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Q&A With Crowell's Mark Supko

Law360, New York (April 18, 2013, 3:59 PM ET) -- Mark Supko chairs Crowell & Moring LLP's 70-lawyer intellectual property group in Washington, D.C. He is a trial lawyer whose practice has been dedicated to IP litigation for more than 20 years, with a heavy emphasis on patent litigation in the computer, electrical and mechanical arts, serving corporate clients in diverse industries including automotive, aerospace, consumer electronics, and telecommunications.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Probably the most challenging case I've worked on was a jury trial in Cleveland a couple years ago where opposing counsel's courtroom theatrics threatened to derail our patent infringement claim. We represented the plaintiff, and the patent at issue was prosecuted by one of my partners. The defendant's theory of the case was that my partner had improperly broadened the patent through a reissue proceeding at the U.S. Patent and Trademark Office. During closing arguments after a seven-day trial, defense counsel presented a skit to the jury in which a junior attorney wearing a T-shirt emblazoned with my partner's name acted out the allegedly improper conduct, replete with an expandable playpen to illustrate how the scope of the patent supposedly grew. The strategy backfired. We succeeded during my rebuttal argument in getting the jury to share our indignation at the defense's condescending presentation, leading to a willful infringement verdict and a multimillion-dollar award of attorney fees.

Q: What aspects of your practice area are in need of reform and why?

A: One aspect of my practice in need of significant reform is the continuing flood of patent infringement suits being filed by nonpracticing entities (NPEs or, euphemistically, "patent trolls"), many of which unfortunately have questionable merit. The venue provision of the recently enacted America Invents Act was intended to curb the practice of patent holding companies filing a single suit against a large number of unrelated defendants. However, far from leading to fewer NPE suits, the legislation appears to have led to more suits being filed, as NPEs have responded by filing large numbers of separate but essentially identical complaints in the same court against different defendants. This has only amplified the prior problems, as now defendants interested in coordinating on common issues like claim construction or invalidity must deal with the additional challenge of coordinating efforts across cases proceeding on different schedules.

Another aspect in need of reform, which thankfully the U.S. Supreme Court appears ready to address, is the de novo standard of review applied by the U.S. Court of Appeals for the Federal Circuit to district court claim construction rulings. The presumed objective of this approach — national uniformity of treatment of claim construction issues — is certainly commendable, but in practice the de novo standard has had the unintended effect of encouraging parties to continue pursuing disputes through the appeal stage because of the high reversal rate of claim construction rulings by district court judges. Giving at least some degree of deference to district court claim construction decisions should lead to greater confidence that lower court decisions will be upheld by the Federal Circuit, and therefore should lead to fewer cases being fought all the way through appeal.

Q: What is an important issue or case relevant to your practice area and why?

A: An issue that has captured the attention of many of my clients is whether patent holding companies and other nonpracticing entities should be able to obtain the broad exclusionary remedies available from the U.S. International Trade Commission in Section 337 cases. In the wake of the U.S. Supreme Court's seminal eBay decision, which dramatically reduced the availability of permanent injunctions in patent cases before district courts, and particularly so for patent owners who aren't competing in the market for the patented products, we've seen more and more NPEs filing complaints in the ITC. Companies targeted by these complaints, however, are questioning why the ITC's exclusionary remedies should be available to a patent owner whose only "investment" in the domestic industry for patented goods may be money spent on lawyers and litigation in a patent enforcement campaign. The ITC appears to be taking steps towards tightening up the domestic industry requirement, but major reform may well require congressional intervention.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I recently took over a patent infringement case in Detroit where prior counsel had retained Fred Herrmann of Kerr Russell as local counsel. I was extremely impressed with Fred. He had fantastic knowledge of the local forum, and he was on a first-name basis with the local judges. Maybe more importantly, he had a great feel for how to bring value to the litigation team. He's a smart lawyer with great litigation instincts, and he'll be the first person I call the next time I have a case in the Eastern District of Michigan.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Almost 20 years ago, when I was a very junior associate, I was given the opportunity to defend my first deposition. I had previously second-chaired a few depositions defended by the senior partner on the case — an old-school "take no prisoners" litigator — and I took note of how he objected to almost every question in order to break up the flow of the testimony. So naturally I took the same approach. Well, it wasn't until opposing counsel presented some of that deposition at trial, and I saw how the jury reacted to what they clearly viewed as obstructionist behavior, that I realized this wasn't a style I wanted to emulate. Since that time, I've always tried to view my conduct during depositions from a jury's perspective, a "lesson learned" that has made me a much more effective trial lawyer.

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