

**DECLARATION OF ANNE E. HUFFSMITH
IN SUPPORT OF REPLY
IN SUPPORT OF
MOTION TO TRANSFER VENUE TO THE
NORTHERN DISTRICT OF CALIFORNIA**

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EXHIBIT D

WHERE TO FILE YOUR PATENT CASE

*Mark A. Lemley**

Abstract

Forum shopping is a feature of modern patent law. Both plaintiffs and defendants do it. But they have traditionally done it on the basis of anecdote and personal experience, not on the basis of actual data. In this paper, I evaluate the records of the thirty-three most active patent district courts, considering plaintiff win rate, the likelihood of getting to trial, and the speed of the forum. The result is a surprising answer to the question “Where should I file my patent case?”

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Forum shopping is alive and well in patent law. The patent venue statute allows plaintiffs to file suit anywhere in the country where the defendant's product is sold or used.¹ Despite the existence of a unified court of appeals that hears virtually all patent cases,² patent plaintiffs—and those who might become patent defendants—spend a great deal of time and effort worrying about where to file their case.³ Meanwhile, accused infringers play much the same game, looking for defense-favorable jurisdictions in which to file declaratory judgment actions.⁴ The result in many cases is a race to the courthouse. The Federal Circuit has acted recently to rein in the worst abuses,⁵ but forum shopping shows no signs of disappearing.

When selecting a forum, patent owners generally look for a few specific characteristics. First, of course, they want to win. Therefore, the fact that a court is considered pro-patentee is, not surprisingly, a strong reason to file suit there. Second, at a minimum, patent plaintiffs want to get to trial. They know that most summary judgment rulings favor defendants in patent cases, but that juries

¹ 28 U.S.C. § 1400(b) (2006) (“Any civil action . . . may be brought . . . where the defendant has committed acts of infringement and has a regular and established place of business.”).

² See 28 U.S.C. §§ 1295(a)(1), 1338(a) (2006).

³ Among the academic discussions of patent forum shopping and costs of patent litigation, see Samson Vermont, *The Economics of Patent Litigation*, in FROM IDEAS TO ASSETS: INVESTING WISELY IN INTELLECTUAL PROPERTY 327, 327-71 (Bruce Berman ed., John Wiley & Sons, Inc. 2002); Mark Chandler, *The Patent System's Relationship to Digital Entrepreneurship*, 112 W. VA. L. REV. 199, 203; Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 928 (2001). Carter Phillips calls forum shopping a “serious problem” in patent litigation. Carter G. Phillips, Lewis F. Powell, Jr. Distinguished Lecture Series, 66 WASH. & LEE L. REV. 1467, 1472 (2009).

⁴ It can be a substantial advantage to sue first as an accused infringer. Kimberly Moore's study found that patentees won 68% of jury trials when they were the plaintiff but only 38% when they were the defendant in a declaratory judgment action. Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 368 (2000).

⁵ See *In re Genentech, Inc.*, 566 F.3d 1338, 1348, 91 U.S.P.Q.2d (BNA) 1027, 1035 (Fed. Cir. 2009); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336-37, 92 U.S.P.Q.2d (BNA) 1861, 1862-63 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320-21, 89 U.S.P.Q.2d (BNA) 1567, 1569-70 (Fed. Cir. 2008).

tend to be far more pro-patentee.⁶ As a result, a jurisdiction that grants many summary judgment motions is likely to be a defense jurisdiction, while a court that allows many matters to go to trial is likely to end up favoring the patentee. Third, patent plaintiffs generally want speed. Because a patent usually expires after twenty years,⁷ it is a wasting asset; every year waiting to enforce the right in court is a year that a patentee doesn't have exclusivity in the market. For plaintiffs only interested in damages, delay is somewhat less of a problem, because the damages will ultimately compensate for the defendant's use during the court proceeding and the courts routinely award prejudgment interest. Nonetheless, time spent waiting for a court resolution is time that cannot be spent using the proceeds of the first suit to sue others. Further, while plaintiffs wait for a court resolution, defendants can design around the patentee's invention, and delay may also bring market changes that render the patented invention less valuable.⁸

Defendants, in turn, generally want the opposite of what plaintiffs want. A defendant's ideal jurisdiction is one that regularly rules for defendants, is unlikely to send cases to jury trial, and takes a long time to do both. The incentives aren't always perfectly misaligned—for example, a small defendant with limited resources may be happy in a jurisdiction that resolves cases quickly—but in general what plaintiffs want and what defendants want are opposites.

Until recently, there was no good source of information about the characteristics of the different district courts. Instead, lawyers tended to rely on a combination of anecdote and their own experiences with a jurisdiction when

⁶ See, e.g., John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 212-13 (1998) (finding that patentees win 67% of jury verdicts on validity but only 28% of pretrial motions).

⁷ See 35 U.S.C. § 154(a)(2) (2006) (providing patents with a twenty year term of exclusivity); 35 U.S.C. § 156(c) (2006) (allowing extension of term of exclusivity equal to the regulatory review period to which the product is subject, in certain circumstances); 35 U.S.C. § 154(b) (providing a number of extensions of patent term).

⁸ At the same time, delay can increase the cost of litigation and, especially if the plaintiff's lawyer is on contingency, that cost may be borne by the defendant. See, e.g., Steven J. Elleman, *Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions*, 12 Ohio St. J. on Disp. Resol. 759, 762-63 (1997). As a result, some plaintiffs do not particularly care about speed.

deciding where to file a patent case. This led to a herd mentality, in which patent plaintiffs flock en masse to a particular jurisdiction perceived as favorable—the Eastern District of Virginia a decade ago;⁹ the Eastern District of Texas in the last several years.¹⁰ Speculation abounds about the next hot forum for patent litigation—the Western District of Wisconsin? The Southern District of Florida? In each instance, assessing the likelihood of winning, or even the likelihood of trial in a patent case, was difficult, so plaintiffs focused primarily on what they *could* observe: how fast a court’s docket moves.

