
Tools of the Trade

By Olga Logan

Unlocking the Toolbox of Resources for Medical Malpractice Cases

Jurors are less like prodigies thirsty for mentoring and more like summer school students making up for a failed course. They have short attention spans and are easily distracted, unmotivated, and determined to do the least work necessary to pass the final test so they can get back outside to their normal lives. They tend to be passive information gatherers, visual learners, and to behave in ways that are modified by social and cultural norms. When there are gaps in their understanding, they fill them with what they already know. At the end of the day, jurors do not end up peers of the experts.

One reason for this is that jurors do not process information deductively (by synthesizing facts to reach a conclusion). Rather, they look at the big picture and seek a story line inductively. They achieve closure first, then fit ensuing facts into their story. Despite judges' instructions and lawyers' reliance on jurors to suspend judgment until the end of the trial, research has shown that jurors develop their opinion early in the trial based on scant information, relying largely on impressions and preconceptions.

Hence, in patent cases there is frequently a mismatch between the way lawyers present their case and the way jurors reach a verdict. While hairsplitting between experts draws significant attention from trial teams, it tends to be the least accessible, salient or useful information to jurors. Thus, whatever jurors learn about a case in voir dire and opening statements is critical, as is their need for the information to be presented in a well-organized story fashion.

Although there has been much discussion (and relatively little empirical research) on this topic, the basic question remains: Do jurors have the capacity to participate in a complex case such as a patent case? Many argue that the right to a jury trial in patent cases should be abolished (thus the progeny of *Markman*). This step might make sense if:

- 1) Trial judges can rationally make such assessments (though judges, too, may be unprepared to deal with such complexity); and
- 2) Juror deficiencies cannot be ameliorated by reasonable procedural innovations.

Research shows that jurors are uncomfortable deciding patent cases, and that the best strategies for coping (in patent

cases and complex cases generally) are those that reduce complexity rather than focus on the fact finder.

These points are especially worth noting, for we must face the reality that jurors serve as the fact finders. Hence, the issue in patent cases is not whether a jury is competent in its fact finding, but rather whether the lawyers can perform their roles properly. Through the effective use of tools readily available to attorneys, jurors can be adequately educated and informed on the issues in patent cases, and attorneys versed in jury persuasion (and its obstacles) can better serve their clients.

Battles of the Mind

Not only are trial attorneys under pressure, but so are jurors. Jurors are asked to make sense of conflicting stories without the benefit of understanding the underlying concepts. For jurors, a courtroom is unknown territory (an authoritarian, highly procedural setting). Technical complexities of patent cases are further complicated by legal complexities. The use of concepts and language unfamiliar to jurors (infringement, invalidity, prior art, obviousness, anticipation, embodiment, etc.) adds to their uneasiness.

Faced with such unknowns, jurors tend to default to what they already know. This emphasizes the lack of control most trial lawyers have over jury decisions when they know neither what jurors have on their minds nor the language they use to discuss it.

How jurors construct their stories has more to do with them than with us. Jurors use their own experience, stereotypes and common sense as a framework for the story they assemble. They use preexisting attitudes and beliefs to selectively attend to facts that support their conclusion, and they filter out whatever is inconsistent with it.

No More Facts (I've Already Made Up My Mind)

Once jurors achieve closure by adopting a view consistent with their preconceptions, it is difficult for them to see any other solution. One theory that accounts for this behavior is the *Einstellung* ("rut") effect, which people who do crossword puzzles may recognize. It suggests that once you find a clue and develop an association to that clue (or a particular way of solving a problem), your ability to generate other solutions is inhibited. Each time you encounter the problem again, it triggers thoughts of the same "solution" – to the exclusion of others. Once jurors generate a story that reconciles conflicting testimony (especially testimony they are ill-equipped to

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understand), it is difficult for them to consider other ways of thinking about the issues in dispute. Once they achieve closure, jurors have no motivation to search any further or attempt to reconcile their views to new information.

Round Peg, Square Hole

Another troublesome jury response to case information is cognitive dissonance. People dislike inconsistency because it creates tension (dissonance). To overcome dissonance, we try to achieve consistency through distortion or rejection of information that does not fit prior conclusions. To this end, jurors may either add consonant elements (such as rationalizing behavior that is contrary to their underlying attitudes) or change inconsistent thoughts by reshaping a fact or issue so it seems to fit, like forcing a round peg into a square hole. Arguments or subtleties that prove a juror wrong will often be dismissed, distorted, or conveniently forgotten.

