

May, 2007

\$9.00

Volume 14, No. 5

Embracing The Differences – How Diversity In Litigation Can Help You Win

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Let's admit it. There's a stereotype about patent attorneys. As is evidenced by the patent lawyer character on the animated TV series "King of the Hill," the public envisions the typical patent attorney as a gangly and awkward middle-aged white man in a grayish-black suit (pocket protector optional). It seems so unfair. But, fair or not, somehow patent litigation has managed to be one of the last professions

still dominated by white men. This sounds judgmental, but it isn't meant to be. It is just a simple fact.¹

A recent survey by the American Intellectual Property Law Association reported that the vast majority of all responding intellectual property professionals were white (90.9 percent) and male (84.8 percent). And considering just the subset of IP professionals who were partners or shareholders in private law firms, there was an even greater representation of white men (94.5% and 91.6%, respectively).² With those numbers in mind, the corresponding numbers of women and minorities who work at private law firms and actually litigate patent disputes are fairly low.

Of course, all numbers are relative. Some patent firms do a better job than others in promoting a diverse workplace. At our firm, McAndrews, Held & Malloy, for example, 27 percent of attorneys are women and/or minorities.³ Because we believe that every patent litigation team can significantly benefit from diversity, we think that those firms that recognize the value of diversity are on the right track. We recently represented the plaintiff, Paxar Americas, in a patent infringement lawsuit, *Paxar Americas, Inc. v. Zebra Technologies et al.* The litigation spanned three-and-a-half years and involved eight patents and more than 50 products accused of infringement. It was a complex case involving the software, electronics and mechanics of bar code printers and almost every facet of patent law imaginable. The case was suc-

cessfully settled for \$63.75 million shortly before trial. Our litigation team was not only diverse, but it was balanced, which, unfortunately, is still an oddity these days. The team was led by a woman, Jean Dudek Kuelper, and had a fairly equal mix of women (Sandra Frantzen, Laura Personick) and men (James Hafertepe, Edward Mas, Matthew Anderson). What we confirmed while litigating this complex and highly contentious case is that our team's diversity was good for the case, good for the client and good for the team.

A patent litigation team should be staffed with the smartest and most highly motivated lawyers. That is a given. However, a good litigation team needs more than brains and brawn. Just as a litigation team benefits from having litigators with different levels of experience, it benefits from having litigators with different *kinds* of experience. What follows are just a few reasons why diversity should be an important factor when staffing a patent litigation team.

A diverse team allows lawyers to draw on their strengths. Different lawyers have different strengths. Some lawyers are especially good at planning and organizing. Others are really good at issue spotting and problem solving. Some lawyers excel at communicating in writing, while others are better at articulating their ideas verbally. Some lawyers like to anticipate all contingencies; others prefer to handle things "on the fly." Some lawyers like to fight; others like to negotiate. Some lawyers are extremely detail-oriented; others see the forest through the trees. The key to successfully staffing a litigation team is selecting people with different skill sets so that all team members' strengths are complementary. In that way, the team operates like a well-oiled machine with each lawyer doing what he or she does best.

What does that have to do with diversity? Different people bring different talents to the table – the more diverse the team, the more diverse the talents. For example, we believe that the skills that we have acquired as working mothers contribute significantly to our success as patent litigators. Any mother of a teenage boy has honed the art of cross-examination. And any mother of a 3-year-old is uniquely qualified to deal with even the most cantankerous and illogical opposing counsel. Moreover, because we are constantly juggling work and family, we become adept at multi-tasking, planning and delegating. Time is our most valuable commodity. So we are good at finding efficient and practical solutions to problems and we tend to focus on what is important and necessary to help us win. When litigation budgets are limited, this is a useful skill to have. So, yes, we are saying it – balancing work and family has helped us excel as lawyers. This does not mean that every working mother will have these skill sets and it does not mean that male lawyers will not. It just means that, when we evaluate lawyers as diverse individuals and understand what their strengths are, we can more accurately ascertain how they can add value to a litigation team.

A diverse team allows people to shine as individuals. In law, as in business, there is sometimes a tendency for younger people to emulate the personal style of the most senior person. While this cloning process can be positive in that it helps the younger attorney garner useful skills from the mentor, it also can be negative in that the younger attorney never really has a chance to develop his own personal style. This is a problem because, in our view, the most effective litigators are those who are comfortable in their own skin.

We don't see the clone effect happening on teams that are diverse. On mixed teams, if the lead attorney is a woman, the men generally do not exactly duplicate the style of the woman (though they may adopt certain aspects of that style). The same is true for women attorneys when the lead attorney is a man. When a team is diverse, each individual has no choice but to shine because there is no prevailing norm. For this reason, we feel very fortunate to be women patent lawyers. We have never felt like we had to conform to any "patent lawyer standard" because we never could conform to such a standard. Over the years,

we have had no choice but to be ourselves. In developing our own personal style, we had the best of both worlds – being able to draw useful skills from male attorneys without becoming the male attorney.

A diverse team is more interesting. Being able to develop a unique personal style is also important for practical reasons. As patent litigators, it is our job to present technical and complicated information in a way that allows our audience not only to comprehend it, but to retain it. Oftentimes, we use different resources to enhance our effectiveness such as demonstratives, PowerPoint presentations and animations. But, ultimately, our biggest asset is ourselves – the people used to present the message.

