Five Trial Tips for IP Lawyers

Trying an intellectual property dispute to a jury is no easy feat. No trial is.

But the inherent complexity of most intellectual property disputes (which generally includes more science and technicality than the layperson can grasp) means that IP lawyers must approach the process differently than lawyers litigating other kinds of matters. A lawyer trying a complex patent dispute to a jury is conducting a much different trial than a lawyer trying a medical malpractice or breach of contract case.

With that in mind, here are five tips for IP lawyers going to trial.

1. GET TO KNOW YOUR JURY

Given the complex nature of IP disputes, particularly patent disputes, it is vital that IP lawyers get to know the jurors they will be trying their cases to.

Of course, generalities about what a jury pool might look like will factor into the decision of where to file the case when such options are available. The jury pool in the Western District of Texas (covering Austin and San Antonio) looks different than the jury pool in the Northern District of California (covering Silicon Valley), which, in turn, looks different than the jury pool in the Eastern District of Missouri (covering St. Louis).

But IP lawyers must get to know their would-be jurors on a deeper level. While they can scope out potential jurors through public databases and social media, the most effective way is to ask them the right questions during *voir dire*.

Open-ended questions help lawyers get a feel for prospective jurors' general views on IP, who among them may be the leaders in the group and who understands technical concepts.

Asking a prospective juror about a time where someone else took credit for their work could elicit an answer that provides IP lawyers with important information about the kind of juror that person might be.

2. TRANSLATE WITHOUT PATRONIZING

IP disputes bring with them unique concepts, fact patterns and language that may be confusing to jurors. At trial, IP lawyers should break down complex ideas to help jurors understand, without making the jurors think lawyers are talking down to them.

Analogies, metaphors and graphics are tactics that IP lawyers should employ when explaining complex ideas. But the lawyer who oversimplifies things too much risks rubbing jurors the wrong way and turning them against the client.

In some cases, oversimplifying things could damage a lawyer's substantive legal strategy. This might happen if a lawyer has oversimplified a client's case to the point that jurors conclude a particular technology or intellectual property asset is not based on creativity or innovation.

3. RETAIN EXPERTS WHO KNOW HOW TO TEACH

In many trials, expert witnesses play a significant role in translating complex concepts into plain English. But not every expert can do so in a way that resonates with jurors.

In IP disputes particularly, expert witnesses who teach jurors about a particular aspect of the case are likely to be more effective at persuading jurors than their peers who simply talk at jurors about a given topic.

Fortunately for IP lawyers, there is a simple way to test experts' teaching abilities: be strategic when interviewing them. If a prospective expert witness is unable to clearly convey, in plain English, their expertise, the topics they've written about or researched and their qualifications regarding the issues in the lawyer's case, that expert is unlikely to connect with jurors at trial.

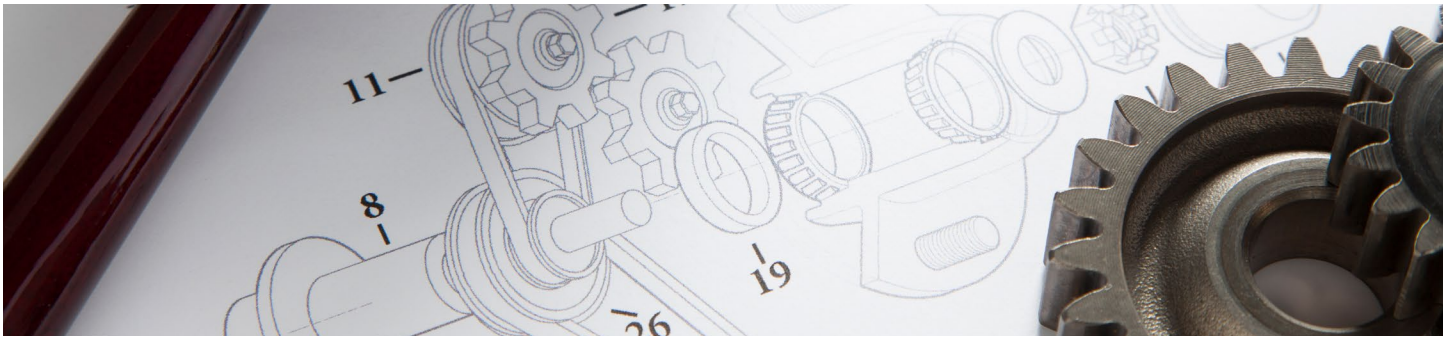
4. PERSUASIVE GRAPHICS ARE A TEAM EFFORT

Humans are visual creatures. In most complex litigation, but especially in IP disputes, images can play an outsized role in helping jurors understand complicated cases.

Because of this, lawyers, their expert(s) and their graphic design team must collaborate:

1. The expert has specialized knowledge about a particular aspect of a case.
2. The lawyer knows how to work that knowledge into the overall case.
3. The graphic designer knows how to display information in a way that is clear, instructive and memorable.

The role of a good designer—in-house or outsourced—cannot be understated. If an expert or a lawyer has sole responsibility for a demonstrative, it may lack the elements necessary for it to be persuasive. Given the time necessary to create and refine a persuasive demonstrative, the lawyer-expert-graphics team should begin collaborating as early as possible once it appears a trial is likely. Rushed demonstratives tend to look that way to a jury.



5. BRING FRESH EYES TO THE CASE

Lawyers tend to be unable to see the flaws in the cases they've been absorbed in for months or years. This is particularly true with IP disputes where familiarity with the material might cover up blemishes in the case that are visible to anyone outside of it.

To avoid this, IP lawyers should consider presenting their cases in mock trials, to focus groups or informally to colleagues. Presenting a case in one of these practice environments well before a trial, and having a frank discussion afterwards about winning (and losing) themes and arguments, can help lawyers sculpt a persuasive case for the actual trial.

TO PERSUADE JURORS, IP LAWYERS MUST CONNECT WITH THEM

To win at trial, IP lawyers must present their clients' cases in a way that connects with jurors and helps them grasp complex concepts. By putting into action the tips we've laid out above, IP lawyers can get started building the kinds of connections with jurors that are necessary to prevail in the courtroom.

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