Setting Goals, Managing Expectations, Assessing Risks and Estimating Costs in Patent Litigation

By Christopher J. Renk and Erik S. Maurer[1]

I. Introduction

Intellectual property litigation, and particularly patent litigation can be a valuable business tool to help businesses create markets, maintain exclusivity and protect profit margins. Nevertheless, because it is among the most complex and costly forms of civil litigation today, the decisions to bring or defend against a patent litigation should always be made after a thorough analysis of the goals, risks, potential benefits and prospective costs of litigation.

There is one question that every litigation counsel must explore with clients when discussing possible litigation. The answer to this question should be used to provide the framework for the resolution of every disputed matter. That question is: "what are your business objectives?" Although the significance of this question may appear obvious on its face, all too often both in-house and outside counsel either forget to ask the question or, more typically, forget its significance along the way. Your client's business objectives must always be used as a framework for setting goals, assessing risk, estimating costs and managing expectations in the litigation context.

This paper begins by addressing considerations and methods for setting goals and managing your client's expectations throughout the litigation process. Then, this paper discusses both qualitative and quantitative methods of assessing risks associated with patent litigation. Both methods should be employed because of the inherently speculative nature of risk assessment in the patent litigation context. Lastly, a method of budgeting for patent litigation that will allow for efficient, cost-effective litigation management is addressed.

II. Setting Goals and Managing Expectations

Suffice it to say, virtually every client wants a total victory – however defined – at minimal cost. But what is a "total victory?" Simple – ask your client! "Total victory" can only be defined by your client, and the answer to the question depends on the facts and circumstances of each case.

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Indeed, there may be occasions where you achieve your client's business objectives to litigation, but did not "win" in your client's eyes. For example, if you deliver what you consider to be a total victory after trial, but do so at a price that exceeds your client's budget, it may not be a victory in your client's mind at all. Your client may have been expecting the same result, but at a fraction of the cost. Worse yet, your client may have expected a result that was impossible to achieve, but you failed to appreciate it because you did not effectively communicate with your client at the outset of the case. Therefore, understanding what your client wants, agreeing with your client on what you will deliver and clearly setting forth the expected costs of your services are the keys to successful representation.

Understanding your client's objectives, agreeing on the deliverables and managing these objectives requires effective, constant communication throughout the entire litigation process. Following are six factors that can be employed to effectively understand your client's goals and manage their expectations throughout the litigation process.

A. Understand Your Client's Business Objectives

The first step in managing your client's expectations is to understand what the client wants from the case. Therefore, the first and most important question you must ask is: "what are your business objectives?" As will be discussed, clients often have both objective and subjective goals, both of which need to be explored.

Some clients may be looking for both preliminary and permanent injunctive relief. However, expectations may be excessive given the facts of a particular case. Although not impossible to obtain, the standards for obtaining preliminary injunctive relief, given its extraordinary nature, are quite stringent. Your client must be apprised of the standards and the likelihood of succeeding on such a motion based on the facts of your case. Likewise, clients sometimes assume that injunctions are automatically granted at the end of the case. That is not always so. Courts "may grant injunctions... in accordance with the principles of equity... on such terms as the court deems reasonable."[2] In essence, courts have substantial discretion. You must, therefore, discuss all of the factors in light of the equities and facts of your case with your client.

Counsel also must understand the scope of injunctive relief the client desires.[3] Injunctions come in different shapes and sizes. However, clients may not understand this. For example, clients sometimes think they will automatically get an injunction stopping all infringing conduct immediately. Again, courts have significant discretion in crafting the scope of injunctive relief; therefore, a court may not enter an injunction that immediately stops infringing conduct from occurring.

[2] 35 U.S.C. § 283.
[3] Skenyon, "Investigation Needed Before Bringing Suit," *in* PATENT LITIGATION, §2:2, pp. 2-10 to 2:11 (Pretty, Ed., 2001).

Marketplace conditions also have an impact on whether your client's desire for an injunction is in the client's business interests. For example, if your client has broad patent rights and the ability to satisfy marketplace demands, an injunction may be the appropriate remedy to pursue.[4] On the other hand, if the client has a history of licensing its patents, exclusivity may not be a desirable, or obtainable, objective. Or, if your client does not have the ability to satisfy marketplace demand, or the patent can easily be designed around, an injunction may be of limited utility. Instead, your client may wish to license the patent at issue. All these issues must be explored and discussed for expectations to be properly managed.

Still other clients may have a desire and expectation of recovering money damages. Under the Patent Act, a patentee is entitled to damages that are "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."[5] Nonetheless, given the cost of patent litigation, damages need to be substantial to warrant pursuing a damages case. Before doing so, counsel should discuss with their clients whether lost profits are recoverable, or whether a reasonable royalty is a more likely measure of damages. The measure of damages will likely have an impact on the amount of any monetary recovery. Furthermore, counsel should discuss with their clients the level of infringing conduct. Although detailed sales information likely will not be available until discovery, oftentimes publicly available information can be used to evaluate an infringer's sales activity.[6] If sales are substantial, damages may well be substantial. If sales are insubstantial, and the goal is to recover money damages, the cost of litigation may well exceed your client's recovery. These issues must be explored.

There may be circumstances in which your client wants neither injunctive relief nor damages, but rather, has other business-related objectives in mind. For example, your client may want to pursue litigation to force a putative infringer to join an existing licensing program. Sometimes existing licenses require patent owners to pursue all infringers. Other times, while not expressly required by contract, "most-favored-nation" clauses implicitly require patent owners to pursue infringers.[7]

The pursuit of injunctive relief and money damages are not always the primary goals of patent litigation. Your client also may have unquantifiable goals. For example, your client may want to file suit to maintain the company's reputation for vigilantly enforcing its intellectual property rights against all infringers. Such an approach may have significant indirect benefits, and hence may be part of your client's business model.

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[4] Selinger, "Prelitigation Considerations and Strategies," *in* PATENT LITIGATION STRATEGIES HANDBOOK, §1.I.B.1. p. 4 (Grossman and Hoffman Eds., 2000).

[5] 35 U.S.C. § 284.

[6] Skenyon, "Investigation Needed Before Bringing Suit," *in* PATENT LITIGATION, §2:2, pp. 2-11 (Pretty, Ed., 2001).

[7] Selinger, "Prelitigation Considerations and Strategies," *in* PATENT LITIGATION STRATEGIES HANDBOOK, §1.I.B.1. p. 4 (Grossman and Hoffman Eds., 2000).

In sum, you must have an open dialog with your client at the outset of your representation to determine what they hope to achieve through the litigation process. This requires you not only to listen to what they tell you, but also to understand what they want from litigation, both in terms of quantifiable results, and in terms of unquantifiable results. If you do not understand your client's goals, your opportunity to help them will almost certainly be left to chance.

B. Understand Your Client's Experience

A second, yet related, step in managing expectations is to understand your client's experience with the litigation process in general,[8] and patent litigation in particular. If your client's legal matters are managed by an in-house counsel who has litigated patent disputes in the past, they likely will understand that patent law is esoteric, litigation is time consuming and expensive and that the cost of a mutually agreeable settlement oftentimes is more desirable, and certainly more predictable, than going to trial.

If your client has experienced patent litigation in the past, it is important to understand how those cases were resolved. Some cases may have been resolved on summary judgment, while others may have been resolved on appeal after trial. Some may have involved money damages, others injunctive relief, others both injunctive relief and money damages. In any event, it is likely that the majority of their cases have settled at some point in the process. With history as our guide, these experiences most certainly will inform your client's perspectives, and particularly the definition of success on any subsequent case.

Obviously, if your client has experience with patent litigation (and the law), it will be much easier for you to discuss possible outcomes to a case. The process of litigation also will be all too familiar to them. Do not assume, however, that you, as trial counsel, can devote less time to understanding the expectations of the experienced client. This is a dangerous assumption. Experienced clients many times reflexively anticipate, without expressing to you, their assumption that your case will be resolved in the same manner as their previous patent cases were resolved.

For example, a client who obtained summary judgment in a prior case likely will assume summary judgment will be granted in your case. However, summary judgment in that case may have been granted because of the very unique facts at issue. Unless you understand your client's prior experience, this latent expectation may

[8] Bikin, "Client Expectations: Discovering, Understanding and Managing Them," *Litigation*, Vol. 30, No. 3, p. 24 (Spring 2004).

never be made known to you, in which case you will not be able to fully manage your client's expectations regarding summary judgment.

Conversely, if you are working with an in-house attorney with no experience in litigation, evaluating evidentiary issues, discovery disputes, dispositive motion strategies and trial strategies will be as unfamiliar to them as they are to the layperson.[9] You, therefore, must take time to explain key legal principles, as well as the litigation process and likely results given the facts in the case.

Suffice it to say, the non-lawyer business person with no experience in patent litigation poses the most considerable challenge. If your client is a business person with little or no legal background, and little or no experience in patent litigation, there is almost certain to be a language barrier in discussing success in any given case. Consequently, care must be taken to explain in simple terms (to the extent possible) patent law principles in the litigation process, including the likely outcomes of the case.

