

Navigating the Road to an Intellectual Property Verdict, Part II: Meeting the Jury Where They Are

Published in Inside the Minds: Litigation Strategies for Intellectual Property Cases, Aspatore Publishing, Boston, MA, 2010

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Note: This paper is a sequel to the paper presented at the 12th Annual Advanced Patent Law Institute, October 2007 entitled "Navigating the Road to an Intellectual Property Verdict: Planning, Execution and Things that Go Bump in the Night" which was subsequently published in April 2008 by the Defense Research Institute in For the Defense, vol. 50, No. 4, pp.10-15; pdf copies of this initial paper are available from the author via e-mail.

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T SEEMS THAT THE MORE PATENT CASES one watches, the more one is astonished by the sheer magnitude of information comprising the case, versus the meager percentage of that information that is actually retained and assimilated by jurors. Recent work by cognitive psychologists in the jury consulting field has pointed out what should have been obvious to many of us a long time ago: If jurors do not remember something, than the material is just as effective as though it had never been presented at all (Steve Tuholski, Ph. D., "When Facts Don't Fit, Some Jurors Make Up New Facts," National Law Journal, 2008, vol. 30, no.21). Jurors do not deliberate the case based on what is *presented*; rather, they deliberate the case based on what they remember, and what they remember are a few meager crumbs, a sliver, from the buffet served up by the lawyers.

The vast majority of the information in a case stays in the courtroom and never makes it to the deliberation room. The most effective trial strategy will focus on the information that jurors take with them, and what jurors take with them is entirely a function of memory and how it operates.

In business coaching and communication seminars, executives are told, "It's not what you say – it's what people hear." In litigation, the game is even more specialized: It's not what jurors hear, it's what they *retain* out of everything that they hear. What they retain is not only a subset of what they hear, but it is a subset that represents a mutated, contorted and transformed version of what they hear. So not only are jurors deliberating based on a tiny subset of the information, but the information that is utilized has been qualitatively altered into something different than what was actually presented, in many cases.

The first question then is what causes jurors to remember something? What factors regulate or govern the process of determining which information gets stored into memory versus which information gets left behind?

Maximizing Retention

Research is available from a variety of sources pointing to the importance of graphics in causing jurors to retain information more efficiently. Jurors retain only about 7% of the information that is presented verbally after a few days, but when information is presented graphically, so that there is visual input as well, the percentage of material that is retained approaches 50% over a three day period.

It is helpful to actually think of brain physiology to conceptualize the significance of what is going on here. Imagine a brain with an auditory cortex (temporal lobes – the portions on the side) and a visual cortex (occipital lobe – in the back) – when both of these areas are activated simultaneously as a result of contiguous auditory and visual input occurring at the same time, there is a better chance of material being "burned into" or "hard wired" into long term memory. When only auditory (verbal, oral) communication is utilized, only the temporal lobe is activated, and the chances that the information gets hard-wired into long term memory are drastically lessened.

In a recent mock trial group exercise, a simple question was asked of respondents: Of all of

the hours of explanations, evidence, argument, testimony, graphics – everything that was presented in the entire exercise throughout the whole day – what is it that you (the jurors, plural) remember? What comes to mind? Out of thirty-six respondents, *each and every one* of them recounted something that was presented *graphically (visually)* and *not one* of them mentioned something that was only presented orally (through auditory channels alone).

However, common sense tells us that just because something is presented visually does not necessarily mean it will be retained. Psychologists long ago have pointed out that memory is not like an objective recording device, such as a video camera or digital recorder; rather, memory functions are dependent on whether an event or object is in some way "meaningful" to jurors; that is, does it relate to their every day experiences, or does it "resonate" in some way with their values, or with what is important to their lives?

In some respects, memory works somewhat like the infant toy with the holes in the shapes of a star, square, triangle, rectangle, and circle, in which the infant must take the loose, three-dimensional objects and put them into the holes with the same shapes. If there is not already a cut-out hole in the surface, there is nothing into which the object can be placed. Retention in memory works in a similar fashion. Thus, jurors discard huge amounts of information in patent cases that is abstract, complex, or otherwise "inaccessible" based on their own set of life experiences because there is no pre-existing "hole" into which the trial information "fits."

