of a case to a substantial issue (e.g., § 101 or standing issues) may often be the most efficient and cost-effective way to proceed.

III. Summary Judgment and Claim Construction

As different courts adopt different case management schedules, the claim construction process may occur at significantly different points in cases. While many courts consider claim construction before the close of fact discovery, others address *Markman* issues only after discovery is completed. Working Group 10 does not take any position about which procedure is better. However, these differing procedures lead to differing best practices when considering summary judgment motions.

In discussing the best practices regarding the relationship between the claim construction process and consideration of summary judgment motions, this section first addresses some general procedures that apply to the relationship between claim construction and summary judgment in all cases. Next, the section divides the continuum of possible schedules into two general approaches. The first approach addresses cases that complete claim construction prior to the close of fact discovery. The second approach addresses cases in which the claim construction proceedings are addressed later, after the close of fact discovery.

A. General Procedures for Claim Construction and Summary Judgment

Best Practice 19 – The parties should attempt to stipulate to a technology tutorial presenting the court with an explanation of the patented invention, a description of the prior art, and a "technology timeline."

In almost all patent cases, before or at the beginning of the *Markman* process, the parties provide the court with a technology tutorial describing the basics of the patented invention. Litigants should attempt to agree on the content of the basic tutorial, rather than developing costly competing tutorials developed separately but in parallel. Where they cannot agree, often the patentee presents its tutorial and then the accused infringer presents a supplemental tutorial only addressing any disputed or additional points. A combined oral argument for *Markman* issues and for summary judgment (as discussed in detail below) presents an opportunity for the parties to coordinate on a joint tutorial addressing not only the patent at issue, but also agreed-upon prior art, as well as agreed-upon descriptions and depictions of the accused products or methods.

There is a benefit to presenting the court with the pertinent prior art, the disclosure of the patented invention, and the accused products in sequence at a combined oral argument addressing both claim construction and summary judgment. Whether in tutorial or argument form, a "technology timeline" reflects the nature of the development in the art. The accused infringer likely will argue that the patented invention is, at a minimum, obvious in view of the prior art, and the patentee will argue that the accused products or processes are, at a minimum, an equivalent variant of the claimed invention. Still, presentation of the prior art, patent, and products at issue in sequence can put these debates in perspective for the court. The "technology timeline" may not ultimately reflect the development of the relevant technology in true chronological order, but can provide the court with a background against which it can more readily assess whether (and how) the patent added to the prior art, and whether (and how) the accused products are distinguishable from the claims.

Best Practice 20 – Summary judgment issues dependent on claim construction should be distinguished and treated separately from those independent of claim construction.

A court may be presented with three categories of issues at the claim construction/summary judgment phase of the case:

(1) claim construction issues that are independent of summary judgment;

(2) summary judgment issues that are dependent on claim construction rulings; and/or

(3) summary judgment issues that are independent of claim construction.

Litigants should apprise the court as to which issues and arguments fall into which of the above categories.

The goal of providing this information to the court is to facilitate the court's review of the issues to be decided during and following claim construction. The briefing and appendices presented to the court at the *Markman*/summary judgment stage are often voluminous. The court has a limited amount of time to work on the case; that time is best utilized by considering the legal issues presented, and not searching for factual information, or determining which issues remain to be decided after threshold determinations are made.

Often, litigants make legal arguments in their summary judgment briefs without specific reference to particular (independent and/or dependent) patent claims. Unless summarized on a joint claim chart, the court may not be aware of which claims are at issue when it is resolving the proper construction of a claim term. Categorization of the pending *Markman* issues alleviates at least some of the court's burden in going back and forth between the patent, claim charts, *Markman* briefs and appendices, and summary judgment briefs and appendices in order to determine which issues and which evidence affect which claims.

