Mediation of Intellectual Property Disputes: Tactics and Strategies

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Mediation of Intellectual Property (IP) disputes can be very similar to the resolution of other types of complex litigation. However, there are a number of important distinctions specific to IP cases and patent cases in particular, that concern timing and strategy of case resolution. Naturally, achieving optimum case efficiency and a resolution for your client's maximum benefit are the primary (and obvious) desired outcomes. I've written this article in a more conversational style to invite the reader into the strategic world of deal mediation.

Simplistically, in any mediation, defendants want to get out as cheaply as they can while plaintiffs want to extract as much as they can. This is not a pretty, touchy-feely, "win-win" problem-solving picture, but it is realistic and a pragmatic view of the pond in which we swim.

Interestingly, in over 30 years of mediating, I have found that logic, reason and rationale are usually the *poorest* choices you can use as negotiating or mediating strategies. This is counter intuitive and sounds absurd, but it is a typical human reaction.

Every parent thinks that their child is the smartest, most athletic, or best looking in school and… that's not usually the case. Will you ever convince him/her of that? It's a fool's errand. You're

not going to convince somebody that their analysis is wrong, that their position is misplaced or unfounded, or that they have failed to consider or weigh this particular piece of prior art correctly etc. This is particularly apt in IP matters where you have extremely bright counsel who often have advanced degrees in highly technical areas.

The most enjoyable part of my work is being able to interact with the brightest of the bright. Since there are plenty of 5-4 decisions by the U.S. Supreme Court and 2-1 decisions by the Federal Circuit, what makes one view right? Victors write the history and flawed analysis can certainly become law. The Supreme Court has had a recent history of reversing the Federal Circuit on several occasions. While clearly the Judges of the Federal Circuit have more patent knowledge and experience, the law and or standards are changed nonetheless. Being "right" on an issue does not necessarily mean you will win.

We soldiers in the trenches of IP resolution deal in the realm of the possible, not the optimum. I once had the president of a large manufacturing plant tell me that "best is the enemy of better". That is, unfortunately a truism, and can act as a barrier to a creative or pragmatic resolution.

I prefer to think of mediation and negotiation of intellectual property matters as more of a chess game. It begins with a move; then a countermove; and then a move once again. Smart chess players think three moves ahead with each move designed to provoke a particular move from their opponent. Grandmasters have the ability to think ten moves ahead seeing

the entire game board and looking at all the machinations and possible outcomes.

“Strategy requires thought, tactics require observation,” says Dutch Chess Grand Master Max Euwe. Taking the time to just observe reveals a treasure trove of information that can be strategically beneficial in the “game”. There are several tactical moves you can make in devising a beneficial strategy to move the case where you want it to go.

Timing is an important factor. There are several time vortices where case resolution has optimal value. First is in the pre-litigation stage. Depending on venue and declaratory judgment issues, it can be very advisable to meet with your opponent to ferret out the response to various respective positions and damage models in order to see what potential business goals may be available. The goals are very fluid at this stage, and a lot of shaping can happen with the right mix of personalities, strategies and creative mediator suggestions and tactics.

I have settled a number of extremely complex matters very early in the game when it was tactically beneficial for the parties to do so. When spaghetti sauce drops on the counter, we can easily wipe it up with a sponge. If left overnight, we’re scraping it off with a spatula! There are a myriad of opportunities available while the spaghetti sauce is still wet. Early in the game positions have not hardened, business alliances may be possible before mortal enemies are declared, and whole-is-greater-than-the-sum-of-it’s-parts options can be devised by clever mediators and counsel.

Business people like making business deals. Once something becomes "legal" it hardens, and joint projects, acquisition of assets, sales and collaboration become more difficult. Particularly in copyright, trademark, and trade secret cases, timing is crucial. Coming to the table early rewards a party with nimble positioning options and potential business solutions. This can be invaluable in structuring a deal. Patent cases can take advantage of this early exploration as well, but it is affected by the greater complexities involved and the disparities in expectations of perceived value. The mix of personalities heavily influences this early solution exploration process.

