The Art of Persuasion in Patent Litigation: Nuts and Bolts

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Our assigned topic, advocacy in patent cases, is so broad that one hardly knows where to begin. And we cannot hope to provide a comprehensive treatment of the topic. So we will focus on the basics of advocacy that apply with particular force to patent cases, tools that we would expect any young lawyer to have mastered before entering the courtroom.

But let us first consider what makes patent cases different from other cases. There are three principal differences that distinguish patent cases from other complex civil cases. First, and most evident, is that rarely will judge or jury have any experience or familiarity with the technical subject matter. Although the product or service accused of infringement may be familiar to some, the details on which infringement liability may turn usually are beyond common experience; indeed, they can be fiendishly complex. And the likelihood that none of the jurors is familiar with the technical subject matter is enhanced where, as is not uncommon, one side or the other uses voir dire to strike jurors with relevant technical education or experience.

Second, patent law and patents themselves are freighted with arcane, unfamiliar terms of art. The prevalence of patent infringement cases means that most federal district court judges have enough experience in such cases to have gained an understanding of basic patent law terminology, but there is no end to the arcane terms that crop up in patent cases and trials. And while judges may bring to the case an understanding of basic patent concepts, jurors certainly will not, and are unlikely to even have seen a patent.

Third, some or all of the trial lawyers may be simultaneously blessed with and hampered by extensive technical education and patent law training. The engineering or "hard science" education required to qualify as a registered patent attorney can leave little room for training in logic, rhetoric or debate. And patent law is a specialized field marked by an increasing rate of change that requires continued study to keep abreast of developments. The upshot is that the lawyers may be used to writing and speaking in a technical language that many judges and most jurors will find incomprehensible.

With this background, we proceed to the basics of advocacy that apply with particular force in patent cases. With the exception of the first, non-negotiable expectation – accuracy and candor – reasonable advocates and judges might disagree about their relative importance. So, to avoid any dispute, we resort to organizing them alphabetically, with the caveat that, in our view, all are important.

1. Accuracy and Candor

That old saw, "When in doubt, tell the truth,"[1] applies with particular force in dealings with the judge and jury. Your reputation – and credibility - depends on the accuracy of every statement you make, whether in open court or in writing. This applies equally to facts, law and arguments. "If a judge catches a lawyer fudging, the lawyer's credibility crashes and burns, taking with it her power to persuade."[2] You should assume that any departure from 100% accuracy invariably will (1) be detected by the court; (2) tarnish your reputation and prevent the court from relying on you; and (3) harm your client's interests.[3] At a recent "bench and bar" luncheon before our local bar, the featured federal judge began his remarks by reminding the several hundred assembled lawyers (and summer clerks) of the importance of maintaining their reputation for candor. It is advice that cannot be over-emphasized.

The obligations of accuracy and candor mean, for example, that lawyers must support every factual contention with evidence – and by that we mean evidence that really, truly and accurately supports the proposition.[4] Of course, you must not lie;[5] but

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[1] Mark Twain, FOLLOWING THE EQUATOR (1897).

[2] Jason Vail, *What Judges Want: Pitching To Your Audience*, 60 Oct. Or. St. B. Bull. 35 (1999).

[3] *See, e.g., Mathis v. Spears*, 857 F.2d 749, 755 (Fed. Cir. 1988) (citing a patentee's "reckless disregard for the truth," court explains "It wastes the time of all concerned when an appellant misstates the record").

[4] *Laitram Corp. v. Cambridge Wire Cloth Co*., 919 F.2d 1579, 1583-84 (Fed. Cir. 1990) (repeatedly complaining of briefs with "statements of fact with no record reference" and "statements of fact for which there is no record"); *Black & Decker, Inc. v. Hoover Serv. Center*, 886 F.2d 1285, 1289 ("Exhibiting a monumental lack of concern for the fair and efficient administration of the appellate process, the parties have . . . [m]ischaracterized the evidence . . ., citing testimony that does not support or that directly contradicts their self-serving descriptions of that testimony."); *Mathis v. Spears*, 857 F.2d at 755 (argument ignoring trial court finding "an attempt at creative nonsense"); *Panduit Corp. v. Dennison Mfg. Co*., 774 F.2d 1082, 1102 (Fed. Cir. 1985) (appellant's "presentation on appeal is disingenuous, containing mischaracterizations, misleading statements, and improper submissions" and "has unnecessarily burdened the court with extraordinary need to check the record in respect of each of its assertions. only to find in too many instances a lack of candor.").

