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PERSPECTIVE

Complex IP cases are unique in ADR

By Irma E. Gonzalez

In today's economy, the sustainability of many companies depends on the preservation of intellectual property rights. As a result, the volume of IP lawsuits has grown astronomically. When a business model centers around copyrights, patents, trademarks or trade secrets, these high-stakes cases are the proverbial "bet-the-company" lawsuits. These cases span most industries, but particularly those that have become essential to today's economy: life sciences, biotechnology, data security, privacy, energy, medical devices, telecommunications and pharmaceuticals.

Not surprisingly, intellectual property litigation is exceptionally complex, often involving several jurisdictions and multiple parties. This kind of litigation is disruptive for any company but especially when the case's effects may impact an entire industry. Therefore, IP cases almost always require swift — and sometimes confidential — resolution. For many parties, alternative dispute resolution may be the answer.

When it comes to ADR, lawyers must employ the most appropriate device to achieve the best outcome for the client. Fortunately, in addition to traditional tools like mediation and arbitration, other highly effective processes can help resolve IP cases favorably. Two devices in particular — neutral analysis and mock trials — are especially suited for IP litigation. In both cases, they can be used before, during or after a trial or arbitration, and may be used for isolated issues or an entire case.

With neutral analysis — also called neutral evaluation — a party or parties consult with a veteran third-party to evaluate the case's facts and legal arguments. The result is a non-binding analysis of how a fact-finder (a judge, jury, arbitrator or administrative agency) might decide the case or other proceeding.

This kind of expert evaluation can happen at any time, even before a case is filed, which could save an otherwise idealistic attorney precious time and money. Because patent cases can be remarkably technical for the average juror, neutral evaluation can also help a party decide whether to waive a jury. Similarly, pretrial motions and hearings — including summary judgment — can be streamlined with neutral analysis. Neutrals may also be consulted before a



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mediation or settlement conference.

Neutral analysis can also include post-judgment second opinions in which an appeal's likelihood of success is assessed. Once, I was consulted at the post-judgment stage on a patent case involving outdoor gear. The district court had ruled there was no infringement, and I was asked to evaluate the judge's decision. Using the summary judgment briefs, the hearing transcript, the district court's opinion and appellate briefs for reference, I advised the lawyer on the case's upsides and downsides and how to best argue the case on appeal.

Another exceptionally useful ADR tool for IP cases are mock exercises. Here, a neutral is consulted not to determine whether a party is likely to prevail, but instead to offer practical tips for refining a case. Specifically, in simulated oral arguments, arbitrations, jury and bench trials, and Markman and appellate hearings, IP lawyers can experiment with trial strategies, practice presenting evidence and arguments, and select the most effective witnesses. These kinds of "dry runs" are helpful not only to the lawyers but also to witnesses and others who may be otherwise unfamiliar with litigation procedures.

As with neutral evaluations, the scope of mock exercises can be tailored to the needs of the case. They can include everything from opening and closing statements, to the presentation of witnesses, documents or demonstrative evidence, to a full simulated trial. In my experience, breaking between segments is helpful to lawyers, who can ask the neutral targeted questions such as which arguments and angles in opening statements were most persuasive or how a jury may react to a particular witness and why.

Patent suits, in particular, require finely slicing out inessential or overly complex informa-

tion so the fact-finder can zero in on the most critical issues. Because these cases can be highly technical, it's crucial that lawyers present the evidence and legal arguments in a comprehensible way without bogging down in technical details. In those cases, mock exercises may be especially helpful to witnesses who need coaching and practice explaining complicated concepts to laypeople.

In modern IP litigation, billions of dollars may be at stake. So it's no surprise that appeals are common. On appeal, lawyers sometimes have just 20 minutes to cover as many as 15 legal issues. In a mock appellate argument, neutrals can train lawyers to quickly home in on their strongest points, distinguish the other side's position and strategically concede weaknesses. As a neutral, I've worked with IP lawyers on mock appeals, peppering them with questions the real judge is likely to ask, many that hadn't occurred to the lawyers before the practice session.

After any mock exercise, the litigation team can hone and improve arguments and, possibly, reevaluate a settlement strategy. Not only do lawyers leave these trial runs better prepared but, as importantly, clients come away with realistic expectations.

The usefulness of traditional ADR tools — arbitration and mediation — are long settled. But in the demanding and constantly changing world of intellectual property litigation, attorneys have other extremely useful tools at their disposal. Neutral analysis and mock exercises may not result in a settlement or dismissal of the case, but with customized, expert feedback, the lawyers can proceed with increased confidence and an informed, enhanced strategy.

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