The development of the Stanford Intellectual Property Litigation Clearinghouse (“IPLC”) allows for a more systematic approach. The IPLC¹¹ is a comprehensive set of data on every patent lawsuit filed since 2000—more than 25,000 suits in all. In this Article, I survey the outcome data of all 21,667 cases in the IPLC database that were resolved at the district court level by March 17, 2010. The results are presented in Table 1:

Table 1: District Court Outcomes 2000-2010

TOTAL OUTCOMES	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	Plaintiff Win Rate
21,667	989	2,054	2,223	37	14,542	1,822	32.5%

Not surprisingly, most patent cases (75.5%) settle. When cases do go to judgment, and almost 15% do, patentees win 989 out of 3,043, or 32.5%.¹²

⁹ See George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA 361, 363 (1995).

¹⁰ See Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 204 (2007).

¹¹ Available without charge at <http://www.lexmachina.org> for academic, government, and non-profit users, and by subscription for commercial users at <http://www.lexmachina.com>.

¹² This does not include consent judgments; adding those would increase the number substantially. But consent judgments are really settlements, not rulings on the merits.

The overall percentage (32.5%) of patentees who win, however, conceals substantial variation in outcome by district. There are jurisdictions where the patentee win rate is 100% (the Middle District of Georgia, for example), and jurisdictions where it is 0% (the District of Wyoming). But these are outliers in districts where small numbers of cases are filed; one can't predict very much about the District of Wyoming by knowing that the only patent case ever resolved there on the merits in the last decade went for the defense. As a result, I limit my analysis to districts that resolved twenty-five or more cases on the merits in the last decade.¹³ There are thirty-three such districts. In Table 2, I list these districts in decreasing order by the number of patent cases litigated there in the last decade.

Table 2: Number of Patent Cases Litigated in Districts with 25 or More Outcomes

District	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL
Central District of California	125	219	193	11	1401	340	2289
Northern District of California	56	159	131	0	1007	71	1424
Northern District of Illinois	47	97	119	3	874	93	1233
Eastern District of Texas	52	77	150	0	703	42	1024
Southern District of New York	51	87	87	1	676	116	1018
District of Delaware	62	75	137	0	682	61	1017
District of New Jersey	29	109	201	0	588	60	987
District of Minnesota	25	54	28	0	450	43	600
District of Massachusetts	43	69	41	1	392	38	584

¹³ A full list of cases for every district is attached as Appendix A.

Southern District of California	21	56	24	1	380	37	519
Eastern District of Michigan	18	54	34	0	378	30	514
Southern District of Florida	25	65	71	1	282	34	478
Eastern District of Pennsylvania	15	40	42	3	342	33	475
Northern District of Georgia	7	54	69	1	265	61	457
Middle District of Florida	25	29	49	2	277	47	429
Northern District of Texas	27	22	55	0	283	18	405
Western District of Washington	11	44	56	0	248	33	392
Eastern District of Virginia	14	32	69	1	229	28	373
District of Colorado	9	27	28	0	285	17	366
District of Utah	15	39	34	2	247	20	357
Southern District of Texas	17	41	51	2	214	18	343
Northern District of Ohio	13	33	14	0	268	15	343
Eastern District of New York	6	28	29	0	245	34	342
Eastern District of Missouri	16	24	26	0	170	55	291
District of Arizona	10	23	28	0	193	17	271
Western District of Wisconsin	12	38	31	2	155	18	256
District of Oregon	19	23	8	0	160	41	251

District of Maryland	7	21	40	0	161	13	242
Eastern District of Wisconsin	7	34	21	0	162	17	241
Southern District of Ohio	8	22	23	0	149	16	218
Western District of Texas	9	18	17	0	151	5	200
District of Nevada	24	28	15	0	117	14	198
District of Columbia	9	25	19	0	59	3	115

The districts with the most patent cases largely track population and technology centers—Northern California, Los Angeles, Chicago, New York and New Jersey—with two exceptions: the District of Delaware, which is the state of incorporation of many litigants, and the Eastern District of Texas, which has little connection to innovation, except its choice as a destination for patent plaintiffs.

Even among these districts, the patentee win rate varies substantially. Table 3 sorts the top thirty-three districts by patentee win rate.

Table 3: Patentee Win Rate in Districts with 25 or More Outcomes

District	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
Northern District of Texas	27	22	55	0	283	18	405	55.1%
Middle District of Florida	25	29	49	2	277	47	429	46.3%
District of Nevada	24	28	15	0	117	14	198	46.2%
District of Delaware	62	75	137	0	682	61	1017	45.3%
District of Oregon	19	23	8	0	160	41	251	45.2%

Eastern District of Texas	52	77	150	0	703	42	1024	40.3%
Eastern District of Missouri	16	24	26	0	170	55	291	40.0%
District of Massachusetts	43	69	41	1	392	38	584	38.4%
Southern District of New York	51	87	87	1	676	116	1018	37.0%
Central District of California	125	219	193	11	1401	340	2289	36.3%
Western District of Texas	9	18	17	0	151	5	200	33.3%
Northern District of Illinois	47	97	119	3	874	93	1233	32.6%
District of Minnesota	25	54	28	0	450	43	600	31.6%
Eastern District of Virginia	14	32	69	1	229	28	373	30.4%
District of Arizona	10	23	28	0	193	17	271	30.3%
Southern District of Texas	17	41	51	2	214	18	343	29.3%
Northern District of Ohio	13	33	14	0	268	15	343	28.3%
Southern District of Florida	25	65	71	1	282	34	478	27.8%
District of Utah	15	39	34	2	247	20	357	27.8%
Southern District of California	21	56	24	1	380	37	519	27.3%
Eastern District of Pennsylvania	15	40	42	3	342	33	475	27.3%