Swimming Upstream

Based on juror prejudices (e.g., that inventors are special geniuses who deserve protection at all costs, and that the U.S.P.T.O. doesn't make mistakes), it is even more likely that jurors will mold information that is inconsistent to their views to fit those views, rather than change them. Attempting to change jurors' minds is like swimming upstream: There is little hope for progress. It is more productive to incorporate their preconceptions into trial strategy. Consequently, it may be useful to become familiar with commonly-held juror beliefs, folk myths, and specific perceptions in patent cases.

Myths in Patent Cases

Expectation is perception; perception is reality. Therefore, it is critical to understand juror perception before attempting to persuade: Juror beliefs often conflict with reality and the law.

For example, jurors believe that inventors are special people, and that the U.S.P.T.O. is highly efficient, thorough, and staffed by the cream of the crop. To jurors, patent examiners are the ultimate experts. Jurors believe that several patent examiners do extensive searches for existing inventions, and take weeks – if not months or years – checking the uniqueness of each patent pending. Some believe that there is a consumer product testing aspect to the process whereby the Patent Office tests a device or conducts research on the invention, composition or process.

As a result, it goes against juror expectations to teach them that applicants are expected to provide the prior art that would make their own patents invalid, that the review itself is relatively short, and that the Patent Office could overlook something relevant or be hoodwinked by an applicant not disclosing relevant prior art.

Jurors believe that the patent system benefits everyone, since protecting new ideas encourages inventors and companies to innovate, thus yielding improved technologies and competition which benefit consumers and the economy.

Hard Proof

Jurors also take the shortcut of favoring information that relates to the concrete and practical world they know over information from the complex and abstract world of intellectual property. For example, they commonly use the commercial success of a company's invention to gauge its "usefulness" and "inventiveness" and to judge its validity. If a company owns a patent but goes bankrupt, jurors wonder, "How good could their invention have been?" Conversely, rather than using an alleged infringer's profits to support damages claims, jurors often applaud companies who are able to run with an idea. Jurors attribute the infringer with ingenuity and innovativeness, aiding the defense.

Similarly, jurors tend to more easily comprehend and interact with patents that cover tangible things than those which do not. When asked to assess an invention, they need to know "What is it?" and "What does it do?" – inquiries difficult to satisfy when discussing method or process patents.

The problems solved by an invention are of great interest to jurors. Research has shown that such information (though it is not legally required) often gets jurors more involved in a patentee's case, creates closure for them, and leads them to favor a patent's validity.

The Moral Is Not Always a Good One

Myths that favor plaintiffs include the juror beliefs that "knowing" infringement means "willful" infringement, and that asking advice of counsel before ignoring a patent is a self-indictment for a defendant accused of infringing. Further, jurors often believe that even the most commonplace device can be patented if no one else thought to go to the Patent Office, and that it does not matter who invented something first – only who filed first. They often believe a patent is the only (or best) way to protect an invention. Finally, jurors think that if the inventor was not able to "make it work," the one who did deserves credit.

The juror belief that companies almost routinely engage in corporate espionage and copying primes them to be receptive to arguments of infringement as well as willful infringement. It is intuitive to the juror that big corporations steal ideas from small companies, and that vulnerable independent inventors lack the wherewithal to protect themselves.

On the other hand, jurors also believe that large, successful corporations with proven track records and patents of their own have no need to steal from others. To override this preconception, it is imperative for a patentee with such an adversary to reveal the benefits reaped by the alleged infringer, and also to demonstrate that the infringer could not have achieved such results independently.

Juror decisions about infringement are also heavily influenced by experiences of stealing and fair play in their own lives. Many jurors have suffered someone else taking credit for their ideas, so they can readily relate to feeling "ripped off."

A Little Knowledge Is Dangerous

Added to the challenge of presenting patent matters to jurors are several counterintuitive issues which may perplex a trial team. These include juror questions and beliefs that are misguided yet strongly felt:

- Why are we being asked to function as experts regarding things we know nothing about (e.g., whether an invention is obvious or anticipated)?
- Why are we being asked to rule on a matter that the experts have already decided (e.g., patent validity)?
- Something already known is obvious.
- How can a company that already has its own patent be infringing another company's patent if the Patent Office already recognized the two as unique?
- There must be something wrong with a patent if the patent holder asks for a reexamination.