The non-lawyer business person many times has an unrealistic understanding not only of your role in solving legal problems, but also in the likely outcome of the case. In this situation, any discussion of risks, possibilities, probabilities and costs will be extremely difficult, although not impossible. You will need to take great care and explaining the difference between an event or outcome that is possible, and the likely outcome of the case. Furthermore, you will have to reinforce, through repetition, that which is likely from that which is possible. If you do not do so, your client's expectations likely will exceed that which you will deliver.

This is particularly true when your client is considering, or engaged in, "bet your company" litigation. The emotional strain of this type of litigation often prevents the business person client from fully comprehending the likely outcomes of the case, and participating in any meaningful way in its preparation. You must understand this at the outset, and prepare accordingly.

It also is unlikely that a business person's definition of success will be consistent with a lawyer's definition of success. Don't be surprised if your client does not get as excited about discovery motion victories as you do. Those are battles, not the war. Thus, do not get lost in the trees when discussing success with the business person client. Instead, keep your eyes and their focus on the forest.

Because your client's prior litigation experience will influence expectations in your case, you must understand them at the outset.

C. Explain the Litigation Process and Time Commitment

[9] *Id.* at pp. 23-24.

A third important step in managing your client's expectations is explaining the litigation process. Your clients cannot possibly make an informed decision on whether to pursue patent litigation unless they understand the path of litigation itself.

One of the best ways of explaining the patent litigation process is to show your client sample scheduling orders in patent cases pending in courts where you are considering filing suit. Standing orders of particular judges or particular judges where you are considering filing suit can also be instructive in this regard. These orders will provide a relative framework for the critical events that likely will arise in their patent infringement case as well.

In explaining the various steps in the patent litigation process, it is important to emphasize to your client that civil litigation, including patent litigation, is a slow process. Even in the fastest jurisdictions, your client's patent litigation likely will not get to trial in much less than one year.[10] Then, the appellate process typically takes at least a year, or more.

No matter who your clients are, they need to be apprised, or in some cases reminded, that the process is lengthy. For various reasons, your client may not wish to be tied up in litigation for such a lengthy period of time. Instead, they may wish to pursue alternative dispute resolution techniques, or forgo litigation altogether, in order to obtain certainty in a shorter period of time.

D. Explain the Costs of Litigation

Obviously, clients want good value for money. Virtually every client wants to know up front how much litigation will cost. This estimate, of course, will vary depending on many factors including the amount in controversy, the technology at issue, the location of the court, your opponent's litigation strategy and the length of the case. The cost of the case also will vary depending on the client's business objectives and willingness and ability to invest in the litigation process.

If, on the one hand, a client wants to win at all cost, the case likely will be more expensive because every issue will be fully developed. If your client has a limited budget because of its financial resources, you must understand this at the outset and explain in clear and concise terms what you can deliver at an agreed price. No matter what, you must clearly explain the vagaries of estimating costs associated with litigation. There are many unanticipated events that occur during the litigation process that require estimates be revised. Anyone with

[10] The fastest jurisdictions to trial, otherwise known as the "rocket docket" courts, are the Eastern District of Virginia, the Western District of Wisconsin, the Western District of Arkansas, the Eastern District of Oklahoma, the Western District of Oklahoma, and the District of Maine. The average time to trial in these jurisdictions is about 12 months or less.

experience with intellectual property litigation understands that estimating the cost of litigation is highly speculative, and subject to change depending on the facts and circumstances of each case.

Part of explaining the costs of litigation includes discussing your fee structure. If your representation will be based on the billable hour, you should address this, and do so in your retainer letter. If your client is expecting, or at least wants you to consider, an alternative fee arrangement, you need to discuss this as well. Your representation may be short-lived if your client expects, or demands, a fee structure upon which you cannot agree.

In addition to the direct costs of litigation, your client needs to understand that litigation is a disruptive process that will almost certainly consume substantial indirect resources. Indeed, those clients who have never been involved in patent litigation may be shocked to know the magnitude of the hidden costs of diverted human resources to support patent litigation. Rest assured, your client's employees will be taken away from their daily job functions to support the litigation. Many of them may be pursued as fact witnesses who will be asked to give deposition testimony, or testify at trial. At a minimum, you or in-house counsel will interview employees to determine what, if any, relevant information they have to the dispute for initial disclosure purposes. Your client's employees will also be called upon to help collect documents for production. While the lawyers may provide support for this function, the employees themselves, because of their familiarity with the documents, are vital to this process, and it can be enormously time consuming in complex patent cases.

Whether you are litigation counsel or in-house counsel, you do not want your client to be shocked and upset that its employees are, at times, spending more time supporting the litigation process than they are in getting their jobs accomplished.

E. Communicate, Communicate, Communicate

Communicate, communicate, communicate. There is no substitution for open and often communication with your client. Good litigation counsel communicates with their clients at every stage of the litigation process. Communicating openly and often with your client not only helps you to understand litigation objectives, but also helps you to prevent them from being surprised by bad news. Communicating with your client requires that you would not only hear what your client expressly tells you, but also understand that which is unsaid. Listening requires more than simply hearing. It requires you to follow up on issues you believe may live beneath the surface, but remain unexpressed by your client.[11]

[11] Bikin, "Client Expectations: Discovering, Understanding and Managing Them," *Litigation*, Vol. 30, No. 3, pp. 26-27 (Spring 2004).

Consequently, if your experience tells you that your client has an unexpressed hidden agenda behind its litigation goals, get it out on the table by asking about it. For example, your client may be a named inventor on the patent in your dispute. You, therefore, need to understand whether personal pride has any impact on her desire to file or settle the case. Or, if your opponent's principal is a former employee of your client, and your client simply wants to "send a message" through the litigation process, you need to know this as well.

Not surprisingly, hidden agendas can be a significant source of miscommunication between lawyer and client. Hidden agendas also can lead to clouded business decisions regarding litigation because they are oftentimes based on principle rather than what is in the best interest of a company.

One very effective way of communicating with your client and ferreting out hidden agendas is to ask your client to state and restate the litigation objectives to you using her own words. Having your client express to you her understanding of the objectives, as well as her understanding of the likely outcomes of the case, is an effective way to arrive at a common understanding of your client's goals, and your directives. In fact, it is amazing how many times this process will provide you with an "opportunity" to clarify your client's understanding of likely outcomes of the case.

Because litigation is a dynamic process, assumptions made at the outset of the case, as well as business objectives, may change depending on how the facts develop during discovery. Facts developed during discovery, rulings on dispositive or nondispositive motions and witness performance during deposition can change the contours of the case dramatically. Therefore, you must keep your client up to date on what is happening in every phase of the case. If facts develop during discovery change your assessment of the case, you must explain these facts and their impact with your client. If these facts change your budget estimates, you must explain that as well.

One very effective way to communicate with your client during the course of the case is via an Extranet. An Extranet is a secure network that is used to share information from counsel's central server. All relevant docketing information, case documents and pleadings can be made available to your client at any time of day via an Extranet.

Equally important, do not withhold bad news from your client. Bad news should never come as a surprise.[12] You will never meet your client's expectations if bad news comes as a surprise. Although certain modes of indication are better for communicating bad news, timing always is critical. In particular, you must communicate regarding the likelihood of success on various case specific events in advance. So, for example, if your opponent files a motion for preliminary injunction, explain in advance the likely outcomes based on the facts and

[12] *Id.*

circumstances of your case. Do not wait until the judge grants the motion, particularly if you were foolish enough to promise a sure victory.

Communicate, communicate, communicate.

F. Confirm the Terms of Your Representation in Writing

There is one circumstance where the written word certainly is more effective in communicating than the spoken word. It relates to the scope of your representation. Specifically, once you have understood your client's goals and discussed your deliverables, you should consider sending your client a retainer agreement/letter. Among other things, the letter should outline the particular deliverables you have outlined orally to the client, and identify how you will be compensated for your efforts.

Again, because of the complexities of patent litigation, a retainer letter/agreement will help your client focus on the tasks to be performed and the outcome sought. This letter may go a long way toward minimizing any misunderstandings regarding the scope of your representation. Indeed, a retainer letter/agreement is particularly important given the esoteric nature of patent law, and the technical complexity of patent cases.

G. Do Not Over Promise

In helping your client attain her goals it also is important not to over promise or over commit. As obvious as it may sound, promising victory is a disservice to your client's interests, particularly those who have a significant emotional attachment to the case, and those who are not experienced in the patent litigation process. You must speak in terms of probabilities and possibilities given the facts and circumstances of your case. Surely, most savvy clients will be uncomfortable with "can't lose" predictions.

Additionally, do not "bait and switch." That is, do not tell your client they cannot lose, and then later inform them after hundreds of thousands of dollars have been spent on discovery that they cannot win, and hence must find a way to settle. If your client hears the words "you cannot lose," she would be well served to ask you how your last 10 cases were resolved. If you have a history of settling cases after substantial discovery, your client may well decide to entrust their legal problems to someone else.

