FUNDAMENTALS FOR EFFECTIVELY CLOSING PATENT JURY TRIALS

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INTRODUCTION

From the devastating melt down of Matthew Harrison Brady in *Inherit the Wind* to the celebration of justice and humanity delivered by Atticus Finch in *To Kill a Mockingbird*, the drama and power of the closing argument – the grand summation -- has been featured in countless courtroom dramas. Indeed, throughout our popular culture today, the 'closer' has been given enormous cachet. Whether in real estate deals or major league baseball games it is the closer not the 'set-up' player who is revered.

Art and popular expectations to the contrary, our work with hundreds of juries and thousands of jurors suggests that placing the closing on a pedestal is fundamentally flawed. Our research indicates that in most large commercial cases 60-80% of the jurors have settled on their resolution of central issues in the case after the opening statements. Typically, this percent is closer to 75% with the remainder – the undecided and the 'flippers' – splitting relatively evenly between those who move towards the defense and those who move towards the plaintiff.

This is not to suggest that the case in chief and the closing arguments are not important – evidence to support or challenge conclusions, testimony that enhances or undercuts credibility, learning reinforced, vocabulary developed, expert teaching, adverse rulings on the law and/or evidence -- are just some of the essential aspects of the examination and presentation of the evidence that affect the outcome. But, it does suggest as we outline the fundamentals of effective closing arguments, it is important to recognize that the closing is an integral part of the total case -- not the soloist but rather part of the ensemble – only as strong as the 'set up' that creates the opportunity to close effectively.

PRINCIPLES FOR TRYING PATENT CASES TO JURIES

Below we discuss ten fundamentals for effectively closing patent jury trials. These include:

- Credibility
- Power
- Purpose
- Context
- Understanding
- Energy
- Vocabulary
- Anticipation
- Priorities

- Imagery

Because each of these fundamentals is part of crafting a closing that is well integrated with the themes, tone, vocabulary, and essential teachings of the overall case, it is important to first set the foundation; to review certain principles of trying patent cases to juries.

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.

INFRINGEMENT AND INVALIDITY ARE 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 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/her work has been stolen. The inventor needs to explain the value of the 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. The integrity of the scientist is being challenged, and his/her response needs to reflect a 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 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 TECHNOLOGY 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.

THE ROLE OF THE PTO IS CRUCIAL TO MANY JURORS AND NEEDS TO BE PART OF THE WELL DEVELOPED STORY

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 PTO 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. The prosecution history is often the best contemporaneous evidence. As a result, the PTO is always "in play" and litigants need to determine how best to develop the most advantageous view for the jurors to take towards the PTO given the positions and circumstances of each case.

TEN FUNDAMENTALS FOR EFFECTIVELY CLOSING PATENT JURY TRIALS

In most cases, the closing comes with great juror anticipation and expectations. Finding a style, tone and rhythm that works for you and the case takes enormous work. And, practice. The time pressure and dynamics of trial place much tension on the crafting, rehearsal, revision and internalization of the closing. Give yourself the opportunity to be at your best – start early, rehearse often.

As you begin to craft the closing, some of the fundamentals that we have found to be very important in effectively communicating with jurors at the end of a long and complex patent trial include:

CREDIBILITY

Especially in a patent trial, your credibility is the 'third pillar of credibility' complimenting and supplementing the credibility of your inventor and your expert(s). Recognize that as you structure the closing you should work to continue to build and protect your credibility and theirs. Promises made in the opening should be delivered in the closing. Gaps or questions raised need to be closed. Most important, jurors should feel that you want them to understand; that you are comfortable with the facts fully presented and understood; and that you invite, rather than fear, their scrutiny in deliberations. As noted above, if the jurors trust you and your witnesses then in a highly technical and difficult trial you will garner support because of that trust even if the substance is too great a challenge for some of your listeners.

POWER

That jurors have great power is not news to you but jurors don't always feel that way. In light of the technical complexities, the expertise of the PTO, the difficulties in the law, it is easy for jurors in a patent case to feel overwhelmed. In deliberations, these feelings often result in an unwillingness to engage and many deliberations are carried by two or three of the jurors. But each side needs its leaders so part of your challenge is to empower your jurors. Empowerment comes from many things including understanding, legal permissibility, confidence, interest and commitment. As you develop your closing, reinforcing your jurors with this sense of power to act in the ways that your case requires is crucial if you hope to have advocates in the jury room speaking with confidence and commitment.

PURPOSE

Why is your case important? Why does it matter? And, why should a juror fight for the resolution you seek? Your closing communication and persuasiveness will be enhanced to the extent that jurors understand and feel the importance of the case, especially the impact of the case on them. Many jurors, at least implicitly, evaluate a dispute from their

perspective – the 'what's in it for me principle'. Figuring out where your case intersects with the lives of the jurors and the values and experiences that jurors bring to court is another important fundamental. A patent case, with all its technical elements and complexities, is still very real and relevant in consumer impact, competitive relationships and basic issues of fair play. Test yourself by asking why you care about the case; what value does it have for you beyond doing a good job for your client, earning your fees, developing your relationship and reputation? No juror will really go to the mat to protect those values so you need to know and feel that there is something more important at stake. To borrow a phrase: "if you build it, they will come." Purpose and power act together and both are elements that can enhance the closing

