

**Navigating the Patent Litigation Maze:
Helping Jurors Find their Way**

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Experienced litigators know that persuading jurors that your side should win is a very difficult task and involves a complex persuasion process. Why is it so complicated? The message must be the *right* message and must be communicated at the right *level*, and of course, the receiver of the message, the juror, must have the required openness, as well as the tools to use the message that is delivered. Have you made it interesting? Will the jurors care? This paper seeks to explain why the process is anything but simple, and how understanding the how jurors' view the patent litigation maze can help you to persuade them that your client should win.

We all know that the “receiver” of the message is never without his or her pre-dispositions, that is, he or she usually comes to the trial with a pre-packaged set of beliefs about everything from the “right to sue” to the “over-litigiousness of society.” These beliefs also apply to the more specific experiences with the subject matter to be presented, be it the use of a widget (and the injury it caused) to the fairness of denying someone a promotion, to how the Patent Office should work and how businesses should compete.

Beyond the complexity of the material, being a juror involves dynamics that those who are comfortable with the legal world often don't recognize. There is a growing body

¹ From the ALI-ABA course “Trial of a Patent Case,” Chicago (2001)

of literature which suggests that jurors consider jury service stressful; they are put in a situation in which they do not know the rules, are not given all the information they need, and are forced to spend days with strangers, both within the jury room and in the courtroom. It is the rare person who enjoys being put in the position of arbiter in a hotly-debated argument. Most people shy away from conflict, and want to avoid the emotions involved in situations where people do not agree. Even though there is some intrigue about figuring out who is right, and the situation is highly formalized in the courtroom in order to prevent shows of emotion or sympathy, this process is stressful. Further, being a student is not a comfortable position for the majority of citizens who are likely to serve on a jury in a complex trial. The last time many of them were students, they were in high school or in technical school, and as you know, not everyone remembers those experiences fondly. Lastly, individual jurors' dynamics are part of a group of jurors' dynamics. They often know that they are ill-equipped to decide a complex case, and they all have personalities when they come into the jury room. As a result, you have the breeding ground for confusion and vulnerability to "leaders" who emerge, but who may have limited talent or background for the job.

The patent attorney must be attuned to these processes and help jurors to tune in, and not tune out, to your message. It sounds basic, but the jury that you empanel must have at least a few jurors who are willing to listen to the arguments and evidence presented. Second, the arguments and evidence must be clearly articulated such that the listener can understand the point being made. Third, these points must be consistent with each juror's life experiences and beliefs or the jurors will disregard them. Lastly, at least some of the jurors must feel sufficiently comfortable with these arguments that they can

repeat them in the jury room and use them to persuade their fellow jurors to reach the right conclusion. This basic structure applies in any type of jury trial.

In a patent dispute, the complexity of the subject matter is exponentially greater than in most other types of jury trials. Given this increased complexity, the patent litigator is usually faced with a jury comprised of individuals who, as noted above, have neither the training, nor any particular interest, in the subject matter involved. The prospective jurors come to the courthouse without any expectation that their potential jury service could include an education in such topics. If the patent litigator is to be an effective teacher to his/her “students,” there are a number of factors to consider and steps that can be taken to overcome their boredom, answer their questions, and persuade them that you should indeed win.

Having conducted attitude research involving hundreds of simulated and actual trial jurors in dozens of patent cases, there are a number of issues that we routinely see that impact a juror’s assessment of a patent case. This article will discuss some of the most common beliefs and perceptions held by patent jurors and present some strategies to increase a patent litigator’s effectiveness. The following outlines the starting point for understanding jurors’ perceptions.

Most jurors have pre-existing beliefs about patents and the patent office.

- ***The PTO conducts an independent investigation prior to granting a patent.***

Most jurors believe that the PTO is in charge of checking on the prior art that is submitted, as well as researching other relevant prior art. The assumption is that the Patent Examiners know the applicant’s business as well as the

applicant, and that any relevant products or patents would be something of which he or she would be aware.

- **Only the PTO should be able to overturn a patent.** Jurors reason, “Why would I presume that I know more about this process than the PTO, to overturn what they already given a stamp or approval? Surely they know more about this than I do.” We often call it the “Power of the Patent Office,” but quite frequently jurors will put examiners on a “pedestal” and assume that they could do no wrong in either the issuance or the review of a particular patent. They are also not clear that they, as jurors, have a legal right to make such a determination. This perception is often due to the fact that they don’t understand the patent application process is non-adversarial, and that other parties cannot challenge the patent until after it is issued.
- **Inventors need to be protected from unscrupulous or greedy copiers.** Jurors picture that inventors are making inventions in their basements, and that there are copiers out there ready to steal someone’s hard-won prize. They tend to view the inventor, even if the patent has been signed over to a company, as an individual fighting against a large corporation. They see those accused of stealing a patent as they would a criminal defendant, and we know from research, that despite admonitions to the contrary, most jurors assume the defendant is guilty before the evidence is presented.
- **Jurors want to see patents used fairly.** Jurors want to see patents used to protect the little guy. Indeed, in these cases, size often matters--a big corporation going after a little inventor, or a little inventor (or “littler”

inventor) going after a big corporation. But, they also don't want to see patents exploited. Take the situation in this case, in which Intergore has not created its own product from the patent. Jurors could dislike that lack of initiative, particularly in the face of the present litigation, and conclude that Intergore is greedy, and was just waiting for an opportunity to sue someone.

