

Experienced Intellectual Property Mediators: Increasingly Attractive in Times of “Patent” Unpredictability

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Our judicial system may be the best in the world, but the reality is that judges and juries sometimes get it horribly wrong.¹

INTRODUCTION

For patent infringement suits, getting a verdict in a federal district court resembles the beginning of a love affair. Lawyers try to woo jurors and judges to accept the lawyers' theories of a case, but

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1. Michael H. King, P.C. & Peter N. Witty, *Know Thyself as you Know thy Enemy: Setting Goals and Keeping Focus When Mediating IP Disputes*, 37 AKRON L. REV. 329, 330 n.8 (2004) (quoting a statement made by Philip David Kopp, the general counsel for the Fortune 500 company Centex Homes, in a corporate counsel roundtable discussion).

the jurors and judges prove to be capricious lovers, churning out inconsistent verdicts on similar sets of facts. Unable to accurately assess what the uncertainty portends for their cases, patent disputants burn holes in their pockets taking their cases through the court system,² only to end up years later with invalid patents or obsolete inventions. However, the unpredictability of patent suits should not automatically lead lawyers into the district courts.

Mediation with an expert well-versed in patent law offers a robust alternative. These mediators are uniquely qualified to (1) give the disputing parties a neutral and informed appreciation for how a court would respond to the case; (2) bypass the steep learning curve that afflicts jurors and judges who are unfamiliar with patent law; and (3) understand and help address the interests peculiar to patent disputants.³ Society also benefits as fewer taxpayer resources are wasted on incorrectly decided or inefficient, prolonged trials, and patent disputants spend more time doing what they do best – pioneering and distributing new inventions.

The remainder of this Article elaborates upon these arguments. Section II provides a brief overview of what mediation and litigation entail for patent cases. Section III then describes a key problem with trial-level patent litigation – unpredictability – and probes how this problem harms disputing parties. Next, Section IV explores how this unpredictability drives up the value of mediators with a specialty in patent law. This section also examines how the use of these specialized mediators creates positive externalities for society.

2. See Kimberly A. Moore, *Jury Demands: Who's Asking?*, 17 BERKELEY TECH. L.J. 847, 873 (2002) [hereinafter Moore, *Jury Demands*] (explaining how, under the theory of mutual optimism, “[c]ases only go to trial when there is a breakdown in the parties’ abilities to estimate outcome and they are therefore unable to settle a case because of differing expectations”). See also Jay Gordon Taylor, *Avoiding Costs of Intellectual Property Litigation: Think “Mediation,”* <http://www.insideindianabusiness.com/contributors.asp?ID=913> (last visited Oct. 8, 2007) (discussing the increasing cost and frequency of patent infringement suits).

3. Much commentary discusses the potential advantages of mediation over litigation in general for patent disputes (e.g., confidentiality, flexibility, lower costs, etc.). See, e.g., Kimberly M. Ruch-Alegant, *Markman: In Light of De Novo Review, Parties to Patent Infringement Litigation Should Consider the ADR Option*, 16 TEMP. ENVTL. L. & TECH. J. 307, 308 (1998); Vivek Koppikar, *Using ADR Effectively in Patent Infringement Disputes*, 89 J. PAT. & TRADEMARK OFF. SOC’Y 158 (2007). In addition, mediation of patent cases by intellectual property experts has already become well-established at the appellate level. Telephone interview with James Amend, Chief Circuit Mediator (July 30, 2007) (describing how roughly four out of every ten patent cases selected for mediation at the appellate level settle with help of a court-appointed mediator with patent law expertise). However, far less attention has been devoted to the specific benefits that expert intellectual property mediators can provide at the trial level.

Finally, Section V concludes that a greater appreciation for the benefits of intellectual property mediators is needed at the trial level.

I. PATENT DISPUTE RESOLUTION 101

Patents represent a powerful type of intellectual property (IP). Patents grant inventors the exclusive rights to make or use their inventions for twenty years after the date the inventors file patent applications with the US Patent and Trademark Office (USPTO).⁴ Disputes concerning patents normally begin when a patent owner, who is known as the patentee, suspects that another party either has or is in the process of infringing his or her patent.⁵

Two of the most common forms of resolving patent disputes are litigation and mediation.⁶ With litigation, a patentee files a patent infringement suit in a federal district court, and either a jury or a district court judge returns a verdict on each of the claims. The parties can appeal a decision of a district court to the Federal Circuit Court of Appeals (“Federal Circuit”), which has exclusive nationwide jurisdiction over appeals from all district court cases arising under the patent laws.⁷ In mediation, a neutral third party meets jointly and/or separately with the disputing parties to hear their legal positions and interests.⁸ Through a consensual, informal, and typically private process, the mediator tries to help the parties achieve a non-binding resolution, such as a settlement or an agreement to resolve the dispute through litigation or arbitration.⁹ In party-initiated mediations, the disputants typically select a mediator based on that person’s particular expertise and reputation for providing neutral, informed assessments.¹⁰ A mediator may also be appointed by a court if a case is selected for court-mandated mediation.

