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Coordinating Litigation

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The panel will review the impact of the AIA on patent litigation and the new opportunities emerging for both patent owners and challengers. Topics will include how the case law is developing in the wake of recent legislative changes and reform advocacy. Discussed are: overall case management considerations including the economics of case funding; joint defense groups; estoppel, prosecution bar, and related considerations; the latest tactical developments in venue selection and transfer practice; the evolution of Federal Circuit case law favoring defendants; and the interplay between proceedings in the courts and PTAB.

Panelists:
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Panel Discussion Topics

1. **Economic Trends and Case Management**
    - What trends are we seeing in the economics of patent litigation?
    - Have there been any changes in the way plaintiffs are funding law suits?
        - Types of assertion entities – emergence of hybrid NPEs as a more formidable competitor than pure NPEs? Which are thriving and which are going away? Also consider big operating companies anonymously owning or empowering trolls.
    - Are there any developments favoring plaintiffs?
        - Options for patent owners using supplemental examination and prioritized examination (Track One) have not had a significant impact on plaintiffs' litigation.
    - Has there been any change in which venues patent plaintiffs prefer?

2. **Case Management to Reduce Exposure and Costs**
    - How are defendants seeking to minimize exposure and costs? Many companies employ a variety of strategies to reduce risk and cost associated with patent cases. What strategies in particular are best used?
        - Through organized purchases or settlements, discuss organizations such as RPX. EFF patent initiative.

        - Through sharing counsel and/or joint defense groups; joint defense group strategies include IPR, motions to stay pending IPR, motions to stay customer suites, defense coordinators.
        - Through reform advocacy.
    - Joint defense groups:
        - What are the biggest challenges in making them effective?
            - Information sharing, challenges with differing levels of exposure, different resources/comfort level with aggressive levels of litigation.
    - What about settlement?
        - Most cases ultimately resolve before trial, some through SJ, but the majority through settlement. But the timing of settlement varies widely. Judicial intervention is a big driver for early settlement. Which courts or judges are the most hands-on and what techniques are most effective?

3. **Reforms Aimed at Improving Efficiency and Reducing Costs**
    - District court and Federal Circuit judges alike recognize the need for improved efficiency and cost reduction in patent cases. What are some of the reforms that have been adopted or are being considered and which will be most effective?
    - **AIA Joinder Restrictions**
        - AIA Section 299 precludes joinder or consolidation of multiple defendants for trial solely because they have infringed the same patent.
        - As a practical matter, how has multi-defendant litigation changed in view of Section 299? What are coordination strategies being employed by defendants?
    - How are transfer motions treated when many defendants are headquartered in different parts of the country?
    - How is the Judicial Panel on Multidistrict Litigation treating requests to centralize patent cases?
    - **Federal Circuit Advisory Council Model Orders**
        - The Federal Circuit Advisory Council (chaired by Ed Reines) has a plan to improve case management, reduce costs, and curb abuses.
            - Step One: Model order limiting e-discovery
            - Step Two: Model order of particularization of issues
            - Step Three: Urging early valuation of law suits so parties can assess where to best apply resources
            - Step Four: Fee shifting where there has been litigation abuse (presumed in situations of litigation blackmail)
        - How is fee shifting and Rule 11 being used as a case management tool?

4. **PTAB Proceedings - Litigation Coordination Issues**
    - When should I consider filing an IPR?
        - Is PTO promise of "better-faster-cheaper" likely to be true in my case?
        - What should I consider in an honest evaluation of the estoppel risk?

            - Do I have other defenses; how well developed is the prior art; will invalidity play well in court given the technology, or given the venue.
            - Risk of filing IPR too early is that all the art is not yet developed. Will the Board accept serial filings within the statutory one year period, or deem them cumulative?
            - How strict will courts be on "raised or could have raised" estoppel standard? See *Belkin v Kappos*, 696 F.3d 1379 (Fed Cir 2012) (A determination of "no SNQ" is not a "final determination of validity or patentability" and "courts have the final say on patentability"); and IPR rule 42.108(b) (denial of a ground is a decision *not* to institute inter partes review on that ground). Does this establish that the reference "could not have been raised"?
        - Am I likely to get a stay?
            - Simplification of issues and low likelihood prejudice to patentee in view of time limits has weighed in favor of stay. *Softview v. Apple et al.,* (Memorandum Order, 9/4/13 D.Del).
        - Are claim amendments likely to impact my case?
            - Claim amendments must narrow a feature in response to an alleged ground, and may not be used to advance a new claim strategy. See, Board decision in *Idle Free Systems v Bergstrom* (IPR2012-00027 June 11, 2013).
- How are joint defense groups likely to operate so as to mitigate the unintended expansion of "real party-in-interest" or "privy" designations to co-defendants?
    - Defense group collaboration is not itself enough to make each member a real party in interest in the IPR filings by others in the group, but when is that line crossed?
- Will industry groups that fund, direct, and control IPRs be able to insulate their members from real party-in-interest and privity concerns?
- How are prosecution bars in protective orders likely to impact IPR?
- Should I ever seek joinder with an existing IPR?
    - Joinder may be desired to hedge against settlement by the parties in an existing proceeding. Opportunity to join after the statutory one year period is limited, but has been approved where petitioner is the same party, seeking to address additional claims, and the patent owner consented. See, *Microsoft v Proxyconn* (IPR2013-00109).
- How does the Board treat claim construction vis-à-vis the district court?
    - Board view of claim construction is that "broadest reasonable interpretation" (BRI) applies because it "encourages patent owners to remove ambiguities and narrow their claims by amendment." *SAP America v. Versata* (CBM2012-00001).
    - Will contrary positions to BRI taken in litigation influence the Board? "Litigation positions taken subsequent to issuance of the patent are unreliable." *Garmin v Cuozzo* (IPR2012-00001).

        - What is likely to happen if I initiate IPR without the benefit of infringement contentions or a district court claim construction?
    - Can the PTAB nullify a district court infringement judgment?
        - See, *Fresenius USA Inc. v Baxter Int'l Inc.,* holding that a reexamination finding of invalidity can negate a prior infringement judgment if the judgment is not yet final. The Board decision divests the court of subject matter jurisdiction over the patent dispute.

5. Final Thoughts

- Do you think fairness and efficiency in the patent litigation process will improve or get worse over the next few years? What factors will have the most influence?

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