



## The Top Seven Myths of Trying IP Cases

Common sense, it turns out, is not always so sensible.

### **Myth: Jurors have to understand your technology in order for you to win.**

Reality: Jurors need to *feel* that they understand the technology, but they don't need to actually understand it. It is true that many jurors are anxious about their ability to understand the technical issues. Anxious jurors are poor at taking in and evaluating information. Reassure jurors from the beginning that they will be taught what they need to know in order to make a good decision. Then, make sure that you give jurors the tools they need to evaluate the evidence and come to a conclusion on their own. Don't just rely on expert opinions to carry the day.

### **Myth: Pick the most highly educated jurors that you can get.**

Reality: Many attorneys believe that since jurors have to understand your technology, you want to pick the most highly-educated jurors that you can. But jurors don't have to understand your technology—and high levels of education may not work in your favor. The characteristics that make for your best (and worst) jurors vary from case to case and are heavily fact-dependent. The only way to find out which characteristics make for your best jurors is to conduct sound jury research.

We conducted such research for the defendant in a major biotech IP case in California. Our research revealed that jurors with high school educations were better for our client. We assisted at the jury pick, and the seated jury consisted of jurors who were all either high school graduates or had some college coursework without completing a BA degree. Our client prevailed, successfully defending its innovations and getting the blocking patent of the plaintiff ruled invalid.

### **Myth: Jurors won't rule against the PTO.**

There is no question that having a favorable PTO ruling can be a big help for a client. And getting a jury to rule a patent invalid is not easy or inevitable. In post trial interviews, jurors often say that they "tried harder" to find evidence to support the patent holder. However, given the right evidence, witnesses and arguments, jurors will overturn a decision by the PTO. We have worked on both sides in invalidity cases and have helped clients successfully defend and successfully overturn PTO decisions.

### **Myth: The more claims we present, the more chances we have to win.**

In litigation as in life, less is often more. Jurors become overwhelmed with too many claims and you lose your ability to direct jurors' focus. You too can become overwhelmed by the demands of presenting so many claims at trial, becoming a less effective advocate. Weak claims also can drive down the value and validity of your stronger claims and could sink your case.



## **Myth: Judges are smarter and more objective fact finders than juries.**

Reality: Judges are people too and are as subject to cognitive distortions and confusion as jurors. Many judges are not knowledgeable about technology and most do not have backgrounds in science or mathematics. Judges are influenced by the same kinds of persuasive techniques as jurors. You will do well to treat your judge as a jury of one and put the same kind of care into creating persuasive arguments and effective demonstratives as you would for your jury of twelve.

## **Myth: An IP trial is boring and dry by nature and little can be done to excite jurors' interest.**

Stories of competition, innovation and invention are some of the most exciting stories around—if you know how to tell them. We have found that the side that is truly excited about the technology and conveys this excitement to jurors most often wins. We can help you convey your excitement.

## **Myth: Your expert's credentials, above all else, determine his or her persuasiveness with the jury.**

If we hear someone went to Harvard, our ears might initially prick up more than if we are listening to someone who went to Local U. However, what persuades jurors ultimately is what comes out of a witness's mouth, not the degrees that hang on the wall. Jurors respond well to witnesses who are effective teachers, treat the jurors with respect, and have a positive enthusiasm and excitement about what they do. Good credentials can also hurt, if the quality of the witness's testimony does not match the quality of the background or if the witness comes across as arrogant and confirms juror stereotypes of highly educated researchers or academics.

## **Not a myth: Hiring a great trial consulting company can help**

Trial Behavior has worked on over fifty major intellectual property cases around the country, in venues that include Alexandria, VA, Santa Clara, CA, San Diego, CA, and Marshall, TX. Twenty-five of these have gone to trial. We also have extensive antitrust experience that we can bring to bear on IP cases with an antitrust component.

Our work for clients has included extensive mock trial, post trial interview and focus group research, witness preparation assistance; development of juror questionnaires and voir dire questions; in court jury selection assistance; and in court monitoring and feedback. Some of the specific ways in which we can help you, over and above our traditional trial consulting services, include:

- ✓ Organize and run mock Markman hearings (with retired Federal judges and/or retired PTO examiners) to test and refine your Markman arguments.
- ✓ Evaluate and test experts to determine who will be the best choice as testifying expert at trial.
- ✓ Uncover the assumptions jurors in your venue make about patents, the PTO, the process of prosecuting patents, and the competence of the PTO—and help you use this knowledge strategically to craft a more persuasive case.