Like the infant toy's different-shaped holes, in

memory we have "templates" based on our experiences and familiarity with the world. What is retained most readily in long-term memory are the incoming concepts that "fit" with those pre-existing experiences, or familiar concepts. *Meeting the jury where they are* entails the use of concepts and ideas that are meaningful to jurors in terms of their own everyday lives, so that the themes and arguments in the case will be retained and taken back to the deliberation room to actually wield influence over the verdict outcome.

What is Meaningful?

There are at least three substantive areas connected with patent cases that represent central, pivotal areas in these memory "templates": 1) hard work, stamina, frustration and the struggle to achieve something; 2) relationships with people; and 3) consumer behavior, including experience with products following the acts of shopping and purchasing them. Thus, issues connected with these types of experiences are stored efficiently into memory. These tendencies help explain why certain aspects of the case fact scenario in a patent case are well-remembered and consequently utilized in deliberations.

The "Eureka Moment"

First, with regard to hard work, stamina, and the struggle to achieve something, a tendency to gravitate toward and absorb information of this type explains why the inventorship story is always a highly salient portion of the patent case. Burning the midnight oil, sweat and toil, repeated frustrations ultimately followed by the "Eureka" moment are substantive story elements that jurors almost always remember. Under the adage that "to win you want to tell a better story than your opponent," the IP litigator is typically advised to tell and use any kind of "Eureka" story that he can. However, the manner in which the "Eureka" story influences the verdict outcome is an excellent illustration of the manner in which memory operates in a patent case.

If counsel is representing a plaintiff, the Eureka story is important to induce the perception of usefulness and to inoculate against charges of obviousness or anticipation (i.e., if it took so much trial and error, how could it be obvious or trivial)? If counsel is on the defense, the story can be effectively utilized as the centerpiece of the infringement defense in showing why the accused device is something that was independently developed and conceived (i.e., what we are using was not "stolen" but rather comes from *our own* "Eureka moment"). Either way, jurors are always "in tune" with the hard work and sweat expended by individual workers, since it fits in so well with life experiences and pre-existing memory templates. These stories exert powerful influence in deliberations because they are stored into longterm memory so efficiently.

Personal Interrelationships

In the realm of relationships with people, the portions of the case fact scenario that pertain to applying for the patent, and interacting with the patent office to obtain approval, resonate with jurors and are stored into memory quite readily. Defense counsel in recent patent cases are starting to tell the entire "application/ denial/ modification/ 2nd application/ 2nd denial/ 3rd modification/ 3rd application/ final approval" cycle of the prospective patentee's relationship with the patent office as a means to narrow the perceived scope of the patent at issue. In implementing the basic defense tactic against infringement of narrowing the metes and bounds of the patent, the interaction with the patent examiner during the application process can play a pivotal role.

From a jury psychology perspective, and particularly in terms of the manner in which memory operates, the most effective means to narrow the perceived scope of the patent is not an exposition of the technical parameters of the invention. More compelling (and more readily recalled in memory) is the story of going back to the USPTO again and again, and being told to make it smaller and smaller - in other words, the story of dealing with the patent examiner and being told, "Sorry, someone else got there first; you get a thinner slice of the pie." These types of application and denial stories fit right in to experiences of applying for jobs; attempting to get into a sold out theater; or any number of similar personal experiences. As a result, jurors remember them far more efficiently than the arcane description of technical characteristics of the patented invention.

Licensing agreements are also well-retained, and heavily utilized in deliberations for the same reasons. A patent that has many licensing agreements is seen as more likely to be valid, and more likely to have been infringed, compared to other patents without licensing agreements, even when the merits of the other patents are comparable. These results are quite analogous to the psychological research showing that popular people are judged to be more competent than unpopular people (even when they aren't).