There are several mechanisms by which litigants can identify claim-construction-dispositive summary judgment issues. Where local rules and/or an individual judge's practices permit the filing of multiple summary judgment briefs, litigants should file separate claim-construction-dependent summary judgment motions and claim-construction-independent summary judgment motions. A roadmap to the issues, patent claims, and accused products should be provided. A listing of claims and the issues affecting each should also be provided in chart form, usually as part of the appendix, or later by letter submission. In short, litigants should not underestimate the value to the court of categorization and organization of the issues.

B. Best Practices for Cases with "Early" Claim Construction (i.e., Scheduled for Before the Close of Fact Discovery)

In patent cases where a claim construction ruling is scheduled for before the completion of fact discovery, summary judgment motions are not normally joined with the claim construction process. With such a schedule, it often makes sense to allow the parties the opportunity to file summary judgment motions based on the claim construction ruling shortly after the claim construction order issues.[24]

<u>Best Practice 21</u> – For cases with "early" claim construction proceedings, summary judgment motions dependent only on the court's claim construction should be allowed shortly after the claim construction order issues.

Where claim construction occurs relatively early, it can be beneficial to the court for the parties to identify during the claim construction process why the construction of certain terms is important and what issues, such as infringement or validity, may be affected by the construction. The parties should also identify for the court any issues for which summary judgment motions are likely after a claim construction order.

It can be efficient and useful for both the parties and the court for there to be a period of time, shortly after an "early" *Markman* order, during which the parties may file summary judgment motions that are based only

[24] This procedure should be contrasted with the earlier section of this chapter that related to early summary judgment motions that may be appropriate before there is any discovery in the case and, in some cases, prior to the claim construction process.

on the claim construction ruling. The court and the parties should realize, however, that not every claim construction ruling will lead to one or more issues being ripe for summary judgment.

Claim-construction-dependent summary judgment motions often concern issues such as infringement, anticipation, and/or indefiniteness that may turn solely on the construction of the claims and often can be resolved with the agreement of the parties that there is no factual dispute once the scope of the claim is determined. This can happen, for example, when the parties agree on the elements that are present in accused devices or on the nature of the prior art disclosures.

One advantage of having such motions filed after the claim construction ruling (rather than concurrently with claim construction briefs) is that the motions can address the specific claim construction adopted by the court. Thus, these motions, unlike ones considered concurrently with claim construction, can often be shorter because there is no need to have alternate arguments that depend upon the respective proposed claim constructions. This procedure also eliminates the risk that the summary judgment briefing will not address the court's actual construction ruling when the court adopts a claim construction that neither party proposed.

In many cases, a *Markman* order leaves no genuine dispute of material fact on one or more issues. Allowing some definite, discrete, and short timeframe after the order for summary judgment motions of this type to be brought allows the parties and the court to dispose of entire cases, or, at the least, eliminate certain arguments and evidence from the litigation, resulting in reduced time and costs in the litigation. In appropriate cases, there will be no reason for continued proceedings where the practical result of the *Markman* process is that an issue, whether infringement or validity, is either moot or determinative of the result in the case.

C. Best Practices for Cases with the Claim Construction Process Scheduled for After the Close of Fact Discovery

For patent cases where a claim construction ruling is scheduled for after the completion of fact discovery, the court is in effect considering claim construction issues and summary judgment motions at relatively the same stage in the case. The Working Group applies a slightly different set of best practices for these cases, as outlined below.

1. Coordinated Briefing

Coordinated or concurrent *Markman*/summary judgment scheduling can be effective in reducing the number of claim terms at issue. The parties, as well as the court, may better understand what terms are actually significant to the case and in need of construction. In addition, consolidated consideration of *Markman* issues and summary judgment allows the court the benefit of understanding the context for claim construction. Given their dockets, limited resources, and responsibilities spanning many subject areas, many courts prefer to consider the technology involved in a patent case just once pretrial, rather than climbing the learning curve on a particular technology repeatedly (once at the *Markman* stage and again at summary judgment). The Working Group recognizes that many courts do not normally consider coordinated or concurrent *Markman*/summary judgment briefing, but the Working Group considers it to be a viable option in particular cases, and a best practice to consider in the scheduling process.

