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Bringing the Juror Back Into Intellectual Property Litigation

Intellectual property litigation is often so complex that attorneys are understandably forced to spend much of their time before trial focusing solely on the legalistic and highly technical details of the case. They can lose sight of the fact that the issues will be decided by a judge and jurors who do not have the scientific or technical background to fully understand the case. In order for jurors to understand complex intellectual property cases, attorneys need to have a meaningful context, or case themes, within which to explain the technical substance of the case. This article examines strategies to develop and convey the big picture of an intellectual property case and help jurors understand and remember the issues.

Mock Trials And Focus Groups

Mock trials are the most important pre-trial consulting activity that an attorney can employ in intellectual property litigation. Our experience has been that mock trials can be a "wake-up call" for the trial team, forcing them to define case themes and theory. Mock trials identify the case themes, analogies and metaphors that are most effective in helping jurors understand technical issues.

Attorneys can use data from mock trials as a tool in basic case preparation. As jurors in a mock trial complete various questionnaires, deliberate together and answer questions in a group interview, they reveal how they think about a case. Because intellectual property cases are so difficult to understand and the topics are often outside jurors' everyday experience, jurors work at creating a frame of reference, analogies and metaphors to assist in their understanding. Astute trial lawyers often select the images discussed by mock jurors and include these images in their case presentation during trial. If a mock trial is held early enough in the discovery process, attorneys can take questions posed by the mock jurors and find the answers during depositions and document exchanges.

But aside from helping attorneys develop a cogent case theory, mock trials allow them to see what jurors will understand and how they will respond to an attorney's presentation. As Paul Heller from Kenyon and Kenyon states, "mock trials are essential because



attorneys work in such different worlds from that of the typical juror." Mock trials answer the questions: Do jurors understand the evidence? Do the analogies hit the mark? Does a witness' style obscure what he or she is saying? What additional information do the jurors need in order to come to a decision? Attorneys can try out various themes, metaphors and presentation styles and see which ones jurors respond to, which gain acceptance, and which ones are remembered during deliberations.

Randy Bain from Brown and Bain notes that mock trials help identify biases and themes that attorneys may have overlooked, but they are not an appropriate tool for predicting an exact trial outcome. Bill Anthony, with Brobeck, Phleger & Harrison, agrees, saying "mock juries are working with play money and clients can be misled as to the magnitude of the damages. The feedback from mock jurors is, however, very helpful in evaluating case approaches and potential juror biases."

When attorneys hear the term "mock trial," they often think about a three or four day session. It is rare, however, for a mock trial in an intellectual property case to take more than one day. In fact, if our clients cannot present the essence of the case for both sides in a day-long session, then we know they will have a significant problem in selling the case to a jury. If a two-hour presentation of an intellectual property case is extremely confusing to jurors, adding information will seldom clarify the issues or bring back jurors who have given up or lost their motivation to understand.

What Jurors Bring To Intellectual Property Litigation

Part of the process of bringing the jurors back into the preparation of an intellectual property case for trial is discovering the attitudes and beliefs jurors have about patents, trademarks and copyright in general, the corporations involved in the dispute, and the actions of the parties. Attorneys for both sides often favor jurors with technical or scientific expertise, however, even the "smartest" jurors have opinions and biases that influence their decisions. Mock trials allow attorneys to discover the juror biases which emerge in their case. Attorneys can pitch their case more effectively with those biases in mind.

Some key questions about juror attitudes that attorneys need to consider in a patent case, for example, include: Does the U.S. Patent Office ever make mistakes? How would a given juror feel about overriding a decision by the U.S. Patent Office? How important are patents for progress? Do companies use patents to stop the progress of other companies? Would a particular company rather sue than compete? Do inventors get what they deserve materially? Does a given juror have a bias against bigger corporations



versus smaller or family-owned companies? Are foreign corporations taking over American markets?

Jurors' attitudes about the U.S. Patent Office can significantly influence their decisions. Although the conventional wisdom is that jurors will defer to the authority of the Patent Office, our recent survey research of several urban jurisdictions suggests that a majority of potential jurors believe the U.S. Patent Office can, and does, make mistakes in reviewing and granting patents. Although the belief that the Patent Office can make mistakes does not automatically suggest an overturning of the Patent Office's authority, it does indicate juror doubt about the validity of its decisions.

Mock trials are an essential tool in developing trial strategy for intellectual property litigators. Mock trials allow attorneys to develop effective case theory and themes so that the jury better understands the issues of a case and can participate fully in the jury process. With the high stakes involved in intellectual property litigation, the crucial decisions now are not whether a mock trial should be conducted, but how it should be conducted and when it should be conducted.