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Commentary on Case Management of Patent Damages and Remedies Issues: Proposed Model Local Rule for Damages Contentions

A Project of The Sedona Conference
Working Group on
Patent Damages and Remedies (WG9)

April 2016 Public Comment Version

The Sedona Conference Commentary on Case Management of Patent Damages and Remedies Issues: Proposed Model Local Rule for Damages Contentions

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APRIL 2016 PUBLIC COMMENT VERSION

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Preface

Welcome to the Public Comment Version of The Sedona Conference Commentary on Case Management of Patent Damages and Remedies Issues: Proposed Model Rule for Damages Contentions, a project of The Sedona Conference Working Group on Patent Damages and Remedies (WG9). This is one of a series of working group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The mission of WG9, formed in November 2010, is "to create guidelines that will help to clarify and guide the evolution of patent damages and remedies considerations to encourage patent damages and remedies law to remain current with the evolving nature of patents and patent ownership." The Working Group consists of members representing all stakeholders in patent litigation.

The original WG9 Commentary on Patent Damages and Remedies was published for public comment in June 2014, and was the focus of the dialogue at The Sedona Conference's 14th Annual Conference on Patent Litigation in Del Mar, CA, in October 2013 and The Sedona Conference's WG9 Meeting in New Orleans, LA, in November 2014. The content of that original WG9 Commentary is being split into two stand-alone Commentaries to be published in final/post-public comment form by mid-2016: one entitled WG9 Commentary on Reasonable Royalty Determinations; and a second entitled WG9 Commentary on Case Management of Patent Damages and Remedies Issues. In early 2015, the WG9 Steering Committee formed a subcommittee to draft this Proposed Model Local Rule for Damages Contentions. To develop this Proposed Model Local Rule, the subcommittee held numerous conference calls over the past year-plus, and the draft was a focus of dialogue at The Sedona Conference's Working Group 9 Meetings in Miami, FL, in May 2015 and in Pasadena, CA, in February 2016, as well as The Sedona Conference's 15th Annual Patent Litigation Conference in Reston, VA, in October 2015.

The Proposed Model Local Rule represents the collective efforts of many individual contributors. On behalf of The Sedona Conference, I thank everyone involved for their time and attention during the drafting and editing process, and in particular: Marta Beckwith, Michael L. Brody, Neel Chatterjee, Melissa Finocchio, Gary M. Hoffman, John Jarosz, Andrea Weiss Jeffries, James W. Morando, and James Nawrocki.

The Working Group was also privileged to have the benefit of candid comments by several active district court judges with extensive patent litigation trial experience, including the Honorable Cathy Ann Bencivengo and the Honorable Paul Grewal. The statements in this Proposed Model Local Rule are solely those of the non-judicial members of the Working Group and do not represent any judicial endorsement of the recommended practices.

Following the Working Group Series review and comment process described above, The Sedona Conference's Commentaries are published for public comment, including in-depth analysis at Sedona-sponsored conferences. After sufficient time for public comment has passed, the editors will review the public comments and determine what edits are appropriate for the final Commentary. Please send comments to comments@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
April 2016

Foreword

As eight-figure and even nine-figure patent damages jury verdicts become more common, other cases involve damage decisions or settlements for less than the cost of litigation. As a result, at both ends of the spectrum, patent damages law has become increasingly important. Even though the forty-year-old *Georgia-Pacific* hypothetical negotiation framework for calculating reasonable royalties currently remains good law, patent damages law remains one of the most complex, unpredictable, and rapidly evolving areas of the law. Indeed, in many cases, the parties' expectations with respect to patent damages often differ by orders of magnitude. However, historically, damages issues have been addressed in the later part of the litigation.

In this Proposed Model Local Rule, Working Group 9 felt that providing for an early exchange of information would benefit both parties and the court. The Proposed Model Local Rule provides a framework for exchanging damages-related information, which, in conjunction with information regarding the merits of the case, is designed to facilitate forward progress of the parties' understanding of one another's damages theories, and possibly settlement, earlier than might otherwise occur. The earlier disclosure of such information will also assist the court in addressing issues of proportionality in connection with requested discovery. Thus, by disclosing damages-related information early, and in conjunction with disclosures on the merits, the parties and the court will obtain a more fulsome picture of the litigation, and be in a position to address damages issues well in advance of trial. This will permit an orderly pre-trial and *Daubert* motion process, and a clear understanding of damages theories and demands during the pre-trial period.