- ✓ Prepare inventors to tell their story clearly and effectively in their trial testimony, including addressing the lack of contemporaneous lab notebooks or other lacks in their documentation or practice.
- ✓ Help you put in perspective a legitimate mistake versus an intentional fraud on the Patent Office in inequitable conduct claims.
- ✓ Helping validity experts to cut through the details to arrive at a good overview of the field to help jurors understand the basic state of the art at the time of the application
- ✓ Help trial counsel develop effective cross of your opponent's validity experts, focusing on undermining their credibility.

### ***What's so different about Trial Behavior?***

There are many trial consultants and trial consulting companies out there. Few, however, have our depth of experience in IP cases. (See the following page for a list of cases on which we have worked.) In addition:

- ☆ Many trial consultants work primarily on cases that settle. We go to trial frequently and have highly developed trial strategy skills that enable us to be true trial partners. Although we are not lawyers, we have good working understanding of the rules of evidence, case law and court rules on jury selection, and appellate issues regarding jury selection and juror misconduct.
- ☆ We don't do cookie cutter research. We take the time to understand your case and design mock trial and other research honed to test your critical issues. We make the process of preparing for a mock trial part an integral part of your trial preparation, not a distracting sideshow.
- ☆ We have strong partnerships with litigation graphics and trial presentation companies around the country and can offer you a complete trial solution when you need it.
- ☆ We have a top-level team of cross-disciplinary talent which includes two Fulbright scholars and award-winning academics. Most trial consulting firms draw narrowly on the disciplines of psychology and market research. Our consultants have degrees that span the social sciences, from public health and statistics to communication, sociology, anthropology and psychology, which gives us a broader perspective and a wider range of skills on which to draw.
- ☆ We offer you the highest quality of consulting at a reasonable price.

For more information, or to discuss your specific case with us to see how we might help, contact:

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Check out our Web site at [www.trialbehavior.com](http://www.trialbehavior.com) for more trial insights!



## **IP cases on which we have worked:**

Adaptec Inc. v. Hornet Technology et al.  
Alpex Computer v. Nintendo  
Atari v. Nintendo  
Asia Source, Inc. v. AFA  
Beddor v. Mindscape  
Cabot v. Solutions Tech. Inc.  
CardioGenesis v. PLC Medical  
Columbia Lighting v. Peerless Lighting  
DH Technology v. Synergystex  
Diasonics v. Acuson  
Fairchild Semi-conductor v. Nintendo  
Gemstar/TV Guide v. Scientific Atlanta, et al. (ITC case)  
Gussin v. Nintendo  
Harris v. Ericsson  
Harris v. Hyundai  
Harris v. Winbond  
Hoffman LaRoche v. Promega  
Kimberly Clark v. Procter & Gamble  
Litton Industries v. Honeywell  
Nintendo v. Atari Games  
Parental Guide of Texas v. Thompson et al.  
Pixion v. PlaceWare  
Senticor v. Medtronics  
Scholle v. CapSnap  
Starsight Telecast v. Gemstar  
Tekmax v. Exide  
University of California v. Dr. Kohne & Gen-Probe  
Wang v. Netscape  
ZF Micro v. National Semiconductor  
Alan Kirsch v. Uncle Julio's Corp  
Apple v. Microsoft Corporation  
Applied Medical v. U.S. Surgical  
Avantek v. Celeritek  
CNS v. Dr. Kohne & Gen-Probe  
Cypress Semiconductor v. Texas Instrument  
Chiron v. Genentech  
Digital Biometrics v. Synergystex  
Ericsson v. Harris  
Flying J v. T. Pistachio  
Gen-Probe v. Vysis  
Generation II Orthotics Litigation  
Harris v. Atmel  
Harris v. Mosel  
Henley v. Dillard Department Store  
IDEXX Labs v. Millipore  
International Rectifier v. IXYS  
Level 1 v. SEEQ  
Mycogen v. Monsanto  
Nukote v. Hewlett Packard  
Security & Access v. Motorola  
Sanyo Energy v. BYD Company Limited  
Sharp v. AU Optronics  
Super Health v. Super Nu-life  
Therma-Wave v. Jenoptik  
University of California v. Genentech  
Unova, Inc. v. Dell Computer Corp  
Whipsaw v. Network Appliance  
Uncle Julio's v. Bouyea et al.  
XOMA v. Centocor