[5] Perhaps the worst way to lie is to misquote the judge below. *See, e.g., Pac Tec, Inc. v. Amerace Corp*., 903 F.2d 796, 803 (Fed. Cir. 1990) (misquote of judge "is reprehensible"); *Eltech Sys. Corp. v. PPG Indus., Inc*., 903 F.2d 805, 809 (Fed. Cir. 1990) (misrepresentation of court's opinion "disingenuous" and "frivolous," and "baseless arguments and misstatements of the record" supported award of sanctions). Misrepresenting the record on appeal is a close second. *See, e.g., Mathis v. Spears*, 857 F.2d at 755 (misrepresenting record shows "reckless disregard for the truth" and "wastes the time of all concerned"); *Devices for Medicine, Inc. v. Boehl*, 822 F.2d 1062, 509 (Fed. Cir. 1987) (appellant "mis-cites to the appendix and mischaracterizes the testimony of its witness").

you also must not mislead by omission or by exaggeration.[6]

The same holds true for legal authority. Not only must that authority be extant – that is, not overruled – but the holding of the authority must be as you represent it. Do not cite cases for propositions they do not support.[7] Do not stretch.[8] Do not cite dicta as holding. Do not ignore adverse authority, even arguably adverse authority.[9] Do not crop or otherwise distort quotes.[10] To emphasize the reliability of your papers, include in your citations pinpoint cites and a short quote or summary of the holding in a parenthetical.[11]

This also holds true for your characterization of your opponent's arguments. Mischaracterizing those arguments to knock them down more easily is known as creating a "straw man," a logical fallacy based on falsehood. This is thoroughly unhelpful to the

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[6] Focusing on a word in the trial court's opinion to the exclusion of the rest of the analysis has been labeled "but another intelligence-insulting tactic." *Lindemann Maschinenfabrik v. American Hoist*, 895 F.2d 1403, 1407 (Fed. Cir. 1990). Cropping a quote in the evidence likewise has been condemned. *See, e.g., Amstar Corp. v. Envirotech Corp*., 730 F.2d 1476, 1485 (Fed. Cir. 1984)("Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of candor required by the Model Rules of Professional Conduct . . . , wastes the time of the court and of opposing counsel, and imposes unnecessary costs on the parties and on fellow citizens whose taxes support this court and its staff.").

[7] Judges perceive the most common form in which lawyers misstate the law to be citing cases for propositions they do not support. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About The Way Lawyers Write*, 8 Legal Writing: J. Legal Writing Inst. 257, 271 (2002).

[8] *See, e.g., Illinois Tool Works, Inc. v. Grip-Pak, Inc*., 906 F.2d 679, 684 n.5 (Fed. Cir. 1990) ("it is inappropriate to quote mere *language* from a court *opinion*, while disregarding the actual holding of the court and the factual pattern which gave rise to the quoted language"); *Korody-Colyer Corp. v. General Motors Corp*., 828 F.2d 1572, 1580 (Fed. Cir. 1987) ("In both quotations, [appellant] wrenches the quoted material completely out of context, resulting in a presentation that mischaracterizes and misleads . . . which wasted the resources of the court and the parties and abused the judicial process.").

[9] Mark A. Drummond, *What Judges Want*, 31 No. 4 Litigation 3 (2005); *see also Porter v. Farmers Supply Serv., Inc*., 790 F.2d 882, 886 n.6 (Fed. Cir. 1986) (appellant cited district court decision "but inexcusably disregards the appellate court's decision" that "contains language directly applicable here and destructive of "appellant's) arguments before us.").

[10] *See, e.g., Porter v. Farmers Supply*, 790 F.2d at 887 (appellant "distorted the quote by omitting language devastating to its position on appeal" and "the necessity of distortion should have alerted [appellant] to the frivolity of its appeal").

[11] Thomas R. Newby, *Maintaining Your Credibility In Argumentative Writing—Part One*, 81 Ill. B.J. 155, 155 (1993).

court and does nothing for your credibility.[12]

Be aware that mischaracterization can occur unwittingly, with even the best of motives. Repeated editing improves the writing and the persuasiveness of your arguments, but it can be dangerous too: it can unwittingly transform a proposition from one supported by the cited evidence or authority to one that goes beyond it. The danger of extensive editing, particularly by lawyers who did not perform the research and compile the factual support, is that the propositions may wander away from the cited support. This is not to say that you should avoid editing your work, but only that you should take care to go back and cite-check after you do so.

And with the jury, credibility must be earned and it must be maintained. In your opening statement, you will tell the jury what the evidence will show. If you oversell your case and fail to prove what you say you will, your opponent will no doubt return to that failure in closing.

2. Adjectives and Adverbs

Your writing and speaking should be persuasive because of the force of your arguments and the logic that supports them. So write and speak with nouns and verbs. Let the court supply the adjectives, adverbs and – most especially – the exclamation points. Particularly avoid unnecessary unpleasantness in the form of angry adverbs and adversarial adjectives. Judges, jurors and just about everyone else are put off by snide comments, ad hominem attacks and exaggeration. If your opposing party's position is really the most serious instance of discovery abuse since the advent of modern discovery, it will be immediately apparent to the court; you don't need to belabor the obvious. And if it isn't that serious and you say it is, your credibility suffers.