Forget Me, Forget Me Not

Besides factoring in juror beliefs and the quality of information presented, patent lawyers should be concerned with the quantity and nature of the information. Memory limitations are an important factor in considering how jurors handle patent information. Several considerations can be employed to boost juror recall of important facts. These include:

Serial position (order) of information presented. "Primacy" and "recency" are truly significant. Information presented first is better recalled than that presented in the middle, and what is heard last is recalled best of all. These effects underscore the importance of opening and closing statements as well as the manner in which witness testimony is elicited. Key points should be outlined up front and recapped at the end; tedious or less favorable information should be addressed in the middle.

Memory interference. When someone dials information for a phone number, it is more difficult to remember the number if an interruption occurs before the number is rehearsed and dialed. Likewise, if key testimony or an attorney presentation is interrupted in court, jurors' ability to recall information learned before the interruption is likely to suffer.

Selective attention and motivated forgetting. Jurors will progressively weed out what neither catches their attention nor appears useful. They intentionally or unconsciously forget such information.

Limitations on juror memory underscore the need for repetition of juror-friendly sound bites to facilitate their recall of thematic points.

Routes of Persuasion

A good deal of the research on juror comprehension in complex cases is premised on the theories of persuasion. Generally speaking, there are two major processes, or routes, involved in persuasion which trial lawyers can use to their advantage:

1) *Systematic or Central Processing* – When it can be effectively used (when factual information is accessible, salient, and not too complex for people to scrutinize a communication, analyze its content, and deduce its validity), this is the more convincing approach to persuasion. By this method, persuasion is essentially a function of the quality of the arguments presented. As the quality of the argument increases, so does its persuasive impact.

Lawyers tend to overrely on this approach. Jurors often lack the ability or motivation to process a message because the issue is not relevant to them, or because the substance of the argument is too complex and not salient. In that case, people tend to resort to an alternate route;

2) *Peripheral or Heuristic Processing* – When the quality and validity of an argument is precluded by its complexity, people resort to shortcuts, peripheral cues, or heuristic decision rules – including the appearance and sheer quantity of evidence – as measures of a message's value. Essentially, they rely on factors associated with the message or the messenger rather than the message itself. Jurors ask, "Does the attorney look credible?" "Did the attorney use a lot of arguments [regardless of their merit] to bolster his position?" "Who showed more documents on that point?" "Is the attorney attractive? A bona fide expert? Likeable?" "Did the expert seem certain or shaken?" "Who has better credentials?" Even a juror's mood when listening to an attorney or witness can color how they credit that side's case and their memory of it.

The literature on persuasion suggests that when jurors hear evidence that they lack the preparation or background to process, they will not engage in careful scrutiny of the testimony. When testimony is complex, jurors are inclined to rely on peripheral cues and engage in heuristic processing to make their decisions.

In a patent case, jurors tend to rely on external factors as clues to the validity of the expert's testimony rather than try to process the scientifically complex content of the message. Since jurors tend to be uninvolved in patent technology and unable to grasp work related to patents, they are prone to using peripheral cues and heuristics over central facts.

Diminishing Returns

Jurors can focus on a limited amount of information and a small number of issues, facts and players. If there is too much information to attend to, comprehend, believe and recall, jurors experience cognitive overload. In this situation, jurors turn off and forget or reject what does not easily fit into their existing story schematic. Not only are jurors likely to become bored when faced with cognitive overload, but they may also become highly frustrated, which can make them angry, hostile, and finally cause them to shut down.

If this happens in a patent matter, jurors may turn entirely to peripheral rather than central case issues as they deliberate, and they may put disproportionate focus on non-evidentiary

factors such as the appearance and demeanor of trial team members, their likeability and communication style, how the judge interacts with them, and the like. Incorporating these factors requires appropriate scaffolding of information and heightened awareness by trial lawyers and witnesses. In fact, even judges have expressed a desire for complex presentations to be streamlined, clarified, and supported by organizing themes and visual supports.

A number of peripheral issues in patent cases involve the mindset of the jurors themselves, including:

- *Individual juror personality factors* – View towards authority, punitiveness, adherence to personal moral code, and notions of conspiracy;
- *Juror attitudes toward the litigants* – As members of the corporate community, as employers, whether they are local or foreign-based, and views about their business practices; and
- *Juror attitudes toward specific industries and companies* – Based on a company's products, policies, and location.

The following peripheral issues involve psychological factors that can influence juror dispositions:

- *Projection of motives* – Ascribing personal motives to litigants;
- *Authoritarianism* – High respect for authority and/or intolerance of violations of the law;
- *Cognitive complexity* – Tolerance for ambiguity and ambivalence;
- *Internal vs. external locus of control* – Tendency toward or away from personal responsibility; and
- *Ability to delay gratification.*

Other sources of potential weakness in the presentation of a patent case go beyond the nature of the audience and the messages presented to it. These sources stem from the messengers themselves.