Jurors frequently make judgments about a patent's "popularity" based on the nature and extent of the licensing agreements that have been formed with the patent. These judgments of a patent's "popularity" then strongly influence perceived validity and infringement of the patent during deliberations – typically more strongly than do the technical merits of the invention itself. Invalidity arguments against "popular" patents face a stiff uphill battle, while infringement arguments by the plaintiff take on added weight and credibility.

From a psychological perspective, being wanted by other people is one of the most important things that can happen in life. Thus, when a patent is wanted by others, it makes things very difficult for the defense.

Consumer Behavior

The third domain in which memory strongly affects the outcome of the patent case is in the transference of experiences with familiar consumer products onto the case fact scenario. In other words, products with which jurors have direct, hands-on experience form the "holes" in the infant toy discussed previously, and jurors try to fit the patented invention and/ or the accused device into those "holes" in memorizing the case issues and claims. When the products at issue are devices like contact lenses; tennis shoe cushions; digital video equipment; automotive devices; internet websites; and other devices with which the general public has direct, hands-on experience, the litigator who can "play" to the experience of the lay consumer in his case themes and arguments will have a definite tactical advantage.

In a contact lens case tried recently, the plaintiff's patented device could not be put into the stream of commerce because testing showed that people who used it had the resulting experience of painful, red and tearing eyes. Pre-trial research on favorable versus unfavorable juror typologies showed that contact lens users were almost invariably defense-oriented, since they railed against the testing results from embodiments of the patented device showing extreme discomfort in the users – discomfort which they, at some point, had experienced with an inferior product. The real life experiences with comparable products overrode all of the other substantive issues in the case with these jurors and drove their verdicts.

A large stream of mock trial test results in IP litigation involving digital recording devices; stereo and other entertainment media; flat screen monitors; and similar technology has shown that jurors are apt to use their perceived judgment of a device's visual or auditory output in judging similarity between products, and thus infringement. (While it is recognized that the proper grounds for finding infringement is between the patent claims and the accused device, jurors nevertheless frequently reduce the patent to some type of embodiment and compare the accused device to that embodiment.) In cases with these types of entertainment media products, pre-trial research shows that many jurors look to see if the accused device is producing a sound or image like that of the patented technology.

When the visual or auditory output of the accused device and the patented technology are indistinguishable, the resulting judgment of infringement becomes far more likely. On the contrary, building the embodiment of the patented device and showing that it produces a perceived visual or acoustical output that is noticeably different than the accused device is a strong tactic for inducing a verdict of non-infringement. In either case, it is the memory of a product-related experience that forms the template in jurors' memories leading to judgments of the case that are ultimately outcome determinative.

Conclusions

IP litigation is somewhat unique in that exceptionally complicated technical issues are typically intertwined with substantive matters connected with inventorship; product development, testing, and refinement; competition in the market place; licensing agreements; and the very real human elements and life experiences of the players involved in the situations that characterize the dispute. The extreme diversity and complexity of the case fact scenarios in IP litigation means that there are inevitably stories of various types involving human relationships or other subjectively "accessible" matters of interest that surface as the case unfolds.

As a result, there are often portions or elements of virtually every patent case that have the potential to "resonate" and become efficiently stored into memory, based on the particular human experiences that arise as salient in the case. In short, besides the three principle content domains described above, there are often unpredictable ones, or ones that are idiosyncratic to the case, that come to dominate in memory because some type of "human element" becomes triggered in the case at some point in the fact scenario.

For example, we worked on a series of 1988-1989 patent cases filed by Mr. Kearns as an individual inventor against several automotive companies (this story has been released as a major motion picture). After working as a contractor for one of the companies in the capacity of developing a windshield wiper delay system, the company dismissed him and started trying to implement the wiper delay technology on its own. However, the company technicians encountered a glitch and did not know how to solve it. So they re-hired Kearns and then, once they had it working, dismissed him again. The plaintiff's presentation then recounted the story of the company trying to use the patented technology by, in essence, asking him later, "Wait - how do you do that again?" and then shunning him afterward. These types of stories completely "wash out" other technical aspects of the case in jurors' memories. In the pre-trial research on this case, jurors did not even care about the technical aspects of the patent - the results were so bad for the defendant that the defendant had to settle as quickly as possible.