This Proposed Model Local Rule was developed by a group of practitioners who represent both plaintiffs and defendants in patent litigation, with the guidance of two Judicial Advisors to the WG9/WG10 Steering Committee. It has been the focus of the dialogue at numerous Sedona Conference working group meetings and conferences, and revised in response to comments received. This public version is open for public comments. We look forward to your feedback.

Andrea Weiss Jeffries
Gary H. Hoffman
Chair and Vice Chair of the Working Group 9
Steering Committee

A. Introduction and Background

The current version of The Sedona Conference *Commentary on Patent Damages and Remedies* recommends that courts consider damages issues early in the case, including the reliability and admissibility of damages-related theories and evidence. As part of this effort, the Sedona *Commentary* recommends that courts require "Damages Contentions" in appropriate cases.[1] A subcommittee of WG9 has been working on drafting a model local rule that courts could adopt in whole or in part to implement this recommendation. This paper summarizes the thinking of the subcommittee and then provides a Model Local Rule for Damages Contentions in patent cases.

1. Considerations

The WG9 Damages Contentions subcommittee has addressed the purposes and benefits of early damages disclosures in patent cases, procedural issues including the appropriate timing and implications of such disclosures, the nature of such disclosures, and the need to provide flexibility to allow the courts and parties to give consideration to unique case management issues presented in individual cases. These considerations are discussed in turn below.

2. Purpose of Damages Contentions

The committee has identified the following primary reasons why Damages Contentions are appropriate:

- Early damages disclosures/contentions can provide guidance to the court and the parties for managing discovery in accordance with the "proportionality" doctrine now embodied in the Federal Rules.

- Early damages disclosures/contentions can give guidance to the court for managing discovery by providing insight as to the nature of the factual disputes for which requested damages evidence will be used to address.

- Early damages disclosures/contentions can give the parties and the court insight as to the true stakes in a lawsuit, and thus enhance early resolution of the case. This may be true where it becomes evident early on that the potential damages at issue is much smaller or larger in scope than had been appreciated. It may also be true where a damages claim or defense is predicated on a legally deficient theory.

- Exchange of damages related documents, information, and Damages Contentions can improve the productivity of early settlement discussions. Given that such a high percentage of patent cases settle, there is a significant

[1] The Sedona Conference, *Commentary on Patent Damages and Remedies*, Sec. III (Pretrial Principles and Best Practices), https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Patent%20Damages%20and%20Remedies (Jun. 2014, public comment version), *available at* [hereinafter *Sedona WG9 Patent Damages Commentary*].

potential benefit to improving the efficiency of settlement discussions at an earlier juncture.

- The exchange of Damages Contentions may help identify disputes that can be appropriately addressed early in the case as a matter of law, and which would materially shape the litigation in positive ways. For example, where damages theories of one side or the other are legally deficient, early identification of that deficiency may reduce or eliminate needless and burdensome discovery, as well as the associated motion practice.

- Requiring the party seeking damages to provide an early disclosure is consistent with the existing initial disclosure requirements set forth in Rule 26(a)(1)(A)(iii) which require a party seeking damages to provide:

> (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents and other evidentiary material, unless privileged or protected from disclosure, on which each computation is based . . .[2]

The subcommittee appreciates that not all patent cases are alike and believes that Damages Contentions requirements should be designed with flexibility in mind so that they can, in appropriate cases, be tailored based on individual case-specific, case-management considerations.[3]

3. Timing Issues

a. Attention to Damages Issues at Rule 26(f) and Initial Case Management Conferences in Patent Cases to Foster Early Consideration and Flexibility

To accomplish the objectives noted above, the subcommittee believes it would be helpful in patent cases to require attention be given to damages issues in Rule 26 reports and joint case management statements and to require discussion of the same at the Rule 26(f) and initial case management conferences. As discussed below, this would include consideration of the appropriate timing and extent of early damages discovery or exchanges needed for the parties to provide Damages Contentions as well as the detail to be provided in such Damages Contentions.

In addition, because the subcommittee believes that there should be flexibility in the application of the Damages Contentions requirements and the timing of such disclosures based on individual case-

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2 Historically, compliance with this provision has been more of the exception than the rule in patent litigations. However, the December 1, 2015 amendments to the Federal Rules of Civil Procedure, explicitly requiring proportionality considerations in determining the scope of permissible discovery, may encourage greater compliance.