Similarly, do not underestimate the cost, both direct and indirect, of patent litigation, unless of course you are willing and agree with your client to a flat sum for handling a case. You will almost never succeed in meeting your client's expectations if you "low ball" your cost estimates to secure a litigation.

Over promising will almost always lead to unrealized expectations.

III. Identifying and Assessing Risks

Once you have fully understood your client's goals, your client invariably will ask: "what are the odds?" What are the odds a patent will be found enforceable? Valid? Infringed? What are the odds of winning and how much will be won? Is there a chance to recover increased damages? Will the judgment be paid, and if so, when?

More likely than not, you've heard questions exactly likely this, and answered in response with something along the lines of "more likely than not...." Lawyers working a case understand "more likely than not." It means maybe, maybe even probably, but of course it allows for maybe not. It accounts for the milieu of uncertainties surrounding a lawsuit and resonates with a lawyer's experience, intuition and gut instincts.

Litigation counsel will respond with these generalities because risk and odds are difficult to measure or predict in patent litigation.

Whether you represent the patent owner or the accused infringer, litigation counsel's first step in preparing to respond to questions regarding risk is to identify all relevant legal issues, and thereafter weigh the strengths and weaknesses with reference to the assigned burdens of proof. In shorthand, this step is called identifying the uncertainties of the case.

If you represent the patent owner, you likely will focus your analysis on infringement issues, potential defenses and potential counterclaims. On the other hand, if you represent the accused infringer, your primary focus will be on defenses and counterclaims.[13]

But sometimes a lawyer may need (or clients may want) to assign quantitative values to the qualitative, subjective words usually used to describe the events in a lawsuit. Because lawsuits – particularly intellectual property cases – are complex, dynamic and evolve over years, this is a difficult task fraught with potential inaccuracies. Consider that even if a lawyer carefully evaluates all the uncertainties and objectively calculates a 47% probability that her client's patent will be found valid and infringed, the Federal Circuit reverses an equivalent percentage of claim construction rulings.[14]

[13] A detailed analysis of the potential legal issues associated with the patent owner's case, and accused infringer's case, is beyond the scope of this paper.
[14] Victoria Slind-Flor, "The Markman Prophecies," IP Worldwide (March 13, 2002), presenting one study's conclusion of a 47% reversal rate; other studies have found comparable but somewhat lower rates.

Significantly, because claim construction issues often are central to a patent case, one experienced patent litigator has commented, rather than asking "what are the odds," clients really should ask the question: "what is the margin of error?"[15] The answer to this question illustrates the confidence level in the prediction. And, significantly, with the Federal Circuit's reversal rate on claim construction issues – issues central to most patent disputes – approaching 47%, arguably any prediction on the likelihood of success of patent infringement cases are of little value.

An example of the significance of margins of error can be found in a political poll. Virtually every political poll reports both the "approval rating" and the error factor, which illustrates the confidence level in the prediction. A poll reporting candidate Jones leading the race by margin of 56% in favor, 40% against, with 4% undecided would present happy news if the margin of error was plus or minus three percentage points. However, if the possible error was plus or minus 47 percentage points – the reversal rate in claim construction issues – that same prediction would be of little use.[16]

Analogously, although a lawyer may have accurately estimated the chances of success in the district court, there are almost even odds that the Federal Circuit will reverse the case if claim construction is on appeal. In this light, investing too much – time, effort, certainty – in quantitative probabilities about the outcomes of patent disputes is likely to be an unfulfilling and expensive exercise.

Because no one method of assessing risk is perfect, litigation counsel should consider employing a combination of various analytical tools, including available statistics, intuitive judgment based on experience and quantative analysis using decision tree techniques. The authors believe that utilizing a combination of these tools may provide some guidance for your client.

A. Statistics

Clients oftentimes ask trial counsel to provide them with statistics in assessing the risks or odds associated with patent litigation. In-house executives and business people seem to find greater comfort in a statistical or analytical analysis of risks than they do in the qualitative "gut reaction" analysis based on counsel's experience.

To date, however, there has been very little empirical research or statistical analysis of patent litigation outcomes. In addition, because of the variability between one patent case and another, statistical analysis is arguably of little value in the ultimate calculus.

[15] Mark T. Banner, "What are the Odds, The Dangers of Handicapping Patent Litigation," The American Laywers' Corporate Counsel Magazine (June 1998).
[16] *Id.*

Nevertheless, the main study relied upon today, prepared by Professor Kimberly Moore, compares patent owner success rates in cases before judges and juries. This survey shows that patent owners prevail approximately 58% of the time, whereas accused infringers prevail only about 42% of the time.[17]

Professor Moore's study also found that juries are more likely to resolve some issues in the patent owner's favor than are judges. Results from part of Professor Moore's study are reproduced below.

TABLE 1

	Total	Jury-Decided	Judge-Decided
Valid	67%	71%	64%
Invalid	33%	29%	36%
Enforceable	73%	75%	72%
Unenforceable	27%	25%	28%
Infringed	65%	71%	59%
Not Infringed	35%	29%	41%
Willful	64%	71%	53%
Not Willful	36%	29%	47%

With the proper disclaimers regarding their value, including the fact that each and every case is different and is ultimately decided on the specific facts and equities at hand, these statistics may provide some guidance in the risk assessment process, particularly when assessing odds of bench versus jury trials.

B. Qualitative Analyses

There are a number of intuitive or qualitative evaluations that litigation counsel should consider in assessing the risks and benefits of a client's case.

Obviously, litigation counsel must have a thorough understanding of the technical and legal issues that are joined in the case to assess the merits of the case, on any level. That said, in patent cases, like any other civil litigation, judges and juries want to answer the same essential question: "what happened?" In general, this is because trials are held only when parties disagree on historical facts. Thus, the witnesses and exhibits in a patent

[17] K. A. Moore, "Judges, Juries and Patent Cases - An Empirical Peek Inside the Black Box," 99 Mich. Law Rev. 365 (November 2000).

case, like any civil case, serve to persuasively establish those facts. Lawyers must use witnesses and exhibits to effectively tell a story.[18]

Because the testimony of witnesses, and the evidentiary value of exhibits, is central to patent cases, evaluating risks and potential benefits must include an evaluation of who the witnesses will be, and what the exhibits will show. Without credible witnesses, be they fact or expert witnesses, your case will be difficult to win. All too often, litigation counsel focus on the technical and esoteric legal issues associated with their case, but forget to consider whether there is anyone to "tell the story" in a credible, persuasive way. This issue must be evaluated at the outset. Suffice it to say, your witnesses have a significant impact on the outcome of the case, so do not get lost in the technical niceties of the case, be they legal or technology related.

Litigation counsel also must evaluate the client's documents at the outset of the case. If you represent the accused infringer, and there are documents indicating your client copied the patented product, this will be a factor in your quantitative analysis of the risks and liabilities. Likewise, if your client has e-mails or marketing documents that contain damning statements that are relevant to the merits of your case, you must know about them at the outset.

Another qualitative factor that must be considered is your judge's proclivities in patent cases. Counsel will also want to evaluate opinions authored by the judge. In similar fashion, jury verdicts (assuming your case is a jury case) rendered in patent cases in your forum should be considered as well.

Last, but certainly not least, all of the equities must be evaluated. If you represent the patent owner, you must consider whether your client's patent is a pioneering patent, or whether it provides important societal benefits. You must also consider whether your client is a "likeable" corporate citizen, or whether public perception of your client – no matter what the merits of the case – will make winning difficult. Counsel must also evaluate the equities associated with the opposition's case, to the extent known.

In short, litigation counsel cannot evaluate case issues in a vacuum. You must get out of the office and "kick the tires." This includes interviewing witnesses, reviewing case-related documents and evaluating the equities. All of these factors will impact counsel's ability to develop a trial theme and tell a story in a way that will convince the judge or jury to decide the case in her client's favor. Hence, all of these factors help counsel to predict the outcome of the case.

C. Quantative Analysis

[18] Banner and Renk, "Witnesses Special to a Patent Case," *in* PATENT LITIGATION, §8.1, p. 8-2 (Pretty, Ed., 2001).

If your client asks that you quantify your risk analysis for them, a decision tree analysis is one way to organize and communicate litigation analyses in quantitative terms. As discussed in more detail below, a decision tree is a method of assigning quantitative values to a lawyer's qualitative estimates about how key issues are likely to be resolved over the course of a dispute. However, despite their quantitative terms, decision trees should not be mistaken as something scientific, certain or even predictive. Indeed, they are no more scientific, certain or predictive than the lawyer's best guesses about what to include in the tree.

That said, decision trees help lawyers and their clients think about cases in ways they may not have thought about their cases before. This section introduces decision tree analysis and offers some thoughts about their use in the context of patent litigation.

1. Mechanics of Decision Tree Analysis

The first step in creating a decision tree is to identify the decisions within your control ("decision nodes") and the uncertainties outside your control ("chance nodes") that are important to the outcome of the case. The decision tree is built from the events that branch, or flow, from these nodes.