Although mediation with patent experts has already become prevalent at the appellate level since the Federal Circuit initiated its

4. 35 U.S.C. § 271(a) (2000).

5. Koppikar, *supra* note 3, at 159.

6. Another well-known form of patent dispute resolution is arbitration, a process that resembles a mini-trial where an arbitrator acts as judge. Like expert IP mediators, arbitrators with patent experience can bypass the steep learning curve that impedes jurors and judges. However, these arbitrators do not provide the other advantages of IP mediators that are discussed in this Article.

7. 28 U.S.C. § 1295 (2000).

8. Marion M. Lim, *ADR of Patent Disputes: A Customized Prescription, Not an Over-the-Counter Remedy*, 6 *CARDOZO J. CONFLICT RESOL.* 155, 165 (2004).

9. *Id.*; see also DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 95 (2006).

10. Interview with E. Anthony Figg, Founding Partner, Rothwell, Figg, Ernst & Manbeck, P.C., in Wash., D.C. (June 1, 2007).

mandatory mediation program on October 3, 2005,¹¹ it has room to expand at the trial level. As this Article next discusses, patents involve a degree of complexity that the district courts are ill-equipped to handle.

II. THE WOES OF PATENT LITIGATION

With intellectual property litigation, the stakes are often exceedingly high, but so is the uncertainty about how it will turn out.¹²

To hold an entry-level position at a bioengineering research company, one needs, at a minimum, a four-year science or engineering degree. To decide the fate of a multi-million dollar biotechnology case, one need never have taken a mathematics or science class. Unsurprisingly, a principle source of uncertainty in patent law is the decision maker – jurors and district court judges.

Give [jurors] a complicated biotechnology case or one involving lasers or computers, and their eyes glaze over.¹³

Jurors are typically ill-prepared to resolve the complex technical issues inherent in most patent cases.¹⁴ Juries for patent cases are not composed of biology Ph.D.s or engineers. Instead, they are ordinary people with ordinary educational backgrounds and experiences. Patent litigants must expend considerable time and resources bringing the jurors up to speed on the relevant technologies and patent law. Instead of neutrally applying the law on an issue-by-issue basis to the facts, as jurors are supposed to do, jurors display a distinct pro-patentee bias and decide cases on an all-or-nothing basis.¹⁵ As jurors

11. Telephone Interview with James Amend, *supra* note 3. For more information on the Federal Circuit's mandatory mediation program, see U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPELLATE MEDIATION PROGRAM GUIDELINES (May 14, 2007), available at http://www.cafc.uscourts.gov/pdf/guideline_may_14_2007.pdf.

12. Jessie Seyfer, *Panel Advises IP Litigators to Wake Up and Smell the Reversals*, LAW.COM, Jan. 22, 2007, <http://www.law.com/jsp/article.jsp?id=1169200945012> (summarizing the arguments made by a panel of IP litigators, ADR specialists, and a federal district court judge at a meeting of the Bar Association of San Francisco).

13. Richard B. Schmitt, *Court May Consider Some Limits On Juries' Role in Patent Lawsuits*, WALL ST. J., Feb. 18, 1994, at B6 (quoting patent attorney Donald Dunner).

14. *See id.* (quoting Professor Martin J. Adelman as saying that jury confusion has created "a system of justice that is basically a lottery").

15. Kimberly A. Moore, *Judges, Juries, and Patent Cases – An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 404 (2000) [hereinafter Moore, *An Empirical Peek*].

are deciding more and more patent cases¹⁶ and as patents are becoming increasingly complex,¹⁷ the number of cases that are incorrectly decided by juries can be expected to increase.