3 The issue of early disclosure of damage information is also addressed in The Sedona Conference *Commentary on Patent Litigation Best Practices: Case Management Issues from the Judicial Perspective Chapter* (Dec. 2015 Edition), at Sec. II.B.3. (Preliminary Statements Regarding Value of the Case for Determining Discovery Limits), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Patent%20Litigation%20Best%20Practices%3A%20Case%20Management%20Issues%20from%20the%20Judicial%20Perspective%20Chapter [hereinafter *Sedona WG10 Case Management Chapter*].

specific, case-management considerations, it believes that it would be appropriate for the parties and the court to consider any possible modification of the Damages Contentions requirements and timing based on specific case considerations as part of the initial case-management and/or Rule 26(f) scheduling conference process.

Accordingly, in addition to its recommendations for the adoption of local rules in patent cases which would implement Damages Contentions disclosure requirements, the subcommittee recommends that existing local rules and standing orders applicable to patent cases should include express reference to the need to address damages-related issues, including the Damages Contentions disclosure requirements, at the Rule 26(f) and initial case management conferences.

Thus, damages issues and the Damages Contentions disclosure requirements need to be discussed between the parties as part of and prior to the Rule 26(f) and initial case management conferences. The Rule 26(f) conference discussions should include both a discussion of each party's damages theories, and each party's estimate of the range of damages appropriate to the case, assuming liability.[4] Discussion of these issues during the Rule 26(f) conference will ensure that damages issues are included in the scope of any Rule 16 and/or case management conference submissions by the parties to the court for meaningful dialogue on these subjects. The subcommittee recognizes that damage estimates cannot always be provided for various reasons at the time of the Rule 26(f) and initial case management conferences. Any modification to the default Damages Contentions requirements that parties might propose, agree upon, or wish the court to address based on individual case-specific considerations would also be part of this process.

For example, consideration could be given to whether the default schedule for Damages Contentions disclosures might be modified based on such factors in individual cases such as:

- the existence of issues that might, from a case-management perspective, dictate deferring Damages Contentions disclosures to a later stage in the case such as a forthcoming key, likely dispositive, claim construction determination or the court's inclination to consider an early motion that would potentially be case dispositive (e.g., noninfringement, Section 101, or standing to bring the lawsuit);

- individual factual circumstances such as those relating to the scope of the particular products or technology at issue where some limited, targeted discovery might be appropriate to ensure meaningful Damages Contentions disclosures can be provided; and

- the existence of prior history or litigation relating to the patent(s) at issue such that additional or earlier exchanges of documents, information, or Damages Contentions disclosures might make sense.

b. Timing of Damages Contentions Disclosures

The subcommittee gave particular attention to the subject of appropriate timing for the initial exchange of damages related documents and Damages Contentions disclosures in patent cases.

4 *See Sedona WG10 Case Management Chapter*, *supra* note 3, at Best Practice 10.

Subject to possible tailoring and modification based on individual case considerations, the conclusion of the subcommittee is that while preliminary document exchanges related to damages issues can be required to occur at an earlier stage, Damages Contentions disclosures by the patent holder should follow the exchange of Rule 26 initial disclosures and locally required infringement contentions, based on the following considerations:

- Damages Contentions disclosures should be required at a relatively early stage of the fact discovery period, so as to provide for targeted damages discovery and to facilitate settlement negotiations/mediation.[5]

- Damages Contentions disclosures should occur after infringement contentions are served, so that the asserted claims, theories of infringement, and accused instrumentalities are already identified. Among other things, this allows Damages Contentions to focus on the actual accused instrumentalities/technology.

- Damages Contentions disclosures should occur early enough in the overall case to focus on and address any damages theories or contentions that may be legally deficient or counter-factual.

Because proportionality is a touchstone of the best practices for patent litigation management, in addition to requiring Damages Contentions from the patentee, the subcommittee believes that information regarding damages and responsive Damages Contentions disclosures should also be required from the accused infringer.

[5] This is not meant to suggest that the court should not inquire about the damage theories and estimated ranges at an earlier stage, as discussed *supra* and in the *Sedona WG10 Case Management Chapter*, *supra* note 3.

B. Proposed Model Local Rule for Damages Contentions in Patent Cases

1. Rule 26(f) Conference of the Parties & Rule 16 Conference

a. Rule 26(f) Conference of the Parties.

