

CORPORATE COUNSEL

An **ALM** Publication

The Business Magazine for In-House Counsel

corp.counsel.com | Fall 2015

Intellectual
PROPERTY

PERSPECTIVES

VIEW FROM THE BENCH

Top 10 techniques of highly effective IP trial counsel.

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During my 30 years as a judge on the federal district court in Chicago, I presided over hundreds of intellectual property cases and witnessed IP trial counsel employ a wide range of techniques and strategies. The following is a compilation of techniques that I observed to be consistently successful and utilized most by highly effective IP attorneys.

1 HAVE A CLEAR THEORY FOR VICTORY

Effective IP trial lawyers provide a clear path to follow for the decision maker—whether judge or jury—to find in favor of their client. They show step by step, based on the facts when applied to the law, why their side should prevail. In doing so, they strive to make it as easy as possible for the decision maker to rule in their favor.

The predetermined “clear theory for victory,” from which highly effective IP lawyers rarely waiver, is typically so well analyzed before trial that it withstands all attacks launched against it by the opposition. This takes a lot of pretrial effort by counsel, but highly effective IP counsel’s presentations at trial look effortless, straightforward, logical and consistent with the weight of the evidence because of their pretrial preparation, including honing their “clear theory for victory.”

2 TARGET THE FINAL ARGUMENT

Highly effective IP trial counsel give the most compelling closing arguments—whether at a trial or a hearing—because they have not only thoroughly planned what they will say, but they have used their planned argument as a checklist to ensure all their points are clearly and convincingly proven by the introduced evidence. The confidence that comes from targeting their



closing argument and using it as an evidentiary checklist gives highly effective IP trial lawyers an edge when standing before the decision maker and arguing why they should prevail.

3 ANTICIPATE OPPONENTS' ARGUMENTS

Highly effective IP trial counsel take time before trial to mentally put themselves in the shoes of their opponent and anticipate

their arguments. Whenever possible, highly effective IP trial counsel try to beat their opponents to the punch by taking the sting out of their opponents' points before their opponents can make them and by leaving none of their opponents' arguments unanswered as the trial or hearing progresses.

4 SPEAK IN PLAIN LANGUAGE, ESPECIALLY WHEN ADDRESSING THE JURY

Intellectual property usually employs, or is defined by, technical language. Highly effective IP counsel are able to help the decision maker interpret and apply what is otherwise unfamiliar jargon by explaining the necessary technical terms in a manner that allows for easy understanding. I have observed jurors, and myself as a judge, though not initially familiar with the technical terms, sufficiently learn to apply them so a correct and fair decision can be rendered.

Based on my experience, jurors always have the collective desire to return a fair verdict and they will make the effort to understand technical language when required. Highly effective IP counsel do not speak down to the jury, but provide definitions, examples and analogies to help jurors better understand the evidence, even when it is couched in technical language. In some cases, when allowed and necessary, effective IP trial counsel have provided a written glossary to the jurors and judge to assist them in understanding the evidence.

5 TELL THE STORY

Every side of every IP case has a human backstory. Highly effective IP trial counsel are able to weave the human interest aspects of that story into the evidence. It helps make the decision maker relate to their client on a human level. Additionally, highly effective IP trial counsel add humor and drama when appropriate to keep their side of the case interesting.

6 USE VISUALS

To maximize the persuasiveness of the evidence, highly effective IP trial counsel employ multisense presentations. Today's decision makers expect it and it enhances their understanding of the points presented. People cling to the idea that "seeing is believing," and visuals aid people to remember as well as understand.

7 ORGANIZE EXHIBITS TO AID THE DECISION MAKER

The decision maker's ability to analyze and understand the effect of the documentary evidence is almost always crucial in IP cases. Highly effective IP trial counsel will arrange and identify the exhibits offered into evidence in a manner that enhances the understanding of the judge and jury. Properly presenting the key documents in a logically organized and persuasive way aids the decision maker in coming to the correct conclusion.

8 PRESENT THE THEME OF THE CASE THROUGHOUT

Highly effective IP trial lawyers typically provide a case theme that encapsulates in a short phrase or slogan why they should win. Presenting that theme consistently throughout the proceedings when applicable is a technique that enhances the likelihood of victory.

9 STAY FOCUSED AND STRAIGHTFORWARD

Highly effective IP lawyers maintain a consistency in their focus that enhances their personal credibility with the judge and jury. Since they have typically anticipated their opponents' evidence and arguments, IP trial counsel are better able to counter their opponents' positions than other lawyers. Being the one person the judge and jury can look to for the truth is a goal all highly effective IP trial counsel attempt to achieve. Once that is accomplished, victory will typically follow.

10 'ON STAGE' AT ALL TIMES IN COURT

Highly effective IP trial counsel never forget that when they are in the courtroom, every facial expression, comment or tone of voice is being scrutinized and analyzed by those seeing and hearing them. For this reason, highly effective IP trial counsel should treat everyone, including their own staff, the judge's staff, witnesses, parties and nonparties, with respect and civility. Their actions, even if unconscious, reflect upon their own credibility and their effectiveness in the persuasion process.

In sum, highly effective IP trial counsel employ each of these 10 techniques persuasively at trial, but these same techniques can also be applied in arbitration and mediation settings as well. Whenever an IP counsel is attempting to convince either a neutral decision maker or the opposing side's party representatives, using these techniques in an appropriate manner cannot help but enhance effectiveness and increase the chances of prevailing.

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—JUDGE HOLDERMAN