Jurors are not the only decision makers ill-equipped to resolve patent cases. Federal district court judges, though adept at interpreting the law, often lack the expertise necessary to accurately resolve complex patent cases. Like the jurors, the district court judges generally do not have formal science or mathematical backgrounds.¹⁸ Moreover, they encounter patent cases too infrequently to develop competence in patent disputes.¹⁹ Nonetheless, these judges play a key role in patent suits. Ever since the 1996 Supreme Court decision in *Markman v. Westview Instruments*, in all patent infringement cases, judges, not juries, determine how the claims in patents are construed as a question of law.²⁰ District court judges deciding these fundamental patent issues are reversed so often on appeal that they may lack incentives to dedicate themselves to a detailed review of patent cases. One commentator has explained that the high reversal rate frustrates district court judges with the claim construction process and thereby deters them from investing the time necessary to effect better decisions.²¹ In fact, the Federal Circuit reverses about thirty-three percent of all the claim construction cases it hears, a much higher rate of reversals than is found in other patent cases.²² Certain judges on the Federal Circuit have provided bright line rules

16. Moore, *Jury Demands*, *supra* note 2, at 850.

17. See John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77 (2002) (demonstrating that patents contain more claims, cited references, and inventors than they did in the 1970s).

18. Moore, *An Empirical Peek*, *supra* note 15, at 374.

19. *Id.*

20. *Markman v. Westview Instruments*, 517 U.S. 370 (1996).

21. See Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Disputes?*, 15 HARV. J.L. & TECH. 1, 30-31 (2001) [hereinafter Moore, *District Court Judges*] (“Undoubtedly, with reversal rates so high, district court judges are frustrated with the claim construction process. If more deference were given to claim interpretations – making them more meaningful – it might encourage district court judges to invest more time in the process, resulting in better decisions.”).

22. *Id.* at 11-23 (describing the results of a survey conducted between April 23, 1996 and December 31, 2000). The Federal Circuit’s overall reversal rates for patent cases ranged merely between thirteen to twenty-one percent in the same time period. *Id.* at 15 (Table 1). The error rate for claim construction issues is thus quite high compared to that of other types of patent issues.

to guide claim construction,²³ but patent law can only be simplified so far.²⁴

The inadequacies of decision makers in the court system cause patent disputants much grief. Patent disputants hire lawyers to develop a theory of a case and advise the inventors if litigation would be fruitful. Unfortunately, lawyers suffer from over-confidence biases – they inadvertently over-estimate their chances of prevailing in court and de-emphasize their risks.²⁵ During times of uncertainty, including the presently unclear state of the law, the problem is exacerbated because the lawyers have fewer hard facts to ground them. Even if the lawyer does realize the weaknesses of his case, he may not clearly convey them to the client:

I . . . often find that the attorney sometimes cannot bring himself to deliver the bad news to his client in the way his client can hear it. The case, of course, doesn't necessarily get better over time but the client often continues to believe it's as pure and pristine as the day he first brought it to his attorney.²⁶

The predictable result is that disputing parties develop disparate estimates of the value of their cases and choose to litigate,²⁷ even when a neutral assessment of the relevant facts would reveal that the benefits of settling far exceed the clients' costs of litigating. And the costs

23. For example, Judge Rader's opinions in two cases involving claim construction, *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420 (Fed Cir. 1997) and *Planet Bingo v. Gametech Int'l, Inc.*, 472 F.3d 1338 (Fed. Cir. 2006), *cert. denied*, 128 S. Ct. 50 (2007) (mem.), supply a bright-line foreseeability test.

24. Although the Federal Circuit is geared to handle more patent cases than any other court, even this court has been known to produce internally inconsistent results and the Supreme Court reverses it with surprising frequency. See Moore, *District Court Judges*, *supra* note 21, at 19-20 (discussing the Federal Circuit's conflicting interpretations of the phrase "greater than 3% elasticity"); Gregory A. Castanias et al., *Survey of the Federal Circuit's Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue with the Supreme Court*, 56 AM. U. L. REV. 793, 798 (2007) ("As 2006 ends, we appear to be in the midst of . . . more aggressive Supreme Court review of the substance of patent law and patent procedure and less deference to the Federal Circuit's views of what the content of U.S. patent law should be.").

25. GOLANN & FOLBERG, *supra* note 9, at 204; Interview with E. Anthony Figg, *supra* note 10 ("Trial lawyers [in patent disputes] may not apprise their clients of bad news because they don't realize it's bad news.").

26. Interview by Victoria Pynchon with Jay Taylor, Partner in IP Practice, Ice Miller LLP (July 13, 2007), available at <http://www.ipadrblog.com/articles/cat18937/mediation> (statement of Victoria Pynchon, IP Mediator).