- **The interests of the consumer are very important.** The first thing jurors will often ask is “How will this affect me as a consumer of this type of product—will it increase the cost?” They are concerned that there be competition in the marketplace, but they have no idea how a patent helps to increase or decrease competition. Availability and cost to the consumer is always an important consideration.
- **Patents should not be used to block innovation or progress.** Patents should not, in jurors minds, be used as a way of keeping innovation out of the marketplace. For example, in health product cases, jurors will focus on the effect an infringement finding will have on others who are interested in developing new products, not just on the current “infringer.” In this case, jurors are likely to believe that Intergore should not be able to keep others from creating innovative software for the Internet by suing for infringement. However, jurors will need to decide if Intergore can “get its share” of the proceeds from any sales Mozilla made, and will that keep Mozilla from being able continue in its business. The idea that an infringement decision could put anyone out of business is a very important determination.

- **Jurors will use case-specific knowledge to make the decision.** Jurors will also use case-specific knowledge or experience, such as computer or Internet experience in this case, to make their decision. For example, jurors will evaluate the present case in terms of their understanding of web addresses, their experience accessing various websites, and their analysis of the innovation of various software programs and browsers available for their use. The level of the jurors' general experience with the Internet and computers in this venue, and the accuracy of their perceived knowledge (that is, the knowledge that they *think* they have) will be important to know in advance of the trial.

Beyond their reactions to patents and the PTO, jurors often have reactions to claims of infringement and to claims of invalidity. The following are some of our common findings.

Jurors' typical reactions to claims of infringement.

- **Comparisons between commercial embodiments are easier to understand and more interesting than comparing the patent to the accused device.** Jurors often think they need to see the patent document to do comparisons, and often they do find it interesting to see the ribbon and the actual document. However, when they see the detail in the patent, they often "shut down." Jurors find it much easier to see, hear, or touch a commercial product and compare that product to the accused product or device. They generally do not understand that this is not the proper and legal analysis that they are supposed to make. Process patents are harder to demonstrate, but creative animations or

graphics can assist the juror in actually seeing how a device works in the context of an actual product.

- **If the accused device is covered by its own patent(s), the jurors will be more reluctant to find infringement.** Jurors are very curious about whether the accused device has its own patent. A patent tends to give credibility to the “difference” or “uniqueness” of this accused device (again based on the fact that the PTO has granted a patent and presumably done an exhaustive search of the prior art.) Jurors are also confused by the existence of another patent, that is, they wonder how it is possible that this product could infringe and still get its own patent.
- **A strong independent development story can mean that there is an absence of infringement.** Jurors are open to hearing that two parties could be developing the same type of product at the same time. They believe there is an inherent unfairness in one party “getting to the steps of the Patent Office an hour before the other guy.” (Interestingly, most jurors think that it is a “first to apply” system, rather than a “first to invent” system.) If it appears that the accused infringer did not know about the original product, this can further support the independent development story. As a caution, however, some jurors have said, “It doesn’t matter if they knew about it, the other party got the patent first, and they (the infringer) got caught.” The believability of independent development depends heavily on the timeline and other factors in the case.

- **Willful infringement is difficult to prove unless there are “smoking gun” documents.** Unless there is direct evidence of stealing of diagrams, “sharing” employees, corresponding about the “other guy’s product” or reverse engineering a product and then creating a similar product, it is difficult to prove willful infringement. Jurors often assume that, as above, two companies could be developing the same product at the same time.
- **If the accused product is better, it must also be different.** Simply saying that the accused device is better is often not enough. Jurors want to know *how* it is different than the original product, and in concrete terms (what’s new in the formula, or how does that particular part of the equipment work differently). Preferably this difference is something physical, which is what makes process patents difficult to explain, but again it is the demonstration of the difference that is important.

When it comes to considering invalidity arguments, here are some common jurors’ beliefs and attitudes.

Jurors hold beliefs that restrict their ability to find a patent invalid.

- **There has to be a very compelling reason to take away the rights of an inventor.** Jurors do find patents invalid periodically, but they must have very compelling reasons since they consider this to be similar to taking away someone’s “pride and joy.” An invention seems like a very important and special “award” to jurors, and they do not want to take that away from someone, nor do they want them to lose the financial value that invention has.

