California Neutrals

PRACTICE AREA SPOTLIGHT

INTELLECTUAL PROPERTY

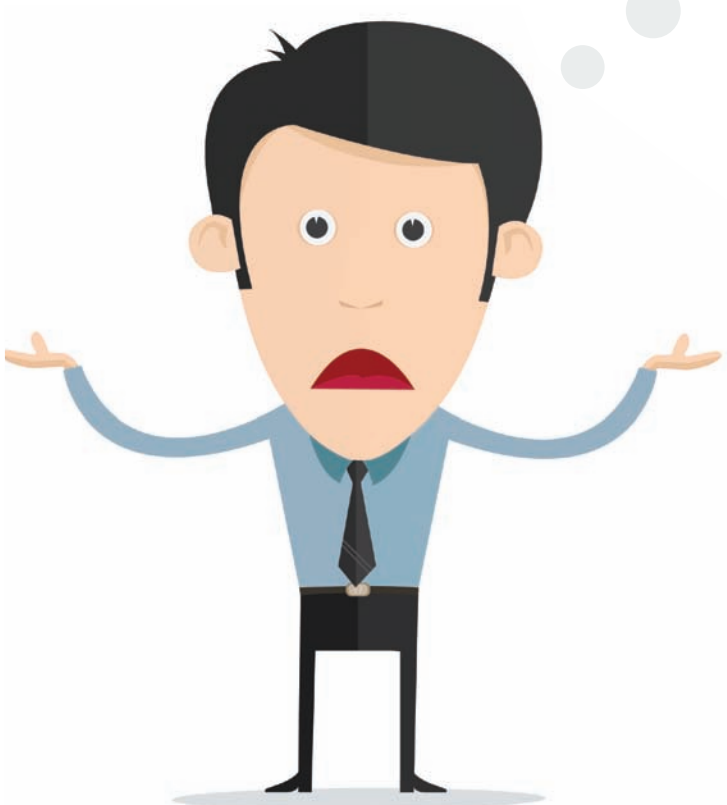
Crafting solutions in IP mediation

By Susan Kostal

The trio of cases facing ADR neutral Vicki was formidable. Though Veenker had been the founding partner of Shearman & Sterling's Silicon Valley IP group, it was her first mediation.

There was a patent case pending in the Northern District, a countersuit in Southern California, and a pending action in the U.S. International Trade Commission. All three had been consolidated and placed before Veenker.

It took a year and four mediation sessions, but Veenker, now on the board of the Silicon Valley Arbitration and Mediation Center, where she is listed as one of the go-to neutrals, was able to help the parties resolve all issues. "They wanted patent peace, and we were able to craft a worldwide resolution," she said. "Then we all went out and had a drink together afterward. These were very sophisticated parties, and we were able to solve cases inter-district. You can't do that in court; you have to handle them one at a time."



The marvel of ADR in the IP field is that neutrals have tools available to them that courts do not. "I can help parties resolve cases by forming a joint venture, or with licensing agreements. You can craft solutions a court cannot. That's the beauty of it," Veenker said.

The keys, neutrals and litigators say, is to find the right process to fit the dispute, and the right time in the lifecycle of the case. "There is a lot more awareness and willingness to engage in ADR when resolving IP disputes," Veenker said. "I attribute that to court-associated ADR program, particularly in the Northern District, and in other districts that have a very active patent docket."

Heidi Keefe, a top patent litigator at Cooley LLP in Palo Alto, said ADR in patent cases "seems to be its most effective post-claims construction. At that point, both parties have to take a fresh look at the strength of their case."

Veenker agreed that at least some discovery is needed to see what the risk level is, which helps "determine what the settlement tolerance is."

In the early stages of big cases, it's

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"Licensing disputes that are distinct from patent cases are perfect for mediation. Most end up resolving three to nine months after mediation. It's a good process, but it's not instant results."

Jim Brelsford, *Of counsel, Skadden's IP and Patent Litigation group, Palo Alto*

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Lawyers across the board said there's no clear evidence doctors are judged more sympathetically by peers. Some, such as Harwell, argued arbitrations may be less biased because the neutral "comes into the process like a mushroom, having been in the dark the whole time." But because arbitrating these cases requires consent from both parties, doctors' hesitancy means the practice remains uncommon.

"The one bottleneck in having more arbitrations is the desire of doctors to be judged by their peers," Harwell said.

Other, more novel styles of alternative dispute resolution aim to address that concern. Arent Fox LLP partner Erin L. Muellenberg, who has represented both sides in these cases, said that while arbitration has its benefits, it's better suited for administrative cases against doctors. Clinical cases are a tougher sell, because most arbitrators aren't qualified to judge medical practice.

"The arbitrator can't make that decision, so I've got to bring in experts, and now he's going to make a decision based on just the experts," she said. "You lose the benefit of peer review right there."

For those cases, Muellenberg recommends use of an independent hearing panel, which seeks a happy medium between review hearings and arbitrations. With an independent hearing panel, doctors are hired from outside the hospital to serve as jury. Having dedicated jurors preserves a doctor's opportunity to be judged by peers in the medical community without tying up colleagues' schedules. And because the doctors don't know the parties, they bring less bias to the jury.

