Putting Persuasion to Work in Highly Technical Cases: a Jury-Centered Approach

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As trial consultants, we don’t believe that high technology cases are too complex for jurors to understand. In fact, our experience conducting focus groups, mock juries and post-verdict interviews in many intellectual property cases over the last fifteen years leads us to quite the opposite conclusion. There is no case too difficult for jurors to understand if it is taught and presented correctly. The controversy over whether lay jurors can grasp highly complex material minimizes the importance of the presentation skills of trial attorneys. It is far easier to blame jurors and doubt their capacities than it is to candidly assess lawyers’ trial skills and grade them from the perspective of how well they simplify, teach and persuade. Unfortunately, since most cases do not proceed to jury trials, many intellectual property lawyers wind up more skilled in pretrial legal procedure and science than in the art of teaching and persuasion.

Identify Themes and Metaphors Early

To foster jury understanding, it is imperative in intellectual property cases for lawyers to reduce cases down into easily understood themes and metaphors before proceeding to the complex science. A theme is a shared social value that is woven into a story line to help jurors feel that a particular position is the morally correct choice. Besides being persuasive, a theme establishes the moral force and justness of one side over the other. Additionally, themes act as filters through which documents, evidence and other information can flow¾ providing a way to screen out extraneous and distracting information that has nothing to do with the persuasive task at hand.

A good example is provided in a case involving a battle over the manufacture of microchips. Our firm was retained to conduct post-verdict interviews that reconstructed each juror’s experience from the moment they entered the courtroom until the final verdict was delivered. The findings were fascinating. The interviews revealed that the jurors related strongly to the plaintiff’s theme, which was that the defendant used it’s property without paying "rent" in the form of royalties. The unfairness of taking something that does not belong to you was very persuasive to jurors. In fact, jurors used this theme as the framework through which they viewed the evidence presented at trial. Years later, these trial jurors may not remember a shred of the technology involved in the case but they will remember the trial was about a company taking more than they were entitled to in their license agreement.

A metaphor is a device or idea that organizes a complex issue into something easily understood and visualized by jurors. In a sense, a theme is a type of metaphor. An excellent example of the effectiveness of a metaphor is the black hole story. For years astrophysicists knew about a profound phenomenon called "Gravitationally Completely Collapsed Objects," but couldn’t get any public attention or research funding. Scientists knew that these dense objects in space could answer questions about how the universe began and how it might end. At one point a creative astronomer came up with the name "black hole" to describe this phenomenon. This metaphor captured the imagination of the world, which then led to science fiction books, movies, articles and ultimately, funding.

Developing effective metaphors in intellectual property cases can also produce extremely successful results. In another example from a hi-tech case, the plaintiff used a 3-D model in the shape of a box that acted as an icon representing the scope of their patent rights. This box sat on counsel table and was referred to regularly throughout trial. The argument was simple and clear: the defendant was permitted to use only the technology represented by the area of the box, and no more. This theme was repeated over and over while using the box as a metaphor for property rights, which the jury easily grasped¾ without ever having to understand the science involved in the technology itself.

In contrast, the defendant used complex drawings and diagrams to educate the jury. The graphics were accurate; however they were not simplified and distilled into a metaphor jurors could grasp. The plaintiff successfully communicated to the jurors that the defendant trespassed on its intellectual property rights by

claiming territory outside the boundaries of the box. The metaphorical device that was employed¾ creating a box that comprised by the original agreement¾ provided an easy concept for jurors to understand.

Tell a Story

People use stories to understand and make sense of the world. When used in trials, stories aid in the retention of ideas, facts and concepts; they are mnemonic devices. For example, 'Every Good Boy Does Fine,' is the way we are all taught to remember the line notes on the musical scale. If we were simply taught EGBDF, it would be much harder to remember. But, walk up to anyone on the street and say "every good boy does fine," and most people will immediately know you are talking about the musical scale.

