

Patent counsel at seminar advise plaintiffs to spend money up front, have settlement amount in mind

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BOSTON – Spending more money at the outset of a case, calculating possible damages early and budgeting specific hours for casework were a few of the cost-cutting ideas floated at a recent Wolf, Greenfield & Sacks patent litigation seminar.

Four lawyers from the Boston intellectual property firm spoke at the firm's Feb. 25 seminar, "The Economics of Patent Litigation," at the Boston Harbor Hotel. Two in-house attorneys and a former local executive participated in panel discussions moderated by another Wolf Greenfield lawyer.

Wolf Greenfield shareholder and patent litigator James Foster told the roughly 60 attendees that plaintiffs suing all types of defendants need to spend enough money up front to create the perception they're prepared and will win. That includes plaintiffs seeking an injunction against a competitor, royalties for future use of the patented technology or money for past infringement, Foster said.

Spending money up front means early research on key case issues and keeping the pressure on the defense team by avoiding extensions and time delays in court. "When in doubt, spend the money, even if you're represented by a different firm [than Wolf Greenfield]," Foster quipped.

When suing defendants for past infringement, as opposed to seeking a royalty for future use of the patent, Foster also recommends focusing on a settlement number right out of the box. Doing so forces the defendant to think about what kind of check they might have to write, he said.

"Lawyers don't always like to do it because they want to focus on liability, and it [also] means they'll have to bug the financial people," Foster said.

Foster believes defendants can also lose ground and money when they try to delay the case in court. "Defendants who delay end up paying more money to lawyers," Foster said. "The plaintiff gets more credible and it gives the impression that you're not prepared [to fight]."

One notable exception to the rule is when a company is one of many defendants named in a lawsuit filed by a so-called patent troll — an entity that uses patents to demand licenses or file lawsuits.

Smaller companies in that situation might want to see how much other defendants pay to settle before making any decisions, he said. Companies with strong counterclaims may be able to get the case dropped after the plaintiff settles with other parties, he added.

The personality of the executive running the opponent company is also a factor in deciding how hard to fight a case at the early stages, said panelist Thomas Field, associate general counsel for intellectual property at Saint-Gobain Corp, a glass and building materials company. It helps to have a sense of whether the executive is likely to act rationally or become angry, Field said.

"I agree that it's a good idea to be aggressive up front, but you have to know the psychology of the other party," said Field.

The philosophy of Citrix Systems Inc., a networking and cloud computing company, is to fight very hard when cases are brought by entities that just use patents to file lawsuits, said Robert Feldman, senior counsel for litigation at the company. "It's an expensive approach," Feldman acknowledged.

Feldman said he looks for opportunities to settle after positive case developments.

Wolf Greenfield shareholder and patent litigator Michael Rader talked about the nuts and bolts of budgeting the client's money and the lawyers' time.

Rader said he uses a spreadsheet to forecast how lawyers working on a case will spend their time, such as how many hours it will take to prepare specific briefs.

Rader quoted a well-known 1955 *Economist* article that came to the conclusion that "[w]ork expands so as to fill the time available for its completion." Rader said tasks that normally take 100 hours, for example, can often be managed down to 75 hours. Alternatively they can balloon to 150 hours, without much gain in quality, he said. Regularly evaluating how the team plans to win the case also helps narrow the investigation, and the costs, he said.

"In any case, there are a lot of different stones you can turn over," Rader said. "In today's economy you've got to figure out which stones."

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