<u>Best Practice 22</u> – Parties should consider requesting that the court schedule *Markman* and summary judgment concurrently when the parties identify multiple dispositive issues that turn on claim construction.

Scheduling concurrent consideration of *Markman* issues and summary judgment motions achieves the goal of allowing the court to climb the learning curve only once in each case. Of course, this should only be

favored where there are summary judgment motions that are dependent on claim construction. If none of the contemplated summary judgment motions are dependent upon the results of claim construction, there may be little to no reason to consider them concurrently. Where the issues are plainly interrelated, concurrent review may result in a deeper immersion into the technology and broader exposure to the art, than would result if the court separately considered issues of claim construction and summary judgment.

Concurrent *Markman*/summary judgment proceedings may also lead to better organization and coordination of the parties' arguments. To facilitate consideration by the court, the parties' papers should be organized into the three categories noted above—claim construction issues that are independent of summary judgment; summary judgment issues dependent on claim construction; and summary judgment issues that are independent of claim construction. Preparation for consolidated consideration and a consolidated oral argument will require litigants to decide which arguments are tied together and should be presented together. The result, in most cases, is a more streamlined presentation, highlighting "cause and effect" where a *Markman* ruling will be case-dispositive.

Depending on the type of claims, the court's articulation of the "meaning of a claim term to a person of ordinary skill in the art at the time of the invention" may not resolve precisely how that meaning is to be applied in the context of infringement/noninfringement and invalidity/validity arguments. For example, the definition may not speak to exclusions.[25] As another example, the definition may itself contain terms that the parties deem subject to multiple interpretations. Awareness of copending summary judgment issues at the time the claim terms are construed may alleviate these issues. While a court need not alter the proper definition to take into account summary judgment positions,[26] it may include in its order or opinion an explanation as to whether particular embodiments or examples are included in, or excluded from, the scope of the adopted construction, or as to whether a fact issue remains.

<u>Best Practice 23</u> – Where the court considers *Markman* and summary judgment issues concurrently and determines that the proper claim construction does not align with the proposal of either party, the parties should inform the court whether and how the court's construction affects summary judgment.

Sometimes a court will adopt a claim construction that is not identical to the proposal of either party. For example, the court may rephrase the principles articulated by one side, delete (what it deemed to be) superfluous terms, or condense a long definition into its core concepts. The court can also elect to construe a phrase rather than a single term, or vice versa, or differently parse a disputed phrase. Litigants may reasonably argue that even minor changes alter the ultimate import of the adopted construction. Accordingly, where it has been argued that no genuine issues of material fact exist under one specific construction or another, revisions to the construction may affect whether summary judgment may be appropriate.

A benefit of the court considering *Markman* and summary judgment issues together is that such a scenario can be explored by the court at oral argument. One downside of considering those issues together is that, if the oral argument itself guides the court to adopt a slightly different version of a party's construction, or if the court settles on a modified construction during the process of drafting its rationale, certain of the parties' summary judgment motions may be nullified or rendered superfluous.

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[25] *See Linear Tech. Corp. v. Int'l Trade Comm'n*, 566 F.3d 1049, 1059–60 (Fed. Cir. 2009) (finding error for a construction adding a negative limitation absent a basis in the patent specification for doing so); *see also Cohesive Tech., Inc. v. Waters Corp.*, 543 F.3d 1351, 1367 (Fed. Cir. 2008) ("[I]t is not appropriate for the court to construe a claim solely to exclude the accused device.").

[26] *Id.*

The court should not be left without guidance as to what extent the parties' summary judgment arguments may be affected by an alteration to the construction. Thus, some form of supplemental submission may be helpful; for example, a short supplemental letter briefing addressing the issues may be useful to the court and, ultimately, conserve court resources.

The court can, alternatively, deny copending summary judgment motions that the parties identified as being dependent on claim construction in any situation where the court adopts a modified construction. In some cases, an altered construction does not create a truly "genuine" issue of material fact, and a perfunctory denial may leave a clear issue of law unanswered.

