

The Three Dysfunctions Of A Complex IP Legal Team

Monday, Apr 28, 2008 --- In his book *The Five Dysfunctions of a Team*, business writer and consultant Patrick Lencioni tells the tale of a dysfunctional company that just can't seem to get its "game on."

Deadlines and critical market opportunities are missed, the competition seems always a step ahead, product development takes too long, and product releases once finally completed and released are riddled with problems.

Lencioni weaves into the narrative five teaching points (i.e., the five dysfunctions) and offers advice to the reader on how to make a business team functional.

Lencioni's five dysfunctions are: (1) absence of trust; (2) fear of conflict; (3) lack of commitment; (4) avoidance of accountability; and (5) inattention to detail - not results focused.

Lencioni's book is a quick and worthwhile read.

Litigation teams involved in complex IP litigation can also suffer from similar dysfunctional behavior that can ultimately result in a poor outcome.

While Lencioni's list of five dysfunctions can certainly and equally apply to a litigation team, in my experience there are three dysfunctions of a litigation team that can be the cause of a poor litigation outcome.

They are: (1) lack of clarity as to the Mission of the case; (2) lack of commitment to the Mission; and (3) lack of Case Protocols concerning how the goals of the Mission will be accomplished.

This article addresses these three dysfunctions and offers advice on how to make a litigation team fully functional.

Dysfunction No. 1: Lack of clarity as to the Mission of the case.

A complex case consists of a group of projects that comprise the mission of the case. For example, in patent litigation there is, among other projects, the infringement/non-infringement project and the validity/invalidity project depending on which party the litigation team represents.

The projects of the case will form and shape the overall Mission and are highly interrelated and require a coordinated team effort.

While the various projects in the case may be understood and defined, the overall “Mission” of the case may be unclear and not fully understood and embraced by the entire team. However, it must be.

Dysfunctional behavior can result when team members focus exclusively or principally on their respective projects to the detriment of the Mission of the case, (e.g., proving infringement without regard to whether infringement positions potentially compromise the validity position).

Simply put, project-related work cannot be performed by team members in a vacuum, without context as to the Mission, and without regard as to how and whether the project-related work achieves the goal of the Mission.

At the outset of every complex IP case, the Mission of the case must be defined.

The definition of the Mission must be concise, clear, consistent with the client's business objective, and, perhaps, most importantly, achievable.

It could be simply: "Our Mission is to prove willful infringement."

Such a defined Mission necessarily means success with both the infringement and validity projects and further requires that both project teams work toward the common goal of the Mission.

Once the Mission is defined, the team must then define and answer the “Core Questions” around which the case will be prosecuted or defended to achieve the goal of the Mission accomplished.

The Core Questions are:

What are the key issues of the case?

There should not be more than ten key issues for any and all complex IP cases. More than ten breeds and feeds the complexity of the case.

A complex IP case will be complex enough; so there is no need to add to the complexity by crafting a myriad of issues.

The issues can be as simple as: non-infringement, invalidity, damages.

Once the issues are defined the issues should be assigned to the Project Teams Leads. Thereafter, all of the evidence should be associated/assigned to one or more of these issues and, most importantly, prioritized in some manner, e.g., high, medium, low; A, B or C, etc. Evidence receiving a “high” or “A” priority will obviously be the primary proof on the given issue.

What is the key evidence that we must use to construct our case or deconstruct the other side's case in order to achieve the goal of the Mission?

Teams assigned to prosecute a complex IP case, i.e., the plaintiff, construct with the record evidence.

With the exception of proving affirmative defenses such as invalidity, teams assigned to defend a complex IP case use the record evidence to deconstruct the case plaintiff attempts to construct.

At the end of the day, this is truly all that complex IP litigation teams do, i.e., they either construct with evidence or use evidence to deconstruct what another team is trying to construct.

One problem in complex IP cases is that they are, well, complex and it is often difficult for team members — especially those who have never tried cases to judges and juries — to recognize that not all evidence merits the same respect or place in the evidentiary line-up. While this may seem obvious, legal teams can get lost in the nuances of a complex IP case.

The team must also face up to the reality that there will be extremely limited time to present the key evidence at the trial.

The reality of time limits means that the team must prioritize the evidence early and often. The prioritization must constantly be re-visited because ultimately the bandwidth for the presentation of the evidence will be extremely narrow.

The bottom line is that the Project Team Lead must be able to articulate the three most important evidentiary points per issue (e.g., the top two most compelling Section 103 prior art obviousness combinations) in order to achieve success with the given project and the goal of the Mission.

If the Project Team Lead cannot articulate the most important evidence, then the Project Team Lead is "down in the weeds" and needs to be coached.

What is the theory and theme of the case?

Having defined the key issues and the evidence needed to construct or deconstruct the case, the team must then define both the theory and theme of the case.

For help defining and developing both a theory and theme, I recommend reading Gerry Spence's book *How to Argue and Win Every Time*. Spence's premise is that telling a story is the most powerful form of argument.

Ultimately, a complex IP case, like any other type of case, must be reduced to a story, e.g., a story about your opponent's infringement, a story about why your opponent engaged in inequitable conduct, a story about why the patents should be declared invalid, etc. The story is always built around a thesis (which is interchangeable with the theory).

The thesis or theory of the case is the point of view that is advanced by the

argument or the answer to the question: What do I want?

According to Spence, “[w]e obtain what we want with the core argument, the thesis.”