The second time vortex is after the suit is filed and initial *Markman* briefs have been exchanged, (or in a copyright, trade secret, or trademark action, after initial discovery). You might surmise that after infringement contentions have been exchanged in a patent case, it would be a beneficial settlement moment. However, this is not usually the case. Often, at this time there is a shortage of information and party emotions run high, negatively impacting pragmatic settlement discussions. There are, of course, always exceptions to the rule based on circumstances and personalities, which should be explored. After the *Markman* briefs are filed and/or after the *Markman* hearing and/or ruling, the aperture of the case necessarily becomes narrowed.

Deciding to mediate early in the case, after *Markman* briefs, after the hearing or after the ruling is a tricky matter. Frankly, it depends as much on the personality of counsel and the decision-making client as the hard facts of the controversy.

In my 30 plus years of mediating, I state one clear unequivocal observation. Take the exact same facts and change the human beings around the table, and you have an entirely different game. Even in the highly sophisticated and intellectual world of IP litigation, *human beings* control the decisions, and we are psychological creatures.

Even though a very high percentage of matters are reversed at the Federal Circuit on claim construction, it is still a very expensive ticket to ride all the way to the Federal Circuit after a trial to get that review. So the aperture of the lens of a patent case, good, bad or indifferent, is basically fixed for that trial after *Markman*.

Based on whichever party thinks they "won" *Markman*, the positions of the perceived winner will harden. Then, often extreme creative legal reasoning, i.e., cirque du soleil contortions, can occur from the "non-winner" of the *Markman* i.e., (better than "loser of the *Markman*" because no one ever thinks they lost the *Markman*). Once these hardened positions or contortions have occurred, it is very hard for strong personalities to step back from the brink. It can be preferable to try for a mediation opportunity pre-*Markman* ruling. In a complex case where the Judge is an unknown, we might need the hearing first. Where there are less complex issues or where the Judge is more of a known quantity, mediation after the briefs are exchanged may be sufficient.

The third and fourth time vortices are: (3rd) after fact discovery (if anything meaningful was unearthed) and (4th) after expert reports have been exchanged. By this point the aperture of the

case is even more narrowed and the parties realistically understand their respective positioning. Summary judgments are being teed up, the damage models are revealed and the money trail, or lack thereof, becomes clarified.

"Filthy lucre"- Money. Ultimately, in most IP matters, there are issues of both the sword and shield. There are times when a settlement can be very creative and include nonmonetary options but often its simply more money, or less money, that drives a deal.

In patent, copyright and trade secret cases, the damage models are clarified once the expert reports are made available. In other commercial matters, the months and weeks leading up to trial may provide a perfect storm in which meaningful settlement discussions can occur. However, in IP cases, this is often *not* the case. The cost to prepare the case and prep the witnesses for trial causes IP counsel to hunker down, dig in their heels, and prepare their trench for war. Once this occurs, it is doubtful that either side will offer an olive branch. Yet, meaningful discussions are still possible during trial if something surprising occurs, or after post-trial motions and before appeal to the Federal Circuit.

All parties at mediation have constituencies to which they must report. In-house counsel reports to business units, CEOs report to boards, partners report to their managing committee. Even sole owner entrepreneurs often have venture capitalist funding, an executive staff, or a spouse, to which they feel accountable. These entities, seen or unseen, are part of the deal creating a shadow boxing effect in the deal. In a contingency fee matter,

while the ethical rules are clear that the clients' best interests always control, counsel has a clear stake in the outcome and is a full partner at the table, psychologically, if not in reality.

Politics. There's a client culture each client representative must abide. It's never a clean "black or white" issue and can be dependent on internally driven issues at a company outside the "logical" parameters of the content of a case. IPOs looming, mergers, shifts in the chain of command, new policy on "toughness", new policy on getting cases moved, are a few but the list is exhaustive. Decision makers of organizations are employees who would like to *stay* employed. Being attuned to those internal politics is critical in creating movement toward a workable deal with proper optics. Good diagnosis is of paramount importance. If the diagnosis isn't correct then the actions taken will be solving the "wrong problem".