Good Messages, Bad Messengers

Research has shown that jurors in patent cases are keenly interested in hearing the personal stories of individual inventors. Inventors are accorded high regard and consideration by virtue of having done something admirable – inventing something. Thus, jurors in a patent case pay more attention to the inventor than to any other type of witness. The fact that jurors tend to rely on peripheral cues when faced with complex technology is evidence of the need for inventors to come across well and to tell a good, comprehensible story.

However, while juror expectations are great, inventors tend to make poor witnesses and lackluster storytellers. Inventors are often poor messengers for many reasons: As backroom scientists they tend toward modesty and a lack of social skills, to not speak thematically or in summary form, to lack presence,

to have poor demeanor, to avoid eye contact, to place a low premium on appearance, and to underestimate the importance of highlighting elements of their story.

An additional reason inventors tend to communicate poorly stems from the fact that they often have difficulty making the transition from the state of mind employed in the scientific world (where one is foolish to make bold statements without qualification) to mustering the conviction necessary to take a stand in a lawsuit. Overqualifying on the stand can be seen by jurors as equivocating rather than scientific rigor, and can be interpreted as a sign of weakness.

To make things even more difficult, inventors tend to be disinterested in and leery, suspicious, or even contemptuous of litigation. This aversion can make them resistant to guidance from counsel when preparing for trial, which does not help when trying to cope with the nonintellectual needs, expectations, and limited knowledge of jurors.

Considering these obstacles, it is often helpful to implement measures like these:

- *Prepare witnesses* and (if necessary) get professional help to modify or manage the unfavorable behavior of an inventor. Sensitize witnesses to cultural differences with the jury, and review with them the communication elements required for credibility and persuasion;
- *Create dynamic visual exhibits* to be introduced by the inventor and reinforced by experts (when you wish to direct attention away from the inventor but draw attention to his or her points); and
- *Instill enthusiasm* through a conversational style of questioning on direct examination.

Ways Experts Are Not Masters

Telling is not teaching; teaching is not persuading. This truth leads us to reexplore the role of the expert witness from the perspective of the jury in a patent case. Though they are potential lifelines to central facts, experts tend to be poor witnesses for the very reason that makes them experts: They know too much to be able to think at the level of a novice. Even when experts believe they are “dumbing down” an explanation for a jury, the concept often remains outside the jurors’ ability to comprehend.

Experts use jargon and develop shorthand which are adopted by the trial team and (because they become habitual) are difficult to unlearn. Experts rarely use strategic themes, develop simple graphics, or understand the impressions they make. By laying out the minutia of their point, they expect the conclusion to be self-evident (when, in fact, it is usually opaque to jurors). The degree of simplicity and clarity a juror needs is usually one or two steps greater than that which is provided.

Both novice and experienced experts have handicaps. Newcomers to the witness stand can be blindsided by skilled cross examiners. Veterans can hold their ground but may

appear arrogant and insistent at inappropriate times. The most seasoned experts often cause difficulties because they become overconfident, stick to habits that can be counterproductive, and are resistant to feedback. Any expert can benefit from additional evaluation and preparation by a professional who is not on the trial team, since the expert and the trial team can become drunk on their own wine (i.e., they can become so enmeshed in their mutual positions that they miss areas of confusion, weakness or contention).

Legal issues and scientific analysis do not always win a case. Sometimes the difference is something experts would not even consider. For example: In actual pretrial research regarding an infringement claim, a key issue was whether a certain physical phenomenon occurred as a result of the process in the patent and accused methods. Prior to conducting mock jury research, a lawyer in the case believed (based on expert testimony) that he had a solid argument for a theory of infringement, but he also recognized a potential appeal to a local bias based on juror familiarity with a well-known architectural structure (which provided a powerful analogy to the claimed structure). The jurors were brainwashed to his visual concept because the architecture was an icon in their daily lives and was easily relatable to the structure claimed by the defense. Based on the results of pretrial research, the lawyer made a decision to appeal to the bias rather than pursue a sound technical analysis and argument which included well-qualified expert witnesses. Much to the surprise of everyone on the other side, the lawyer was successful (the success of the analogy was confirmed during post-trial interviews).

Analogies can be powerful, but a word of caution: Do not use analogies that are untested pretrial. A skilled opponent can turn an analogy from your best tool into their best weapon.