Yet, no matter how great our oratory skills, the audience will eventually get bored if the presentation is too long and unvaried. The audience cannot be persuaded by our message if they aren't paying attention to it. But how does this relate to diversity? We've all sat through painfully long presentations with a series of successively boring speakers. While we eagerly anticipate each new speaker, we are quickly disappointed when each speaker sounds like the preceding one. Now imagine sitting through a 12-hour summary judgment or Markman hearing where the same speaker, or the same type of speaker, drones on for hours on highly complex patent issues. Even multiple hours with Clarence Darrow (and Clarence Darrow Junior) can get boring.

If team members are appropriately selected, a diverse litigation team will not have this problem. We believe that a litigation team with different characters, who have different personal styles, is inherently more interesting (and thus more effective) than a team of gray-suited clones. At the very least, it mixes things up. For example, in the Paxar case, we had a summary judgment hearing that involved all eight patents-in-suit and covered a variety of issues ranging from infringement to validity to damages. The hearing lasted until nearly midnight. Our summary judgment team was composed of two women and two men – all with very different styles – arguing different aspects of the case.

Different people offer different viewpoints. Every lawyer is unique and draws from his or her own unique experiences when assessing any given aspect of a lawsuit. Some lawyers are equity-focused.

Others orient toward bright-line rules. While some prefer facts, others cling to the law. While we don't necessarily ascribe to the "Men Are From Mars, Women Are From Venus" world view, we realize and accept that people with different experiences approach issues differently.

Now it should be obvious that different people offer different viewpoints. But what is not obvious is that different points of view actually add value to a litigation team. Indeed, some people just don't appreciate, and don't want, other points of view. Unfortunately, different view points are sometimes equated with insubordination or dissension. Yet, a litigation team operates at its peak when team members are encouraged to openly express their views, especially when their views differ from each other. We are lawyers. We are supposed to debate. Debate stirs ideas and innovation and encourages precision and clarity. During the course of our recent litigation, the various personalities on our team were able to work cohesively, using vigorous debate, to hone and refine our strategy. The case benefited because our team was made up of individuals who each approached and solved issues differently.

The jury is expecting to see women and minority lawyers. In addition to making the trial presentation more interesting, a diverse litigation team helps at trial in at least two other ways. First, thanks in part to television, people are now used to seeing women and minorities as doctors, lawyers, police officers, scientists and politicians. Like it or not, some people notice and care if women and minorities are absent from roles that they now are expected to fill. We notice when there is a team of eight lawyers litigating against us and not one of those lawyers is a woman or minority. Though there may be some explanation (see footnote 1), it just seems strange. We think it is likely that at least some jurors might also think it is strange. Moreover, this strangeness is amplified when one team has women or minorities actively participating in the lawsuit, and the other team has no women or minorities at all. That is, when one litigation team is diverse and the other is not, the difference between the two teams becomes stark.

Second, when we diversify our team and put women and minorities in prominent roles at trial, we increase our chances that the jury can relate to us. There is a reason why Apple's latest advertising campaign

against Microsoft personifies Apple as a hip-looking twentysomething and Microsoft as a stodgy middle-aged man. While some people might be more comfortable with stodgy and middle-aged, Apple's target market can relate to the twentysomething. It's simple marketing.

Clients are demanding diverse litigation teams. Times are changing. Many corporations are not only demanding diversity among their own ranks, but are also actively seeking diversity in their outside counsel. For example, many corporations have signed on to the diversity "Call to Action" initiated by Rick Palmore, general counsel for Sara Lee Corporation. The "Call to Action" is a concrete and concentrated effort to promote diversity in the legal profession, particularly among outside counsel. Signatories of the "Call to Action" pledge that they "will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms." Moreover, the signatories "intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse."⁴ Our clients care about diversity and we should too.

Diversity is also good for its own sake. As we discussed above, being qualified is a prerequisite to being a patent litigator. We are all smart and highly motivated. We need to recognize, however, that being smart and highly motivated is not enough to succeed. For a lawyer to be successful as a litigator, he or she needs the opportunity to succeed. Studies show that women and minority attorneys report much higher rates of missing out on desirable assignments and work opportunities than white men attorneys. According to a study conducted by the ABA Commission on Women in the Profession, 43 percent of women attorneys of color, 55 percent of white women and 24 percent of men of color report having limited access to client development and relationship opportunities as compared to only 3 percent of white men. Likewise, the numbers of women and minority attorneys who report missing out on desirable work assignments are also disproportionately high (44 percent, 38.6 percent, 25 percent, and 2 percent, respectively).⁵ Ultimately, we have to admit that, when 94.5 percent of partners at patent law firms are white and 91.6 percent are men, there is a chance (even if unintentional) that women and minorities will not be given the same opportunities as those in

the majority. All of us should make every effort to avoid that.

We are grateful to everyone who worked on the Paxar case with us. It was a fantastic team effort in which every team member gave his or her all. We are also thrilled and thankful that our client, Paxar, gave us the opportunity to show what a diverse and balanced team can do. When a 5-year-old daughter asks if boys can be lawyers, we know the world is changing. We look forward to the day when there is no longer a patent lawyer stereotype and everyone is as forward-thinking as a 5-year-old. **IP**

ENDNOTES

1. We do not purport to take up the question of why patent law is dominated by white men, but we guess it is influenced, in part, by the numbers of women and minorities entering science and engineering.
2. See AIPLA, Report of the Economic Survey 2005 at 4, 5, and I-27.
3. Interestingly, according to the AIPLA survey, it appears that the number of women and minorities is higher at IP boutiques. *Id.* at 27, 29.
4. The diversity commitment statement and a list of signatories can be found at www.clocalltoaction.com.
5. For these statistics and a summary of the ABA report, see Paulette Brown, *Visible Invisibility: Women of Color in Law Firms*, Diversity & The BAR, Mar.-Apr. 2007, at 44-54.