Southern District of Ohio	8	22	23	0	149	16	218	26.7%
District of Columbia	9	25	19	0	59	3	115	26.5%
Northern District of California	56	159	131	0	1007	71	1424	26.0%
Eastern District of Michigan	18	54	34	0	378	30	514	25.0%
District of Colorado	9	27	28	0	285	17	366	25.0%
District of Maryland	7	21	40	0	161	13	242	25.0%
Western District of Wisconsin	12	38	31	2	155	18	256	24.0%
District of New Jersey	29	109	201	0	588	60	987	21.0%
Western District of Washington	11	44	56	0	248	33	392	20.0%
Eastern District of New York	6	28	29	0	245	34	342	17.6%
Eastern District of Wisconsin	7	34	21	0	162	17	241	17.1%
Northern District of Georgia	7	54	69	1	265	61	457	11.5%
TOTAL OUTCOMES								
	Claimant Win	Claim Defendant Win	Procedural	Indeterminat	Likely Settlement	Consent Judgment	TOTAL	Claimant Win
	989	2054	2223	37	14542	1822	21667	32.5%

The variation in win rates ranges from a high of 55% in the Northern District of Texas to a low of 11.5% in the Northern District of Georgia. Statistically, then, it seems that the jurisdiction in which a case is litigated has a

significant impact on its outcome.¹⁴ Even limiting the analysis to the largest districts—those with more than 100 judgments on the merits—the variation is substantial, ranging from a high of 45.3% in the District of Delaware to a low of 21% in the District of New Jersey. Notably, the Eastern District of Texas, while having a higher than average plaintiff win rate, is not in the top five districts. Moreover, the districts that are in the top five (the Northern District of Texas, the Middle District of Florida, the District of Nevada, the District of Delaware, and the District of Oregon) are not normally thought of as patent plaintiffs’ jurisdictions of choice. Indeed, accused infringers often choose the District of Delaware, filing declaratory judgment actions there. Conversely, patent plaintiffs often file suit in districts, like the District of New Jersey, that have a surprisingly low win rate. In short, if patentees or accused infringers are to pick a forum only by win rate, both sides should probably be picking different districts than they do.

It is important to note, however, that your mileage may vary. The win rate in any district will be a function of the merits of the cases filed there. For example, one experienced litigator suggested to me that patentees fare so well in the District of Nevada and the Middle District of Florida because those jurisdictions are home to many trade shows, and cases brought against a new product demonstrated at a trade show may be stronger than the average patent case. So the fact that patentees have won in a district in the past doesn’t mean you will win if you file there. Indeed, the fact that plaintiffs gravitate to a particular jurisdiction because it is viewed as plaintiff-friendly may reduce the ultimate win rate if those plaintiffs assert patents of lower overall quality than the cases filed before the influx.

Of course, win rate is not all that matters. Most cases don’t go to judgment, after all. And if the patentee is interested in trial—which is where the patentee win rate is the highest, and the largest judgments are possible—things look rather different. Table 4 ranks the top thirty-three districts by the percentage of patent cases that make it to trial.

¹⁴ To be clear, this is not a causal claim: it may be the nature of the cases, the lawyers, or something else that explains part or all of this difference.

Table 4: Percentage of Patent Cases that Result in Trial in Districts with 25 or More Outcomes

District	Claimant Win	Claim Defendant Win	Procedural	TOTAL	Claimant Win Percentage	Cases to Trial	Percentage to Trial
District of Delaware	62	75		1017	45.3%	120	11.8%
Eastern District of Texas	52	77		1024	40.3%	82	8.0%
Western District of Wisconsin	12	38		256	24.0%	19	7.4%
Eastern District of Virginia	14	32		373	30.4%	24	6.4%
District of Massachusetts	43	69		584	38.4%	36	6.2%
Southern District of Florida	25	65		478	27.8%	21	4.4%
Eastern District of Missouri	16	24		291	40.0%	12	4.1%
Western District of Texas	9	18		200	33.3%	8	4.0%
Middle District of Florida	25	29		429	46.3%	17	4.0%
Southern District of Texas	17	41		343	29.3%	12	3.5%
District of Oregon	19	23		251	45.2%	8	3.2%
Northern District of California	56	159		1424	26.0%	44	3.1%
Southern District of California	21	56		519	27.3%	16	3.1%

District of Arizona	10	23		271	30.3%	7	2.6%
District of Nevada	24	28		198	46.2%	5	2.5%
District of Maryland	7	21		242	25.0%	6	2.5%
Northern District of Texas	27	22		405	55.1%	10	2.5%
District of Minnesota	25	54		600	31.6%	14	2.3%
District of Colorado	9	27		366	25.0%	8	2.2%
Eastern District of Michigan	18	54		514	25.0%	11	2.1%
District of New Jersey	29	109		987	21.0%	21	2.1%
Northern District of Georgia	7	54		457	11.5%	8	1.8%
Northern District of Illinois	47	97		1233	32.6%	20	1.6%
Southern District of New York	51	87		1018	37.0%	16	1.6%
Central District of California	125	219		2289	36.3%	35	1.5%
Eastern District of Pennsylvania	15	40		475	27.3%	7	1.5%
Northern District of Ohio	13	33		343	28.3%	4	1.2%
Eastern District of New York	6	28		342	17.6%	3	0.9%
Eastern District of Wisconsin	7	34		241	17.1%	2	0.8%

