

LITIGATORS CORNER:

How to Simply. . . .

My Wishes for 2003



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I got to thinking the other day – dangerous for a lawyer – about what I'd like to see happen in patent litigation during the coming year. Despite the well-intentioned reforms of the past ten years, patent cases are more complex and slower moving than ever before. I do not pretend to be any kind of legal scholar; I'm just a guy in the trenches. But I don't think we need more scholarship; what we do need is a big dose of common sense. So here are some of my wishes about how I'd like to see litigation change in 2003.

(1) Let's junk the Schlieffen plans. Well before World War I, the high command of the German Army planned how to invade France; the plan, which depended on exact timing, was to swing the German Army through Belgium like a door on a hinge. The Germans calculated how many troops could move how fast on a given road, how many trucks were needed and where, and the number and size of troop trains. Timetables were calculated to the minute. The plans for mobilization were so massive and intricate that, once set in motion, mobilization could not be stopped without

jeopardizing a successful invasion. The war started, in part, because of momentum.

We've adopted something like the Schlieffen plan in patent litigation. We employ scheduling orders that set dates for amendments, joinder of parties,

initial disclosures, requests for admissions, close of fact discovery, submission of waves of expert reports, summary judgment motions, pretrial conferences and pretrial orders.

Let's cut it out. There is only one date that really counts: the trial date. Next in importance is the date for the close of discovery. We are pretending that judges, who have too many cases as it is, can really "supervise" and indulge in "judicial intervention" – to recall a few of the catch phrases I have heard used to justify greater judicial involvement. Forget it. They don't have the time. One of the greatest judges in the Northern District of Illinois was the late Nicholas Bua. He set a trial date and a discovery close date. Nothing more. Then he did not change them. His cases went to trial or settled. And if one did go to trial, he was a great trial judge.

(2) There should be fewer, not more, summary judgments. In one of our cases, the defendant moved for summary judgments regarding non-infringement and invalidity of our client's patents. We responded with an assault of our own summary judgment motions, including one for infringement. The district judge denied all of the motions with one-paragraph orders. At first, I was annoyed. Then I began to think that he might be right. It might be easier to understand the whole controversy at a trial, rather than having law clerks wading through piles of briefs and exhibits.

When I began in this racket, summary judgments in patent cases were rare; patent disputes were regarded as too complex to be resolved on summary judgment. Now, patent cases are, if anything, more complex; yet summary judgment motions are thought to be a popular way to cut down on the judicial workload. But summary judgment motions these days are typically massive and complex; defendants often contest too many elements of the claims, particularly the interpretation of those elements. The exhibits are often foot-tall stacks.

I don't think these motions are really simplifying things. One, they require a great deal of work. Two, the results are undependable.

Many grants of summary judgments are appealed and reversed. The rate of reversal is so high that the reliability of the process in the trial court leading to the summary judgment is in question.

Looming trials make cases settle. Cut back on the summary judgments unless the motion is truly simple. If the case is tried, the decision-makers will learn the case, and the result is likely to be better.

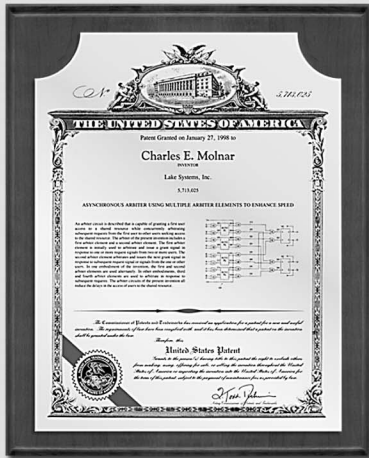
(3) Stop the search for the damn holy grail of legal perfection. The law is for people, not lawyers. We are turning into a priesthood in patent law, and we don't even notice it. Our fact-finding processes deal with probable cause, a preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. Not one standard in our system for deciding facts relies on perfection or absolute truth as the goal. Yet, perfection is what we lawyers seek in developing, analyzing and interpreting the law. *Festo* is one example. This case has been going on for what – ten years? A theme of the common law is finality, but the litigants in *Festo* have been denied any finality and any clarity. I'll bet they wish they had never started. I also wonder what the total bills are by now.