3. Analogy

Perhaps no area of law cries out for the use of analogy like patent law. When concepts are complex or otherwise difficult to convey, a clear analogy that compares the situation at hand to an easily understood concept can be golden. In a recent patent infringement trial, the patentee's damages claim dramatically dwarfed the purchase price of the patent, a point made in cross-examining the patentee's damages expert, but he responded with an analogy, likening the situation to one in which a person buys a piece of land and later discovers that it has oil on it, arguing that owner would reasonably expect to sell the land for much more than the purchase price even though the land itself had not changed. While that analogy may not be particularly apt, several members of the jury nodded along in apparent agreement.

Of course, analogies like the fence around the property for patent claim scope have been so commonly used that one should expect them to crop up. And research on your opponent may reveal that he or she likes to use a particular analogy for a particular

[12] *See, e.g., Laitram v. Cambridge Wire Cloth*, 863 F.2d at 857 ("Counsel for each side accuses the other of sanctionably distorting and misrepresenting the record" and "Each recasts arguments of the other and then attacks the recasted arguments.").

issue that you will face in your case. One would be well served to have a ready counter-analogy of one's own or, alternatively, a hole to poke in the common analogies that one is likely to encounter.

Just a warning about using popular culture analogies. We recently tried an arbitration before a panel of three very experienced patent attorneys, all of whom had reached an age that could be described as "mature," and the entire panel looked befuddled when our opposing counsel analogized to a poster of pop star Justin Bieber hanging on his daughter's wall. None of the panel had any idea who this person was, or why his name was being bandied about, and the entire analogy went down in flames.

4. Body Language

Because lawyers tend to think of words as their stock in trade, they can neglect nonverbal communication. Whether before a judge or jury, nonverbal expressions from smirking to open-mouthed astonishment, from balled fists to red-faced embarrassment, can convey a message very different from the message the attorney intends. Jurors do watch, even when opposing counsel is speaking, if only to find clues about what you think of your opponent and his or her case. Jurors watch your client as well, so ensure that your client behaves appropriately.

5. Brevity

"Writing leads only to writing. . . . But when does writing have an end?"[13] Know when to stop. Remember that page limits are *maximums*, not minimums. Say what you need to say and no more. Judges universally agree that there can be great persuasive power in a short, punchy, well written brief that goes straight to the heart of the matter. If a motion or opposition takes too many pages to make its point, a court may be tempted to wonder why the lawyer had to work so hard. So think lean: Eliminate the clutter of unnecessary words. Pare down your sentences. Cut your paragraphs to single ideas. Short sentences and paragraphs are easy to read and easy to understand.

We attended a writing symposium a while back featuring federal appellate judges, every panelist stressed the importance of *readability*: Reams of paper hit judges' desks every week. One of the most important things judges want is papers that are clear, crisp, easy to follow, and *interesting* to read. Judges may not have the time (or the inclination) to re-read briefs or arguments that are confusing or convoluted. Even when the issues are complex, make sure your brief is clear enough to be understood in a single reading. The consequence of lack of readability is simple: the paper won't be read.[14]

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[13] Colette, THE BLUE LANTERN 161 (1949).

[14] *See* Noah Lukman, THE FIRST FIVE PAGES: A WRITER'S GUIDE TO STAYING OUT OF THE REJECTION PILE 19 (2000) ("Many writers spend the majority of their time devising their plot. What they don't seem to understand is that if their execution—if their prose—isn't up to par, their plot will never even be considered."). Even worse than having your writing disqualify your paper from being read is to have your writing be so bad that it persuades the court to adopt the position opposite from the one you advocate. Indeed, the fifth golden rule of bad writing is "Whatever their purpose in writing, whatever emotion

6. Civility

At a recent panel of federal trial judges, every single judge on the panel referred with dismay to lawyers who "could not get along," "could not play nice," or who conducted themselves as a "problem child." Do not confuse good, effective, aggressive lawyering with incivility. Be pleasant to everyone: the court, court staff, jurors, witnesses, opposing counsel and everyone else involved. Do it first and foremost because it is the right thing to do. But if that isn't reason enough for you, do it because judges dislike it intensely when you don't.

Civility goes beyond politeness. Avoid personal attacks or accusations of misconduct, whether in person, in court papers, or in correspondence.[15] Do not ascribe motives to your opponent.[16] If they're wrong about the facts or the law, point out that they are wrong (and how), but don't accuse them, e.g., of willfully trying to mislead the court. Let the court draw its own conclusions about why they miscited the case or the facts.

Nothing good will ever come of quibbling with – or sniping at – opposing counsel when you are appearing before the court; judges invariably are annoyed at this kind of behavior. Unless the court instructs otherwise, judges expect lawyers to direct their comments to the court, not to the opposing counsel or party. If you feel you absolutely must get in a spat with opposing counsel, do not waste the judge's time (or squander her patience) by doing it in court.

One benefit of civility is that it will cloak your conduct with the aura of reasonableness. Reasonableness is your shield, and the more reasonable you appear, the more likely you are to win. For that reason, you always should strive to be reasonable.

