IP LAW360

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Q&A With Axinn Veltrop's James Veltrop

Friday, Nov 02, 2007 --- The most pervasive problem in IP law is the incredible delay and uncertainty typically associated with litigating patent cases, says Axinn Veltrop's James Veltrop in our series of chats with high-profile IP lawyers.

Q. What's the most challenging IP case you've worked on, and why?

A. One would be a case we handled when we started AV&H 10 years ago. We all came out of Wall Street firms and wanted to practice the same kind of law in a different environment, but we were still hiring associates and scratching together an office.

We took on a knockdown, drag-out between two large competitors that involved multiple claims in multiple cases in multiple courts. Each side filed a patent case against the other, in different courts, and there was also a state court action. The claims alleged patent infringement, trade secret misappropriation, breach of contract and multiple antitrust violations, and many of the issues overlapped.

Having a small core of litigators working on all aspects of all cases was effective and, near the end of discovery in all three cases, the other side initiated settlement talks and eventually entered into a comprehensive multiyear license agreement.

Q. What's the most ridiculous IP lawsuit you've defended a client against?

A. Sadly, the list of candidates is fairly long, given the number of corporate clients being held up for ransom with junk patents. But probably the most ridiculous was actually filed by a client's competitor, whose law firm overlooked some issues before filing suit. Not only was their infringement claim dead wrong as a matter of law (the accused device had exactly the opposite configuration as the claimed feature), but they were also precluded from collecting damages (for separate reasons) and our client had already switched to a different product (again for separate reasons).

Because we were before a court that would not consider the merits before the close of discovery, however, the plaintiff's law firm was able to continue billing while they searched for a graceful exit. Eventually they dropped the suit but that was small consolation.

Q. Which aspects of IP law do you think are in need of reform, and why?

A. Historically low standards of patentability and excessive judicial deference have been a problem, but there have been significant developments in those areas and we need to see how they play out. I also think that many of the pending congressional reforms, including opposition procedures, are a step in the right direction.

The most pervasive problem, however, is the incredible delay and uncertainty typically associated with litigating patent cases. Businesspeople can incorporate IP considerations into their plans, but they cannot plan around years of delay and overwhelming uncertainty. Rocket dockets at the courthouse level largely no longer exist because they are so popular, and the Federal Circuit still reverses 50% of its cases.

I am familiar with one case in which the district court issued summary judgment for the defendant six years into the case, the Federal Circuit reversed two years later, and the defendants now face a trial and potentially catastrophic damages. At a minimum, courts must decide summary judgments earlier, perhaps through increased use of special masters, and we need to continue moving down the path toward specialized courts.

Q. If you were the head of the USPTO, what changes would you make?

A. I would advocate certain administrative changes, such as upgrading the examiner position through better compensation and improving the allocation of the appropriate technical expertise to each application. And I would advocate continued congressional reform. But I would also recognize that many reforms have recently been adopted (e.g., the rule changes and KSR guidelines) and that it could take years to determine whether these reforms have gone far enough or too far. My focus would be on the successful implementation of these rules and monitoring the results, rather than pushing for more sweeping rule changes within the PTO.

Q. Where do you see the next wave of IP cases coming from?

A. The obvious answers are that, in the wake of KSR, more defendants will challenge patents on obviousness grounds (e.g., pharmaceutical formulation patents) and that, in the wake of Medimmune, more companies will bring DJ actions. In terms of industries, I think insurance and financial services will see a significant wave of business-methods cases, despite Comiskey and Nuijten.

But the real tsunami will come in biological generics after the regulatory approval pathways have been established. There will be numerous patent cases and many of these will raise novel issues. There will also be many trade secret misappropriation cases, some of which could lead to criminal prosecution under the Economic Espionage Act.

Q. Outside your own firm, can you name one IP lawyer who's impressed you and tell us why?

A. In the interests of fairness, I need to exclude a fine lawyer, Mike Cantor, from consideration because he named me in an IP Law360 Q&A a few weeks ago. One of the lawyers who stands out for me is Barry Bretschneider of Morrison & Foerster. We have been on opposing sides and on the same side, and Barry is always a consummate professional. He also has an encyclopedic knowledge of Federal Circuit case law.

Q. What advice would you give to a young lawyer who's interested in getting into IP?

A. IP law is a wonderful blend of law and science but it is the law that drives the equation. Although it sounds obvious, learn to be a good lawyer first and then bring your scientific training to bear on solving clients' legal problems. A good lawyer is one who provides sound advice and problem-solving abilities to clients in need of counseling, and zealous, skilled advocacy to clients in litigation. One way to learn how to do that is to expose yourself to talented lawyers and draw upon the best of what you see in each of them. Another is for IP litigators to litigate other types of complex cases. Litigation is like surgery – you need to understand how everything works and how clients react to the problem as a whole before specializing.

Q. I'm a general counsel with a Fortune 500 company facing a major patent lawsuit. Why should I hire your firm?

A. Axinn, Veltrop & Harkrider is a litigation firm whose lawyers have vast experience in bet the company cases both here and in their prior lives at large Wall Street firms. Virtually every lawyer in the firm is a litigator, and our IP lawyers have litigated many kinds of complex cases. We take pride in the fact that our clients hire the same lawyers who litigate their important patent case to also litigate key contract or regulatory cases.

Our IP litigators are also highly experienced and knowledgeable patent lawyers who work in close partnership with our clients to address their ongoing intellectual property challenges, including product design, patent claiming strategies, clearance and opinion work, portfolio assessment and strategic planning. We are also adept at navigating the interplay between our clients' IP strategy and the complex regulatory schemes in which they sometimes operate. In addition, AV&H combines the best aspects of large firm experience with small firm responsiveness and personal attention.

James Veltrop is the chair of the intellectual property and biomedical practice group at Axinn, Veltrop & Harkrider LLP.