Decision trees can be created for all the important aspects of a case, or for discreet parts of a case. A rudimentary decision tree outlining a plaintiff's evaluation of one aspect of a patent infringement case, an inequitable conduct defense, is shown below:

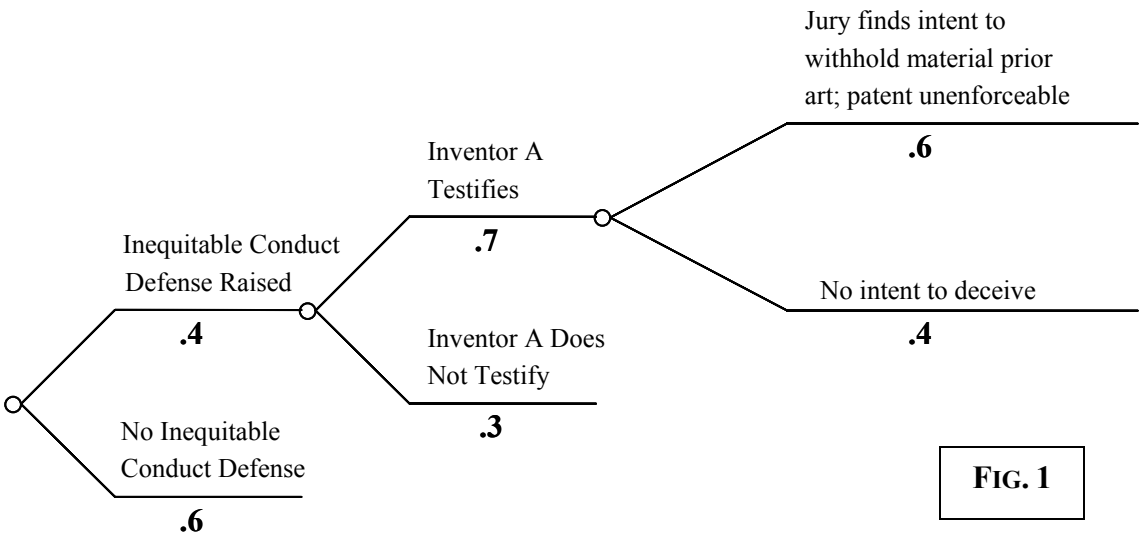

FIG. 1

The circles in this example represent chance nodes. These are the decisions and circumstances that are outside the plaintiff's control, *i.e.*, the decision to raise an inequitable conduct defense rests with defendant, whether inventor A testifies depends on whether defendant locates and secures A's testimony and judgment of the patentee's

intent is left to the jury.[19] Although there can be any number of nodes in a decision tree, it is important to ensure that the tree includes the important events that will impact the costs and outcomes of each issue under consideration. If the tree omits issues to be decided or key events in the decision process, it will be flawed and information derived from it will be misleading.

Each node is divided into branches that resolve the possible outcomes of the node. Although the tree in Fig. 1 only shows nodes divided into two branches, there can be any number of branches flowing from a node so long as the branches are mutually exclusive and at least one of them completely resolves the uncertainty at the node.[20] Applying that rule to interpret the example above, the plaintiff's decision tree identifies four ways in which the issue of inequitable conduct could be resolved: (1) inequitable conduct will not be raised as a defense, (2) an inventor with intimate knowledge of the patent's prosecution will not testify, (3) the inventor will testify, but the jury will not find that the patentee had any intent to deceive the Patent and Trademark Office or (4) the inventor will testify, the jury will find prior art was withheld with an intent to deceive and the patent will be rendered unenforceable.

Finally, a probability, *i.e.*, counsel's quantitative guess at the likelihood an outcome will occur, is assigned to and written below each branch. Because the branches flowing from a node must be mutually exclusive, the probabilities at each branch of a node must add to 1 (or 100%). It is critical that the probabilities be set with an objective eye and that they account for the reasons why each event expressed on a branch of the decision tree is expected to have a given outcome.[21] Counsel should consider a variety of resources in estimating probabilities, *e.g.*, past experience, any available statistics about the issue, knowledge of partners and peers, etc.

The completed tree is read from left to right along continuous node-branch paths. The likelihood that any given scenario will occur is determined by calculating its compound probability, *i.e.*, the result of multiplying all the probabilities along a path from node to terminal branch. Thus, based on the probabilities counsel entered into the tree above, there is a 16.8% probability that the patent will be held unenforceable due to inequitable conduct (0.4*0.7*0.6 = 0.168). The probability of some favorable outcome for the plaintiff can be calculated by summing the compound probabilities of each favorable outcome for the plaintiff. Thus, based on the probabilities counsel entered into the tree, there is an 83.2% probability that inequitable conduct will either not be raised, or fail if it is raised ((0.4*0.7*0.4) + (0.4*0.3) + 0.6 = 0.832).

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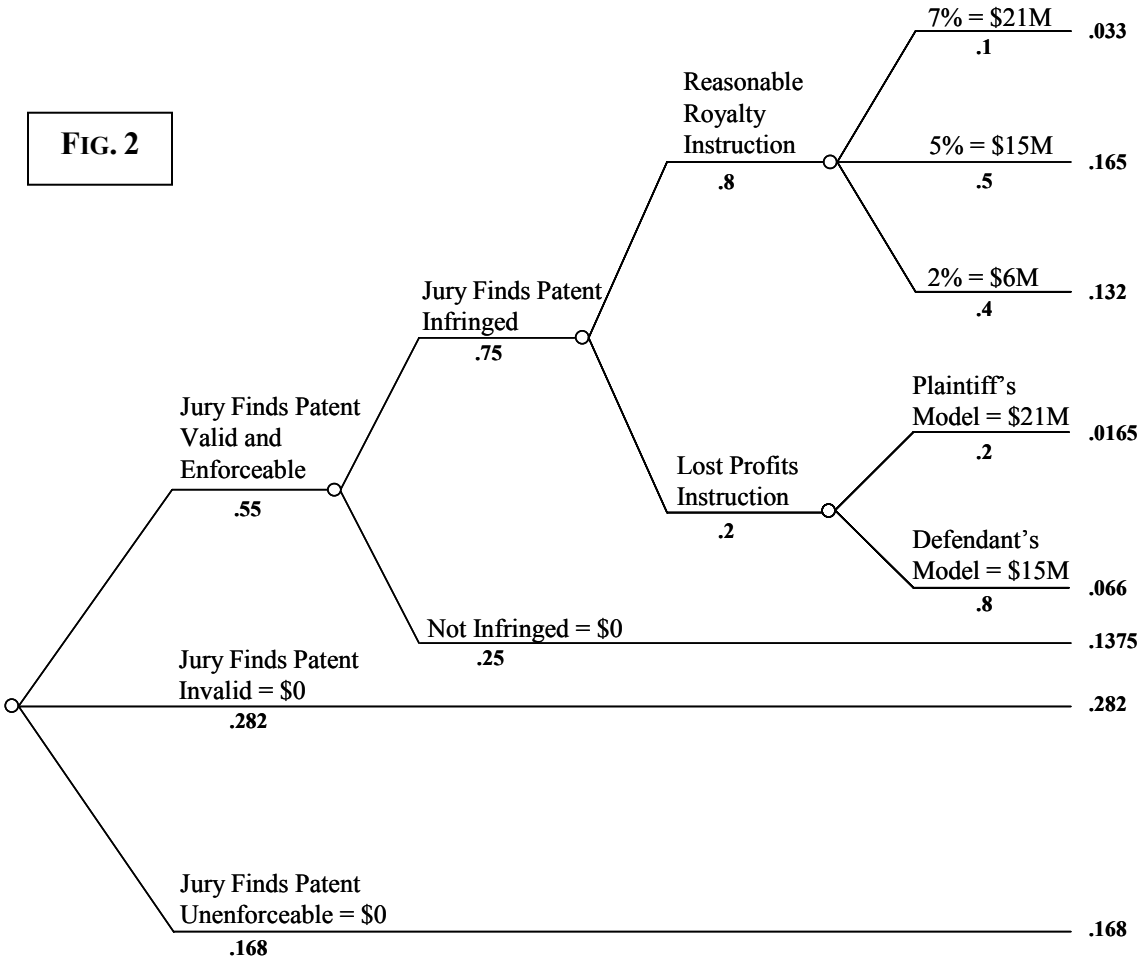
[19] Decision nodes, *i.e.*, decisions to be made by the plaintiff, can be represented by a different shape, *e.g.*, a square. Thus, in a tree evaluating the entire patent case, plaintiff's initial decision whether to sue or do nothing could be represented by a square having two branches.

[20] For example, the plaintiff's initial decision described in footnote 19 could branch four ways instead of simply two: (1) sue, (2) do nothing, (3) arbitrate or (4) mediate.

[21] Marc Victor suggests listing the reasons why each issue might be won or lost under each branch of the tree; he concludes that at least five or six reasons should be identified for every branch. Marc V. Victor, "Risk Evaluation in Intellectual Property Litigation," INTELLECTUAL PROPERTY COUNSELING AND LITIGATION, ch. 50 (2002).