An Ounce of Prevention

If pretrial juror profiling and case studies point to specific peripheral factors that adversely influence verdict orientation, the trial team can develop appropriate jury themes as well as juror questionnaires (when the court permits) that significantly aid the trial lawyer in identifying and deselecting jurors with unwanted traits.

Presenters in patent litigation are well-advised to address jury issues and limitations in other ways as well. Instead of taking for granted that the jury will know how to weed out what is important from what is not, the trial team should consider several tactics:

- Pretest the case and analogies before mock jurors to learn winning jury themes and the language jurors use to discuss the case;
- Incorporate these themes and language into case presentations;
- Reinforce themes through strategic graphics that simplify information, make it attractive, and guide jurors' attention;

- Introduce key points with a drum roll. Use organizing and attention-getting phrases such as "Now, what is most important to remember about this is";
- Signal that what is coming next is important by seating additional people at counsel's table or by filling the spectator section before key witness testimony; and
- Practice paraphrasing jargon and complex terms and theories into layman's language and concepts.

Since jurors do not intuitively know which information is most significant, using these signals prevents the risk of jurors fading out at inopportune times or giving undue attention to the wrong information.

Educate Before You Advocate

Another potential stumbling block presents itself if one juror with relevant knowledge becomes the self-appointed "expert" of the jury. Since other jurors look to that person for information (yet are unable to discern when they are being misinformed), it is vital to "educate before you advocate." Jurors need to understand fundamental concepts that will allow clarity in their deliberations.

Additional Ways to Improve Jury Performance

Some of the following measures have been successfully implemented to improve jury performance in complex patent cases:

- Simplify the jury instructions;
- Allow jurors to ask questions of the witnesses (an often-debated option);
- Allow jurors to take notes; and
- Grant access to daily transcripts (although it is unclear what remedies are appropriate if jurors can't comprehend the testimony, access has been shown to increase juror comprehension of difficult legal and technical concepts and/or a high volume of evidence).

Other Improvements

Restructure the Case: The length and complexity of a trial can be reduced by implementing time restrictions (e.g., for opening and closing statements), eliminating parties and/or joining claims, reducing the amount of testimonial and documentary evidence, dividing and/or separating issues, and including clear and simple summary demonstrative exhibits.

Restructure the Jury: Many advocates have suggested 12-person juries, as this would allow more resources to come to bear on a given issue. Damages would less likely be extreme, and attrition would have less effect on the outcome of a case. Other suggestions include increasing the amenities of jury duty (e.g., paid parking, increased compensation) and altering jury composition by creating "blue ribbon" panels wherein jurors would be required to have a minimum educational level.

Case Management Techniques: Advocates argue that jury instructions should be simplified, and that judges should pre-instruct jurors on the law, allow the use of memory aids (such as juror note-taking, exhibits, and daily transcripts), break the trial into smaller chunks, provide interim summaries of the evidence, allow jurors to question witnesses, allow jurors to have a copy of the jury instructions, and provide court-appointed experts.

Judicial Intervention: Some advocates suggest that judges would have increased control of the trial process through the use of J.N.O.V. and directed verdicts, as well as through summarization and comment on the evidence to highlight the conflict between parties for jurors.

Lawyer Education and Training: The ways in which attorneys present a complex case have a dramatic impact on the ability of jurors to comprehend it. The attorney who is prepared, organized, has conviction, and who understands the ground upon which jurors walk (by doing pretrial research) is ultimately the best-armed.

Conclusion

As Shakespeare said, "Brevity is the soul of wit," yet many patent trial lawyers are overly ambitious and overlook the fact that jurors glaze over when faced with the minutia of presentations longer than 30-35 minutes. Since teaching does not equate to learning, a traditional approach creates tradeoffs: A detailed record may come at the cost of an alienated jury (and possibly judge), and important information may not persuade. Unless he or she is banking on an appeal rather than winning the trial, the successful litigator will consider the needs of the judge and jury carefully at the same time an accurate record is being created.

One solution to the conflicting needs for simplicity and detail in a jury trial is to use a "sandwich" approach, in which details are the meat but simplicity is the bread. Introduce key points in simple, thematic, summary terms; explain them in detail for the record and to establish expertise and credibility; tie them to the themes; then recap in simple terms. Be "bilingual" – present technical information in the original jargon, then translate the jargon into layman's terms.

Some believe that it is too much to expect jurors to accurately weigh the merits of both sides in the conflicting and complex testimony of a patent case. However, when we understand how jurors make decisions, changes can be made to increase the likelihood that they can participate meaningfully. The attorney who is the architect of such participation will likely be the victor.