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UNDERSTANDING AND CONTROLLING THE COST OF UNITED STATES LITIGATION

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CONTROLLING THE COST OF HIGH STAKES U.S. LITIGATION

- I. Understanding the bases for the costs
- II. Controlling legal fees
- III. Controlling litigation costs
 - (a) discovery
 - (b) strategy in patent cases
- IV. Mediation and settlement

I. UNDERSTANDING THE COSTS ASSOCIATED WITH U.S. LITIGATION

Litigation Timeline

- Takes 1-3 years. Average time to trial in U.S. federal courts is two years.
- Depends on the court: E.D. Virginia is still the fastest, taking less than a year. ITC is approximately a year.
 The E.D. Texas is now closer to two years.
- Three phases to litigation: Pleadings, Discovery, Pre-Trial/Trial

Discovery In Civil Litigation

- Involves exchange of documents and information between parties and third parties.
- Involves examination of witnesses under oath in informal setting without judge being present (depositions).
- The preservation, collection, review and production of electronic documents.
- Very broad scope.
- Begins shortly after case starts.

Electronic Discovery Can Be The Largest Cost In A Case

- Electronic discovery can be half of company's litigation costs.
- Microsoft spends between \$10 and \$20 million on electronic discovery per lawsuit.
- Oracle estimated cost of \$16.5 million dollars to respond to discovery requests in one case.
- One defendant estimated cost of \$6.2 million to produce emails in one case.
- Estimated spending on electronic discovery in U.S. commercial litigation was \$1.8 billion in 2006.

Why Electronic Discovery Matters

- A sloppy electronic document collection or review poses many risks:
- waiver of privileges
- disclosure of trade secrets
- costly repetition of the process
- The failure to produce relevant documents can result in serious sanctions:
- dismissal of the action
- evidentiary sanctions
- issue preclusion
- high monetary sanctions (millions of dollars)

What Is The Price of Patent Infringement Litigation?

- Cases with \$1 million to \$25 million at risk:
- Median cost in California: \$3,000,000
- Median cost in New York: \$3,250,000
- Top Quartile cost in California: \$4,000,000
- Cases with more than \$25 million at risk:
- Median cost in California: \$6,000,000
- Median cost in New York: \$6,000,000
- Top Quartile cost in California: \$7,850,000

Source: 2007 American Intellectual Property Law Association Record of Economic Survey.

CONTROLLING LEGAL FEES

Fee Structures Contingency Fee Agreements

- Plaintiff's lawyer receives a percentage of the money received if plaintiff wins or settles the case out of court.
- Three kinds for Plaintiff, One for Defendant:
 - 1. Flat Contingent Percentage
 - 2. Variable Contingent Percentage
 - 3. Mixed Fee -- Partial Contingency Fee, Reduced Hourly Rates
 - 4. Reverse Contingency Fee for Defendants

Flat Fees

- 1. Single Flat Fee
- 2. Flat Fee Per Month
- 3. Flat fee per task
- 4. Flat fee with success element
- 5. Flat fee with collar
- 6. Fee Caps

III (a). CONTROLLING DISCOVERY COSTS

Document and Electronic Data 6 Initial Steps to Control Costs

Communication with your attorney is key

Step 1: The legal team needs to understand the scope of the case. "Preserve relevant documents" is unhelpful.

Step 2: The entire team needs to determine relevant people.

Document and Electronic Data 6 Initial Steps to Control Costs

Step 3: The relevant people need to hear DIRECTLY from the U.S. attorney what the obligations are in U.S. litigation and how to conduct a search.

Step 4: Your attorney needs to meet with your IT group DIRECTLY. Helps understand situation AND negotiate with opposing counsel.

Document and Electronic Data 6 Initial Steps to Control Costs

Step 5: Set Litigation Hold. This may not be challenged or reviewed until years later, so needs to be done correctly at the start. Also avoids costly repetition.

Step 6: Choosing an E-Discovery Vendor

UNDERSTANDING DEPOSITIONS

- Types of depositions
- How they are used
- Preparation and costly traps
- How Japanese companies may be able to negotiate significant cost savings
- How Japanese companies can set up strategic and cost advantage when sued by an American company
- How to limit company depositions

CHECKLIST TO PREVENT COSTLY MISTAKES

- Discuss alternative arrangements with U.S. attorney
- Do not underestimate communication and teamwork
- Ensure attorney understanding of documents and IT system
- Make sure your attorney is doing a comprehensive "preserve" pull that can be searched later.
- Be involved: I recommend a weekly call.
- Challenge any move to over-translate documents
- Make sure your lawyer knows/is using the strategic advantages that only Japanese companies have.

III (b). CONTROLLING COSTS IN PATENT CASES

Controlling Costs In Patent Cases

- Early case assessment and settlement
- Focus on case strengths
- Retain strong experts and provide adequate supervision
- Avoid extraneous motion practice
- Narrowing discovery/e-discovery
- Focus on Markman hearing
- Mock trial testing

How To Efficiently Defeat A Patent Troll

- Make the troll take early positions on validity.
- Doing so may force the troll to narrow its claims to get around prior art.
- Consider filing for an early ex parte re-exam at the PTO
- Consider requesting the Court to decide validity first
- File an early summary judgment motion
- Consider filing an early Rule 11 motion
- Open settlement dialogue early

III. MEDIATION AND SETTLEMENT

Settlement Strategy

- When do most cases settle?
- At mediation
- After significant milestones, such as motion for summary judgment, Markman hearing, or motion to dismiss
- End of fact discovery
- Right before trial
- When is it too early/too late to approach settlement talks?
- Never too early or too late
- Settlement talks worthwhile whenever you believe there is a resolution that the opposing party may accept to avoid the cost and risk of loss associated with trial.