As should be obvious, decision trees can be much more complicated than the example above. A more complex decision tree addressing events in the damage awards phase of our hypothetical patent case is shown below:

FIG. 2



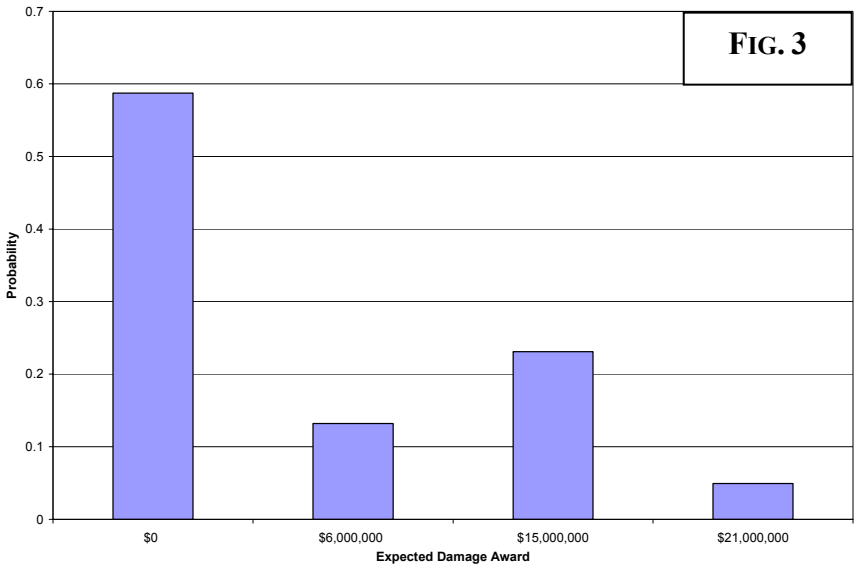
Again, the compound probabilities can be calculated for each scenario, reading continuous node-branch paths from left to right to their termination. The compound probabilities for each scenario are shown in bold at the far right of Fig. 2. The compound probabilities of plaintiff's various recoveries can be summarized in a table as follows:

TABLE 2

Damage Award		**Probability**
$0		0.5875 (.1375+.282+.168 = .5875)
$6,000,000		0.132

$15,000,000		0.231 (.165+.066 = .231)
$21,000,000		0.0495 (.033+.0165 = .0495)

The compound probability results can also be depicted graphically in a bar chart like the following:



Finally, the probabilities from the decision tree can be used to calculate an expected value of the litigation by weighting each possible damage award by its probability of occurring and summing the results. An expected value analysis for the damage awards evaluated in Table 2, are shown in the table below:

TABLE 3

Damage Award		**Probability**		
$0	*	0.5875	=	$0
$6,000,000	*	0.132	=	$792,000
$15,000,000	*	0.231	=	$3,465,000
$21,000,000	*	0.0495	=	$1,039,500
			Expected Value:	$5,296,500

In this example, the lawyer has determined that if the case were litigated one hundred times, the average award would be $5,296,500. Importantly, however, the analysis also reveals that, based on the lawyer's best

estimates, her client would receive no damages almost 59% of the time. This data would need to be considered in context with the client's risk aversion, budget, the importance of the case, etc.

Expected values can also be used to perform sensitivity analyses, which are used to identify the degree of influence an issue has on expected scenario outcomes. In this technique, the probability at a branch in the tree is reestimated at different values (*e.g.*, 0 and 100%). The expected value calculation is then repeated, substituting the new probabilities. If the expected outcome flowing from the reestimated branch is approximately the same across different probabilities (*i.e.*, the results graphed as a line have a low slope), the issue is relatively "insensitive" and significant resources should not be spent to influence its outcome. In contrast a lawyer can maximize her return by investing resources to "win" highly sensitive issues that increase the expected value of the case. It goes without saying that all of these analyses are no better than the "best guess" probability counsel plugged into the tree.

2. Limitations and a Word of Caution

As the examples above demonstrate, decision trees can help lawyers think about a case in different, graphical and quantitative terms. Indeed, the process of building a decision tree can positively influence a lawyer's thinking as she critically evaluates what to include in the tree, what has been omitted and how issues are likely to be resolved.

However, any lawyer creating a decision tree, or confronted with one created by another lawyer, should avoid undo reliance on its quantitative terms. Because decision trees are no more accurate than the lawyer's best guesses about what is going to happen in a case, every decision tree should be discussed in terms of the assumptions and estimates underlying its creation. Counsel and client alike should consider the variables that were included in the tree, those that were left out and recognize that there were likely important variables that should have been included in the tree, but that were unknown or unrecognized when the tree was made. Put simply, there is no formula to evaluating a case and the quantitative terms assigned to a decision tree do not magically give certainty to a lawyer's best guesses.

Accordingly, a decision tree is but one tool available to help evaluate a case. It is no substitute for experience, intuition and gut instinct. A decision tree can reassure a client and maybe persuade an opponent, but it cannot substitute for your qualitative, subjective best guess.

IV. Budgeting

Patent litigation is expensive no matter what the technology, no matter where suit is filed and no matter how much is at stake. Recent AIPLA statistics confirm that the cost of patent litigation can be staggering.

Litigators typically dislike and often resist preparing litigation budgets. There are a number reasons for this resistance. First, some clients treat budgets as fee caps, and therefore sometimes refuse to pay legal fees in excess of budgetary amounts. Second, some clients refuse to pay for the budgeting process. Third, the uncertainties of litigation make any budget estimate inherently speculative.

Nevertheless, clients need more from you, as trial counsel than the conclusory statement: "it's expensive." Specifically, they want and need to know a realistic estimate of the costs associated with achieving their stated business objectives. They need these estimates to determine whether to pursue litigation, or consider alternative dispute resolution techniques or forgo litigation altogether. Indeed, litigation costs are part and parcel of the potential downside risk a client may face, and thus are part and parcel of any risk analysis. Once in litigation, budgets are necessary to prevent sticker shock, or surprise.

Therefore, once you've understood your client's business objectives and priorities, litigation counsel should prepare a detailed litigation plan and budget. The plan will provide a roadmap of how you propose to reach objectives.[22] After reviewing the plan, your client may well decide to forego litigation all together. If your client decides to pursue the case, the plan and budget also can be used as mileposts to measure progress.

Importantly, any budget must not only address legal fees, but also out-of-pocket expenses, or disbursements. As will be discussed below, disbursements can be significant in patent cases because of the expert intensive nature of these cases, as well as the expenses that may be incurred to simplify the case to educate the judge or jury.

There are as many approaches to budgeting as there are imaginative lawyers and clients. Because many of the costs associated with litigation are beyond the control of litigation counsel once litigation commences, budgets often change because budgeting assumptions are belied by events that develop during discovery. Nonetheless, looking at available cost statistics and developing a phased-based budget can help litigation counsel and clients develop a working budget for a case.

A. Budgeting Statistics

The Report of Economic Survey 2003, prepared under the supervision of the Law Practice Management Committee of the American Intellectual Property Law Association, is a widely used, excellent starting point in

[22] The preparation of litigation plan is outside the scope of this paper. That said, the scope of any litigation plan will vary depending on the client's business objectives and the nature of the case. Generically speaking, most initial budgets nevertheless will include estimates for preliminary investigation and case analysis, preparation of the discovery plan, preparation of pleadings (including complaints, answers, or counterclaims), written discovery including document production, deposition discovery, non-dispositive motions, dispositive motions, experts, settlement negotiations and trial.

preparing your case budget. The *Report* highlights the fact that litigation expenses are highly dependent on the forum in which your case is pending, and the amount in controversy. It is a tool that can be used to provide a quick estimate of expected litigation costs and as a cross-reference once you have completed your budget.

B. Budgeting Factors

Patent cases are complex litigations involving substantial document production, electronic discovery, motion practice, demonstrative exhibits and many expert witnesses. The number of patents and complexity of the technology can also influence the cost of the case. Your opposing counsel and opponent also can be factors.

There are number of factors that influence the patent litigation budgeting process. They will be discussed in the following section, followed by a discussion of an approach to litigation forecasting using off-the-shelf software; namely, Microsoft Excel®. Use of off-the-shelf software in this manner not only simplifies the budgeting process, but allows for budgets to be revised quickly and efficiently as needed as the case progresses through discovery to trial.

1. Document Discovery

Intellectual property cases, and patent cases in particular, can be some of the most document intensive cases in the federal courts. It goes without saying that document discovery can be extremely expensive depending on the volume of discoverable documents in the case.

In addition to the cost of collecting the documents, a substantial component of document discovery is the cost of reviewing the documents. To save costs, clients often prefer to have their staff to review documents for relevance, responsiveness, privilege and sometimes even substance rather than having outside counsel do so. They sometimes believe that that handling document inspection activities internally will result in substantial cost savings, and if they have the resources to do it, will opt to do so rather than involving outside counsel in this process. The issue of who will conduct document review will have a significant impact on the budgetary process.

Document review and inspection does not end with documents in hardcopy format. In today's litigation world, litigation documents are scanned and OCR'ed and databases are created to facilitate the discovery process. In addition, electronic discovery is becoming pervasive, and courts sometimes order production of client's electronic files, including databases, in native format. In these circumstances, costs, including the cost of forensics experts, can be extraordinary and must be considered in the budgeting process.