As to the theme, Spence describes it as a “descriptive phrase or metaphor that symbolizes the soul of the case. The argument’s theme supports the argument’s thesis.”

Once the Mission and the answers to the Core Questions are defined, every team member must know and embrace the them.

I emphasize the word "every" because I'm literally talking about every member of the team, including paralegals and even contract-based document reviewers.

They are all involved in the Mission, but cannot make meaningful contributions without knowledge of the goal of the Mission and the answers to the Core Questions.

These two important aspects of the case must be articulated to the team members before the project teams split off to work on their separate projects.

Absent this clarity, the project teams will proceed not knowing what is truly important, make decisions that are ultimately in conflict, and, potentially, resent the work of other project teams as compromising the "mission" of their own specific project.

There must also be complete clarity regarding two other aspects of the Mission.

First, the roles and responsibilities of all team members must be clearly defined.

There should be no question as to what team member has ultimate responsibility for a particular project team and/or the assigned issues and/or what team members are on the project teams and/or their specific roles and functions.

Lack of clarity as to an individual team member’s role and responsibility will cause mistakes.

Second, the authority of the COO (Chief of Operations) must be unquestioned.

The job of the COO (i.e., the lawyer responsible for the overall management of the team and the case) is to ensure coordination between and among the project teams in order to achieve the goal of the Mission.

To the extent there is a "lead trial lawyer" (who is not also serving the COO

role), the lead lawyer similarly must not question the administrative authority of the COO.

If team members feel free to ignore the COO's instructions or fail to follow the Case Protocols (discussed below) the team will become dysfunctional and the Mission will be compromised. The COO must, in turn, step up, assume the mantle of leadership, and lead the team as the administrative head.

Dysfunction No. 2: Lack of commitment to the Mission of the case.

IP litigators are not taught in law school how to work on teams. In general and with few exception, the law school experience is mostly about the solitary experience of preparing for classes or exam.

Not much changes for young associates when they join a litigation team involved in a complex IP case because they are given "one-off" type of assignments where they, for example, research a legal point, write a memo on a discrete topic, or sit in front of a computer screen reviewing documents.

The point here is that so much of the early years as law students—and then later as litigators—are spent in solo-flight working on a specific assigned project with very little collaboration with other lawyers.

But, complex IP cases are all about collaboration and team effort. (If you're looking for a movie metaphor, think Hoosiers and not Rambo.)

With this backdrop, let's consider the second dysfunction: lack of commitment to the Mission of the case.

– "Not my project, not my job" mentality. Because of our training (discussed above) and because of the time-intensive challenges posed by achieving project success, team members can become myopic and choose to focus only on their specific project to the potential detriment of the Mission.

Team members can think that if a particular matter does not affect their project, then "It's not my job."

Success depends on changing the "not my job" mentality to "the Mission of the case is my job and my contribution to the Mission is success with my project."

– 10% time and 10% commitment v. 10% time and 100% commitment. Ideally all team members would have no other cases to focus upon. But, that's not reality.

Usually members of the litigation team are staffed on other cases.

Thus, rather than a 100% time commitment, the team member can only give 10% or 20%. This is fine so long as the team member gives 100% commitment and focus during the 10% time they can provide.

If not, they need to be moved off the team because they are filling space and the Mission will be compromised. The bottom line is that there can be no team members "dabbling" on the case.

– Lost legacy knowledge. Complex cases can take years to resolve. Team members can move on to other firms or opportunities and, as a result, there can be a loss of the legacy knowledge possessed by certain team members.

Lost legacy knowledge caused by a lawyer leaving can drive clients crazy because they legitimately fear that the knowledge acquired by the particular lawyer will be lost with the departure of that lawyer.

Addressing this problem is not easy. But for starters team members should know that signing onto the case is a commitment for as long as they are at the firm.

Additionally, and by requiring that Case Protocols are followed, most of the legacy knowledge should be captured and available to the entire team, which will substantially mitigate the impact caused by a departing team member.

Dysfunction No. 3: Lack of Case Protocols (including how the team communicates).

At the outset of the complex IP case, the COO should prepare a Protocol Memo setting forth the Case Protocols. Case Protocols define the organizational architecture of the case and team conduct and behavior.

As part of the preparation of the Protocol Memo, the COO should work with or direct team members to develop standardized formats for Key Work Product, e.g., witness interview summaries, deposition summaries, claim charts, research memos, etc.

Having pre-defined and standardized Key Work Product ensures a "One band, one sound" uniformity to the work product, will streamline and enhance the flow of important case information, ensures that all necessary information is captured and presented and mitigates against the loss of legacy knowledge.

This means, for example, all of the team members use and follow the same format (literally down to the font that is used) for the Key Work Product.

All Key Work Product, once prepared, should be posted to a central and shared location, i.e., a shared drive or a Web room with clear instructions to team members on posting requirements and placement inside the shared location.

The Case Protocols discussed in the Protocol Memo should cover a wide array of topics, including the Mission, team members' roles and responsibilities, the responses to the Core Questions (in particular the key

issues, theme and theory), the Key Work Product and how it should be completed, meeting schedules and meeting conduct (i.e., expectations of team members at meetings, the various types of meetings that will occur between team members and timing of meetings), email procedures and policies (to enhance, foster and streamline communications), any special billing/time entry requirements, and client-insisted protocols.

Addressing these three dysfunctions of a legal team will not guarantee success for all complex IP cases, but will definitely improve the odds of achieving the goals of the Mission.

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