LITIGATORS CORNER:
My Wishes for 2007: Part 1

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I got to thinking the other day – still dangerous for a lawyer – about what I'd like to see happen in patent litigation during the coming year. Then I looked back through my previous columns and realized that the last time I wrote about "my wishes" for a coming year was in February, 2003 (*How to Simply. . . My Wishes for 2003*). I decided that it was about time to write an update.

Reading over that column was an eye-opener. I discovered that most of my now-four-year-old wishes have still not been realized – and that there are now several more I'd like to add. In this column – Part 1 – I'll revisit seven of my original 2003 wishes, making some changes and additions. In a future column, I will finish commenting on my 2003 wishes, and write about some totally new wishes for 2007.

It is still true that, despite the well-intentioned so-called "reforms" of the past several years, patent cases are more complex and move more slowly than ever before. I have never pretended 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 common sense and realistic thinking.

(1) Let's junk the Schlieffen plans. Before World War I, the high command of the German Army planned how to defeat France in forty days, before Russia could mobilize. The plan, which depended on exact timing, was to swing the German Army through neutral Belgium and Luxembourg, 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 this momentum.

We use 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 are only two dates that count: the trial date, and the date for the close of discovery. Everything else is fluff. We are pretending that judges, who have too many cases as it is, can really "supervise" and engage 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 was 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, not to mention the statements of disputed and undisputed facts, which are now *de rigueur*.

When I began doing patent litigation, 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 now are typically massive and complex; defendants often contest too many elements of the claims, particularly the interpretation of those elements. The exhibits are often three-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. Judges sometimes seem to strain for ways to grant such motions, when the facts are too complex or disputed. 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 damned 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. The case went on for a decade. A theme of the common law is finality, but the litigants in *Festo* were denied any finality and any clarity. I'll bet they wish they had never started. I also wonder what the total bills were.

We pass the point of diminishing returns with sagas like *Festo*. As I wrote in my May, 2001 column, "*Does* Festo *Change Patent Prosecution?*," in addition to taking up the court's time for a decade, thanks to *Festo*, the doctrine of equivalents is now nearly dead – to my mind, an unfortunate result. We do not, but should, balance the benefits of a change in the law against the potential burdens the change introduces in terms of uncertainty and complexity. We unfortunately compare the disadvantages of what we do now with the advantages of what we

would like to do. The grass always looks greener. When you get there, though, you will still have to weed it, mow it, and water it. Honestly, I wish the Supreme Court would stay out of patent law. They venture into it too infrequently to have a feel for it.

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 destroys the rights and property of the very people the law is meant to help. The constant change destroys predictability.

(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. They squabble about protective orders, or schedules, or document production, or they hide documents. 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.

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(5) Use effective mediators. This is another good way to make cases settle. 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 we achieved a successful settlement. We recently did another mediation with him. Again, he forcefully engaged both sides, and the case settled.

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

(7) 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. Pitkin. 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 band-wagon. 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 still like to see accomplished in 2007. In an upcoming column, I will address several others. IPT