PRINCIPLES FOR TRYING PATENT CASES BEFORE JURIES

By

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In this brief article, we have outlined the principles for trying patent cases before juries. These principles emerged as we assisted counsel in the development of trial strategy in nearly one-hundred patent cases around the country.

JURORS TEND TO SEE EVERY CASE AS A STORY AND THE CENTERPIECE OF THE STORY IS THE COMPETITIVE RELATIONSHIP BETWEEN THE PARTIES

Jurors tend to organize material into coherent stories. If the case is not presented as a story, the jurors will create one of their own, filling in gaps in the facts with their own speculation about what happened. Thus, it is important to present your case as a fully integrated, thematically anchored story, with a beginning, middle, and end. Although an understandable technical presentation is essential, jurors will tend to focus more on the relationship between the parties and what went on behind the scenes, than on the more technical issues. The story should detail that relationship in a clear manner that supports the conclusion that your client's conduct was fair and just.

THE STORY'S THEMES NEED TO ANCHOR, NOT REPLACE, THE SUBSTANTIVE TECHNICAL EVIDENCE

Jurors often feel that broad themes, when unsupported by concrete evidence, are being offered in lieu of the substance and they infer that there are weaknesses in the substantive positions. Broad themes should anchor the substantive case, not replace it.

FOR JURORS, INFRINGEMENT AND INVALIDITY ARE TWO SIDES OF THE SAME COIN

The law separates infringement issues and invalidity issues and goes so far as to set different standards of proof for each. However, jurors typically view the two issues as part of the same story that starts with the prior art, addresses the unsolved problems, details the invention story, and identifies the similarities and differences between the plaintiff's solution and the defendant's solution.

THE BEST TEACHER WINS

Because patent cases often involve technology that is difficult to understand, the side that teaches the best has a distinct advantage. Lawyers often speak in terms of "dumbing down" the material. Rather than "dumbing down", the process is really one of lifting up the jurors. The best teachers do not blame their students for the teacher's failure to communicate the material in a way that the students can understand.

THE PLAINTIFF'S INVENTOR MUST PROVIDE A CLEAR EXPLANATION OF THE NOVELTY AND IMPORTANCE OF THE INVENTION AND DIFFERENTIATE IT FROM PRIOR ART

There is a personal aspect to a patent case. In essence, the inventor is claiming that his work has been stolen. He needs to explain the value of his work and why it is entitled to be protected. The inventor is also, in many cases, being accused of getting credit for something of little value; that is, an obvious or anticipated invention. His integrity as a scientist is being challenged, and his response needs to reflect his sincere belief in the value of his discovery.

THE DEFENSE MUST HAVE AN INVENTION STORY OF ITS OWN

In defending against the accusations of infringement, jurors expect the defense to explain how its product was developed independently. What is the independent invention story and how did they arrive at a different solution to the same problem that confronted the patent holder?

JURORS REWARD WORK AND PENALIZE THE ABSENCE OF EFFORT

In their assessment of the invention, both with respect to infringement and invalidity, jurors are interested in knowing how hard and how much effort it took to make the invention. The more effort, the bigger the problem, the more people the solution helps, the more public acclaim for the discovery, the more credit the inventor deserves in the eyes of the jurors. This is true of both the patent holder and the accused infringer. There are three "inventors" who can benefit from this principle: the prior art inventors, the patent holder, and the accused infringer. In the invention story, jurors ask: "Who did the most and whose work was most important?" Whoever answers this question most persuasively lays claim to being the entitled to the jurors' support.

JURORS SEEK TO COMPARE PRODUCTS TO PRODUCTS, NOT PRODUCTS TO CLAIMS

Although they are instructed to compare the allegedly infringing product to the claims of the patent-in-suit, jurors are more comfortable talking about products. In many of the mock deliberations we have studied, we often hear reference to the characteristics or performance of the plaintiff's product compared to that of the defendant's product. This tendency may be helpful or detrimental, depending on the case and whether one is asserting or defending the infringement claim. It is important to recognize this tendency, determine if it helps or hurts, and, if it hurts, take the appropriate steps to clarify the issue for the jurors.

OFTEN CONFUSED BY THE TECHNOLOGY, JURORS RELY ON THEIR ASSESSMENT OF THE CREDIBILITY OF WITNESSES AND THE ATTORNEYS

Jurors may not be able or willing to fully understand the technical material that inventors and experts try to teach them during a patent trial. Trying to understand the substance of the case may be too intimidating or too difficult a chore. This lack of understanding, does not, however, inhibit jurors from choosing between two competing explanations of the technical issues. They do so by deciding which witnesses they perceive as competent and trustworthy, the two key elements of credibility. Having made their credibility assessments, jurors will "agree" with the witnesses they find believable. Thus, the way material is presented is as important as the substance of the material itself.

JURORS DEFER TO THE "EXPERT" IN THE JURY ROOM

Being a juror on a patent case is a tough assignment. Many jurors feel overwhelmed and not up to the task. As a result, they are more willing to defer to jurors who claim an expertise and express an interest in the subject matter of the case. While some jurors may enter the deliberations with a clear opinion about the case, they may not have the will to stand and fight with other jurors who have asserted that they have more related technical experience. The non-technical jurors often "fold", deferring to the self-proclaimed "expert" who is more likely to "hold" his or her position during deliberations.

VISUALS ARE ESSENTIAL, BUT COURTROOM PRESENTATION TECHNOLGY CAN GET IN THE WAY OF EFFECTIVE COMMUNICATIONS

Jurors are already working very hard in patent cases and the courtroom presentation technology has to make their work easier, not more difficult. Graphics that are not clear, concise, and easily understood are held against the party that presents them. Jurors normally have little tolerance for boring deposition reading, fuzzy video, and unintelligible documents. Their tolerance is even less in patent trials. The attorney who produces a poor show during trial runs the risk of having resentful and frustrated jurors evaluate his or her case.

DURING JURY SELECTION, ASSESS JURORS' PERSONAL CONNECTION TO PATENTS AND THEIR RELATIONSHIP TO RULES AND AUTHORITY

With respect to the attitudes and values that affect jurors as they hear and interpret a patent case, there are a number of "cross-currents" at work. This is because the cases often involve claims of infringement and invalidity. Thus, a patent holder begins the trial as the plaintiff asserting its claim, but must also assume the defense position regarding the allegation of invalidity. Classic classifications of jurors as plaintiff or defense "types" do not readily apply to patent cases. Nonetheless, we have observed certain juror types who consistently show a plaintiff's or defendant's orientation. These include, on the plaintiff's side, jurors who have a personal connection to a person or entity that has patents and, on the defense side, jurors who are frustrated or burdened in their jobs by rules and regulations and who have the "me against the establishment attitude" often found in small time entrepreneurs and salespeople.

MANY JURORS ARE INCLINED TO DEFER TO THE PATENT OFFICE, BUT MOST ARE NOT LIKELY TO BE LEADERS ON THE PANEL.

Patent cases take on many different configurations. For example, have both the plaintiff and defendant received patents? What are the invalidity arguments that are being asserted? What is the nature of the prosecution history? The Patent Office typically has an important part in both the plaintiff and defendant's rendition of the master story. Jurors often look to the Patent Office as the independent arbiter of the issues in suit and wonder why they should not defer to the experience of that office. As a result, the Patent Office is always "in play" and litigants need to determine how best to develop the most advantageous view for the jurors to take towards the Patent Office given the positions and circumstances of each case.

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