Arbitrating the Patent Case Part II: How many arbitrators?

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In the first article in this series, we considered the types of patent cases most likely to be arbitrated. With a few exceptions, your patent dispute will not be arbitrated unless the parties have a contractual relationship -- such as a license agreement, employment agreement or development agreement – and provide for arbitration. If the parties decide to provide for arbitration, there still are a number of decisions that need to be made. The first is whether or not to have an administrator such as AAA, which I suggested is normally a good idea because it provides for professional administration at a reasonable rate, access to arbitrators with expertise in the subject matter, and provides a "referee" for disputes concerning arbitrator impartiality and the like.

The next question you are likely to face is whether to have a panel of three arbitrators or go with a single arbitrator. Each has advantages and disadvantages. Let's consider a few of them.

The advantages of a panel of three arbitrators are many. First, you will enjoy the benefits of the thinking of three professionals rather than one. After all, there is a reason that appellate courts panels have three or more judges instead of one. A panel of three is, for example, less likely to overlook an important fact, or misapprehend an important legal principle.

Second, different types of expertise can be brought to bear on resolving the case. If you plan for it, you could choose a panel where at least one panel member has significant expertise on technical matters, another on financial matters, and another on case management matters.

Third, with three arbitrators, there is less chance you will encounter an arbitrator who has a specific attitude toward a specific type of case based on past experience that will be hard to shake.

But there are disadvantages to using a panel. Most obvious is cost. It is about three times more expensive to have three arbitrators rather than one. And, typically, arbitrators in patent cases have hourly rates about the same as patent litigators, so that added expense can be substantial. This can be ameliorated by the arbitrators splitting up tasks, such as having the chair or a designate responsible for discovery issues and the like. But there is no way to avoid paying three arbitrators to hear and analyze the evidence.

It is also harder to coordinate two more schedules with those of the already-crowded schedules of the lawyers and party representatives. Finally, the panel's decision is more likely to be a "compromise" to bring together three divergent views. Of course, this can be a benefit depending whether you are on the winning or losing side.

The advantages of a single arbitrator are, of course, the flip side of the disadvantages of a panel, as are the disadvantages.

There is a possible compromise to seek the best of both worlds. The parties could provide that if, for example, the amount in dispute is $1 million or less, there will be a single arbitrator. If it is over that, a panel can be put in place on the assumption the greater amount at stake will justify the added expense.

In the next article, we will consider other aspects of the arbitration the parties need to consider in their agreement to arbitrate.