AMERICAN SOCIETY OF TRIAL CONSULTANTS
The Jury EXPERT
The Art and Science of Litigation Advocacy
SUBSCRIBE via RSS
SUBSCRIBE via Email
A BiMonthly E-Journal
Excerpt from Volume 24, Issue 2, March 2012

Intellectual Property Cases: Ten Lessons From Pre-Trial Research

BY ELLEN BRICKMAN AND JULIE BLACKMAN

Ellen Brickman, PhD is a social psychologist and a Director at DOAR Litigation Consulting in New York, NY. She designs and conducts pre-trial research and consults to attorneys on trial strategy. She specializes in complex litigation, in both criminal and civil cases. You can read more about her work at www.doar.com

Julie Blackman, PhD is a Vice President and Managing Director at DOAR Litigation Consulting (www.doar.com). Her specialty areas include matters of intellectual property and white-collar crime cases. She is a social psychologist who is particularly interested in the interface between the courtroom and the Internet. DOAR is based in Long Island, NY, and has an office in midtown Manhattan.

Intellectual property cases pose special challenges – but also special opportunities – for both attorneys and jurors. The material is typically complex, and often completely new to the jurors. Attorneys and witnesses are called upon to teach this material in a way that is clear, engaging and persuasive. While this can be daunting, jurors' lack of familiarity with the material also provides an opportunity to shape their attitudes without having to overcome strong pre-existing beliefs about the topics at hand.

In over 20 years of conducting pre-trial research in intellectual property cases, we have seen many commonalities in how mock jurors and focus group respondents across the country think about such cases. We have learned a great deal from these research activities, and share some of those lessons with you here.

1. Context Matters to Jurors

In mock trials and other pre-trial research, mock jurors often focus on how the actions of each party fit into historical and industry context. While jurors are supposed to decide a case based on the facts presented to them, the most common questions that we hear have to do with context: – What were other companies doing at the same time? How have the parties dealt with other companies, compared to how they are dealing with each other? Did others take licenses and, if so, how much did they pay for them? Any contextual information you can present to jurors that will bolster your case is likely to be very powerful.

2. A Picture Is Worth a Thousand Words

In intellectual property cases – perhaps more than most others – demonstratives can have a tremendous impact. Mock jurors cite demonstratives as helping them understand the technology at hand in ways that words alone could not. People react most positively to demonstratives that are uncluttered, well-labeled, and accompanied by a simple and clear narrative.

3. Simple Clear Ideas, Repeated Often, Will Always Work in Your Favor

Attorneys sometimes worry that they are oversimplifying their case, or repeating key themes or points too often. In intellectual property cases, over-simplification is rarely a problem. The material is new, jurors are learning it primarily by ear (which makes it harder to take in), and it is complex. The more you can simplify it, the better jurors will understand your case. And the more often they hear your themes, the better they will understand and like them.

Along the same lines, simple analogies work well, both in presenting your themes and in teaching your scientific material. While jurors may have a hard time understanding complex scientific and technical details, they latch on to simple themes around issues of fairness, as well as simple analogies that present parallels from daily life.

4. Arguments and Themes: Quality Beats Quantity

A few powerful arguments can carry the day. While it is sometimes tempting to use every possible argument in your case, jurors may perceive this as a strategy of desperation. We have heard mock jurors suggest that one party is "throwing out everything they have" to camouflage the weakness of its case. Jurors are likely to respond better to a few well-chosen strong arguments than to a myriad of weaker ones. It is also useful to remember that even a complex intellectual property case should revolve around no more than five key themes. These themes will provide an organizing rubric for jurors and allow them to understand and remember the details of the case within this framework.

5. Jurors Take the Burden of Proof Seriously

Frequently, we hear mock jurors say, "I believe the patent was infringed, but I don't think they proved it." Even in mock trials – and presumably, far more in actual trials – jurors attend carefully to the burdens of proof and hold each party to its burden. They are able to distinguish between the "preponderance of the evidence" and the "clear and convincing evidence" standards and to apply them correctly and appropriately.

6. The Idea of Patent Protection Is Viewed Favorably

Most mock jurors express positive sentiments about the general concept of patent protection. Typically, very strong majorities (75% or more) agree that patents are important for protecting inventors' rights and encouraging new inventions. Similarly, very high numbers disagree that patents are old-fashioned monopolies. To the extent that we hear anti-patent sentiment, it tends to focus on the pharmaceutical industry. Some, though not most, people feel that drug companies have a moral and social responsibility to make new drugs available and keep costs down. They contrast this industry with other industries, where they do not see a moral imperative to share intellectual property.

7. The Presumption of Validity Is Powerful

Most mock jurors and other research participants rely on the presumption of validity. People generally assume that the Patent and Trademark Office has conducted a careful review of the patent application, and give much weight to this review, though they acknowledge the possibility that the PTO can "get it wrong."

In some of our research activities, participants have focused on the fact that the patent is a government-issued document, and have even suggested that such a document cannot be invalidated by ordinary citizens.

8. Jurors Expect Professional Behavior

While mock jurors (and presumably, real jurors) know that a trial is an adversarial situation, they expect attorneys and witnesses to conduct themselves appropriately and professionally. Personal attacks or "digs" at opposing counsel or witnesses are likely to backfire; jurors are likely to hold them against whoever is advancing them.

9. Jurors Look for Ethical Behavior, But Accept "Business Realities" in a Competitive Market

At the same time that jurors in intellectual property cases are comparing technical specifications of multiple products, they are also focusing on questions of how fairly or unfairly each party behaved in their dealings with each other. Especially when the technology is unfamiliar and/or difficult to understand, issues of fairness can predominate in jury deliberations.

Jurors look to businesses to be fair and ethical in their dealings. However, we have observed that mock jurors are also quite pragmatic about each company's drive to advance its own self-interest, particularly in highly competitive marketplaces. Actions that may seem problematic at first glance – such as your client continuing to do business with the company that it has just sued – are often understood by mock jurors as simply being "business realities." Of course, this pragmatism will only go so far; once jurors perceive a business as having crossed an ethical line, they are considerably less forgiving.

10. Nothing Beats a "Dry Run" for Enhanced Trial Preparation

One of the most important lessons that we have learned from pre-trial research in intellectual property cases is how valuable a tool such research can be. Focus groups and mock trials, in particular, allow attorneys to test both their themes and their strategies for teaching the technology at issue. We have seen attorneys at trial adopt analogies or explanations offered by research participants, often to great effect. Listening to mock jurors explain technologies to each other opens up new ways of explaining your complex case to your jury. Listening to mock jurors grapple with new material, deliberate on the arguments, and evaluate your demonstratives is the next best thing to getting a "dry run" with your actual jurors before trial.

