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Virtual Mediations and Patent Litigation: Lessons Learned and Best Practices

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Mediation has always been an important part of patent litigation – especially in the Eastern District of Texas. Because of the Covid-19 pandemic, virtual mediations have become an important and successful way to resolve patent disputes. We have conducted or participated in more than 50 virtual patent mediations since the pandemic began, and these recommended best practices are based on our experiences over the past year.

Before the pandemic, many courts and judges required that everyone be physically present to conduct mediations, including the physical presence of a corporate representative with authority to bind each company. Failure to comply with this requirement was a sanctionable violation. Due to the assumption that the mediation session would not be productive unless everyone was physically present, requests to allow remote participation, even when not opposed by the other side, were frequently rejected outright by the court and/or the mediator.

When the pandemic began, there were three anticipated disadvantages to conducting virtual mediations in patent litigation. First, there was a concern that virtual mediations would not be effective because the participants and decision-makers were not physically present. Second, there were fears about security and confidentiality. These concerns were understandable given that many litigants were not proficient in using Zoom and that patent litigation mediations necessarily involve substantial communications regarding highly sensitive technical, financial and licensing information. Finally, some were worried that pervasive technical difficulties would render virtual mediations impracticable.

With the benefit of hindsight, however, it is now apparent that virtual mediations have been a surprising success and have resulted in tremendous cost savings for patent litigants with only minimal reductions in effectiveness. In our 50-plus virtual mediations involving patent litigation since the pandemic began, there have been no security issues in any of

those mediation sessions. Similarly, while there was a bit of a learning curve at the beginning, most litigants seem to have now mastered the technology.

Due to the tremendous cost savings associated with virtual mediations, we expect that they will continue for the foreseeable future in patent litigation cases. Not only do parties no longer incur out-of-pocket expenses for airfare and hotel expenses to attend mediations, but they also avoid the substantial cost of the lost time incurred during transit. This expense was particularly significant for overseas companies that were required to fly corporate representatives from abroad to the United States to attend patent litigation mediations.

While nothing is more effective at getting patent litigation lawsuits settled than an imminent trial setting, we recommend the following best practices to maximize the effectiveness of a virtual mediation in a patent case.

1. Be mindful of time zones

Prior to the session, you should address any differences in time zones. While the virtual session avoids travel issues, this forum creates the potential for time zone issues, especially in patent litigation when the participants may be joining from multiple continents.

As an example, the Central time zone is up to 14 hours behind Asian countries. For sessions involving Asian parties, we usually begin around 4-6 p.m. CT and end around 10 p.m. CT. If progress is made, we typically pick up the session the next day in the same time slots. On some occasions, we have begun sessions early in the morning and continued for as long as the parties in Asia could stay awake.

2. Pre-mediation communication is critical

To help ensure that the virtual mediation is productive, there would ideally be some pre-mediation communications between the parties and the mediator.

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This will typically include:

- A separate pre-mediation call between the mediator and the attorneys for each side; and
- A longer call between the mediator and each side (including the corporate representative) shortly before the mediation.

3. Test run the technology

If conducted with the same platform used for the mediation, the pre-mediation calls recommended above will also help to ensure that there are no technological issues on the day of the mediation. But if you do not have a virtual pre-call by video, then it is important to at least ensure in advance that you can connect to the virtual platform that will be used for the mediation.

4. Behave just like you would at an in-person mediation

This means that you should utilize the video feature (not just phone it in) and focus your attention on the mediation. Mediation is an art, not a science. For that reason it is important for the mediator to be able to see and observe the players. It is also important to respect the process as well as the time of the mediator and the other side. For example, Judge Folsom will typically send an email notice five minutes before he will next meet with your side. But if recipients are not monitoring their email, they will not know that and will hinder the progress of the mediation.

5. Do not participate from the same room

When all participants are in the same room, it is difficult for the mediator to see who is speaking and hear what it is being said. The better approach is for each participant to have his or her own screen.

6. Maintain confidentiality of the proceedings and documentation

Due to the sensitivity of the negotiations and documentation involved in mediating patent cases, it is also critical for participants to participate from a private location where others within range of your computer will not be able to listen in and to log off if you step away from your computer.

7. Maintain proper decorum

While it may seem like this is common sense, it turns out that, as in Voltaire's day, common sense is not so common.* While you do not necessarily need to wear a suit and tie, you should still dress professionally and at least wear a dress shirt. Attire such as workout clothes, shorts, T-shirts and the like is not appropriate. Similarly, you should avoid eating

on screen and be mindful of your surroundings and what is taking place within range of your camera. Needless to say, you should also turn off your cat filter.

By being mindful of these best practices, you can help to maximize your chances for success in your next patent litigation mediation.

* Indeed, the Northern District of Texas recently sent out a reminder that LR 83.16 ("Dress and Conduct" rules) applies to virtual proceedings and that, as a result, "[u]nless otherwise expressly permitted by the presiding judge, participants must dress and conduct themselves as if in a courtroom. Business attire is appropriate for attorneys. Certain clothing items, such as a golf shirt, t-shirt, tank top, halter top, athletic wear, lounge wear, hat, and sunglasses, are not appropriate in a court proceeding, whether virtual or in-person."

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