Western District of Washington	11	44		392	20.0%	3	0.8%
District of Utah	15	39		357	27.8%	2	0.6%
Southern District of Ohio	8	22		218	26.7%	1	0.5%
District of Columbia	9	25		115	26.5%	0	0.0%
TOTAL OUTCOMES	Claimant Win	Claim Defendant Win	Procedural	TOTAL	Claimant Win Percentage	Cases to Trial	Percentage to Trial
	989	2054		21667	32.5%	602	2.8%

These numbers seem more reflective of the conventional wisdom among patent plaintiffs. While on average only 2.8% of patent cases go to trial, a far higher percentage make it to trial in the District of Delaware, the Eastern District of Texas, the Western District of Wisconsin, and the Eastern District of Virginia. With the exception of Delaware, all these are traditional patent plaintiff districts of choice. By contrast, six districts send less than 1% of their cases to trial. One might reasonably expect accused infringers to target those districts, though as mentioned above, many are—apparently foolishly—sending their cases to Delaware instead.

Finally, plaintiffs are frequently interested in speed. A speedy trial can hold down costs and get a plaintiff quick relief. A speedy settlement can have the same effect. Both can allow a patentee to build a war chest to sue other defendants, and, in the case of trial, build the reputation of the patent. Defendants' incentives are less clear; defendants generally want to delay any day of reckoning, and may think they can wear down a plaintiff in a long case, but they too will probably pay more in legal fees in slow jurisdictions than in fast ones. Table 5 ranks the district courts by their time to ultimate disposition of the case.

Table 5: Districts with 25 or More Outcomes, Sorted by Time to Resolution

District	Claimant Win	Claim Defendant Win	TOTAL	Claimant Win Percentage	Time to Resolution (in years)
Western District of Wisconsin	12	38	256	24.0%	0.56
Eastern District of Virginia	14	32	373	30.4%	0.64
Western District of Washington	11	44	392	20.0%	0.80
Southern District of Florida	25	65	478	27.8%	0.83
District of Colorado	9	27	366	25.0%	0.88
Middle District of Florida	25	29	429	46.3%	0.89
Central District of California	125	219	2289	36.3%	0.89
Northern District of Ohio	13	33	343	28.3%	0.91
Northern District of Illinois	47	97	1233	32.6%	0.95
Northern District of Texas	27	22	405	55.1%	0.97
Western District of Texas	9	18	200	33.3%	0.98
District of Maryland	7	21	242	25.0%	1.00
Northern District of Georgia	7	54	457	11.5%	1.02
Southern District of California	21	56	519	27.3%	1.03
District of Delaware	62	75	1017	45.3%	1.05
Southern District of Texas	17	41	343	29.3%	1.06
District of Utah	15	39	357	27.8%	1.07
Eastern District of Missouri	16	24	291	40.0%	1.07

District of Nevada	24	28	198	46.2%	1.09
Eastern District of Michigan	18	54	514	25.0%	1.10
Southern District of New York	51	87	1018	37.0%	1.12
Eastern District of New York	6	28	342	17.6%	1.13
District of Columbia	9	25	115	26.5%	1.14
District of New Jersey	29	109	987	21.0%	1.14
District of Oregon	19	23	251	45.2%	1.14
District of Minnesota	25	54	600	31.6%	1.18
Eastern District of Wisconsin	7	34	241	17.1%	1.21
Eastern District of Texas	52	77	1024	40.3%	1.24
Southern District of Ohio	8	22	218	26.7%	1.28
Northern District of California	56	159	1424	26.0%	1.28
District of Arizona	10	23	271	30.3%	1.28
District of Massachusetts	43	69	584	38.4%	1.29
Eastern District of Pennsylvania	15	40	475	27.3%	1.32

The differences here are not that dramatic. Most districts take approximately a year to resolve the average patent case. But there are some notable—and well-known—“rocket docketts.” The Western District of Wisconsin and the Eastern District of Virginia resolve the average case in just over six months. The Western District of Washington and the Southern District of Florida are not far behind. Interestingly, the Eastern District of Texas is among the slowest jurisdictions, only slightly faster than the Northern District of California. This is likely a function of congestion resulting from its popularity as a patent forum; the sense in the bar in the early 2000s was that the Eastern District of

Texas was a fast docket.¹⁵ Here too your mileage may vary; if everyone moves to a fast district, it can easily become a slow district as a result.

Related to time to resolution is time to trial. Table 6 ranks the districts by time to trial.

Table 6: Districts with 25 or More Outcomes, Sorted by Time to Trial

District	Claimant Win	Claim Defendant Win	TOTAL	Claimant Win Percentage	Cases to Trial	Percentage to Trial	Time to Trial (in years)
Western District of Wisconsin	12	38	256	24.0%	19	7.4%	0.67
Eastern District of Virginia	14	32	373	30.4%	24	6.4%	0.96
Southern District of Florida	25	65	478	27.8%	21	4.4%	1.66
Middle District of Florida	25	29	429	46.3%	17	4.0%	2.00
District of Delaware	62	75	1017	45.3%	120	11.8%	2.03
District of Oregon	19	23	251	45.2%	8	3.2%	2.07
Eastern District of Texas	52	77	1024	40.3%	82	8.0%	2.13
Western District of Washington	11	44	392	20.0%	3	0.8%	2.19
District of Maryland	7	21	242	25.0%	6	2.5%	2.22
Northern District of Texas	27	22	405	55.1%	10	2.5%	2.26
Southern District of Texas	17	41	343	29.3%	12	3.5%	2.38

¹⁵ See, e.g., Alisha Kay Taylor, Comment, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?*, 6 J. MARSHALL REV. INTELL. PROP. L. 570, 570 (2007).