In addition to the three substantive content domains listed previously that are readily stored into memory – 1) achievement stories (the Eureka moment); 2) human relationships; and 3) consumer product experiences – the potential for various, unexpected types of salient events or issues that are "accessible" or that "resonate" with jurors and become stored into memory are in principle too diverse and unpredictable to be listed in an exhaustive and definitive manner on an *a priori* basis. The litigator faced with the task of determining which elements of the case fact scenario will become memorable for jurors is best prepared by performing a "reality check" at the jury level with some type of jury research activity – not before going to trial, but *before going to mediation*, so that the true strengths and vulnerabilities in the case are revealed in advance.

We have listed two separate means to infuse and implant important issues into memory: first, through visual means utilizing graphics; and second, by tying the case themes and arguments into substantive content domains that are "meaningful," as exemplified by the three categories listed previously. Of course, these two approaches can be combined for even greater impact. In other words, identify the substantive areas that resonate with jurors, and then use visual support (graphics) to drive them home for maximal persuasiveness.

The graphics shown here illustrate a case in point. The sequence of illustrations depicts the prospective patentee approaching the patent office with his idea. Subsequent pictures show him being rejected, not once, but twice, before his application is finally approved. This is a process about which jurors know absolutely nothing in their naïve state, but which holds substantial tactical potential for defendants in demonstrating the narrowing of the scope of a patent. In other words, as described previously, a technical exposition of how and why the metes and







7



bounds of a patent are limited is far less memorable and convincing than the experience of a human being as rejected on two different occasions in his quest for accomplishment. As simplistic as these graphics appear to be, their tactical significance can be invaluable. And of course the present example is just one of many that could be used to make the point. As stated earlier, the considerable number of different events or nuances comprising the fact scenario in any given case may present many different possibilities depending on what has transpired in the events leading up to the dispute.

The absolutely pivotal task of dominating the visual side of the trial is a topic that has been dealt with in many fine publications elsewhere, and the breadth of this topic is beyond the scope of the present treatise. It is important to note, however, that the production of effective demonstrative exhibits is not something that should be relegated to brainstorming sessions by the trial team; rather, the effectiveness of graphics and exhibits should be tested with a mock jury panel, using the results as an empirical basis for augmenting and refining the graphics according to what *they* (mock jurors) say that *they* need to see in order to assimilate case issues in a manner that gives the maximal tactical advantage to your client.

You win by out-preparing the other side. The way to gain an edge in the crucial fight for the minds of the jury is to captivate the jury visually, with exhibits that are developed through an *iterative* process. In other words, graphics are created, then tested, then re-created until the trial team has what it needs to convince the jury. In today's "trial by hurry" atmosphere, it is still not uncommon to see trial lawyers sketching concepts with felt pens on flip charts, justifying this practice with "I can communicate better with the jury this way." Alternatively, impossibly complex charts by experts are used as the expert created them, with meager consideration for whether the jury can comprehend and retain the crucial information.

It is important to remember that if the jury does not retain the information and bring it back to the deliberation room in their memories, then the communication is just as effective as if it had never been presented at all.

With the typical damage awards that are at stake these days in IP cases – often tens or hundreds of millions of dollars – the time simply must be set aside to get the graphics right, based on what jurors report as meaningful to them in pre-trial research.

About the Author



Dr. Speckart received his Ph.D. in Psychology from UCLA in 1984 with a specialization in personality measurement. He has been active in the jury consulting field since 1983, and has conducted over 1200 mock trials and focus groups in pre-trial research for numerous types of litigation. Dr. Speckart

has worked with litigators in over 200 jury selections, beginning with Dalkon Shields cases in 1983, the Agent Orange litigation in 1984, and *Exxon Valdez* litigation in 1994. His area of emphasis has shifted to patent litigation over the past decade as a result of increased demand for assistance in this complex area of jury psychology.



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