27. See Moore, *Jury Demands*, *supra* note 2. See also Jay P. Keenan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 252 (2006) (discussing how empirical evidence indicates that "patents in new technologies, such as biotechnology, are more likely to be litigated than those in mature fields because there is more uncertainty about case outcomes").

of litigating a patent case can be immense. The average patent infringement suit lasts 1.12 years and costs nearly \$2 million.²⁸ Such costs prevent economically disadvantaged litigants from appealing “incorrect” lower court decisions. Moreover, these trials have an opportunity cost – each day a patent is in limbo, the patent disputants are not going to market their products with full vigor because doing so could later subject them to treble and punitive damages.²⁹ Lengthy trials also carry other large risks – the disputed technologies could become obsolete and completely devalued by the time litigation ends.³⁰ Using an IP mediator offers a means of sidestepping these problems.

III. THE ADVANTAGES OF AN EXPERT IP MEDIATOR

The bad news about the uncertainty of patent litigation is that it does not appear to be on the way out. The court system is not about to require that all jurors and judges in patent cases be patent savvy or that the Federal Circuit hear every patent case. And increasing mandatory mediation of patent disputes, without specifying who should mediate, does not provide a clear solution because district courts often appoint mediators, such as magistrate judges, with no formal experience in patent law. Instead, the Federal Circuit’s mediation program, under which the court “almost exclusively” appoints an IP expert to patent cases selected for mandatory mediation,³¹ provides a useful model. The good news is that, by simply following the Federal Circuit’s lead and shifting a controversy over to an expert IP mediator, either through mandatory or voluntary mediation, many of the adverse consequences associated with patent litigation can be avoided.

A. *Expert IP Mediators Can Give Attorneys the Gift of a Reality Dose*

Lawyers tend to get more and more convinced of their likelihood of success at trial. But anything can happen in a trial. More helpful mediators say which facts might not be good for you.³²

28. Koppikar, *supra* note 3, at 159. In contrast, the typical mediation cost \$50,000 in 1995. COMM. ON THE ECON. OF LEGAL PRACTICE, AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF ECONOMIC SURVEY 63 (1995).

29. Interview with Anonymous CEO of a biopharmaceutical company, in Greenbelt, Md., (July 2, 2007).

30. *Id.*

31. Telephone Interview with James Amend, *supra* note 3.

32. Interview with E. Anthony Figg, *supra* note 10.

One of the beauties of an expert IP mediator is her ability to give parties the dose of reality they need when litigation is unpredictable and the stakes are high. A mediator well versed in the industry and uncertainties of patent litigation can provide the parties with a neutral assessment of the facts that challenges their unrealistic assumptions.³³ In particular, an IP mediator “can give the parties a good idea what the court is thinking: he understands what issues are hot, how the court has decided previous cases.”³⁴ If the mediator’s opinion is respected by the parties, which it likely will be if the mediator has experience as a patent law practitioner or judge,³⁵ the opinion will help the parties converge their estimates of the value of the case.³⁶

The ability of expert IP mediators to neutrally assess a case carries substantial value for even the largest players in the technology market. In a recent case, a jury demanded that Microsoft Corp. pay Alcatel-Lucent \$1.52 billion for alleged infringement of Alcatel-Lucent’s patents for the MP3 format.³⁷ The jury deadlocked, however, on the question of whether Microsoft willfully infringed on the patents.³⁸ If the jury had found that it did, Microsoft would have had to pay Alcatel-Lucent an additional \$3 billion as treble damages.³⁹ Given the high stakes at risk and the ease with which the jury could have come out with a much more drastic verdict against Microsoft, Microsoft’s decision to litigate seems ill-informed. By providing a neutral assessment of how the law and the inadequacies of decision makers combine to affect the facts of the case, expert IP mediators could have helped Microsoft realistically assess its litigation risks. Perhaps Microsoft would have still considered litigation to be in its best interests, but at least it would have done so with a better appreciation for the risks involved.⁴⁰

33. Telephone Interview with James Amend, *supra* note 3. (“Parties want to know they’re not wasting their time in mediation. Parties want a somewhat evaluative person – you need a background in patent law to be evaluative.”)

34. *Id.*

35. Interview with Harry F. Manbeck, Jr., Founding Partner, Rothwell, Figg, Ernst, & Manbeck, P.C., in Wash., D.C. (June 4, 2007).