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they were attempting to stir, the truly bad writer always manages to achieve exactly the opposite. They aim for the moon, but only succeed in shooting themselves in the foot." Nick Page, IN SEARCH OF THE WORLD'S WORST WRITERS 257 (2000).

[15] Improper conduct in the courtroom includes verbally attacking opposing counsel. *See Nordberg, Inc. v. Telsmith, Inc*., 82 F.3d 394, 398-99 (Fed. Cir. 1996) ("During his rebuttal argument, counsel turned around, pointed a finger at opposing counsel, and heatedly said: 'These two lawyers are bad lawyers. They deceived the examiners, they deceived the trial judge, and then they pull this here.' This court is accustomed to hearing forceful argument. However, counsel's outburst was unacceptable. Strong conviction concerning the merits of one's case is not justification for losing one's composure at oral argument and making pointed accusations at opposing counsel. Opposing attorneys are expected to disagree concerning the merits of their cases. However, the essence of legal process is rational and civil advocacy of one's position. Angry, intemperate verbal attacks have no place in this court.").

[16] This applies as well to judges in that charging a judge with bias rarely ends well. *See, e.g., Pac-Tec v. Amerace*, 903 F.2d at 802-04 (allegation of judicial bias in a patent case won "a prized place . . . in the annals of frivolity" and was "frivolous, . . . brazen, blatent, and boorish").

A good way to instill reasonableness is to start every letter with the most underused phrase in the English language: "Thank you . . . ." "Thank you for your June 10 letter." Thank you for your telephone call this morning." "Thank you for your voice mail message." Use of this simple phrase triggers a presumption of reasonableness. You can reinforce that presumption by closing every letter with "In the meantime, please call me if you have any questions." Helpful, solicitous, and downright reasonable.

Between these phrases, apply the reasonableness test to everything you write. Treat each letter, e-mail and brief you write as if it were the first exhibit the jury or judge will see. How do you want to be perceived?

Whether before judge or jury, your behavior in the courtroom will be noticed. "[Y]ou show yourself to be likeable by some of the actions that inspire trust, and also by the lack of harsh combativeness in your briefing and oral argument, the collegial attitude you display toward opposing counsel, your refusal to take cheap shots or charge misbehavior, your forthright but unassuming manner and bearing at oral argument—and, perhaps above all, your even-tempered good humor."[17]

7. Clarity

"[W]hat is subordinate to the main issue can never be allowed to obscure that issue or distract attention from it."[18] Remember that, although you know your case, your audience (the court) probably does not. Clear writing follows from clear thought, disciplined outlining, and careful word choice. Avoid detours in the legal argument: keep it tight and simple. "[C]larity is of paramount importance," Chief Judge Re said, and "begins with 'straightforward thinking.'"[19]

To obtain clarity, avoid clutter, such as long string cites (cite only the most recent controlling case), long block quotes, and long footnotes (they are rarely necessary and often can – and should – be weeded out in a thorough edit).[20] Cut facts that may be relevant background but are not essential.

8. Compliance

Comply with the court's orders. Produce documents, witnesses or whatever else the court orders – and do it within the deadlines ordered by the court. Make compliance

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[17] Antonin Scalia & Bryan A. Garner, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES xxiv (2008).
[18] Francis-Noel Thomas & Mark Turner, CLEAR AND SIMPLE AS THE TRUTH 40 (1994).
[19] Edward D. Re & Joseph R. Re, LEGAL WRITING AND ORAL ARGUMENT 5 (1991).
[20] One judge in the Central District of California limits, by standing order, the parties to footnotes that do not exceed five lines, and we have seen no evidence that it limits one whit the quality of the advocacy or the results in his courtroom. "If a particular matter is important to the discussion, its substance should be skillfully woven into the text," Chief Judge Re explained. "Matter that is merely peripheral to the discussion does not warrant inclusion in the brief." Re & Re, *supra* note 19, at 10.

with the letter and spirit of the court's orders the highest priority. Excuses will not eliminate the consequences that flow from failing to comply; nor do they erase the reputational harm that comes from noncompliance.

9. Cross-Examination

Reams have been written on effective cross-examination, and we do not intend to re-plow that ground. We do, however, pause to note that the most common error we have seen in cross-examination in patent cases is that it goes on way too long. Cross-examination is an opportunity to make a few crucial points and reinforce themes, but is often wasted by the examiner badgering or arguing at length with the witness. Skilled expert witnesses will turn this kind of cross-examination into an opportunity to reinforce their testimony. And when skilled expert meets dogged cross-examiner the result is long, tedious and angry exchanges that do little to advance the interests of either party. So, keep it short, crisp and relevant, and do not quibble over the small stuff.

10. Deference

Remember that you are the attorney, and the person sitting on the bench is the judge. You can ask; she can order. Therefore, you may tell the court what you *want* it to do; you may even respectfully suggest to the court what it *should* do. You should never tell the court what it *must* do. Even where the court's discretion is constrained, many judges are offended by lawyers who presume to instruct the court on what it "must" or "must not" do. This may be just a matter of semantics, but semantics count. Deference applies to both written submissions and court appearances. Under no circumstances should you interrupt the court, try to talk over the court, or – should things not be going your way – let your exasperation or frustration show. Address the court as "Your Honor" – not "Judge." We know of one judge who bristles at lawyers who "direct" (rather than "invite") his attention to a document or authority.

