

Attys Tout Need For Diverse IP Trial Counsel Amid Skepticism

By Ryan Davis

Law360 (September 11, 2023, 6:24 PM EDT) -- Efforts to boost diversity among attorneys leading intellectual property litigation can improve results and remain a priority for many firms and clients, even amid lawsuits and legislative scrutiny of such practices, attorneys said at a conference Monday.

At the Intellectual Property Owners Association's annual meeting in Boston, a panel of attorneys shared strategies they have used to bring aboard more diverse groups of lawyers to work on IP trial teams and noted the backdrop of skepticism such programs are drawing from conservatives.

Members of the panel said their firms were among the dozens of recipients of a letter from U.S. Sen. Tom Cotton, R-Ark., who argued law firm diversity programs may violate federal law following the U.S. Supreme Court's recent decision on affirmative action. They also noted that other firms have been sued by the same group that brought the high court case.

"We haven't changed what we're doing because we got this letter," Sapna Palla of Allen & Overy LLP said. She added that "I hope there's going to be some legal maneuvering around that and pushback, and I hope that that's not going to reverse some of the efforts that have taken place."

Kassie Helm of Dechert LLP said increasing diversity has wide-ranging benefits in addition to having greater representation on trial teams, noting studies have found that companies with diverse boards show an increase in profitability.

"This is not a charitable or pro bono effort here," she said. "This is something that if you care not at all about diversity, you should care about your bottom line. And diversity is really helping that, ultimately."

Intellectual property cases in particular present a range of complexities where a trial team with diverse viewpoints may be able to achieve better results, Palla said. As judges and juries are also becoming increasingly diverse, trial teams need to have people of different racial and socioeconomic backgrounds, she said, because "if you don't have that perspective and that diversity of thought, you're really doing a disservice."

"If you don't have the different perspectives that are coming to the table, you're not going to be able to manage your case the best you could," she said.

For that reason, it's important for law firms to take a broad view in their diversity efforts, encompassing not only people of different racial and ethnic differences but to take into account people who are queer,

neurodivergent or come from different socioeconomic backgrounds, the speakers said.

While there has been an increased focus on diversity in recent years, "the numbers are not moving as quickly as we'd like," Helm said. At current rates, even some form of parity "doesn't seem like it's going to happen in the lifetime of probably anyone in this room, and that's not fast enough," she said. "So we want to talk about ways to speed this up."

Part of that will involve attorneys breaking out of old mindsets and finding ways to share work and opportunities, members of the panel said.

Brian Brookey of Tucker Ellis LLP noted that in intellectual property cases, there are fewer trials and fewer oral arguments, saying some judges have said they don't have time to hold arguments on anything but substantive motions. With fewer opportunities, experienced attorneys "have to shift our paradigm a little" and start giving some of them to younger and more diverse colleagues so they get the experience they need, he said.

"We have to take responsibility of sharing, of saying, I know these opportunities don't come along as much as they used to, but I'm going to step back," Brookey said, noting that some courts will offer extra time to younger attorneys.

Nichole Valeyko, director of patents at Merck & Co. Inc., said when law firms take steps to increase diversity on IP trial teams, it often presents a learning curve for clients.

She said she talked to an attorney who received pushback from a client when the firm planned to use the Patent Trial and Appeal Board's Legal Experience and Advancement Program to provide an argument opportunity for a younger attorney.

The client initially questioned the decision, saying the case was very important to the company, but came on board when it was explained that they would get more argument time and other attorneys would be standing by to help, Valeyko said.

"For your general counsel, you have to encourage them that these initiatives are important and that we should take a role in it," she said.

Clients who want to encourage more diverse trial teams at the firms they work with, sometimes consider setting certain targets and imposing negative consequences if they aren't met, like a pay cut, but "that's not really encouraging the program" and can lead to bad blood, Valeyko said.

A more effective alternative is to offer a reward or a bonus for meeting goals, rather than a penalty for not doing so, she said, because "I think that's just a better way of forming a collaboration with the firms and trying to really encourage the ultimate goal, which is not just diversity, but it's inclusion of people, too."

--Editing by Janice Carter Brown.