A Narrative Framework for Patent Litigation

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Approximately 2,000 new patent lawsuits are filed in U.S. courts each year. Studies have shown the average litigation cost is $769,000, per party, when the risk is below $1 million, and more than $2.6 million when the risks are greater. These exorbitant costs, combined with the risks of invalidation, loss of proprietary rights or an injunction, can often create a "bet the company" scenario for each of the parties, which only adds to the tremendous pressure a patent attorney faces as trial nears.

The peculiarities of patent litigation only further complicate the situation. Unlike medical malpractice litigation, where jurors have seen doctors and been to hospitals, or product liability cases, where every juror has been a consumer, few jurors have a background for understanding patent issues. This can lead to a great sense of uncertainty as the trial team prepares for trial.

This article addresses many of these uncertainties by highlighting common factors jurors draw on as they make sense of the information they are showered with over the course of trial. These narrative frameworks draw on our common experiences, which function to create "norms" and expectations for the way things should be. We then use these "norms" as a point of comparison by which we judge the events in question at trial.

Patent cases are unique in that they center around issues unfamiliar to most jurors. However, this does not mean that jurors do not use the same reasoning process. Our research identified several of the narrative elements jurors apply to patent cases.

The American Dream

The most common narrative theme we saw in our research is that of "the American dream" — the belief that individuals are and should be rewarded for their hard work. This taps into a belief system that is at the core of our very being because it gives meaning to our everyday actions.

To deny this, in many ways, is to render meaningless much of how we live our lives. Consequently, many jurors "protect" individuals whom they believe have worked hard and earned the patent rights as a result. So, the first question an attorney should consider is how the case narrative taps into a story of hard work and rewards.

The Invention Story

As an element of "the American dream," the invention story is where we find the human side of the story, which draws us in and motivates us. The most common shortcoming we see in our research is when one side presents a very technical explanation that focuses on the invention itself. This approach sacrifices key organizing principles for complicated and forgettable details that constitute a "story-less" context. This significantly impacts jurors' motivation and ability to be effective advocates for the client.

While the invention is important, it is the person behind the invention that captures jurors' attention and interest. Whether the party is a corporation or an individual, the best invention stories are those that focus on the people, their hard work and their seminal "aha" moment.

The Marketplace

The other fundamental belief jurors draw on as they make sense of the issues is that of an open and fair market that depends on competition. Over the course of deliberations, jurors carefully consider the impact of their verdict on the marketplace in two ways.

First, they generally do not want to eliminate or "punish" companies or individuals that have developed a superior product because, in their minds, the real loser in this situation is the consumer. Second, jurors dislike monopolies because they are contrary to the common cultural belief of an "open and fair market." Consequently, jurors are hesitant to render verdicts that they believe could lead to a monopoly.

Attorneys need to consider how a verdict in favor of their client sustains or enhances the market and the ideals of capitalism, which may serve as a starting point for identifying the specific psychological satisfaction jurors can derive from rendering a verdict for the client. After all, jurors will gravitate to the verdict that makes them feel good at the end of the day about what they have done.

Differences over Similarities

The human mind tends to focus on differences rather than similarities. This is
especially the case in patent litigation. We often see jurors declare two things the same at first glance. But then as they are given time to observe the two items in question, they slowly start to identify differences, such as slightly different shades of blue or minute differences in curvature.

Once these differences are identified, they tend to overwhelm the similarities, which can lead jurors to conclude that there is no infringement. This can be particularly difficult to deal with in cases where the infringer "added something" to the patented invention. In these instances, mock jurors often believe — since it is still different in the end — there was no infringement.

The Patent and Trademark Office (PTO)

The Elaboration Likelihood model is a well-accepted theory of persuasion that posits when individuals have the motivation and/or ability to engage the details of an argument, they defer to peripheral cues in arriving at their opinion. This may explain the tremendous amount of credibility jurors give to the PTO. Put simply, jurors assume the PTO always gets it right, which can make it very difficult for the defendant asserting an invalidation claim.

The key factor guiding jurors' perspectives on this issue is the stubborn assumption of a comprehensive and thorough investigative review process undertaken by the PTO. While patent attorneys know this is not the case, jurors have great difficulty accepting anything to the contrary.

The First One to the Patent Office Wins

While the invention story is important, jurors also appreciate smart business decisions as long as those decisions respect the goal of fair competition. This means, absent the perception of "breaking the rules," jurors also will reward a party who was "smart enough" to "beat" the competition to the patent office.

This narrative element requires that a fine balance be provided when presenting the invention stories. In other words, jurors still need to hear the human side of the story. No one wants to reward a faceless entity or corporation, especially when the other side has a human story. Consequently, the most successful narratives that use this theme are those that tell the story of an entrepreneur who possesses both the genius of an inventor and the skills of a savvy businessman.

David vs. Goliath

As with any story, the characters are central to our understanding of the issues presented. Every story has a protagonist and an antagonist, whether by the design of the attorney or by the natural interpretation of events by the jurors. Jurors often will assess the identities of the parties involved in the litigation and, if seemingly applicable, apply a "David vs. Goliath" theme to it.

"David vs. Goliath" speaks to principles that are deeply embedded within our culture. We see it in movies, books, sports, politics, etc., where an underdog, who against all odds defeated a seemingly unbeatable foe. In these situations, we tend to root for the underdog. Even when the parties are two corporations, we often see jurors filter the case narrative through this "David vs. Goliath" framework. The question then is whether your client is David or Goliath.

"Business Is Business"

This element is sometimes at odds with some of the other narrative components we have periodically identified, but nonetheless, we have seen it emerge in recent years in some groups. Specifically, we have seen a renewed appreciation for "business sharks," likely spurred by pop culture figures such as Donald Trump, who espouse that "winning is everything" and flaunt their coveted lifestyles as proof.

While still a minority on most jury panels, there is an emerging demographic of jurors who admire this personality type and feel parties should be rewarded for having these kinds of "shark-like" business skills. Often, we hear these jurors draw a distinction between what they believe is "socially right" versus what is legal: They reason, "Well, even though I don't agree with it, it is legal, and I can't punish the guy for taking advantage of the situation."

For those who might be concerned about this theme, because these individuals fall in the minority, it may be easy to identify them in jury selection and remove them from the venire through strikes.

As an attorney, you spent years in law school immersed in the law, in legal concepts that are dense and only understood through analyzing years of case law. Add to this the fact that once you receive a case, you spend months or even years in the trenches of discovery, which provides you not only an exceptionally detailed knowledge of the case facts, but plenty of time to carefully think through the meanings of those facts. So much thought is put into this process that your theory of the case and your conclusions become "the" conclusions — there is no way to see it another way.

This often makes it difficult to step outside of your context and see how jurors might construct narratives around the case facts. While this article only scratches the surface (as the complete findings of our research are too lengthy to fit within this article), it should provide patent attorneys with a starting point for developing a compelling case narrative that motivates and arms jurors to be your advocates in the deliberation room.