By the time the pretrial order is submitted and/or the pretrial conference held, the court has a limited timeframe to consider outstanding issues requiring its decision. An earlier mechanism to alert the court about the effects of its construction on the parties' summary judgment motions mitigates against this problem.

2. Consolidated Oral Argument

Best Practice 24 – When claim construction and summary judgment are being considered at the same time, the parties should request, and the court should hold where feasible, consolidated oral argument on *Markman* issues and related summary judgment motions.

Consolidated oral argument is a useful tool for both the parties and the court in cases where claim construction is determined after the close of fact and expert discovery. Regardless of the manner of briefing, a consolidated oral argument for *Markman* and summary judgment allows for a streamlined presentation of the patented technology and of the most pertinent claim construction issues, and a more focused argument about why resolution of these issues may be case- or issue-dispositive.

The court gains more familiarity with the technology at issue by considering the specification and intrinsic record alongside the most pertinent prior art and/or the accused products. There is a limited window in which to review and interpret the claims in a particular case, and the litigants cannot unilaterally expand this time frame. The court's limited time is maximized by requiring the litigants to present multiple, related issues in a coherent fashion.

The Working Group considers it a best practice for courts normally to hold oral argument on summary judgment motions, but recognizes that some courts may not do so. WG10 submits that in particular where the court is going to hear oral argument on both *Markman* issues and summary judgment issues, having a consolidated oral argument is beneficial to the parties and the court.

Appendix: The Sedona Conference Working Group Series & WGS Membership Program

"DIALOGUE DESIGNED TO MOVE THE LAW FORWARD IN A REASONED AND JUST WAY."

The Sedona Conference Working Group Series ("WGS") was established to pursue in-depth study of tipping point issues in the areas of antitrust law, complex litigation, and intellectual property rights. It represents the evolution of The Sedona Conference from a forum for advanced dialogue to an open think tank confronting some of the most challenging issues faced by our legal system today.

A Sedona Working Group is formed to create principles, guidelines, best practices, or other commentaries designed to be of immediate benefit to the bench and bar and to move the law forward in a reasoned and just way. Working Group output, when complete, is then put through a peer review process involving members of the entire Working Group Series including—where possible—critique at one of our regular season conferences, resulting in authoritative, meaningful and balanced final commentaries for publication and distribution.

The first Working Group was convened in October 2002 and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first draft publication—The Sedona Principles: Best Practices Recommendations & Principles Addressing Electronic Document Production (March 2003 version)—was immediate and substantial. The Principles was cited in the Judicial Conference of the United State Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the "public comment" draft, and was cited in a seminal e-discovery decision of the United States District Court in New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer's Digital Discovery and E-Evidence, "The Principles ... influence is already becoming evident."

The WGS Membership Program was established to provide a vehicle to allow any interested jurist, attorney, academic, consultant or expert to participate in WGS activities. Membership provides access to advance drafts of WGS output with the opportunity for early input, and discussion forums where current news and other matters of interest can be discussed. Members may also indicate their willingness to volunteer for brainstorming groups and drafting teams.

Visit the "Working Group Series" area of our website, www.thesedonaconference.org for further details on our Working Group Series and WGS membership.

The Sedona Conference was founded in 1997 by Richard Braman in pursuit of his vision to move the law forward in a reasoned and just way. Richard's personal principles and beliefs became the guiding principles for The Sedona Conference: professionalism, civility, an open mind, respect for the beliefs of others, thoughtfulness, reflection, and a belief in a process based on civilized dialogue, not debate. Under Richard's guidance, The Sedona Conference attracted leading jurists, attorneys, academics and experts who support the mission of the organization by their participation in WGS and contribute to moving the law forward in a reasoned and just way. After a long and courageous battle with cancer, Richard passed away on June 9, 2014, but not before seeing The Sedona Conference grow into the leading nonpartisan, nonprofit research and educational institute dedicated to the advanced study of law and policy in the areas of complex litigation, antitrust law, and intellectual property rights.