District of Nevada	24	28	198	46.2%	5	2.5%	2.39
Central District of California	125	219	2289	36.3%	35	1.5%	2.47
Southern District of California	21	56	519	27.3%	16	3.1%	2.48
Eastern District of Missouri	16	24	291	40.0%	12	4.1%	2.52
Western District of Texas	9	18	200	33.3%	8	4.0%	2.52
Northern District of Illinois	47	97	1233	32.6%	20	1.6%	2.52
Northern District of Ohio	13	33	343	28.3%	4	1.2%	2.61
District of Massachusetts	43	69	584	38.4%	36	6.2%	2.66
Southern District of New York	51	87	1018	37.0%	16	1.6%	2.85
Northern District of California	56	159	1424	26.0%	44	3.1%	2.92
District of Arizona	10	23	271	30.3%	7	2.6%	2.95
District of Minnesota	25	54	600	31.6%	14	2.3%	2.96
District of Utah	15	39	357	27.8%	2	0.6%	2.99
District of New Jersey	29	109	987	21.0%	21	2.1%	3.06
Eastern District of Pennsylvania	15	40	475	27.3%	7	1.5%	3.09
Northern District of Georgia	7	54	457	11.5%	8	1.8%	3.10
District of Colorado	9	27	366	25.0%	8	2.2%	3.19
Eastern District of New York	6	28	342	17.6%	3	0.9%	3.28
Southern District of Ohio	8	22	218	26.7%	1	0.5%	3.30

Eastern District of Michigan	18	54	514	25.0%	11	2.1%	3.41
Eastern District of Wisconsin	7	34	241	17.1%	2	0.8%	3.51
District of Columbia	9	25	115	26.5%	0	0.0%	n/a

Not surprisingly, there are some similarities between time to resolution and time to trial, though the average time to trial is much longer than the average resolution, reflecting the prevalence of early settlements. The Western District of Wisconsin and the Eastern District of Virginia are truly rocket docket; in those districts the average patent trial was completed less than a year after the case was filed. Notably, however, districts that are among the slowest to total resolution, including the Eastern District of Texas and the Northern District of California, are much faster than others when it comes to bringing cases to trial.

What is notable about all these measures is that no district court stands out as the best for plaintiffs or defendants on every measure. In other words, parties that want to forum shop must make tradeoffs.

To facilitate those tradeoffs, the following tables rank the districts by their aggregate standing on each of the possible measures: patentee win rate, the percentage of cases to trial, the time to resolution, and the time to trial. Table 7 presents a simple aggregate ranking, adding the rank of each district on each of the four measures. The lower the aggregate ranking number, the better the district is for patent plaintiffs; the higher the aggregate ranking, the better the

district is for accused infringers. The magnitude of the numeric differences gives a coarse indication of how much more desirable one district is than another.¹⁶

Table 7: Aggregate Ranking of Districts

District	Claimant Win Percentage Ranking	Percent to Trial Ranking	Time to Resolution Ranking	Time to Trial Ranking	Aggregate Ranking
Middle District of Florida	2	9	6	4	21
Eastern District of Virginia	14	4	2	2	22
District of Delaware	4	1	15	5	25
Southern District of Florida	18	6	4	3	31
Western District of Wisconsin	28	3	1	1	33
Northern District of Texas	1	17	10	10	38
Eastern District of Texas	6	2	28	7	43
Western District of Texas	11	8	11	16	46
District of	5	11	25	6	47

¹⁶ I ran a more sophisticated approach that compared the ratio of each district on each measure to the mean for that measure. That allows me to test the effect of the size of the difference between each district on the various measures. Doing so required inverting the ratio for the time to resolution and time to trial results, as lower numbers were desirable there. I have not reprinted the analysis because I think it distorts the results in favor of districts that happen to be outliers on measures with higher standard deviation (specifically, percentage to trial and time to trial), and creates other anomalies as well. For those nonetheless interested, the most favorable patentee jurisdictions on that analysis were the Western District of Wisconsin, the Eastern District of Virginia, the District of Delaware, the Eastern District of Texas, and the Middle District of Florida. The jurisdictions most favorable to accused infringers were the District of the District of Columbia, the Southern District of Ohio, the Eastern District of Wisconsin, the Eastern District of New York, and the District of Utah.

Oregon					
Eastern District of Missouri	7	7	18	15	47
District of Nevada	3	15	19	12	49
Southern District of Texas	16	10	16	11	53
Central District of California	10	25	7	13	55
Northern District of Illinois	12	23	9	17	61
Southern District of California	20	13	14	14	61
District of Maryland	25	16	12	9	62
District of Massachusetts	8	5	32	19	64
Northern District of Ohio	17	27	8	18	70
Western District of Washington	30	30	3	8	71
Southern District of New York	9	24	21	20	74
District of Colorado	26	19	5	28	78
District of Minnesota	13	18	26	23	80
District of Arizona	15	14	31	22	82
Northern District of California	24	12	30	21	87
District of Utah	19	31	17	24	91
Northern District of Georgia	33	22	13	27	95
Eastern District of Michigan	27	20	20	31	98
District of New Jersey	29	21	24	25	99

