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Tips on Managing Patent Litigation Expense

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Enforcing patent rights or defending against a claim of patent infringement can be some of the most expensive legal needs facing business today. Opinions vary as to why the cases are so expensive, but most CEOs seem to agree on one constant factor: uncertainty. In patent litigation, the level of uncertainty is peculiarly high.

Two titans in the medical products field have recently sparred over this very issue in a Supreme Court appeal, with one urging the high court to change the law completely. In the case of *Retractable Technologies Inc. v. Becton Dickinson & Co.*, Retractable Technologies claims the court of appeals has such broad authority to change lower court rulings, a patent owner or accused infringer cannot rely on what a trial judge or jury decides after years of litigation (and potentially thousands if not millions of dollars spent to do so). This encourages parties to appeal because of the success rate in appeals.

What are best practices for weathering the costs associated with protecting valuable intellectual property rights or defending against claims of infringement?

◆ **Budget, budget, then budget again**: Nearly all federal district courts in the country have adopted some form of local rules governing patent cases to streamline the cases as much as possible. The local rules provide insight on what the court expects as the minimum procedures that must occur by parties in a patent case, as well as guideposts for budgeting. Experienced patent litigation counsel should provide clients with projected budgets that anticipate the minimum procedures required by these local rules, and the projected associated cost.

◆ **Review budgets regularly:** Projected budgets should be regularly scrutinized as the case proceeds to account for actions taken by the opposing party, and additional procedures imposed by the Court. Regular communication with outside counsel is a must for ensuring projected budgets are accurate and account for unanticipated expense.

◆ **Consider limiting issues and procedures with the opposing party(ies)**: Patent litigation can be highly contentious, leading to higher cost. Consider narrowing the issues in the case, either by looking hard at the patent(s) in the case and choosing the claim(s) that likely makes or breaks the case, and seek agreement by the opposing party(ies) to focus proceeding on that claim(s), or expediting procedures that define the claims in dispute. Increasing numbers of courts are considering limiting patent disputes to exemplary claims, making this more of a commonplace decision in patent cases.

Overall, a clearly defined goal for raising and resolving disputes over intellectual property rights, and plain and open discussion between businesses and their outside counsel, are the best practices for managing the expense of enforcing valuable intellectual property rights.

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Matthew Murphey is a partner with Troutman Sanders and a litigation and trial attorney handling intellectual property and commercial litigation matters. Matt has argued cases before the Federal Circuit and Ninth Circuit Court of Appeals, and federal and state trial and appellate courts throughout the United States. Matt's intellectual property litigation practice focuses on a particular expertise in patent cases involving a range of technologies. These include molecular biology disciplines related to the biotechnology industry, chemical and pharmaceutical sciences in the context of Abbreviated New Drug Application (ANDA) litigation, mechanical disciplines related to the diving, transport and manufacturing industries, electrical and electronic disciplines related to the semiconductor, microcomputer and energy industries, and chemical disciplines related to the food processing and supplement industries.

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