CONTEXT

The importance of an organized well told story that sets the context or the skeleton upon which the evidence can be hung in a fashion that makes sense is not a headline for any of you. For years, people have spoken about: a) jurors reasoning from the general to the specific; b) jurors understanding an integrated story rather than the stacking of facts or arguments; c) the basic principle that a well told story has a beginning, middle and end; d) the story needs to be concrete and specific rather than abstract and general told from the perspective of a credible voice; and e) the importance of filling gaps so that jurors are not left to their own imaginations and biases. 'Stacking facts' and/or lecturing and listing arguments, even when well done and supremely organized, will fall on tired ears. Don't make the jurors work to create the context and story line. This is your job. The closing is the last chapter of the story that you introduced in your opening, developed through the trial and are now tying all together. Another test as you develop the closing: have I told a story that is transferable into the jury room; have I given jurors a story that they can and want to retell during deliberations – a story that is credible, easily recalled, and grounded in common sense?

UNDERSTANDING

Do the jurors know what they need to know to follow you and your case? A lack of understanding will quickly lead to detachment and disinterest. Accept your teaching responsibilities and embrace the opportunity to be the voice of clarity and understanding. Take a moment and think about how someone hearing your closing would report on it to a friend. Can they set the foundation accurately? It is part of your challenge to give them the understanding needed to use the information the way you request. Assuming that they 'got it' from the weeks of trial testimony comes with great risk. Test yourself by asking have I provided a clear and understandable thirty second version of the case; three minute version; and, of course, the extended version.

VOCABULARY

By the time of the closing, you and the jurors should be speaking the same language. This is not an easy task in a patent trial with complex technology and scientific jargon. Ideally, you have worked to communicate in the jurors' language. None of us would go

to a foreign country and expect the local residents to speak our language rather than theirs. We wouldn't in frustration claim that we had to 'dumb it down' for the foreigner to understand. Instead we would listen and learn. So too with jurors: travel to the jurors' world rather than try to force/argue them into yours; listen and learn about how they talk and understand the complex matters in dispute; adopt their language when possible. In short, find the common ground and where a concept or technology can not be 'translated' into common parlance, accept the teaching burden to build the vocabulary that you feel necessary always recognizing that at least for some learning a foreign language takes time and patience.

IMAGERY

There are auditory, tactile, and visual learning styles and odds are that you will have an assortment of different types of learners on your juror. Recognize that the persuasiveness of your closing can be enhanced if you tell both a narrative and visual story. The visual story does not simply spring forth from a PowerPoint Program and it is not a stack of bullet point charts that re-state the topic sentences of your narrative. The message from each demonstrative in whatever form (boards, electronic, hard copy etc.) -- and in a complex case a variety of forms is probably most effective – should spring from the visual without need for explanation. So again, test yourself and your graphics in advance – what message does this graphic convey in the absence of any additional words and is that the message that supports the story that is my closing? And, a note of caution: too much, too many, too elaborate a set of visuals can quickly lose their power and become a drag on the narrative. Enhance the power of the visual story by being selective in their design and use.

ENERGY

To paraphrase another great book, 'I've set before two paths – choose life.' People are attracted to the energy, passion and adventure of life and avoid the abyss of boredom, drudgery and redundancy. Bring life to your closing. If you are not excited about what you have to say, it will be nearly impossible to excite your listeners. This is not to say that that you need to deliver your entire closing in an exaggerated theatrical style. Passion and commitment are communicated in a variety of tones. Modulate, use all your gears, but do so with intensity and purpose. There is an expectation from jurors that you, as a trial lawyer, are an orator and entertainer. None of us is as good as those who close in the movies or on TV – after all, we have neither the benefit of great writers nor multiple takes. But we can work at telling a good story well.

PRIORITIES

You can't, nor would you want, to 'cover' everything in your closing. You need to set some priorities for yourself and, as a result, for the jurors. How much depth in usually the tough question – fly to high and you run the risk of being accused of 'over simplification' or 'having no evidence' but dig too deep and your audience will leave your story often never to return. Be cognizant of the attention span of the jurors – there is

a reason that a sitcom is about 22 minutes and that a New York radio stations tag line is 'give us 22 minutes and we will give you the world.' That's not to say that you only have about a half an hour of time. It is to suggest that in structuring your closing you remember the importance of the first few minutes; that you realize that all data points (evidence) are not equal so that there should be a hierarchy that you try to establish for the jurors rather than having them select from a menu of evidence and arguments; and that you remain aware that the jurors are finite vessels – at some point the vessel is filled and if you pour more in, something is going to flow out.

ANTICIPATION

By the close, there should be few surprises about the other side's evidence, themes and arguments. Anticipate your adversary's closing and integrate your answers to their case in your story. Think about what the dialogue will be like in the jury room and what 'responses' you want to arm your jurors with when they are confronted with the best evidence and arguments of adverse jurors. Don't leave your jurors to their own devices – prepare them for war with the ammunition they need both to attack and counterattack to effectively control the deliberation dialogue.

In the end, you will only be as good as your 'set-up'. But, if you find and practice your story, your purpose and your voice, Mariano Rivera will have little on you as a 'closer.'

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