Stories provide the listener the opportunity to visualize, experience and organize the information the trial lawyer is attempting to convey. Intellectual property cases, by their very nature, are arcane with complex technical evidence. The task of the trial attorney is to reduce this science into understandable elements, giving the story a heartbeat so that jurors can relate to its logic, consistency, themes, and characters, along with their motivations.

Learning is Stimulating

Most jurors enjoy learning complex material. Rather than boring jurors, when presented correctly, complex scientific evidence fascinates them. After all, the information presented enables them to understand the world they live in, whether it's how computers and software work, how genes are cloned or how drugs interact with the human body. We have found the side that best simplifies technical issues has the advantage at trial. Jurors attach to attorneys who teach well, looking to them for information and clarification about case issues.

Intellectual property lawyers and the experts they employ possess advanced academic degrees and practice in a very narrow universe. This creates an intellectual distance between them and the average juror so they don't often realize when jurors disconnect or become confused by the science they are teaching at trial. We counsel attorneys and experts to envision juries as a 12th grade high school class, and to present information from that perspective. One of the key skills used in teaching is the ability to reduce complex material into logical, sequential layers, moving from the easiest to the most difficult, using visual aids as much as possible.

Jurors have a difficult enough time grasping new, technical concepts without attorneys inserting arcane scientific and legal language into their presentations. In a misappropriation of trade secrets case involving proprietary source code for a highly customized relational database, focus groups conducted before trial revealed that the jurors did not understand the testimony of experts hired by counsel. These experts used terminology such as "opaque" and "transparent" to describe types of source code programming and user interface systems. The experts assumed they had simplified the concepts down to a level which jurors could easily understand. They were amazed, however, that the mock jurors had no idea what they were talking about and learned they had to simplify much more than they had originally believed. The experts were using wholly different meanings for 'opaque" and "transparent" than used in vernacular English, but assumed they were using commonly accepted definitions. The jurors, however, experienced it as technical jargon. Using language juries do not understand leaves gaps in their minds, rather than clear concepts. These gaps often come back to haunt when the jurors then fill the blanks with guesswork and erroneous beliefs, rather than actual fact.

The Adam & Eve Rule:
Start at the Very Beginning

We've learned from juror interviews and focus groups that lawyers often make the mistake of starting opening statements in what jurors consider to be the middle of the story, which to them is an artificial starting point, rather than at the natural beginning. Attorneys often begin opening statements at the point at which a dispute occurs, moving forward to explain the dispute to the jurors, whereas jurors consistently need them to provide a more global and historical perspective first. Beginning an explanation without providing its background is like trying to teach kindergartners calculus before they've learned to add and subtract.

The approach jurors need is what we call the ‘Adam & Eve Rule’. Simply start at the beginning of time and come forward. For example, hypothesize a patent infringement case involving the Wright Brothers and their invention. Rather than starting with the infringement, begin the opening statement earlier with a brief survey of mankind’s dream of flying leading up to Orville and Wilbur’s discovery of the aerodynamic principles underlying flight. By doing this you provide a wider perspective, told in story form, which segues directly to the narrower issues relevant to the case. In this way, you have engaged the jurors and related the case to their common experience.

Designing Intelligent Graphics

When faced with the daunting task of teaching lay people about the inner workings of semiconductors, recombinant DNA, or how pixels create the illusion of movement on a video screen, lawyers cannot underestimate the importance of visual aids. However, lawyers and scientists often design the graphics and demonstrative evidence used in intellectual property cases with no input from lay people. These graphics frequently skip over points deemed non-essential to the attorneys, but which are important to jurors to connect one piece of information to another. Graphics should be designed keeping the concept of the 12th grade class in mind at all times. In this way information will be simplified and stacked in a logical order. When designing graphics, rather than brainstorming in isolation, include non-technical people to get feedback on whether the graphics communicate effectively. By doing this, the attorney is forced to reframe and explain the principles involved until they make sense. While doing so, be aware of the analogies and metaphors used, because these often translate into excellent visuals.