Eastern District of Pennsylvania	21	26	33	26	106
Eastern District of New York	31	28	22	29	110
District of Columbia	23	33	23	33	112
Southern District of Ohio	22	32	29	30	113
Eastern District of Wisconsin	32	29	27	32	120

The best aggregate patent district for plaintiffs is, surprisingly, the Middle District of Florida. As shown in Table 7 above, it is the only district that is in the top ten in every measure, with a ranking of two for claimant win percentage, nine for percentage of claims to trial, six for time to resolution, and four for time to trial. The other jurisdictions in the top five are somewhat less of a surprise: the Eastern District of Virginia, the District of Delaware, the Southern District of Florida, and the Western District of Wisconsin. What is surprising is that the Eastern District of Texas isn't in the five best districts for patent plaintiffs. On the accused infringer side, the most favorable jurisdictions are the Eastern District of Wisconsin, the Southern District of Ohio, the District of Columbia, the Eastern District of New York, and the Eastern District of Pennsylvania.

Aggregating rankings is, of course, a crude measure of how favorable a district is likely to be. Depending on a party's preferences, some of these districts might not look so favorable. For example, one of the top plaintiff's jurisdictions, the Western District of Wisconsin, actually ranks near the bottom in terms of patentee win rate. A patentee more concerned with winning than with speed would presumably not want to sue there. To account for these different preferences, Table 8 double counts the role of outcomes to present a rank ordering for an outcome-oriented plaintiff. The results do not change that much; the Northern District of Texas appears in the top five plaintiff jurisdictions, replacing the Western District of Wisconsin, and the Eastern District of Texas edges into the top five in a tie for fifth place. The District of New Jersey edges out the Eastern District of Pennsylvania as a prime jurisdiction for accused infringers.

Table 8: Outcome-Emphasis Ranking of Districts with 25 or More Outcomes

District	Claimant Win Percentage Ranking	Percent to Trial Ranking	Time to Resolution Ranking	Time to Trial Ranking	Aggregate Ranking Weighted to Outcomes
Middle District of Florida	2	9	6	4	23
District of Delaware	4	1	15	5	29
Eastern District of Virginia	14	4	2	2	36
Northern District of Texas	1	17	10	10	39
Southern District of Florida	18	6	4	3	49
Eastern District of Texas	6	2	28	7	49
District of Oregon	5	11	25	6	52
District of Nevada	3	15	19	12	52
Eastern District of Missouri	7	7	18	15	54
Western District of Texas	11	8	11	16	57
Western District of Wisconsin	28	3	1	1	61
Central District of California	10	25	7	13	65
Southern District of Texas	16	10	16	11	69
District of Massachusetts	8	5	32	19	72
Northern District of Illinois	12	23	9	17	73
Southern District of California	20	13	14	14	81
Southern District of New	9	24	21	20	83

York					
District of Maryland	25	16	12	9	87
Northern District of Ohio	17	27	8	18	87
District of Minnesota	13	18	26	23	93
District of Arizona	15	14	31	22	97
Western District of Washington	30	30	3	8	101
District of Colorado	26	19	5	28	104
District of Utah	19	31	17	24	110
Northern District of California	24	12	30	21	111
Eastern District of Michigan	27	20	20	31	125
Eastern District of Pennsylvania	21	26	33	26	127
Northern District of Georgia	33	22	13	27	128
District of New Jersey	29	21	24	25	128
District of Columbia	23	33	23	33	135
Southern District of Ohio	22	32	29	30	135
Eastern District of New York	31	28	22	29	141
Eastern District of Wisconsin	32	29	27	32	152

Perhaps plaintiffs have other preferences. Table 9 shows the ranking for a plaintiff particularly interested in getting to trial, double-counting both the percentage of cases that go to trial and the time to trial. The order of the top five patentee jurisdictions changes, with the Eastern District of Virginia topping the list, but the top five stay the same. The same is true of the top five accused infringer jurisdictions.

Table 9: Trial-Emphasis Ranking of Districts with 25 or More Outcomes

District	Claimant Win Percentage Ranking	Percent to Trial Ranking	Time to Resolution Ranking	Time to Trial Ranking	Aggregate Ranking Weighted to Trials
Eastern District of Virginia	14	4	2	2	28
District of Delaware	4	1	15	5	31
Middle District of Florida	2	9	6	4	34
Western District of Wisconsin	28	3	1	1	37
Southern District of Florida	18	6	4	3	40
Eastern District of Texas	6	2	28	7	52
District of Oregon	5	11	25	6	64
Northern District of Texas	1	17	10	10	65
Eastern District of Missouri	7	7	18	15	69
Western District of Texas	11	8	11	16	70
Southern District of Texas	16	10	16	11	74
District of Nevada	3	15	19	12	76
District of Maryland	25	16	12	9	87
District of Massachusetts	8	5	32	19	88
Southern District of California	20	13	14	14	88
Central District of California	10	25	7	13	93
Northern District of	12	23	9	17	101

Illinois					
Western District of Washington	30	30	3	8	109
Northern District of Ohio	17	27	8	18	115
Southern District of New York	9	24	21	20	118
District of Arizona	15	14	31	22	118
Northern District of California	24	12	30	21	120
District of Minnesota	13	18	26	23	121
District of Colorado	26	19	5	28	125
Northern District of Georgia	33	22	13	27	144
District of New Jersey	29	21	24	25	145
District of Utah	19	31	17	24	146
Eastern District of Michigan	27	20	20	31	149
Eastern District of Pennsylvania	21	26	33	26	158
Eastern District of New York	31	28	22	29	167
Southern District of Ohio	22	32	29	30	175
District of Columbia	23	33	23	33	178
Eastern District of Wisconsin	32	29	27	32	181

Finally, Table 10 shows the results for a plaintiff interested only in speed, double-weighting time to resolution and time to trial. Once again the top five districts for both patentees and accused infringers change their order but remain the same. Notably, by this measure the Eastern District of Texas drops to ninth place, behind the Central District of California.

