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Time For Mandatory Mediation At Federal Circuit?

Guest Column by Kevin R. Casey

Most people familiar with federal court litigation understand the wisdom of settling a case at any time. Nevertheless, few have considered the merits of mediating a case after a trial court has entered judgment and while an appeal is pending. Fewer still have considered mediating an intellectual property (IP) case (patents, trademarks, copyrights, trade secrets, and related matters) at the appellate level. Perhaps they should, because they may soon be required to do so.

The Growth of Federal Appellate Mediation Programs

In recent years, federal appellate courts have increasingly integrated alternate dispute resolution (ADR) methods into their procedures. This trend has included a growing institutionalization of mediation programs based upon Rule 33 of the Federal Rules of Appellate Procedure.

The Second Circuit started the first appellate ADR program, called the Civil Appeals Management Plan ("CAMP"), in 1974. Since then, all 12 regional courts of appeal have established mediation programs under Rule 33 and local circuit rules--almost all of which mandate participation.

Robert W. Rack, Jr., Chief Circuit Mediator, Sixth Circuit Court of Appeals, opined that "to the best of [my] knowledge, this support has been based on the appellate judges' recognition of the efficacy of these programs and their value to the courts in terms of docket relief, case management assistance, and good service to litigants."

What Is Unique About The Federal Circuit?

The jurisdiction of the twelve regional U.S. courts of appeal is limited by geography. In contrast, the jurisdiction of the U.S. Court of Appeals for the Federal Circuit is defined by subject matter and includes all appeals from patent infringement cases tried anywhere in the country, appeals of patent and trademark matters from the U.S. Patent and Trademark Office, and appeals involving other non-IP areas of law.

The Federal Circuit is also the *only* one of the 13 federal courts of appeal *not* to have an appellate mediation program.

Why Has The Federal Circuit Not Enlisted?

Traditional reasons offered against appellate court mediation abound. They have been proven wrong.

In contrast with trial court litigation, appellate litigation does not present as many motives or opportunities for exploring settlement. When the subject of mediating a case after trial arises, a natural response is: "Why should we mediate, we won (or lost); there's nothing to settle?"

Such a response promotes intransigence, for example, about discounting an award to achieve settlement.

But settlements allow the litigants to avoid the risk of the appeal and achieve results that the court cannot impose, and present opportunities to add value by including elements that are not before the court.

Another traditional barrier to settlement during appeal is the dearth of natural opportunities for opposing counsel to communicate. Mandatory appellate mediation programs constitute a mechanism for starting settlement discussions without one of the parties providing the initial impetus.

The Federal Circuit's special subject matter jurisdiction is thought to create additional barriers unique to that court. One of the main rationales offered in defense of the Federal Circuit's holdout against a mediation program is that IP--and particularly patent--cases are ill-suited to ADR, in particular to mediation, at the trial let alone the appellate level.

What May Persuade The Federal Circuit?

1. More and more IP cases are being successfully mediated at the district court level. One federal magistrate judge in the U.S. District Court for the District of Delaware, a leading forum for IP cases, had mediated over 200 patent cases by early 2003. The settlement rate approached 90% for mediations during the last 12 months of the reporting period--an improvement the court attributes to the growing comfort of attorneys with mediation. The message: IP cases are more amenable to successful mediation than previously thought.

2. Sister federal appellate court mediation programs have been successful. Cumulative results evidence an improvement in overall case management and an increase in settlements. The Third Circuit program disposes of 90-100 cases per year and most circuits report between a 35% and 45% settlement rate. The programs have enabled courts to accommodate increased filings without additional judges, saved money, and increased party satisfaction. Given such success, how much longer can the Federal Circuit avoid emulation (at least for its non-IP cases)?

3. The Federal Circuit's "customers," government agencies and private corporations, increasingly turn to mediation as a dispute resolution mechanism. A study of Fortune magazine's top 1,000 companies revealed that, by 1997, almost 90% of the companies had recent experience with mediation. Perhaps more important, the companies viewed mediation as a superior method for achieving quicker, less expensive, and more satisfying results, with more direct involvement by the parties. If the parties who appear before the Federal Circuit demand a mediation program, the court is unlikely to resist.

4. The Federal Circuit Bar Association ("Association"), which supports the work of the Federal Circuit, just created an ADR Committee. Although new, an impressive number of members have joined the committee. The ADR Committee will present a program at the next annual Association Bench and Bar Conference--which most of the Federal Circuit judges attend. Education typically fosters informed change.

In summary, the myth that IP cases cannot be mediated with sufficient success rates to justify a mediation program has been dispelled, sister appellate court mediation programs provide guidance and a track record of success, the parties who appear before the Federal Circuit are more and more comfortable with mediation, and the court's own bar association has taken an active interest in appellate mediation. Given this confluence of factors, a mandatory mediation program at the Federal Circuit appears imminent.

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