36. It is important to note that many mediators will not reveal their assessments of a case on their own initiative. Instead, when a party meets privately with the mediator, either the party can request the mediator’s opinion or the mediator can offer to give it. *Id.*

37. Saul Hansell, *MP3 Patents in Upheaval After Verdict*, N.Y. TIMES, Feb. 23, 2007, at C1.

38. *Id.*

39. *Id.*

40. Increasing the ability of parties to make rational decisions is often a key purpose of mediation. See GOLANN & FOLBERG, *supra* note 9, at 110 (quoting mediators

B. *Expert IP Mediators Cut Costs, Quickly*

In addition to assisting parties in gaining a more neutral understanding of the risks of litigation, expert IP mediators can also help parties resolve their disputes more quickly and cheaply. While it is well known that mediation in general produces time and cost savings for parties due to the absence of formalistic procedures, the savings can be even greater when the parties use an expert IP mediator. The learning curve for an IP mediator is simply much flatter than for jurors and district court judges. This can be especially valuable when a high-level understanding of a certain technology is required, such as in cases involving electrical or biotech patents. Unlike in court, where the lawyers must break down intensely complex facts to digestible portions, the expert IP mediator can delve straight into the issues. This translates into less time and fewer lawyer bills needed to resolve a patent dispute before the relevant invention becomes obsolete.⁴¹

C. *Clients Get Better Remedies*

In addition to receiving benefits on the bottom line, disputants can use expert IP mediators to achieve remedies that address more of their needs. Instead of receiving an arbitrary interpretation of the law from a jury or district court judge who may not understand the technology at issue, parties using an IP mediator can expose and resolve an array of complex legal and non-legal issues.⁴²

Eric Green and Jonathon Mark, who had recently concluded a mediation that settled alleged antitrust violations by Microsoft, as saying, "Successful mediations are ones in which, settle or not, senior representatives of each party have made informed and intelligent decisions").

41. Strategically, a party with a large checkbook may refuse to mediate if it knows that the other party cannot afford the high costs of a patent suit. Little can be done in such a situation. Even court-mandated mediation may not be appropriate unless the court provides an incentive for constructive behavior, like a penalty for bargaining in bad faith.

42. One fear parties have of mediation is that other parties will use it as a means for discovering information about the strength of their case before trial. This fear is misplaced. Mediation does not obligate parties to disclose any information, even if the information would be exposed at trial. Moreover, if the parties make it known to an IP mediator that they do not want to disclose any information that could affect their ability to prevail in court, the mediator could help the parties decide when it may be disadvantageous to disclose particular information.

Experienced IP mediators can unearth more issues because they understand the distinct interests of patent disputants. For one, people generally attribute higher values to things they possess.⁴³ Inventors are no different. They invest substantial time and effort creating what they hope will be an innovative and substantially beneficial product: “Accused infringers are, after all, not merely casual observers of the patent system. They are putatively putting the patented invention to some use themselves. They may well have developed [the] product on their own, unaware of the patent they are accused of infringing”⁴⁴ Inventors not only have an interest in achieving some kind of recognition for their efforts, but they also fear that they could completely lose their entitlement to use their invented product. An IP mediator further understands that the IP community is small; reputations and relationships matter and even disputing parties may share an interest in developing a business relationship with each other. For instance, after protracted litigation between Microsoft Corp. and Stac Electronics produced first a \$13.6 million verdict against Stac and then a \$120 million verdict against Microsoft, the two parties signed a broad cross-licensing agreement, which gave Microsoft a 15% share in Stac.⁴⁵ As Michael Brown, Microsoft’s vice president of finance, expressed, “This [collaboration] is a lot more fun than disagreeing.”⁴⁶

After recognizing the parties’ interests, the IP mediator can assist the parties in satisfying them. Unlike in litigation, where emotional interests are less recognized, a mediator has the insight to understand how these interests affect patent disputants and could ensure that interests are addressed either through the mediation process or in a resolution. If one party needs to stop using an invention for the parties to come to any agreement, the IP mediator could frame settlement as a gain instead of as a loss of entitlement. If parties indicate a desire to work together in the future, the mediator could use his familiarity with the industry to suggest ways for the parties to work together, like entering a cross-licensing agreement. In addition, the expert IP mediator could help the parties craft a creative remedy.⁴⁷ Take for example, a typical controversy between the

43. *Id.* at 205.

44. John R. Thomas, *Claim Re-Construction: The Doctrine Of Equivalentents In The Post-Markman Era*, 9 LEWIS & CLARK L. REV. 153 (2005).