As part of the Rule 26(f) conference of the parties, the parties shall discuss the requirements of this Local Rule, including whether any deviation is appropriate for the case. Note that deviation from the Local Rule will be limited, and determined on a case-by-case basis.

b. Rule 26(f) Report.

The parties should set forth their joint or separate positions on adherence to or deviation from this Local Rule, regarding both damages discovery and Damages Contentions, in their Rule 26(f) report.[6]

c. Rule 16 Conference.

The court shall engage the parties in a meaningful discussion of how damages discovery and Damages Contentions shall be crafted for the case, consistent with this Local Rule. Each party shall be prepared to discuss the specific information it requires in order to provide its Damages Contentions consistent with this Rule.

The parties shall try to provide the court with a non-binding, good-faith estimate of the damages range expected for the case along with a high-level explanation for the estimates. If either party is unable to provide such information, then the party shall explain to the court why it cannot and what specific information is needed before it can do so. Such party shall also inform the court of the time by which it should be in a position to provide that estimate and explanation.

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[6] FED. R. CIV. P. 26(f) (Conference of the Parties; Planning for Discovery) states in relevant part:

> ****
>
> (2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

FED. R. CIV. P. 16(b) (Scheduling) states in relevant part:

> (1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:
>
> (A) after receiving the parties' report under Rule 26(f).

2. Rule 26(a)(1)(A)(iii) Initial Disclosures

a. Compliance with Rule 26(a)(1)(A)(iii).

The patentee is expected to comply with Rule 26(a)(1)(A)(iii) which requires the patentee to provide "a computation of each category of damages claimed by the disclosing party" as well as to provide "the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based." To the extent that it is not possible for the patentee to provide a computation of damages, the patentee shall provide a description of the methodology it expects to use to compute its damages. This description shall include:

1. an explanation of whether the patentee expects to seek lost profits, price erosion, a reasonable royalty, or damages based on other theories, including identification of the accused instrumentalities which are the basis for the damages claims;

2. with respect to a lost profits claim, a description of the market and of the competing products that support the lost profits claim, and the bases for any assertion that the patentee would have made some or all of the sales of the accused instrumentalities or technology; and

3. with respect to a reasonable royalty claim, the form of royalty (e.g., lump sum vs. running royalty), identification of the appropriate royalty base to which any running royalty would apply, and the factors applicable to the determination of the royalty rate specific to the case.

b. Amendment and Supplementation.

Initial damages disclosures are subject to the requirements for supplementation and amendment of disclosures set forth in Rule 26(e).

3. Initial Discovery Period: Within 90 Days of Rule 16 Conference

a. Exchange of Limited Damages-Related Discovery.

1. Within 90 days of the Rule 16 Conference on a date set by the court, unless agreed otherwise, the parties shall produce to each other certain discovery sufficient to enable the parties to set forth meaningful detailed Damages Contentions, including:

    a) sales, revenue, cost, and profit data for accused instrumentalities;

    b) market share data for the market covering the accused instrumentalities;

    c) license or other agreements that include the patent(s) in suit, including agreements related to any sale of the patent(s) in suit;

d) license or other agreements that (i) a party may use to support its claims or defenses; and/or (ii) involve patents within the scope of an agreed upon technology area of potential relevance;

e) documents sufficient to show marking of embodying accused instrumentalities; and

f) any documents comprising or reflecting a F/RAND commitment or agreement with respect to the asserted patent(s).

2. Discovery under this Section 3 must be provided for any "Accused Instrumentality" defined by name, model number, or functional description as part of the Rule 26 damages computation and/or methodology description. A functional description shall be as specific as possible, and shall provide information beyond identification of a product category.

b. Non-limiting.

This section is not intended to limit the discovery that may otherwise be pursued by the parties pursuant to requests for proposals, interrogatories, requests for admissions, or other discovery means.

4. Damages Contentions by the Patentee

Within 60 days of the service of the Limited Damages-Related Discovery,[7] the patentee shall serve on the accused infringer(s) detailed Damages Contentions and computations which shall contain the information set forth below. The Damages Contentions and computations may be supplemented and/or amended consistent with Rule 26(e).

a. Economic Advantage(s) of the Asserted Patent(s).

The patentee shall identify the economic benefits it believes have been obtained from the infringement which are attributable to the asserted patent claim(s).

b. Computations, Categories of Damages, and Basis.

