

Killing Two Birds with One Party: Using Neutral Third Parties to Represent the Public Interest and to Dampen Overzealous Advocacy in District Court Patent Litigation

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Patent cases at the district court level are one of the most contentious forms of litigation. Scorched-earth litigation tactics, which include protracted discovery battles and overly aggressive motion practice, are common. Overzealous advocacy is not only costly to the parties but also burdens the courts and undermines the public interest in the efficient adjudication and just resolution of patent disputes.

This Article proposes a structural change to the manner of conducting patent litigation at the district court level that may potentially decrease the level of overzealous advocacy by the parties as well as enhance the court's ability to take into account public interest considerations when adjudicating patent disputes. Specifically, this Article proposes the inclusion of a neutral third party in district court patent litigation to represent the public interest, whereby the neutral third party participates in all aspects of the litigation, including discovery, motion practice, trial, and settlement. Drawing on principles of game theory, this proposal is modeled after the current practice at the U.S. International Trade Commission (ITC), where a patent dispute brought before that agency includes a dedicated ITC staff attorney who represents the public interest as a full party to the litigation, and whose presence acts as a moderating influence, especially in discovery disputes.

The procedural mechanisms through which a district court may be able to accommodate a neutral third party litigant include intervention and the "litigating amicus" device. This Article also evaluates the suitability of the Federal Trade Commission (FTC) as a neutral third party litigant in light of its statutory mandate under Section 5 of the FTC Act, which empowers it to investigate "unfair methods of competition," and its expertise in evaluating intellectual property issues in view of competition policy.