Eliminating Risk: Testing Themes, Witnesses and Evidence

In any jury trial, attorneys assume a tremendous amount of risk. They do not know how the jury will vote, nor do they know how jurors will react to opening statements, themes, witnesses, analogies, demonstrative exhibits, or arguments. Nor, in intellectual property cases, do they know how well jurors will understand the scientific principles involved or the testimony of their expert witnesses. To prevail at trial, lawyers must eliminate these risks as much as possible. To do so means conducting focus groups to learn how typical jurors will react to the various elements of a case.

Focus groups are critical in intellectual property cases because it is imperative to make sure jurors can track the explanation of the technology involved. By testing the case on mock jurors, attorneys learn how to teach the case effectively and gain feedback on how jurors view case issues and exactly where they become confused or misguided. We have never conducted a focus group in an intellectual property case where jurors understood the lawyers are surprised, if not shocked, that the jurors do not understand their "simplified" presentation. There is often too much at stake to simply assume jurors will understand the language, illustrations, animation, expert witnesses or concepts without first pre-testing. After all, Proctor and Gamble would never think of venturing into the marketplace before identifying how to align its marketing approach with its target audience. In the same vein, it is extremely risky for intellectual property lawyers to go to trial without gaining insight into how ordinary people experience their case.

In many cases focus group jurors provide more effective analogies and metaphors than the ones attorneys suggest for the simple reason that it’s better to use jurors’ concepts, than the attorneys. For example, in a mock jury conducted in a recent case, we were attempting to teach the jurors to compare an infringing product to an existing patent rather than comparing product to product. The jurors, however, didn’t understand the attorney’s analogy. One of the mock jurors then offered a better analogy that involved a hypothetical patent for the first automobile. She explained that the patent claims covered an internal combustion engine, four wheels with a steering device and a cabin. It wouldn’t matter if one changed hood ornaments, added chrome or changed body styles, a car is a car is a car. Upon hearing this analogy, the other jurors understood the concept of comparing product to patent, rather than product to product. This analogy was then used successfully at trial.

In another focus group, the mock jurors devised an analogy to demonstrate the legal basis of holding a patent without developing the actual product. The jurors compared the issues to common real estate law that does not require someone who owns a parcel of land to construct a building on it. In fact, if anyone built on that parcel, they would have to pay rent for the use of the land. Once the jury concluded that

intellectual property rights were really no different than real property rights, they had a much easier time understanding the concepts involved.

Focus groups also provide useful feedback on witness credibility. In a recent case we played the videotape deposition testimony of two opposing witnesses, each of whom were founders of their respective companies. The lawsuit involved a license agreement negotiated years earlier. Although the case issues centered on patent infringement, it ultimately reduced down to a credibility contest between the two founders. One evening, many years before, the two engineers scratched out a set of ideas on a napkin during a dinner meeting at a restaurant. One claimed to have perfect recall of the dinner and the conversation held fifteen years earlier, while the other's memory was fuzzy. Who did the mock jurors believe? They believed the witness with the fuzzy recollection. These jurors said that they couldn't remember what they had for dinner two weeks ago, so how could they believe someone who had absolute recall of a restaurant conversation fifteen years ago.

In some cases focus group jurors come up with poignant tidbits that provide valuable jury profile information no one involved could have foreseen. In a case involving the history and evolution of word processing programs and their graphical user interfaces, the defendant company was being sued by an inventor who claimed that it had misappropriated proprietary information. To our surprise, we learned that jurors who had owned or used Apple and Macintosh computers automatically voted in favor of our client. This occurred because their Apple computers employed the very technology the plaintiff claimed he invented prior to the time he said he developed it. We identified Apple and Macintosh owners as excellent jurors and considered this an important criterion during jury selection.

A Jury-Centered Approach

Persuasion works best when attorneys understand from jurors what they really need. When given the opportunity jurors will always provide new insights and pivotal information on how to present, and ultimately prevail at trial. If the approach outlined above is followed, attorneys will find themselves much more aligned with how jurors think, how they are motivated, and how they make decisions. A greater chance of success at trial will follow.