Mediating the IP Dispute
Part V: The mediation session continues

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In the first four articles in this series we explored the importance of timing the mediation in intellectual property disputes, mediator selection, preparation for the mediation session, and the beginning phases of the mediation session itself.

We will now begin to address issues that may arise later in the mediation session. As the session continues, the parties will begin to explore the structure of a settlement and will begin to trade offers. It will often appear at some point that the parties simply will not be able to narrow the gap. For the initial stages of trading offers, patience is the key. No party ever comes straight to its bottom line, nor should it. The discussions necessarily proceed incrementally. But in some mediations the process of simply trading offers may become unproductive.

It isn't at all uncommon for one party to feel that it has "moved more" that the other side, and the negotiation is becoming lopsided. This feeling needs to be explored. Often one side expresses movement in percentages, while the other expresses it in actual dollars, which nearly always leads to an imbalance in perceptions. Of course, one side is also likely to feel the other side started unrealistically high or low, so their concessions and movements "don't really count."

At this point, the discussion needs to be redirected to the main purpose of the mediation: determining what a reasonable settlement range is for the case that both parties can live with, within a structure they can agree to. As some very good negotiators have noted, the focus needs to be on what their side needs and can live with, not what the other side has given up. In the end, every case presents opportunities and risks that need to be weighed, understood and valued. "Doing the math" most often leads to the conclusion that a fair settlement is a better alternative than continued litigation.

It is not, however, at all unusual for it to appear an impasse has been reached. This is the point where a tenacious mediator gets busy. I have come to the conclusion over the last few years that it is often a necessary part of the mediation to reach what would appear to be an impasse. Only then can some of the key underlying issues be examined and solved.

Rather than giving up, the mediator and parties need to focus on an aspect of the settlement they can agree to, re-evaluate where they have come and the risks and opportunities of the case, and address the emotional issues that may be getting in the way of "doing the math" to determine a path to reaching a fair resolution.

Here are a few questions to consider:

- You know what you could settle the case for. How much will it cost you to try it? Don't forget that time of management and key witnesses away

from the company is also a cost. Also, what is the opportunity cost of putting your energy into a trial rather than your business? Now compare that cost to the offer and see how the equation looks.

- What are the various outcomes, what dollar value is associated with each, and how likely is each? How does that compare to where you are now? What would it be worth to have an insurance policy to avoid the worst outcome? The other not-so-good outcomes? How does that affect your evaluation of the situation?

- Who is your best witness? Why? Who is their best witness? Who is your worst witness? Who is their worst witness? Why? How much of your case hangs on whether your witnesses are believed? Theirs? How does that affect your risk?

- What are we missing? You solve business problems every day, and this is just another one.

- What do you think the other side's real interests are? What are yours? Very few people aspire to simply win a lawsuit. There has to be something more here each party is after.

- Is there something about the other side's position you don't understand or don't know about that could change your evaluation of the case and value of a settlement? What is it?

Of course, which of these areas to explore, or whether to explore some completely different, will depend on the specific case, personalities and what you have learned at the mediation. Remember, for example, that many IP cases involve counterclaims which provide the opportunity for cross-licensing and other creative non-cash exchanges of value. Changing the focus to look at things in a new way is often in order at some point in the proceedings.

Finally, with the parties' consent, the mediator may make a "last-ditch" attempt to settle the case with a "mediator's proposal." This is not the mediator's own evaluation of how much someone will win or lose at trial, but rather what the mediator thinks the case should reasonably settle for given all the input he or she has had all day. Generally, each side will agree to hear the mediator's proposal and say "yes" or "no." If both say" yes," there is a settlement. If not, there isn't, but the mediator does not reveal who said yes and no. Of course, if one side said "yes," it will know the other side said "no" if there is no settlement. But, importantly, a side who said "yes" when there is no settlement is not setting a floor or ceiling for any further negotiation, as the other side doesn't know whether or not it agreed with the mediator's proposal.

But don't rush to the mediator's proposal too fast, as it normally ends discussion for the day. It doesn't always though. A tenacious mediator may learn something from that process that will allow him or her to find a new path forward.