Mediation for the Intellectual Property Practitioner

By Laurie H. Anton, Esq.

Mediation is still not popular among some lawyers. Despite its availability, it is still underutilized as a strategy to resolve disputes. As an Entertainment or I.P. practitioner you may be overlooking a valuable tool in settling your clients' cases. Intellectual Property (i.e. Copyright) disputes are especially appropriate for mediation. Mediation is fueled by a process promoting creative compromise. What better Alternative Dispute Resolution forum for those who promote creativity for a living?

The three most typical aspects of intellectual property are copyrights, patents, and trademarks. They all involve property rights, but are dissimilar in nature. The Constitution directly authorizes Copyright and Patent legislation. Congress' power to enact trademark legislation is founded in its general authority to regulate interstate commerce. Copyright, which arises from the protection, afforded creative works, fixed in a tangible medium of expression is derived from Article I, Section 8. Patent law protects the novel invention, and Trademark protects "source of origin" of goods. Your mediation will differ, to some extent, depending upon which type of case you are representing; your client's burden of proof; stake in the outcome.

One of the best reasons for mediating intellectual property disputes is the cost-cutting feature. Copyright litigation, for example, might cost up to $ 200,000 through trial. The median cost of mediation is significantly less than other forms of alternative dispute resolution or litigation.

Another reason to consider mediating is the "unknown outcome" factor.

Uncertainty in Internet issues, and technology cases can hoist the I.P. practitioner into treacherous waters, and uncharted territory. Mediation provides the potential for the savvy attorney to navigate around these ambiguous or undetermined issues and avoid potential malpractice claims but also unfavorable litigated decisions.

Deciding to mediate also preserves the business relationship and reputations of the parties in an intellectual property case. The less formal atmosphere, the expedited process, minimization of business interruption, the disputant created outcome are all positive aspects of the mediation process. There is often an ongoing business partnership, association, or relationship between these types of disputants, and the need to preserve these relationships is essential, and valuable. Once the case goes to Court and is litigated, there is no guarantee these parties will ever want to work together in the future.

In planning for potential disputes in an effort to preserve the business relationship, a practitioner may wish to discuss incorporating a mediation clause, before conflicts arise. Parties maintain control over future mediation by utilizing terms or language to determine the length of the mediation, the mediator or process for choosing one, who bears the costs, and issues which might be covered. Drafting these clauses in your agreements reduces a future disputant's refusal to attend mediation.

These clauses are enforceable, and may be invoked to dismiss a complaint filed by one of the parties to the agreement.

Once a mediation clause has been implemented, and the mediation has been set, you will want to prepare your client and advise them as to what they might expect. As mediation is not a forum for debate, it should be noted that no one is there to prove anything. Your client should know that mediation is not a win/lose setting. The mediator's job is to assist the parties in understanding one another and reaching an acceptable agreement. They will help to identify issues and interests. They will encourage brainstorming and creative solutions. Each side will have an opportunity to give an Opening Statement before the Mediator, and the Other side, and once this is established, the parties will be situated in separate rooms in order to caucus. The mediator is not there to make decisions about how your dispute will be resolved. It is crafted by the parties themselves. The mediator is also bound by rules of confidentiality, and the parties are not to discuss the mediation or the outcome with any third parties.

This caucus procedure affords the mediator the opportunity to explore the interests, information and values of both parties. This may be the first time your client will find out how the dispute has actually effected the other side. Some parties assume that the other side is not bothered by the conflict, and wants them to be miserable. That's generally not the case at all.

Mediation helps to dislodge misunderstandings by defining the problem, describing behavior, and fostering cooperation. The reasons behind the dispute in the first place involve an objection to something said or done. Setting these out in an honest manner helps to address the concerns, set a roadmap for future dealing, and will expedite resolution.

Most of all it's important to exhibit RESPECT for the reputation and dignity of the other person, despite your client's anger or mistrust. Advise them to avoid their use of hostile or offensive gestures, threats, or verbal abuse. This will certainly allow the opposing party to avoid the important issues relevant to the dispute and focus their attention on the client's outburst. Remember that "good faith" participation is essential.

A successful mediation is completed by the parties entering into a mediation agreement, which encompasses those points that are meaningful and agreed to by both sides. It should be one that the parties understand completely, and one which provides for options if the agreement is violated. You may want to suggest that if such a condition should arise, the parties agree to mediate future disputes as well.

Remember that mediation shields the parties from exposing their issues and problems in public, is less expen-

continued, next page...

MEDIATION

from page 3

sive for your client, facilitates easier and less formal communication by the parties, and protection of confidential or financial information. It sometimes is cathartic in that it allows expression of their issues in a more suitable environment to be heard by the other party.

As a litigator who likes to win in Court, the intellectual property lawyer may be reluctant to seek mediation or even suggest this to their client. However competent a litigator you may be, it is a lawyer's primary responsibility to represent their client's objectives. Litigation is often difficult to predict and may ultimately harm the client or business relationship. The ethical duty to the client supersedes the need to further develop federal law.

***Laurie H. Anton**, a long standing*