Furthermore, the cost of document discovery in patent cases oftentimes is compounded because of the sensitive nature of the documents themselves. This is true even though protective orders are entered in virtually every case.

Litigation counsel must understand the volume of relevant documents, where they are located and who will be inspecting the documents prior to production. Consideration must also be given to whether electronic discovery will be sought and obtained. These factors will have a significant impact on the litigation budget.

2. Non-Dispositive Motion Practice

Litigation counsel also must consider the number and types of nondispositive motions that will be filed in the case when preparing the litigation budget. If your client gets sued in a foreign jurisdiction, you may consider filing transfer motions. Or, you may consider filing a motion challenging the court's jurisdiction. Both of these motions may require limited discovery. Either way, if these motions are going to be filed, they must be included in the budget, and they can be very expensive.

Because of the sensitive nature of many discoverable documents in patent infringement cases, discovery motions are filed in virtually every patent case. This is true even when protective orders seemingly are sufficient to adequately protect the movant's interests. The only real question is "how many" will be filed?

Litigation counsel can employ a number of methods to estimate the number of these discovery motions. One way is to take an average of the number of discovery motions filed in your other patent infringement cases. If you know your opposing counsel, you can estimate the number of discovery motions based on your experience with this counsel. It also may be helpful to ask your client whether there are any politically sensitive documents they will not produce absent a court order. Your opponent likely will file discovery motions to compel production of these documents.

Nondispositive motions can be an expensive line item in any litigation budget.

3. Protective Orders

Protective orders that govern the dissemination of confidential information produced in the case are entered in virtually every patent case. Although money can be saved if counsel agree on the form of these orders, all too often it is not possible to reach agreement.

One of the most significant costs associated with protective orders relates to whether your client will have access to your opponent's "confidential" information. Specifically, there is frequently a fight over whether your client's in-house counsel will have access to your opponent's information. There is a significant body of case law on this point, and it should be explored in advance of any protective order disputes about this issue.

If fights over who will see confidential information do arise, substantial time and effort can be spent in negotiating and/or moving for entry of a protective order.

4. Deposition Discovery

Although the Federal Rules of Civil Procedure limit the number of depositions in any case to 10[23], deposition discovery in patent cases nonetheless is expensive. Sometimes opposing counsel will use the complexity of patent litigation to seek depositions that exceed the number provided for in the rules. Courts on occasion have been sympathetic to these requests. Therefore, 10 may not mean 10.

Furthermore, unlike slip and fall cases, it takes substantial time to prepare to conduct a deposition in any intellectual property case. Documents must be reviewed, technology must be evaluated and sometimes experts must be consulted. As a result, the cost of preparation can often exceed the cost of the actual deposition itself. Deposition costs are not limited to simply showing up and asking questions.

In addition, out-of-pocket expenses for deposition discovery in patent cases are greater than in most civil litigations. Because of the high stakes in most patent litigations, depositions are frequently videotaped in addition to being transcribed by court reporters.[24] Videotaped depositions, while effective communication tools in court, add to the cost of deposition discovery.

5. Opposing Counsel

Your opposing counsel's litigation strategy, as directed by her client, will have a significant impact on the cost of the case. The more aggressive your opposing counsel, however unreasonable she may be, the more costly the case.

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[23] The Federal Rules of Civil Procedure, and particularly Rule 30(a), Fed. R. Civ. P., limits the number of depositions that can be taken without leave of court to 10.

[24] This is particularly true where the deponent cannot be compelled to appear a trial.

If your opposing counsel has a reputation for being overly aggressive, your case almost certainly will be more expensive. Conversely, it your opposing counsel is reasonable and chooses to fight only on those issues of significance, discovery disputes likely will be minimized, and hence the cost of the case will be less.

Even if your opposing counsel has a reputation for being overly aggressive, your working relationship with opposing counsel will help you more accurately assess the perspective costs of the case. If need be, you can calculate this factor into your estimates, particularly those relating to non-dispositive motions.

6. Venue

The choice of forum can have a surprising impact on the cost of litigation.[25] Naturally, the length of time a case is pending will have an impact on the cost of litigation. It is almost inevitable that the slower the docket, the more cost your client will incur. You can get a good idea how long it will take you to get your case to trial from the Federal Court Management Statistics.[26]

In addition, the forum's local rules will impact the cost of the case. If the forum has local rules for patent cases, such as the United States District Court for the Northern District of California, every patent case is guided by the court's local rules applicable to patent cases. There is no way to "short-circuit" the process. And, it is a lengthy process. On the other hand, other local rules of court and some "rocket docket" courts do not provide detailed requirements for certain disclosures, and in fact are much quicker than courts having patent specific rules. Existence, vel non, of these rules in your forum must inform the budgeting process.

7. Dispositive Motion Practice

Dispositive motion practice in patent litigation can be extremely expensive. The most significant cost oftentimes relates to focusing and simplifying the issues so that issues can be easily understood by the court.

Moreover, though clients naturally prefer prompt resolution of their disputes, many courts will not allow, or at a minimum do not prefer, having dispositive motions filed before the close of fact discovery in the case. If you're anticipating litigating in one of those jurisdictions, you will have to factor the cost of discovery into the cost of dispositive motion practice.

[25] This fact is borne out by the *AIPLA Report of the Economic Survey 2003*.
[26] These statistics can be found at http://www.uscourts.gov/fcmstat/.

This of course is not always the case. There are circumstances where courts direct the parties to focus on limited claim construction, or *Markman*,[27] issues before taking discovery on other issues in the case. In those circumstances, the cost of an evidentiary *Markman* hearing must be factored into the budget, but you may find that the cost of getting to dispositive motion practice, and sometimes the cost of the entire case, can be greatly reduced by early *Markman* decisions.

Either way, litigation counsel needs to understand and advise her client on the court's proclivities relating to dispositive motions. Filing early may result in wasted legal fees, and will tip off the opposition to your theories of the case. Waiting until the close of discovery in jurisdictions that will consider case dispositive motions early, on the other hand, will result in wasted attorney's fees in the discovery process.

Litigation counsel must factor in the dispositive motion practice of the forum court in evaluating costs.

8. Expert Witnesses

Patent infringement cases might be the most expert intensive cases in the American system of jurisprudence. Expert testimony often is adduced on a myriad of issues including technical issues, U.S. Patent and Trademark Office practice and damages. In some cases, multiple experts testify on technical issues. In other cases, parties retain consulting experts and testifying experts on the same issue.

The scope and use of experts in your case is another factor that must be considered in the budgeting process.

9. The Number of Patents and Complexity of the Technology

Litigation counsel also must factor in the number of patents and the complexity of the technology at issue in estimating the litigation budget. Generally speaking, the more patents there are in suit, the more expensive the case will be (and there will be more documents to review, issues to analyze, etc.). Likewise, the more complex the technology the more costly litigation is to simplify to facilitate judge and jury comprehension (and it becomes more likely that more than one expert will be retained).

Therefore, whether your case involves a single patent on a simple mechanical device, or whether it involves multiple patents related to biotechnology, will have an impact on the total cost of the litigation.

[27] In *Markman v. Westview Instruments, Inc.,* the Supreme Court affirmed the decision of the Federal Circuit that claim interpretation is a matter of law to be carried out by the judge, not the jury. *Markman* proceedings sometimes are held when the meaning of one or more patent terms are disputed. Other times, claim construction rulings are made without resort to a *Markman* hearing.

10. Demonstrative Evidence And Jury Consultants

Because simplification is usually the key to success in a patent case, demonstrative evidence, including audiotapes, videotapes, charts, animations, simulations and the like are essential to the effective presentation of any patent case.

Jury consultants also are used in patent cases to enhance the effectiveness of jury selection, as well as to evaluate at perceptions of jurors via shadow juries during a presentation of evidence at trial. These consultants are used in high stakes intellectual property litigation more so that in other forms of civil litigation.

Because of the need to simplify, and then attempt to measure the effect of your efforts, these disbursement items, though discretionary in many forms of civil litigation, can be critical in high-stakes patent litigation.

C. A Budgeting Approach

As mentioned, there are many ways to prepare budgets for intellectual property litigation. Although budgets can and have been prepared on the back of an envelope, it nevertheless is helpful from a case management perspective to prepare phased-based budgets that break the case into its constituent parts based on litigation counsel's well defined litigation plan.[28] Breaking a case into its constituent part allows for more cost-effective case management to occur.

Simple technology can be used to automate the budgeting process, and make it more efficient, less painful and more useful. This technology can be used to update budgets as the case progresses, or it can be used to evaluate actual legal fees and expenses incurred with budgetary estimates.

Fortunately, off the shelf spreadsheet software like Microsoft Excel® makes the budgeting experience relatively palatable because it allows information to be organized, manipulated, duplicated and interrelated in a flexible, nearly universally familiar format.

[28] Preparation of a litigation plan is outside the scope of this paper. That said, the scope of any litigation plan will vary depending on the client's business objectives and the nature of the case. Generically speaking, most initial budgets nevertheless will include estimates for preliminary investigation and case analysis, preparation of the discovery plan, preparation of pleadings (including complaints, answers or counterclaims), written discovery including document production, deposition discovery, non-dispositive motions, dispositive motions, experts, settlement negotiations and trial.