These issues have deep relevance based on the decision-making apparatus of the client. A good mediator should have keen diagnostic abilities in order to help bring about laser clarity to work through the thorny field of unrealistic expectations and unreasonable positions in order to ferret out unrealized possibilities for a deal or a solution. Significant issues such as timing, deal options, settlement parameters and creative structures that will work within the given dictates of each group should be explored. Sometimes done subtlety, sometimes, overtly depending on the politics and dynamics of the situation.

Optics. The visuals of a deal are usually more important for defendants but can also be important for plaintiffs who want to preserve the structure of a licensing program, for example or

set parameters for other deals in the future. The Federal Circuit, Congress and even the Supreme Court have all been wading into the intellectual property waters in a more activist way than in past history. The landscape is constantly changing, especially since the lifespan of an IP case can be longer than the average commercial case. Things can change during the interim, giving parties an opportunity for motions for rehearing, motions for *en banc* rehearings, and petitions for *Writ of Certiorari* to the U.S. Supreme Court, all of which can impact the case midstream.

Israeli psychologist Daniel Kahneman, who won the 2002 Nobel Prize in Economics, has extensively studied the psychology of judgment and decision-making, behavioral economics and hedonic psychology. He proved that most people respond to the loss of a given amount of money about twice as strongly as they react to a similar gain. In other words, it hurts twice as much to lose something than the pleasure derived from an equal gain. He clearly demonstrated how the human decision-making process works regarding loss aversion by explaining why many people fail to make money in the stock market over the long term. People lack the fortitude to sell shares when down because they are unable to fathom taking a loss; rather, they will watch their investment plummet with the hope that one day it will rise again.

Kahnerman established a cognitive basis for common human errors that arise from heuristics and biases. I see this in operation every day. Predicting outcomes is extremely difficult. By definition one side will be wrong, not necessarily in what the

outcome “should have been” but in what the outcome actually becomes. After Decca Records rejected the band “The Beatles” with the comment, “Guitar groups are on the way out, Mr. Epstein”, George Martin signed the group to EMI’s Parlophone label. The rest, of course, is history.

Human beings are much more failure avoidant than success driven. In fact, our whole compensation system rewards little successes and punishes big failures. A good mediator can counter this with options outside the box that tap into the internal needs of each party while designing the structure of a deal around these parameters.

I have been a warrior most of my career, starting out in the early 1980’s doing oil and gas litigation, securities fraud, complex tort and business litigation. I think it takes an old warrior to know how to be an effective peacemaker. Some of the nice "win-win” problem-solving bromides are not particularly effective in complex commercial litigation, much less IP litigation where the smartest of the smart play. Thinking far outside the box, but still within the standards of the game, attuned to the optics and politics of the parties, armed with a heavy dose of patience, and a relentless pursuit of a solution, are the best tools to achieve results.

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Hesha Abrams, Esq. is a nationally acclaimed attorney mediator for over 30 years, known for crafting highly creative settlements in very difficult cases. She has created settlements worth over $700 million in the past year alone. She specializes in creating innovative solutions for complex or difficult matters in commercial, Intellectual Property and "Deal Mediations", which is driving a complex business deal to successful signing. She has the unique ability to work with big egos and strong personalities. Hesha has successfully mediated for thousands of parties and was an innovator in the mediation field serving on the legislative task force that drafted the landmark Texas ADR law. She mediates, consults, and negotiates on behalf of private parties throughout the country and internationally. She has worked in the UK, China, Mexico, Thailand and India and with parties from all over the globe in complex patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution, in The Hague. She is on the national panel for Dow Corning Implant cases, and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, 2002, speaker 2005, elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators. For further information, see www.HeshaAbramsMediation.com.