Stop treating patent law as a subject so occult that only an oracle can pronounce what it is (but of course only after suitable translation of the oracle's pronouncement by us priests). The search for ideological purity hurts the very people the law is meant to help. Let cases develop the law, case by case.

(4) Make the lawyers learn the facts early. It makes them work, and it makes their heads hurt. Too many lawyers fall back on the same old tricks in case after case; they tend to employ the same tactics, often based on procedure rather than substance, because it is easier to rely on what they know than learning the facts of a new case and new technology. Making the lawyers really learn the facts will make them assess their cases more realistically, and advise their clients accordingly. Short discovery periods will help, too. They might even be more willing to settle early.

(5) Use effective mediators. I have now seen mediators in a number of cases. They usually fall into one of two categories: those who are forceful and pushy, and those who are not. The latter don't bring many cases to a successful settlement. In one of our cases, the mediator, a forceful fellow, met privately with our client. We could hear him yelling, but we didn't mind, because our client needed a dose of realism, and wasn't paying enough attention to us, his lawyers. Thanks to this effective mediator, our client got realistic, and achieved a successful settlement.

We don't need mediators who ask what the parties want to do. In another of our cases, we



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had a clear-cut non-infringing design, and the case was worth less than one hundred thousand dollars, even on a lost profits theory. We went into a court-ordered mediation hoping that we would be able to achieve a reasonable settlement, and were prepared to give up the original design.

But that didn't happen. The mediator was, well, just too nice. He should have challenged the plaintiff about the wisdom of pursuing the case. Instead, he accepted the plaintiff's positions at face value and did not challenge them at all. The mediation was a waste of time and money. A mediation like this is worse than none at all.

I prefer a head-knocker, one who will challenge my client, too. In another of our cases, the mediator looked at each of the lawyers and litigants at the table in the first get-together, and asked each person, one by one, if he or she would agree that the mediator, in the interest of saving valuable time, could be extremely candid. We all agreed. After that, he lowered the boom, and carved up both parties' positions. He awed us. Our client was rather strong-willed, and the mediator accomplished in a couple of hours what we could not accomplish in months, even though we had tried hard to make our client see the risks of the case.

(6) Beat up your own client when he is unreasonable. I used to be pretty deferential

to all my clients. After all, I figured, it was the client's case, not mine. It was his right, with my recommendations in mind, to make informed decisions about the legal strategy, whether and when to settle, and so forth.

It isn't just a matter of refusing to do things that a client wants you to do, but which you believe are unethical. Sometimes your client wants you to do something that just doesn't make sense. One of the things I have written about before is the unrealistic attitude of clients who think that, through a lawsuit, they are going to right the injustice they have suffered. True, some of them have been badly treated – trade secrets stolen, inventions that took years of work infringed by companies that treat their complaints with disdain, endless punishing litigation in front of courts that seemed not to care, and often worse. But they must also realize that a settlement is a just result, too, and one that provides immediate and certain redress for the wrong.

(7) Skip free-standing Markman hearings. The reversal rate is still ridiculous. We are wasting our time on them. A forty or fifty percent rate of reversal shows that Markman rulings by district courts are not predictable. Making these decisions in a factual vacuum makes a difficult problem worse.

(8) Use more contingent fee litigation. I remember a cartoon in the *New Yorker*. A lawyer, in a handsome office, sitting across a large desk from a prospective client, said, “You have a pretty good case, Mr. Smith. How much justice can you afford?” Contingent fee litigation is the only way the individual inventor or small company has an opportunity to litigate. The little guy has no other way into the courthouse, and big infringers know it and rely on the little guy's lack of resources. In case after case, I have seen wealthy litigants with resources use those resources to achieve victory by wearing down or outright crushing the small plaintiff. They seek to accomplish exactly what Rule 1 of the Federal Rules of Civil Procedure was meant to avoid: a decision made slowly, expensively, and badly.

Contingent fee litigation has an advantage: it gets the lawyers off the billable bandwagon. That way, they are focused on ending the case, rather than stringing it out. If it is a bad case, then there is an incentive for the lawyers to say so.

These are just a few of the things I'd like to see accomplished in 2003. During the coming year, I plan to write columns on some of these topics. If there are other subjects you'd like me to cover, please contact me at jhosteny@hosteny.com. **IPT**