The cost is generally higher than arbitration or mediation, but it's still cheaper than a protracted in-house hearing. "If I can do that in 5-7 days and bring it in for $100,000 for everything, I mean, that's miraculous," Muellenberg said, adding that a standard peer review hearing can run 10 times that cost.

Muellenberg and Roth emphasized the potential for mediation in such disputes. Not only is it a cheaper, faster alternative to peer review, it also allows for more creative, negotiated resolutions than a ruling for one side. Muellenberg said she recommends hospitals add mediation language into their bylaws to make it a more feasible alternative from the get-go.

In a health care setting, these disputes affect more than just the parties. Without finding cheaper, faster ways to resolve cases, lawyers warned, patient care could suffer. Not only might peer review panelists return to work stressed or deprived of sleep after a long night of proceedings, but hospital funds could be diverted from more critical patient needs.

"There's no insurance, it's not in the reserves, so it has to come off of their bottom line," Muellenberg said. "If all of a sudden that hospital wanted an MRI machine or blood pressure cuffs, they can't buy them because the other money is going out the door."

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firm's trade secrets group.

"It can be a whole different ball of wax when you actually get to the trial: what is going to be introduced into the public record and whether the courtroom is going to be cleared of the press and the public, whether the jury is going to keep things confidential or have to sign disclosure agreements," he said.

On top of that, introducing potentially sensitive evidence risks a "mini-trial" that eats up time as parties try to undermine each other's claims of confidentiality, Milligan said. "Each time you introduce this type of information into court, it's an opportunity for one side to try to knock down the other side. That's why mediation to resolve these cases is perfect."

Milligan did caution cautioned that mediator selection is key, noting the importance of someone experienced in employment mobility and trade secrets cases in order to "help each side know about the warts in their case and also recognize the liability." That sort of evaluative approach is invaluable in these contexts, he said.

Alexander S. Polsky, another JAMS neutral who handles employment mobility cases, emphasized the importance of experience but warned parties against expecting a mediator to evaluate everything about their cases, such as documents that only one party can see.

"The danger for a mediator is that, let's say I review them and I say, 'Hey, you're at risk,'" Polsky said. Is he able to give that information to the other side? Is that fair? "That's going to kill the settlement when the other side hears it, but the side that reads it now knows [the risk]."

For his part, Polsky says he tends "to avoid expressing opinions about evidence that is not seen by both sides."

While many employment law cases find their way to mediation, Milligan said, others stay in court because parties worry that moving to mediate might signal a chink in their armor.

"Oftentimes parties or attorneys have a feeling that going to an early mediation is a sign of weakness. I actually think it's the opposite," he said. "You're really doing your client a disservice if you're not considering going to an early mediation."

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"hard to get people excited to go to a mediator until something has shaken loose," Keefe said. "I'm happy to go to ADR or ENE (early neutral evaluation), but not until I know more about what the case is really about." Keefe said she thinks that far fewer bet-the-company patent cases go to ADR than those with less at stake.

Licensing disputes distinct from patent cases are perfect for mediation, said Jim Brelsford, of counsel to the patent litigation group of Skadden, Arps, Slate, Meagher & Flom. "Most end up resolving three to nine months after mediation. It's a good process, but it's not instant results. But it's beneficial, as it educates the parties." Infringement claims are far less likely to go to mediation, he said.

Litigators are looking for a different skill set in their neutrals these days, said John Holcomb, litigation partner at Knobbe, Martens, Olson & Bear LLP. "Years ago, in complex tech cases, the parties would insist on a mediator with technical experience. They would say, 'we need a chemical engineer' or 'we need a software person.'" Now, he said, there is less of an insistence on technical competence. "You need a mediator who is smart. If he or she isn't deciding anything, you don't need to do a patent analysis, for example. There are many good mediators out there who have no technical background at all."

Mediation may not settle a case, Holcomb says, but "you are always going to learn things in mediation." Some lessons, though, are not always obvious. Holcomb is on the mediation panel for the Central District, and has done several. "It can be frustrating, because while I don't know the case as deeply as counsel, you can see where it ought to settle, or at least a range. In a perfect world, you should be able to get it right if it's apparent."

Veenker, who has been a neutral for nine years, has settled cases before litigation is even filed. "I spend a lot of my time these days helping people to avoid the litigation process in the first place, when a demand letter arrives." She's seen an increase in this type of work over the past five years. "In every one I've done, no one has ever been sued."

The key, Veenker said, is to use "the right tool in the toolbox," whether it is mediation, arbitration, a mock trial, a neutral analysis of a case, or a hybrid. "I've had parties come to me at the very beginning, and say 'we know we have a difference in opinion, we're happy to talk about it, and somebody needs to tell us about issue X'." In those cases, she said, the parties had a good idea of what would be most beneficial.

Holcomb said the biggest wild card in IP mediation is the prep work. "The cost of the neutral may be $10,000, but in a complicated case that you really want to settle, you want to understand all aspects of the case, and you might spend days preparing.

"But if you look at the fact that the overall cost of the average IP case ranges from $1 million to many millions, the cost of mediation is a drop in the bucket."

— SUSAN KOSTAL