The patentee shall identify each of the category(-ies) of damages it is seeking for the asserted infringement, as well as details regarding its theories of recovery, factual support for those theories, and computations of damages within each category, including when applicable:

1. lost profits;

[7] We assume for purposes of this Model Local Rule that the local rules of the court require service of infringement contentions followed by invalidity contentions, or that the parties have agreed upon an exchange of these contentions pursuant to interrogatories or other means.

2. price erosion;

3. convoyed or collateral sales; and

4. reasonable royalty.

c. Timing of Claimed Damages.

The patentee shall identify the following:

1. the timing of the point of first infringement;

2. the timing of the start of claimed damages;

3. the timing of the end of claimed damages; and

4. any resultant limitations on damages.

d. Additional Discovery Required.

For each of the foregoing subsections (a)-(c) as to which the patentee contends it is unable to provide a fulsome response, including a computation of damages for each form of claimed damages, the patentee shall identify the information it requires from the accused infringer(s) or from third parties in order to provide a fulsome response.

5. Accused Infringer's Response to Damages Contentions

Within 60 days of service of the patentee's Damages Contentions, the accused infringer shall serve a Response to the Damages Contentions, which shall specifically address whether and how the accused infringer disagrees with the patentee's contentions and computations relating to the information set forth below.

a. Economic Advantage(s) of the Asserted Patent(s).

The accused infringer shall respond as appropriate to the patentee's contentions regarding the economic benefits obtained from the infringement attributable to the asserted patent claim(s).

b. Form of Damages and Basis.

The accused infringer shall respond, with factual support, to the patentee's contentions regarding the category(-ies) of damages the patentee is seeking for the asserted infringement, as well as to the patentee's computations and theories of recovery within each category, including:

1. lost profits;

2. price erosion;

3. convoyed or collateral sales; and

4. reasonable royalty.

c. Timing of Damages Sought by Patentee.

The accused infringer shall identify the following:

1. the timing of the alleged point of first infringement;
2. the timing of the start of damages;
3. the timing of the end of damages; and
4. any resultant limitations on damages.

d. Additional Discovery Required.

To the extent the accused infringer contends that it has insufficient information upon which to provide a fulsome response to the patentee's damages theory as set forth in the patentee's Damages Contentions on any of the foregoing subsections (a)-(c), the accused infringer shall identify the additional discoverable information it contends is required from the patentee or any third parties.

Appendix A: 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 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 has convened leading jurists, attorneys, academics, and experts, all of whom support the mission of the organization by their participation in conferences and the Sedona Conference Working Group Series (WGS). 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.

The 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 created when a "tipping point" issue in the law is identified, and it has been determined that the bench and bar would benefit from neutral, nonpartisan principles, guidelines, best practices, or other commentaries. Working Group drafts are subjected to a peer review process involving members of the entire Working Group Series including—when possible—dialogue 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. Its first publication, The Sedona Principles: Best Practices Recommendations & Principles Addressing Electronic Document Production, has been cited favorably in scores of court decisions, as well as by policy makers, professional associations, and legal academics. In the years since then, the publications of other Working Groups have had similar positive impact.

Any interested jurist, attorney, academic, consultant, or expert may join the Working Group Series. Members may participate in brainstorming groups, on drafting teams, and in Working Group dialogues. Membership also provides access to advance drafts of WGS output with the opportunity for early input. For further information and to join, visit the "Working Group Series" area of our website, https://thesedonaconference.org/wgs.

Appendix B: The Sedona Conference Working Group 9 on Patent Damages and Remedies—List of Steering Committee Members and Judicial Advisors

The Sedona Conference's Working Group 9 on Patent Damages and Remedies Steering Committee Members and Judicial Advisors are listed below. Organizational information is included solely for purposes of identification.

The opinions expressed in publications of The Sedona Conference's Working Groups, unless otherwise attributed, represent consensus views of the Working Groups' members. They do not necessarily represent the views of any of the individual participants or their employers, clients, or any organizations to which they may belong, nor do they necessarily represent official positions of The Sedona Conference. Furthermore, the statements in each publication are solely those of the non-judicial members of the Working Group; they do not represent judicial endorsement of the opinions expressed or the practices recommended.

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Hon. Cathy Bissoon, U.S. District Judge, Western District of Pennsylvania
Hon. Hildy Bowbeer, U.S. Magistrate Judge, District of Minnesota
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