Table 10: Speed-Emphasis Ranking of Districts with 25 or More Outcomes

District	Claimant Win Percentage Ranking	Percent to Trial Ranking	Time to Resolution Ranking	Time to Trial Ranking	Aggregate Outcome Weighted to Speed
Eastern District of Virginia	14	4	2	2	26
Middle District of Florida	2	9	6	4	31
Western District of Wisconsin	28	3	1	1	35
Southern District of Florida	18	6	4	3	38
District of Delaware	4	1	15	5	45
Northern District of Texas	1	17	10	10	58
Western District of Texas	11	8	11	16	73
Central District of California	10	25	7	13	75
Eastern District of Texas	6	2	28	7	78
District of Oregon	5	11	25	6	78
Eastern District of Missouri	7	7	18	15	80
Southern District of Texas	16	10	16	11	80
District of Nevada	3	15	19	12	80
Western District of Washington	30	30	3	8	82
District of Maryland	25	16	12	9	83
Northern District of Illinois	12	23	9	17	87
Southern District of	20	13	14	14	89

California					
Northern District of Ohio	17	27	8	18	96
District of Colorado	26	19	5	28	111
District of Massachusetts	8	5	32	19	115
Southern District of New York	9	24	21	20	115
District of Minnesota	13	18	26	23	129
District of Utah	19	31	17	24	132
District of Arizona	15	14	31	22	135
Northern District of Georgia	33	22	13	27	135
Northern District of California	24	12	30	21	138
District of New Jersey	29	21	24	25	148
Eastern District of Michigan	27	20	20	31	149
Eastern District of New York	31	28	22	29	161
Eastern District of Pennsylvania	21	26	33	26	165
District of Columbia	23	33	23	33	168
Southern District of Ohio	22	32	29	30	172
Eastern District of Wisconsin	32	29	27	32	179

The results, in short, seem fairly stable across a variety of likely preferences, and they reflect received wisdom only in part. Accused infringers should be trying to litigate in the Eastern District of Wisconsin, the Southern District of Ohio, or the District of Columbia, none of which are currently on the radar screen of most patent lawyers. Patentees should be suing in a variety of districts, including the District of Delaware, the Eastern District of Virginia, and

the Western District of Wisconsin. Virginia and Wisconsin aren't much of a surprise, but patent lawyers seem to overvalue the Eastern District of Texas and undervalue the District of Delaware.¹⁷ And as for the best—and least appreciated—jurisdiction for patent plaintiffs? Let's put it this way:

Q: "Mark, you've just completed an exhaustive study of where to file your patent suit. What are you going to do now?"

A: "I'm going to Disney World."

¹⁷ *But cf.* John E. Kidd & Keeto H. Sabharwal, *The District of Delaware: An Ideal Venue for Patent Litigators*, 18 DEL. LAW. 16, 17 (2000) (explaining why the Delaware District court is an ideal venue for patent plaintiffs).

Appendix A
Patent Litigation Outcomes by Court

Court	Outcomes						TOTAL	Claimant Win Percentage
	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment		
First Circuit								
District of Maine	0	3	1	0	19	2	25	0.0%
District of Massachusetts	43	69	41	1	392	38	584	38.4%
District of New Hampshire	5	11	6	0	45	6	73	31.3%
District of Rhode Island	5	6	5	0	38	4	58	45.5%
District of Puerto Rico	0	2	3	0	4	1	10	0.0%
Subtotal	53	91	56	1	498	51	750	36.8%
Second Circuit								
District of Connecticut	4	17	21	0	209	27	278	19.0%
Northern District of New York	4	2	4	0	76	7	93	66.7%
Eastern District of New York	6	28	29	0	245	34	342	17.6%
Southern District of New York	51	87	87	1	676	116	1018	37.0%
Western District of New York	4	10	17	0	122	10	163	28.6%

District of Vermont	1	0	3	0	18	1	23	100.0%
Subtotal	70	144	161	1	1346	195	1917	32.7%
Third Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
District of Delaware	62	75	137	0	682	61	1017	45.3%
District of New Jersey	29	109	201	0	588	60	987	21.0%
Eastern District of Pennsylvania	15	40	42	3	342	33	475	27.3%
Middle District of Pennsylvania	6	1	5	1	33	8	54	85.7%
Western District of Pennsylvania	5	18	21	0	123	14	181	21.7%
District of Virgin Islands	0	0	0	0	0	0	0	N/A
Subtotal	117	243	406	4	1768	176	2714	32.5%
Fourth Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
District of Maryland	7	21	40	0	161	13	242	25.0%
Eastern District of North Carolina	3	8	3	0	47	11	72	27.3%
Middle District of North Carolina	6	10	5	0	106	23	150	37.5%
Western District of North Carolina	5	7	9	0	117	15	153	41.7%

District of South Carolina	5	15	11	0	88	12	131	25.0%
Eastern District of Virginia	14	32	69	1	229	28	373	30.4%
Western District of Virginia	2	6	4	0	31	1	44	25.0%
Northern District of West Virginia	2	1	6	0	16	4	29	66.7%
Southern District of West Virginia	0	2	1	0	4	0	7	0.0%
Subtotal	44	102	148	1	799	107	1201	30.1%
Fifth Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
Western District of Louisiana	2	5	4	0	39	3	53	28.6%
Northern District of Mississippi	0	1	3	0	6	1	11	0.0%
Southern District of Mississippi	0	5	4	0	5	2	16	0.0%
Northern District of Texas	27	22	55	0	283	18	405	55.1%
Eastern District of Texas	52	77	150	0	703	42	1024	40.3%
Southern District of Texas	17	41	51	2	214	18	343	29.3%
Western District of Texas	9	18	17	0	151	5	200	33.3%
Eastern District of Louisiana	3	1	17	0	53	13	87	75.0%