D. Budgeting – The Steps

Three important steps maximize the likelihood of preparing an effective budget with this, or any spreadsheet software. [29]

First, identify who will be working on the matter. Lawyers, paralegals, professional staff and anyone who will bill time to the case should be identified along with their billable rates. Using spreadsheet software, this information can be entered one time and duplicated throughout a budget as necessary. If the spreadsheet will be shared with a client, this is also an opportunity to introduce your team. Because clients often like to know who will be working on their matters, as well as each time-biller's hourly rate, you should identify your team early and build your client's confidence in your team members and what they will be doing.

Second, identify the work that will be done and when it will be done. Budgeting is made easier by breaking the work into logical blocks, or phases of the case, defined by common tasks and anticipated due dates. Spreadsheet software lends itself well to deconstructing complex budgets into such blocks because separate sheets within a single spreadsheet file can be used to track common tasks that have been grouped into phases of litigation.

More and more these days, sophisticated clients are tracking outside counsels' work in task-based increments, rather than by the chronological approach to budgeting followed by most lawyers. This is consistent with a phased approach to budgeting and facilitated by the ABA's creation of a set of task-based codes for every phase of litigation.

For example, the ABA defined general phase code L100 to cover case assessment activities. Specific task code L110 relates to basic fact investigation and development. Thus, defense counsel confronted with a complex complaint accusing multiple products of infringing multiple patents can estimate that a substantial quantity of time will be spent assessing and developing facts under phase/task code L100/L110. The complete list of ABA codes can be viewed at: www.abanet.org/litigation/litnews/practice/utbms.pdf.

Finally, determine how much time you think it will take your team to accomplish the tasks you have identified as necessary to accomplishing your client's goals. As shown in the following section, after counsel determines how much time each time-biller will spend on specified tasks, spreadsheet software readily calculates a budget. With experience, this part of the process becomes routine.

[29] The authors will make available the Microsoft Excel® spreadsheet to conference participants.

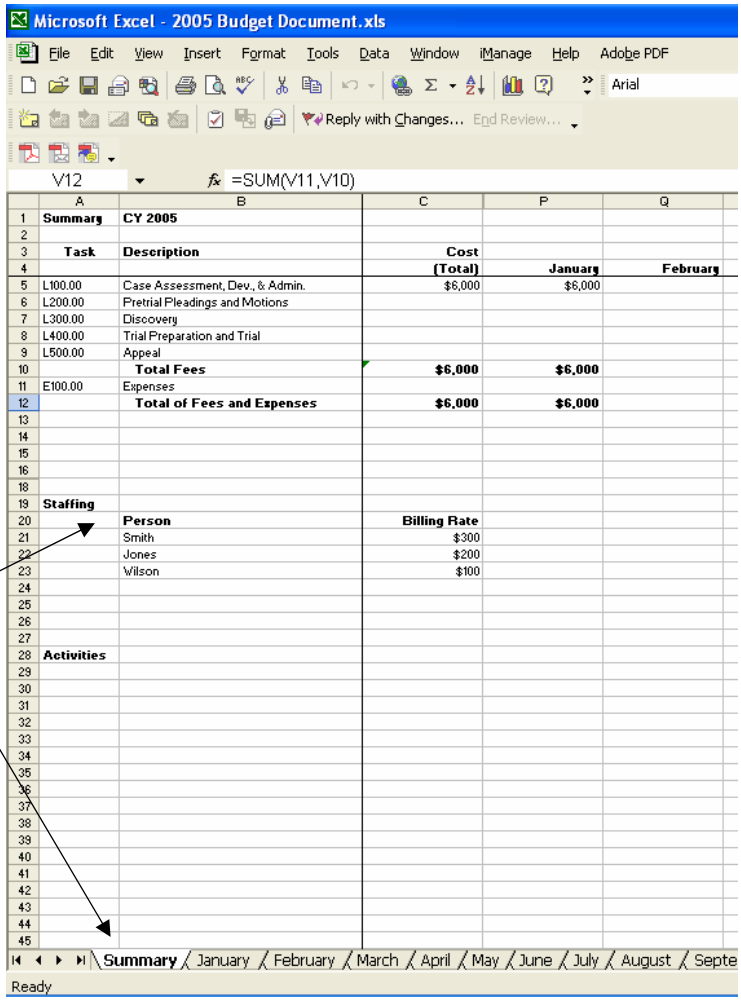
Budgets broken into detailed, monthly, task-based estimates can readily be used to identify and evaluate litigation expenses with clients. They can also be used as a cross reference to evaluate – and refine – litigation objectives and decision trees.

E. Budgeting – An Example

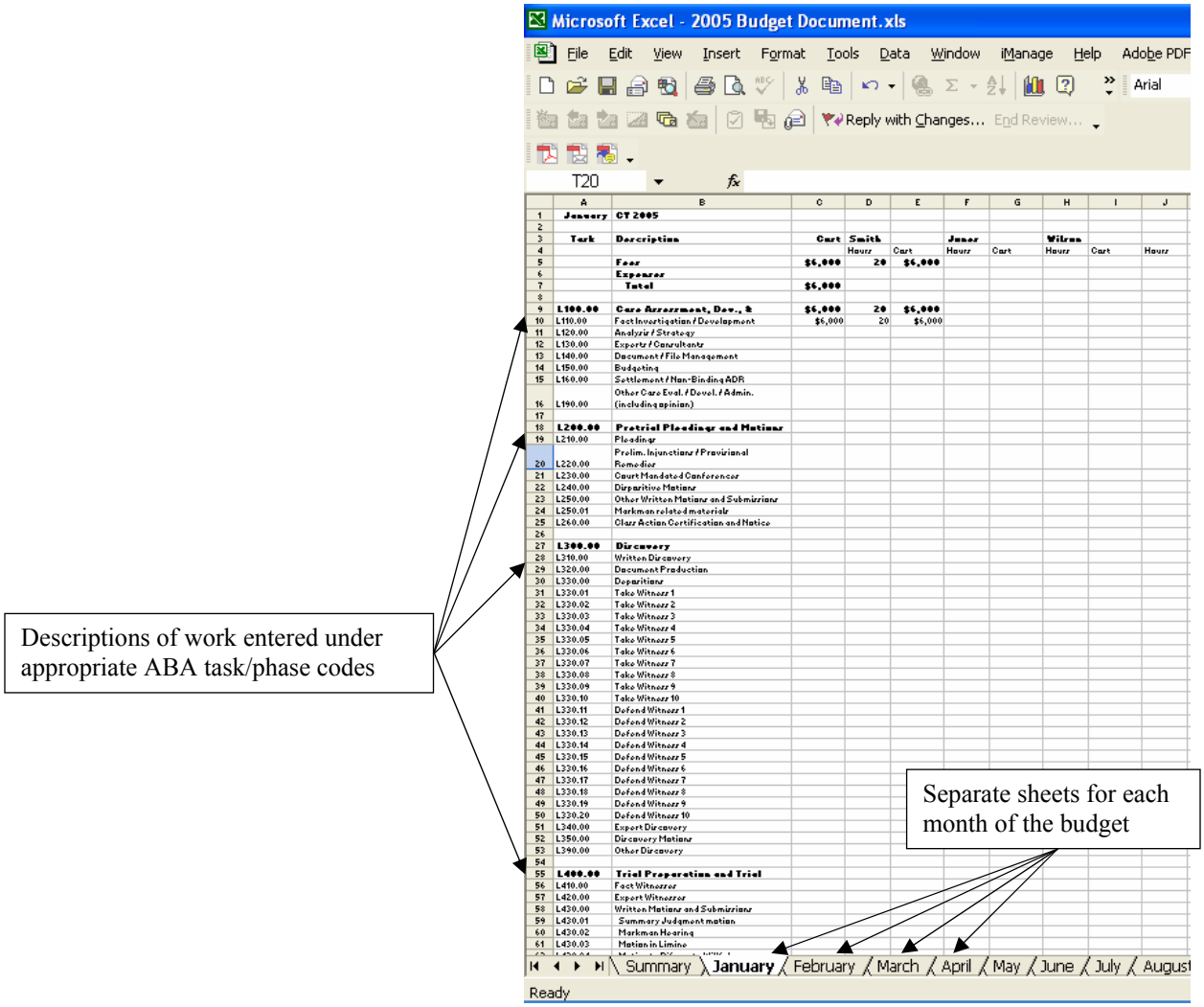
Following are examples of Excel® spreadsheets created by Banner & Witcoff, Ltd. attorneys to budget IP cases. These spreadsheets take full advantage of the calculators and linking functions of Excel®, such that costs, hours, average rates and similar data can be automatically summarized and carried across sheets within a single spreadsheet file.