45. GOLANN & FOLBERG, *supra* note 9, at 22.

46. *Id.*

47. In essence, using an IP mediator enables the parties to negotiate in a manner that expands the pie of available solutions. For an interesting normative analysis of

brand name manufacturer of drug X (“brand company”), which possesses a patent for X, and the manufacturer of a generic version of drug X (“generic company”). An IP mediator would understand that the parties probably have plans to invest in a new product at some point, motivating them to prefer a sliding payment scheme. After probing this issue, the mediator could help the parties choose a payment scheme that maximizes their money in the bank when they want to make a purchase. Such a remedy could include a lump sum payment, running royalties (periodic payments), and/or payments on a sliding scale.

D. *Society Benefits*

Trials, especially in the common-law tradition, are in many respects ‘wasteful’: they produce a victor, but at great cost to both sides and to the public ‘[A] trial is a failure.’⁴⁸

Besides the various benefits patent disputants derive from mediations with IP experts, the IP mediators create positive externalities for society at large. When district court rulings carry little meaning to the parties due to their high reversal rate, taxpayers pay too high a price to keep the court system going.⁴⁹ Mediation encourages settlement, which in turn reduces this needless litigation.⁵⁰ Although some critics of mediation and other forms of alternative dispute resolution (ADR) argue that ADR robs society of valuable precedent,⁵¹ “the situations where a party should not agree to ADR . . . are not likely to be involved in a patent infringement dispute.”⁵² Patent disputes usually do not involve important statutory interpretations or constitutional questions.⁵³ In the exceptional case that involves a

this negotiation style, see ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40 (Penguin Books 1991) (1981).

48. Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 947-48 (2004) (citations omitted).

49. See Ruch-Alegant, *supra* note 3, at 308 (discussing how the losing party in a patent infringement suit will always appeal to the Federal Circuit provided he has the necessary resources).

50. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (“[L]awyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial. Much of our civil procedure is justified by the desire to promote settlement and avoid trial.”).

51. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

52. Ruch-Alegant, *supra* note 49, at 318.

53. *Id.*

highly valuable patent, the parties will likely litigate.⁵⁴ Although some extol the benefits of revoking “bad” patents through increased patent litigation,⁵⁵ an increase in patent suits will likely not help jurors and district courts gain enough of an appreciation for the technologies involved to start returning verdicts that consistently revoke only “bad” patents. The USPTO, the gatekeeper of patents, has the requisite technical competence to weed out “bad” patents, not the courts.⁵⁶ Moreover, a strong argument can be made that by freeing a patent from controversy earlier, as occurs in mediation with IP experts, parties can bring more innovative products to the market sooner and can focus their resources on pioneering new products that carry great benefits for society, like new drugs to treat cancer:

Unpredictability or uncertainty in the boundaries of the patent holder’s property right and its enforceability will . . . divert resources from innovative efforts (research and development) to enforcement (transaction or litigation costs)⁵⁷

IV. CONCLUSION

Although litigation is usually a tempting option when court outcomes are uncertain, as they typically are in patent controversies, patent disputants should be well advised of the benefits of mediation with IP experts. Neutral, informed IP experts reduce the uncertainty of patent litigation by giving the parties an objective appreciation of their litigation risks. At the same time, parties reap time and cost savings as expert IP mediators can be brought up to speed on the relevant industries and issues far more easily than the average juror or district court judge. Lastly, the parties obtain a remedy that satisfies a broader range of their interests than a simple court verdict would satisfy. At the trial level, more widespread realization of these benefits by parties, lawyers, and those empowered to appoint

54. See John R. Allison et al., *Valuable Patents*, 92 GEO. L.J. 435 (2004) (arguing that the patents that are litigated are likely to be the most valuable).

55. Keesan & Ball, *supra* note 27, at 237.

56. Pursuant to 35 U.S.C. §§ 302–05, 311–14 (2000), the USPTO can review a patent’s validity through several types of reexamination procedures.

57. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 928 (2001). See also Marion M. Lim, *ADR of Patent Disputes: A Customized Prescription, Not an Over-the-Counter Remedy*, 6 CARDOZO J. CONFLICT RESOL. 155, 169 (2004) (“[T]he litigation process delays new ideas in reaching the marketplace, resulting in lost opportunities for the patent holder, because the time spent in court determining validity or infringement issues exhausts a significant portion of the twenty year patent term.”).

mediators to court-mandated mediations will reduce needless litigation with its high transaction costs and enable more parties to focus on pursuits that are more profitable and beneficial to themselves and to society.