11. Discovery

If there is anything that judges dislike, it's discovery disputes. (For that matter, don't we all?) Judges' advice on the subject typically boils down to this: be fair and reasonable. To lawyers, that means avoiding the string of boilerplate objections to every written discovery request; educating your clients to the need to be forthcoming with relevant, responsive documents (even the bad ones); and knowing when to stop the discovery wheels from churning. To clients, that means taking their discovery obligations seriously (including the need to preserve and produce electronically stored documents) and being willing and able to rein in the outside lawyer who threatens to over-discover a case.

12. Details

Ignore the advice book on the best seller list: You do need to sweat the small stuff. Judges care about – and notice – details, and they expect you to do the same. Tenth Circuit Judge Michael Murphy summed it up well: "When the judges read briefs, they are not reading them to give grades, but the type of things that come out if they were grading a paper do stand out. If there are misspellings, typos, or if it is sloppy, these things are an indication of the quality of the arguments. They destroy any likelihood that

you are going to create an aura of credibility."[21]

So read Strunk & White,[22] even if you have already read it. Then read one of Ed Good's works on grammar.[23] And keep a dictionary handy.[24] Automatic spell checking is handy, but it cannot substitute for good, old-fashioned proof-reading.

13. Empathy

Put yourself in the judge's place: think about how a judge's mind works, how she decides cases.[25] In short, imagine you are the judge. Help the judge understand that deciding in your favor is fair, logical and feels right. To do that, you must present the legal rule (and sometimes the underlying reason for the rule) and apply it cogently to your facts. A lawyer we know still tells the story of a young colleague who did not fare well in a hearing after blundering into the following exchange: When the judge remarked that the result the attorney advocated didn't seem fair, the attorney responded, "We don't have to do what's fair, your honor; we just have to follow the law." Recognize that judges (and juries) want to do *both*, and it is your job to help them understand how the result you seek does just that.

Perhaps the most important aspect of empathy is regard for the court's busy schedule. Any given judge you appear before will have literally hundreds of other cases on her docket. Be respectful of the court's time and limited resources. Whether at a hearing, in a brief, or in trial, focus your presentation. Get to the point. One of the most common judicial complaints about lawyers is the inability to abandon weak arguments. As Judge Murphy explained, "be selective with the issues you present . . . . Adhere to Justice Jackson's admonition that legal contentions, like currency, depreciate through overuse."[26] In short, judges do not expect to have to wade through a pile of weak arguments to ferret out the one or two good arguments. And if you think so little of an argument that you relegate it to a footnote, you cannot possibly expect the judge to hold it in any higher regard. Delete it and devote the space to the arguments that matter.

14. Errors

Well, of course, the best advice on the subject of errors is to avoid making them. But life and people being what they are, you need to know how to deal with mistakes. Judges agree that there are no better ways to compound an error than by ignoring it (hoping no one else notices or that it will just go away), trying to rationalize it, or

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[21] Remarks of Michael R. Murphy, *What Appellate Advocates Seek From Appellate Judges And What Appellate Judges Seek From Appellate Advocates*, 31 N.M. L. Rev. 255, 256 (2001).

[22] William Stunk, Jr. & E.B. White, THE ELEMENTS OF STYLE (4th ed. 2000).

[23] C. Edward Good, A GRAMMAR BOOK FOR YOU AND I . . . OOPS, ME (2002).

[24] We recommend Bryan A. Garner, A DICTIONARY OF MODERN AMERICAN USAGE (1998), in addition to your technical dictionaries and, of course, J.A. Simpson & E.S.C. Weiner, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

[25] Jason Vail, *What Judges Want: Pitching To Your Audience*, 60 Oct. Or. St. B. Bull. 35 (1999).

[26] *Id.*

blaming it on someone else. If you, your staff, or your client has made a mistake, advise the court; take responsibility; offer a sincere apology; and offer up a solution. And do it promptly. This may not avoid the consequences that flow from the error, but it will likely avoid making the problem worse by angering the judge. In one e-discovery opinion we read recently, the court had some particularly harsh words for a party (and counsel) who learned of a massive failure to preserve documents in violation of a court order; waited months to remedy the problem; and waited months *more* before mentioning it to the court.