Middle District of Louisiana	0	0	4	0	13	0	17	N/A
Subtotal	110	170	305	2	1467	102	2156	39.3%
Sixth Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
Eastern District of Kentucky	2	5	6	0	29	2	44	28.6%
Western District of Kentucky	2	1	1	0	40	3	47	66.7%
Eastern District of Michigan	18	54	34	0	378	30	514	25.0%
Western District of Michigan	6	15	9	0	110	12	152	28.6%
Northern District of Ohio	13	33	14	0	268	15	343	28.3%
Southern District of Ohio	8	22	23	0	149	16	218	26.7%
Eastern District of Tennessee	3	3	4	0	33	3	46	50.0%
Middle District of Tennessee	5	7	7	1	43	2	65	41.7%
Western District of Tennessee	5	4	9	0	33	14	65	55.6%
Subtotal	62	144	107	1	1083	97	1494	30.1%
Seventh Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
Northern District of Illinois	47	97	119	3	874	93	1233	32.6%

Central District of Illinois	6	4	2	0	37	8	57	60.0%
Southern District of Illinois	0	2	3	0	14	4	23	0.0%
Northern District of Indiana	0	9	7	0	72	13	101	0.0%
Southern District of Indiana	7	7	22	0	106	10	152	50.0%
Eastern District of Wisconsin	7	34	21	0	162	17	241	17.1%
Western District of Wisconsin	12	38	31	2	155	18	256	24.0%
Subtotal	79	191	205	5	1420	163	2063	29.3%
Eighth Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
Eastern District of Arkansas	3	3	1	0	14	10	31	50.0%
Western District of Arkansas	1	2	1	0	14	3	21	33.3%
Northern District of Iowa	3	2	0	0	17	1	23	60.0%
Southern District of Iowa	7	7	2	0	52	10	78	50.0%
District of Minnesota	25	54	28	0	450	43	600	31.6%
Eastern District of Missouri	16	24	26	0	170	55	291	40.0%
Western District of Missouri	5	12	3	0	69	8	97	29.4%
District of Nebraska	2	7	3	0	47	5	64	22.2%
District of North Dakota	1	2	4	0	13	1	21	33.3%

District of South Dakota	0	0	0	0	9	2	11	N/A
Subtotal	63	113	68	0	855	138	1237	35.8%
Ninth Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
District of Arizona	10	23	28	0	193	17	271	30.3%
Northern District of California	56	159	131	0	1007	71	1424	26.0%
Eastern District of California	8	16	6	2	64	8	104	33.3%
Central District of California	125	219	193	11	1401	340	2289	36.3%
Southern District of California	21	56	24	1	380	37	519	27.3%
District of Hawaii	4	3	1	0	17	9	34	57.1%
District of Idaho	6	3	0	0	28	3	40	66.7%
District of Montana	2	2	2	1	10	1	18	50.0%
District of Nevada	24	28	15	0	117	14	198	46.2%
District of Oregon	19	23	8	0	160	41	251	45.2%
Eastern District of Washington	0	12	4	0	35	7	58	0.0%
Western District of Washington	11	44	56	0	248	33	392	20.0%
District of Guam	0	0	1	0	0	0	1	N/A
District of Northern Mariana Islands	0	0	0	0	0	0	0	N/A

District of Alaska	0	0	0	0	1	0	1	N/A
Subtotal	286	588	469	15	3661	581	5600	32.7%
Tenth Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
District of Colorado	9	27	28	0	285	17	366	25.0%
District of Kansas	2	6	6	0	62	8	84	25.0%
District of New Mexico	2	2	3	0	12	0	19	50.0%
Northern District of Oklahoma	1	1	2	0	33	2	39	50.0%
Eastern District of Oklahoma	0	1	1	0	0	0	2	0.0%
Western District of Oklahoma	3	12	3	0	34	5	57	20.0%
District of Utah	15	39	34	2	247	20	357	27.8%
District of Wyoming	0	1	0	0	10	1	12	0.0%
Subtotal	32	89	77	2	683	53	936	26.4%
Eleventh Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
Northern District of Alabama	2	2	6	0	27	9	46	50.0%
Middle District of Alabama	0	0	0	0	6	0	6	N/A
Southern District of Alabama	1	2	1	1	6	0	11	33.3%

Northern District of Florida	1	1	3	0	19	3	27	50.0%
Middle District of Florida	25	29	49	2	277	47	429	46.3%
Southern District of Florida	25	65	71	1	282	34	478	27.8%
Northern District of Georgia	7	54	69	1	265	61	457	11.5%
Middle District of Georgia	2	0	2	0	14	1	19	100.0%
Southern District of Georgia	1	1	1	0	7	1	11	50.0%
Subtotal	64	154	202	5	903	156	1484	29.4%
District of Columbia Circuit	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
District of Columbia	9	25	19	0	59	3	115	26.5%
Subtotal	9	25	19	0	59	3	115	26.5%
TOTAL OUTCOMES	Claimant Win	Claim Defendant Win	Procedural	Indeterminate	Likely Settlement	Consent Judgment	TOTAL	Claimant Win Percentage
	989	2054	2223	37	14542	1822	21667	32.5%