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Alternative Dispute Resolution for IP Cases: Neutral Evaluations and Mock Exercises

PRESENTED BY JAMS

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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.

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, or 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. 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 mediation or settlement conference.

Neutral analysis can also include post-judgment second opinions in which an appeal's likelihood of success is assessed.

Another exceptionally useful ADR tool for IP cases are mock exercises. Here, a neutral is consulted 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.

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.

Patent suits, in particular, require finely slicing out overly complex information so the fact-finder can zero in on the most critical issues. 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.

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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