15. Focus

We have said it before (*see* "Empathy" above), but it bears repeating: Think hard about your case, your motion, your trial. Then exercise what may be the most important thing clients pay you for: your good judgment. Have the courage to abandon weak arguments and weak claims. Do not offer six witnesses when one or two will suffice. As one court wryly noted:

> It would seem that early in the career of every trial lawyer, he or she has lost a case by leaving something out, and thereupon resolved never again to omit even the most inconsequential item of possible evidence from any future trial. Thereafter in an excess of caution the attorney tends to overtry his case by presenting vast quantities of cumulative or marginally relevant evidence . . . .[27]

If the court sounds exasperated, it is with good reason. As the judge explained:

> This Court was once subjected to the calling of ten firemen in an arson prosecution to prove a house burned down. On another occasion, fifteen bank patrons were called to prove a bank was robbed by a masked marauder that no one could identify or describe, since he was heavily disguised.[28]

As you plan your evidence for trial, eliminate duplicative evidence by identifying your most persuasive evidence on a point and discard the less persuasive cumulative evidence. Consider whether stipulations of fact can help condense your case without losing the impact of your evidence. Avoid putting in unnecessary "background" information. Resist the urge to cross-examine on small or collateral points. A colleague recently used an extraordinarily effective three-questions cross-examination that caused the judge to reject the entirety of the opposing expert's *Markman* hearing testimony. Work with the court before and after the trial day to raise and resolve evidentiary issues.[29]

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[27] *United States v. Reaves*, 636 F. Supp. 1575, 1576 (E.D. Ky. 1986).
[28] *Id.*
[29] Martha K. Gooding & Ryan E. Lindsey, *Tempus Fugit: Practical Considerations For Trying A Case Against The Clock*, 53 No. 1 Fed. Lawyer 42, 45 (2006).

Admit facts you cannot dispute. Judges (and juries) expect – and reward – focus and efficiency.

Focus on what is realistic.[30] Whether assessing your arguments or your settlement demands, consider whether you can make your argument or request with a straight face. If in doubt (or if you suspect you may have developed a high tolerance for silly arguments), run it by your secretary, spouse or sixth-grader; they can provide the kind of unbiased, common sense evaluation you should expect from a judge or a jury. Better yet, jettison the argument or request; if you are even suspecting it may be too extreme, it probably is.

Judicial expectations about focus do not differ in the context of patent litigation; indeed, given the complexity of some multi-patent litigation, focus is arguably more important. Asking a court to construe 73 disputed claim terms in a *Markman* hearing or to parse through reams of prior art in a summary judgment motion is likely to be a non-starter.

16. Graphics and other Demonstratives

The technological content of the average patent infringement case cries out for simplification. Even the stylized and simplified drawings of a patent can be overwhelmingly complex to jurors and judges. But the points those jurors or a judge need to understand and decide may in fact be relatively few and can be distilled into relatively simple concepts. Hence, the need for compelling graphics and other demonstrative exhibits at tutorials, claim construction hearings, summary judgment motions, and trials. Timelines help present the basic story of the case. Technical tutorials presented and handed up in hard copy to the court early on will be well-thumbed by the end of the case. (One judge we know videotapes patent tutorials so that he and his clerks can refer back to them as needed.) Well-crafted visual presentations will assist counsel in presenting complex content. Jury research shows that time and again juries rely on demonstrative exhibits that encapsulate for them the crux of the issue. Jurors and judges are visual learners, and have come to expect visually compelling evidence.

The key to successful use of demonstratives in a patent case is two-fold: hire a professional and hire them early. A professional will help bring your case to life, articulate your points and identify the optimal way to convey those points. But to do so, they should be integrated as part of the team before the first substantive hearing in the case.

Of course, presentation suffers from overuse of demonstratives. A recent mock jury exercise resulted in complaints from the jurors that the lawyers put up too much information on the large screen and talked through it in a way that prevented the jurors from assimilating the information either from the spoken presentation or demonstrative. Slowing down the presentation may dramatically improve the jurors' comprehension.

[30] Stanley S. Clawar, *What Judges Want – Part II*, 28 Fall Fam. Advoc. 46 (2005).

Another technique for improving comprehension and maintaining interest is mixing forms of demonstratives, for example, alternating between slides on a large screen, models and pre-printed white boards or flip charts. Keep it interesting. And remember that you must not rely so heavily on technology, graphics and other demonstratives that you neglect to personally connect to and establish your credibility with the jury.

The requirement of accuracy applies with particular force to demonstrative exhibits. Often, the objections to demonstratives is the last matter the court handles before trial starts, and you do not want to start trial with the court just having excluded your demonstratives for being misleading or contrary to the evidence.

17. Help

It is your job, as a trial lawyer, to make judges' lives easier. We do not say this because judges are lazy or incapable of understanding the complex. To the contrary, judges deal with an astonishing array of complex legal and factual issues and a crushing workload, all with minimal staff and ever-shrinking budgets. They work hard. But given those realities, judges want, expect, and *need* the lawyers before them not to make their job any harder. Put another way, your job is to make it easy for the court to rule for your client. Consider the following:

In motion practice, do not make the judge struggle to understand what you are asking it to do. Educate the judge. State up front the relief you are requesting and succinctly summarize the reasons you are entitled to it. Identify the issue, the essential facts, the essential legal holdings, and the reasoning that leads to the result, then stop. Provide roadmaps to your arguments, particularly if the issues are numerous or complex. (*See* "Roadmaps" below.) Use correct citation form, so the court easily can find the legal authorities that support your position. (Most judges like and expect Bluebook[31] form or something close to it; but whatever format you use, be consistent and give helpful parallel citations where local rule, practice, or courtesy requires.) Support every factual assertion with a precise citation to the evidence. Don't make the judge hunt for your evidence; she may not have the time or inclination to do so. Address the other side's arguments and explain clearly and calmly why they are wrong. Meet adverse authority and explain why it is distinguishable or inapplicable. Never ignore the bad fact, bad witness, or bad case. You can be sure the judge will find it (or have it pointed out to her). The most helpful thing you can do is explain to the judge why what *looks* like a bad fact (or authority) is not dispositive and show her how she can – and should – rule for you anyway.

Remember that judges live in the same computerized world that you do. Offer to provide proposed orders and a judgment, jury instructions, findings and conclusions, and the like electronically as well as in paper form. You may be surprised by how often the judge will accept your offer.

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[31] Harvard Law Review Association, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (18th ed. 2005).

At trial, continue to consider how you can make the judge's life easier. Take exhibits, for example: Judges want copies, and one at a time is okay, but trial notebooks are better.[32] Agree with the other side on the content of the exhibit notebooks, and include all the exhibits in notebooks that are usable: do not, for example, stuff the notebooks so full of exhibits that they difficult to open.

18. Local Norms and Customs

In court, as in real estate, "location, location, location" counts. Different courts, different localities, different judges have their own peculiar norms and customs. Judges expect you to take the time to learn them and then to respect them. This can be as simple as studying the court's local rules or a judge's own personal protocols for her courtroom (check the court's website). Judges do not appreciate lawyers who do not take the time to learn the local rules; at a minimum, it shows a lack of respect for the court and a lack of attention to detail. And most judges are no more eager than you are to begin a hearing with a lecture on following the rules.

Local counsel offer far more than just a mail-drop. Use them to educate you about local practice and your judge's personal preferences; have them review briefs, attend hearings and vet arguments. You may know more about the factual intricacies of your case than your local counsel does, but if you have chosen them wisely, they know the court – and that makes them a resource you cannot afford to waste.

19. Motions

Judges exist to resolve disputes. That's their job. But make sure that the matters you present to the court for resolution are genuine disputes that merit judicial intervention. Even if the court rules do not require it, meet and confer with opposing counsel in a genuine effort to resolve – or at least narrow – the issue before burdening the court with a motion. Judges have little respect for attorneys who waste their time with frivolities. If you have any doubt about that, consider the case (which made the rounds on the internet) of two squabbling lawyers who could not agree on whether a deposition would be taken in one of the lawyer's offices or down the street at a court reporter's office – and who actually thought it would be a good idea to file a motion asking the court to weigh in on the issue. A federal judge in Tampa, Florida ordered the parties to engage in a game of "rock, paper, scissors" to resolve the frivolous dispute.[33] The moral: If you don't want a court to treat you like a peevish child, don't act like one.

20. Objections

Judges know you have to make objections. But as with motions, they expect your objections to be worthy of being made. Avoid making objections just because you can.[34] When an objection is necessary, make it clearly and concisely. Take the time to find out whether your judge permits an objection with explanation, the mere citation of the

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[32] Drummond, *supra* note 9, at 3.
[33] *See* Roger Parloff, *Judge Orders Lawyers To Play Game*, Fortune (June 7, 2006) (reprinted at http://money.cnn.com/2006/06/07/magazines/fortune/rps_fortune/).
[34] Drummond, *supra* note 9, at 3.

evidentiary rule, or nothing more than "objection."

21. Oral Argument

When done well and correctly, most judges like oral argument. It can be engaging and intellectually stimulating – and it can help the court crystallize the issues and its thinking. Listen to the questions; pause to think, if you need to. Then answer the question asked, initially with a yes or no; judges know an evasive answer when they hear it and they don't like it. They want – and expect – an answer. If you don't know the answer, say so—and offer to find out and submit the answer later. Don't read your argument; in fact, do not even bring a prepared text. Do not even think about interrupting. Don't present to judges as if they were the jury, and for heaven's sake don't argue with them. Keep emotions in check. On appeal, stick to the record, but do not stress your evidence while ignoring the other side's evidence and the findings. Avoid repeating the obvious.[35]

22. Organization

For over two hundred years it has been recognized that "[t]hose who write as they speak, even though they speak well, write badly."[36] So, drafting documents should not proceed like a conversation. Before you write, you should know what you want to say, and you should know the order in which you want to say it. Remember, "writing is an intellectual activity, not a bundle of skills. Writing proceeds from thinking."[37] Think before you ever put pen to paper:

What are you writing?
Why are you writing it?
Who are you writing for?

After you have answered these questions, outline your paper. Only after you edit your outline so that it is complete and persuasive should you begin writing. This organization will keep your analysis clear, speed your writing, and lead to a clearer, crisper presentation.

