Zen & The Art of Legal Networking

INSIGHTS & COMMENTARY ON RELATIONSHIP BUILDING WITHIN THE INTERNATIONAL LAWYERS NETWORK

PUBLISHED BY

Lindsay Griffiths

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June 21, 2011 by Lindsay Griffiths

Actual Knowledge Necessary for Inducement, Mr. Norman Zivin, Cooper & Dunham

We kicked off the Saturday morning session with a presentation from Mr. Norman Zivin of one of the ILN's member firms in New York, Cooper & Dunham, who reported on their recent involvement in a Supreme Court case and the implications for ILN member firms, both in the US and abroad.

Norman said that the case involved a deep fryer, a product made by their client, SEB, a French company in Lyon. A number of years ago, they brought a lawsuit against a company in Hong Kong for infringement of the patent. The opposing side defended on the grounds that they couldn't have infringed the patent because the products were made and sold in China. They said that therefore, they don't do any business in the United States and couldn't have induced anyone to infringe, because they didn't even know that SEB had a patent.

The case was tried three or four years ago, before a jury. Norman commented that the reason that a lot of foreign companies bring cases to the US is that juries in the US tend to grant much higher damages than one would get in a case in Europe or Asia. The jury took about 15 minutes to deliberate and came back with a judgement of $5 million in favor of their client. The case went up on appeal, and the decision was affirmed, so everyone thought the case was over.

However, the defendant then asked the Supreme Court to hear the case. Norman said that this is a real long shot in the US, as there are about 10,000 petitions filed every year for the Supreme Court to hear cases, and they generally hear about 100. So there's 1% chance that

the Supreme Court would even hear the case. For patent cases, the Supreme Court may take one or two a year, but that's it.

But in this case, the Supreme Court decided they would hear the case. Norman said that this is normally an "uh oh," and that everyone said that if the Supreme Court was going to hear the case, they would throw out the judgement. The case was argued in February, and they received the decision last week - the Supreme Court affirmed the decision in their favor, which was the first time in 47 years that the Supreme Court has interpreted what constitutes patent infringement. Norman said it was a good victory for their client.

Rather than discuss the finer points of patent law, Norman said he wanted to make two interesting points to the delegates:

1. You can't hide from US law. For firms with clients in Europe and Asia, if they think they're immune to US law because they're making things in foreign countries, they're not. The US has a very broad reach, and if a company sells anything in the US or if the goods end up in the US, firms had better advise their clients to take US intellectual property rights into account.

2. Norman's second point was a procedural one - most patent lawyers in the US will never have the opportunity to try a case before the Supreme Court, so they're not always familiar with the procedures. For one thing, there is a third party involved - the US government, who is represented by the Solicitor General. The Solicitor General may or may not decide to support one of the parties, or he may take some other position. In civil cases, such as this one, both parties are invited to Washington, DC to make a presentation to the Solicitor General to try to convince him that he should write a brief to support their side.

   Both sides went to Washington and made their presentation, and Norman heard rumors that the Solicitor General was going to submit a brief on their behalf. They would have been pleased had he done so, but no brief was forthcoming.

   The week after their arguments in February, there was an article in a trade publication that reported on a meeting held at the White House, with representatives of Microsoft, Intel and a few other large companies, along with the Solicitor General and the Attorney General. These companies were trying to convince the Solicitor General not to file any brief, and the Solicitor General was apparently ordered not to do so.

   Norman said that these kinds of political considerations were not within his realm of experience, and he's sure that many of the other attorneys in the room wouldn't have expected this either, unless they're in the political realm. He added that they have to be cognizant not only of the legal position and facts for their cases, but also the political ramifications, which are normally beyond the scope of what they do as advocates on behalf of their clients.

Lindsay Griffiths of the International Lawyers Network
179 Kinderkamack Road
Westwood, NJ 07675
Phone: (201) 594-9985
Fax: (201) 740-9765