- **If the prior art was properly disclosed to the PTO, than the patent must be valid.** Jurors believe that the PTO is very powerful and knowledgeable, and as such, if the prior art was disclosed, then the likelihood is small that the jury will “overturn” the patent examiner’s decision. If on the other hand, the defendant can prove that the prior art was not offered to the Patent Office, and that this omission was deliberate, the jury will likely consider this deceit in their deliberations. In the case of the defendant trying to show that its own patent is valid, if the patent examiner considered the accuser’s patent and still issued the new patent, the defendant’s patent is also likely to be considered valid (and non-infringing).
- **If the inventor was the only one doing this type of work at the time, the invention must not be obvious.** If the inventor was truly “first,” or the inventor was the only one developing this type of product at the time, then jurors will be reluctant to find that the invention was obvious. “Obviousness” is a very confusing term for jurors, and they generally rely on their common sense definition, that is, if no one else had thought of it, then it must not have been obvious. If other inventors were working on similar concepts at the same time, then the invention could have been obvious. Though validity arguments were not discussed in the Intergore matter, the idea that the inventor had little other prior art to examine in this area, and was one of only a few people working on such a concept would have assisted Intergore’s validity arguments.

As a result of the above, here are some recommendations for your next patent trial.

How to effectively communicate with jurors in a patent case.

- **Understand jurors' pre-existing feelings, beliefs and attitudes.** Remember that jurors will bring to the trial general feelings about the trial process, general beliefs about the PTO and patents, attitudes toward infringement and invalidity issues, and specific knowledge about the subject matter. You must understand how the jurors in this venue will likely receive your message. In particular, you should understand how jurors are likely to view this type of case. For example, in this case the attorneys needed to know about how jurors might approach computer and Internet cases and to conduct searches to assess who uses the internet and why. They might also have conducted research on the issues, such as mock jurors' familiarity with software packages, websites, surfing the web and knowledge of recent lawsuits involving Internet or e-businesses.
- **Simplify the language and use it consistently.** Choose a couple of key words or phrases that represent why your particular product is infringed or is not infringing. And remember to keep "legalese" to a minimum in your general discussion. A primer on patent terminology presented by the judge as a preliminary instruction can be very helpful to jurors, as can repeating that primer by the attorney in opening statement. Another important consideration is a glossary which explains general patent concepts and/or specific definitions of the product or device.

- **Avoid wasting time on extraneous information.** Too much detail often hurts your presentation, and jurors get bored and tune out. What does someone really need to understand about your device to help them decide that the other party's product is infringing? What do they need to know to help them decide it is a different and unique contribution and thus does not infringe?
- **Use analogies (carefully) to help illustrate your message.** Jurors will create analogies if you don't offer one, so consider translating the information you are presenting into an everyday analogy. However, be aware that the other side can turn your analogy to their advantage by showing it is flawed, so test your analogies out on "regular" people before you trust that it is iron-clad.
- **Give the jurors a context for evaluating the evidence.** The history of the companies and the individual inventor(s) is very important to jurors. Explain the importance of the invention to the field, and don't forget to explain its importance for consumers. The timeline of events is also another important context. But, most importantly, within this historical and chronological framework, you need to describe the motives of the parties at the time of the invention, at the time that the patent was filed (or the alleged infringing product came out) and at the time that the lawsuit was filed.
- **Educate the jurors about the PTO, and the necessary narrowness of patents.** It is important to explain what patents really afford an inventor, and to describe the narrowness of the inventions, so that they will understand how innovation can still occur and how more than one patent can exist on similar

products. Explaining claim language and how to assess infringement based on specific claims is very important.

- **Give jurors permission to find invalidity.** When proving invalidity, teach the jurors why, in general, it is appropriate for a jury to find a patent claim invalid and, in particular, why they should find this claim invalid. Jurors don't feel they have permission to invalidate a patent—you need to give it to them. Explain the law regarding invalidity, and show that it is what their right and their job in a patent case. Remember that showing that there was an error at the PTO is an uphill battle, but can be accomplished if there are marker or required events (reporting prior art) that have not occurred. Clarify the responsibility of the patent applicant, and remind jurors that the Patent Examiner is limited by what the applicant offers.
- **Use transitional statements to help jurors navigate among the issues.** Let jurors know when you are talking about infringement versus invalidity issues. If possible, ask the court to consider transitional summaries as a way of assisting jurors to understand the complexity of multi-patent cases in which there are both infringement and invalidity claims being offered by both sides.
- **Illustrate and list the differences (if accused) or similarities (if patent holder).** Remember every patent trial translates to one basic jury issue, no matter whether the infringement is literal or by the Doctrine of Equivalents: Is the accused product or process the same as the patent holder's product or process? Does it look the same? Does it act the same? Does it accomplish the same result? Specifically, how are the two products the same (or

different)? It is often helpful to show how the claims in the suit have been infringed or not infringed. But because of the complexity of claim language, in many cases a checklist in common language (with matching pictures) is the best way to show similarities or differences and allow the jurors to decide if the products are the same.

- **Test potential juror (or judge) reaction to your case story.** Remember that testing your case through a mock trial, or a mock bench trial, can be the best insurance against surprise reactions to your case story. These processes are well worth the time and effort because they allow you to make your arguments with confidence and to be able to assess your best case strategy.

In summary, jurors need special assistance to navigate the patent litigation maze. Our experience suggests that recognizing some common attitudes and beliefs regarding the Patent Office, infringement and invalidity issues, and case-specific issues, as well as recognizing juror stress in complex cases, you can help jurors to navigate that maze and help them to find for your client.

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