As described above, the first step is to identify who will staff the case. Thus, our Excel® spreadsheet begins at a summary sheet and entry of billers and their billing rates:

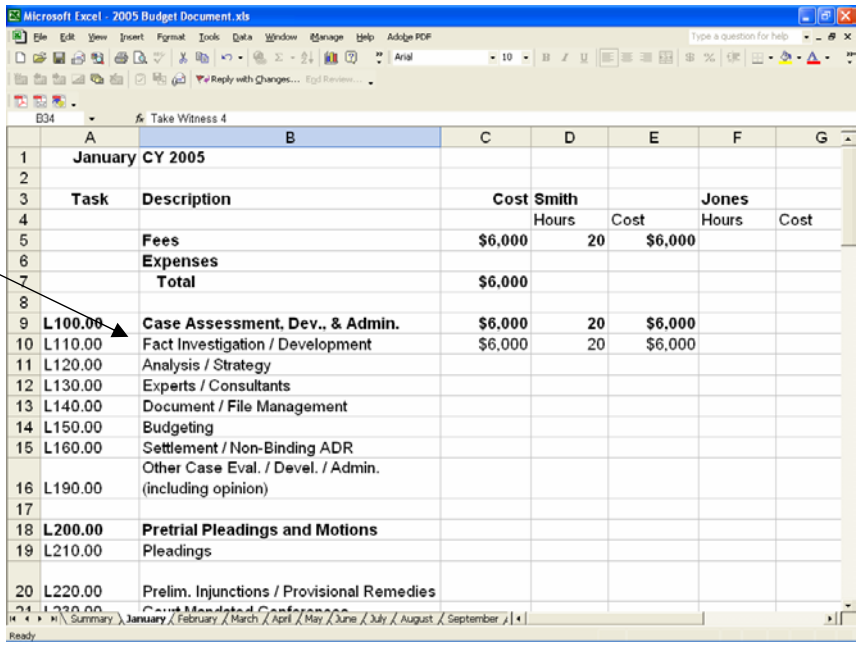
Summary Identification of Team Members and Hourly Rates



Next, work is described in phases by month and in terms of ABA uniform task/phase codes with the addition of detailed descriptions. It is important at this step to thoroughly anticipate and describe the work to be done. If the spreadsheet will be shared with the client, counsel should explain what tasks are certain to occur and which are contingent on circumstances that may or may not develop during litigation. This can be done with or without the aid of decision tree analysis or assigning probabilities to anticipated expenses. The key is to be reasonable, comprehensive and diligent in communicating budgetary factors with your client. As shown below, Excel® allows significant flexibility in constructing and describing monthly task/phase-based budgets.



Work description cells are based on ABA uniform codes and can be edited to provide specific detail about work to be performed



Microsoft Excel - 2005 Budget Document.xls

B34 Take Witness 4

	A	B	C	D	E	F	G
1	January	CY 2005					
2							
3	Task	Description	Cost	Smith		Jones	
4				Hours	Cost	Hours	Cost
5		Fees	$6,000	20	$6,000		
6		Expenses					
7		Total	$6,000				
8							
9	L100.00	Case Assessment, Dev., & Admin.	$6,000	20	$6,000		
10	L110.00	Fact Investigation / Development	$6,000	20	$6,000		
11	L120.00	Analysis / Strategy					
12	L130.00	Experts / Consultants					
13	L140.00	Document / File Management					
14	L150.00	Budgeting					
15	L160.00	Settlement / Non-Binding ADR					
16	L190.00	Other Case Eval. / Devel. / Admin. (including opinion)					
17							
18	L200.00	Pretrial Pleadings and Motions					
19	L210.00	Pleadings					
20	L220.00	Prelim. Injunctions / Provisional Remedies					

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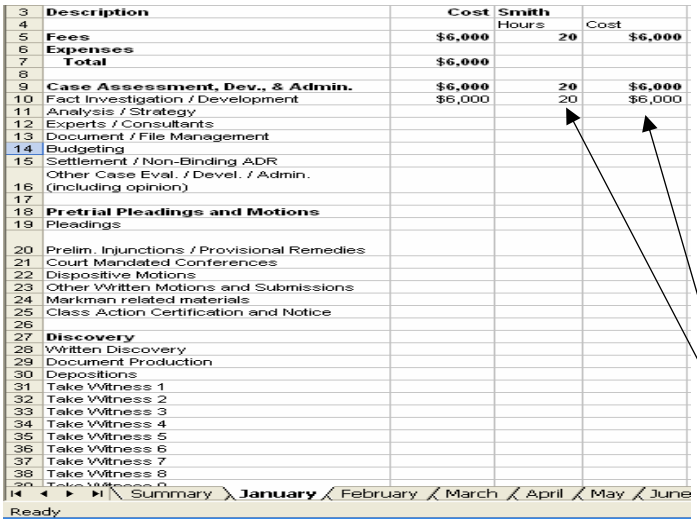
Finally, the estimated hours team members will spend on each phase/task are entered into the spreadsheet. At this step, counsel should exploit the power of Excel® to link data and automatically perform calculations. Hours and team member rates should be linked and automatically multiplied to determine the budget. In addition, hours and expenses per phase/task should link back to summaries that provide high-level profiles of the overall budget.

As shown in the example below, attorney Smith is budgeted to bill 20 hours to fact investigation and development, phase/task code L100.L110, at an hourly rate of $300. Smith's $6,000 charge is automatically calculated in the January budget and linked to summary entries throughout the spreadsheet file.



	Description	Cost	Smith Hours	Cost
5	**Fees**	**$6,000**	**20**	**$6,000**
6	**Expenses**			
7	**Total**	**$6,000**		
9	**Case Assessment, Dev., & Admin.**	**$6,000**	**20**	**$6,000**
10	Fact Investigation / Development	$6,000	20	$6,000
11	Analysis / Strategy			
12	Experts / Consultants			
13	Document / File Management			
14	Budgeting			
15	Settlement / Non-Binding ADR			
16	Other Case Eval. / Devel. / Admin. (including opinion)			
18	**Pretrial Pleadings and Motions**			
19	Pleadings			
20	Prelim. Injunctions / Provisional Remedies			
21	Court Mandated Conferences			
22	Dispositive Motions			
23	Other Written Motions and Submissions			
24	Markman related materials			
25	Class Action Certification and Notice			
27	**Discovery**			
28	Written Discovery			
29	Document Production			
30	Depositions			
31	Take Witness 1			
32	Take Witness 2			
33	Take Witness 3			
34	Take Witness 4			
35	Take Witness 5			
36	Take Witness 6			
37	Take Witness 7			
38	Take Witness 8			

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	A	B	C	P
1	**Summary**	**CY 2005**		
3	**Task**	**Description**	**Cost (Total)**	**January**
5	L100.00	Case Assessment, Dev., & Admin.	$6,000	$6,000
6	L200.00	Pretrial Pleadings and Motions		
7	L300.00	Discovery		
8	L400.00	Trial Preparation and Trial		
9	L500.00	Appeal		
10		**Total Fees**	**$6,000**	**$6,000**
11	E100.00	Expenses		
12		**Total of Fees and Expenses**	**$6,000**	**$6,000**
19	**Staffing**			
20		**Person**	**Billing Rate**	
21		Smith	$300	
22		Jones	$200	
23		Wilson	$100	
28	**Activities**			

Summary | January | February | March | April | May | June | July

Smith's 20 hours billed in January to phase/task L100.L110 are automatically multiplied by his $300/hr rate and linked to summarize budget data throughout the spreadsheet

In addition to estimating legal fees, your estimate must also address the out-of-pocket disbursements outlined in this paper. Again, these expenses include such things as expert witness fees, expenses for video

depositions, expenses for document imaging and fees for demonstrative exhibits and videos to simplify your presentation of the dispositive motion or trial stage can be considerable. Conservatively speaking, these expenses easily can approach, and at times exceed, 30% of the attorneys' fees in a case.

Outlays, disbursements and other anticipated charges can be budgeted in a similar fashion similar to that of attorneys' fees. Thus, although document scanning or expert fees could be estimated in a cursory, lump-sum fashion in a summary sheet, spreadsheets allow virtually any anticipated expense to be budgeted in detail, in connection with logically associated tasks and at realistic dates in the litigation. Indeed, given the significance of some of these expenses, they should be outlined in detailed, rather than in lump sum fashion. Moreover, like other data entered in the spreadsheet, disbursements can be linked to summary sheets and automatically calculated into the bottom line.

As should be apparent in the examples above, data in the budget can be readily manipulated, updated and revised. If team members change, billing rates are adjusted or anticipated work-hours are adjusted, a few simple key strokes can update an entire budget.

What's more, spreadsheets facilitate comparisons between estimated and actual billings. In this way, careful budgeting with the use of spreadsheets affords lawyer and client a realistic, real-time planning and assessment tool.

V. Conclusion

Your client's business objectives must always define the scope of your representation. These objectives will help you perform a cost benefit analysis and provide a realistic assessment of your client's case. Understanding these objectives also is important to providing your client with a realistic estimate of the cost to achieve those goals. Through teamwork, goal setting and open communication, litigation counsel and clients will be able to make informed decisions regarding the dispute resolution process and, if necessary, manage litigation so that the client's goals can be achieved in a cost-effective manner.