23. Patent System

Many judges use the Federal Judicial Center's video on the patent system to introduce jurors to patents, the patent system and the United States Patent Office.[38] Jury consultants vary widely in their view of the FJC's video, from mildly pro-patentee to decidedly pro-patentee, but different parts of the video play differently, and parties

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[35] *See generally*, Paul R. Michel, *Effective Appellate Advocacy*, 24 No. 4 Litigation 19 (1998).

[36] Comte De Buffon, DISCOURS SUR LE STYLE (1753).

[37] Thomas & Turner, *supra* note 18, at 82.

[38] Federal Judicial Center, AN INTRODUCTION TO THE PATENT SYSTEM (2002), available at http://www.fjc.gov/public/home.nsf/pages/557. While this video is perhaps more interesting than jury instructions read from the bench, it has been described as less interesting than Ben Stiller and Jack Black's ENVY, a 2004 film about invention that has been described as "pretty stupid."
http://www.patentlyo.com/patent/2006/04/movie_review_en.html.

emphasize those aspects that favor their case, if they refer to the video at all. Most often the video is played and never referred to again during trial, post-trial motions or subsequent appeal.

To put the patent system in context, some patentee's counsel cannot resist referring to the United States Constitution, exhorting their case as the test case for the wisdom of the founding fathers in Article I, Section 8, Clause 8. Cloaking one's patentee client in Constitutional robes rarely carries much weight, however, because the accused infringer can use the section's requirement that the exclusive right granted to the inventors is only "their . . . Discoveries" as a launching pad for discussion of noninfringement and invalidity defenses, one that is particularly helpful if combined with the theme that the patentee "didn't follow the rules." At the end of the day, the Constitution and the importance of the patent system rarely carries much in the way of weight.

24. Plain Speaking

Law in general—and patent law in particular—are chock full of terms that we would never utter in everyday conversation. That is something one cannot say about, for example, Abraham Lincoln's Gettysburg Address, Martin Luther King, Jr.'s "I Have A Dream" oration, or Winston Churchill's "We shall fight them on the beaches" speech. To be memorable, your words need be readily understood.

But do not carry this admonition too far. We tried a case in the South against an Ivy League-educated Yankee who started his opening statement by consciously dropping his g's and using "y'all," sounding for all the world like a parody, particularly once he reverted to his natural speaking style, a point not lost on the shadow jury that panned his performance. Be yourself, from start to finish.

25. Reading

Don't. Whether to a judge or jury, don't.

26. Relevance

The details of an invention claimed in a patent may have no effect on the ordinary consumer or on the consumers that sit on a bench or in a jury box. But the effective advocate adjusts the lens on the presentation to bring the focus to a level that demonstrates why that invention is relevant, and even important, to the judge or jury. The width of an electrode may not matter to them one way or another, for example, but every judge or juror knows someone with diabetes, and test strips used by those diabetics contain electrodes that have properties that allow use of a smaller sample of blood or provide a quicker glucose level reading, providing not only increased comfort but safety. Those are facts that can make an obscure technical feature enormously attractive and important to the trier of fact.

27. Repetition

Don't be repetitive.

28. Respect

Whether judge or jury, the finder of fact merits your respect. As a mock juror recently told us, "we may talk slow, but we ain't stupid." Treat the finder of fact with respect by never serving up an implausible story. Treat them as your peer, and expect them to believe your version of the facts because it is plausible and reasonable. By treating everyone in the courtroom with respect, you follow that invaluable advice "Don't be a jerk."[39]

29. Roadmaps and Persuasion

In their classic "How to Read a Book," Adler and Van Doren advised readers to "Study the table of contents to obtain a general sense of the book's structure; use it as a road map before taking a trip."[40] Judges follow this advice; many read the table of contents first. Every portion of your brief should be persuasive; the table of contents and headings are no exceptions. There is no less persuasive roadmap than "Introduction," "Argument" and "Conclusion."

The statement of facts should not be argumentative; but it should tell a persuasive story. Include all of the facts the judge needs to know – either because it helps you or because your opponent is bound to tell her – and nothing else. Avoid reciting irrelevant dates; as with your legal arguments, exercise your judgment and make the hard choices about what should be included and what should be deleted. Be suspicious of "background" facts. If they will not help the court decide the issue before her, do not make her wade through them. Make your facts persuasive by subtle use of word choice, not adjectives and adverbs.

The statement of law in your argument should be persuasive, too. Don't belabor the obvious, but state the burden of persuasion and standard of proof, and if the court has discretion, tell it so. Signpost your arguments with, for example, numbers (*e.g.*, "the defendant's motion fails for the following three reasons") and indicate whether arguments are independent from each other or depend on each other. Summarize long arguments.

30. Rules

Federal Rules of Evidence, Civil Procedure and Appellate Procedure. Local rules. Judge's local, local rules. Know them. Follow them. Enough said.

31. Schedules and Timing

Courts set schedules to allow your case – and the scores of other cases on their docket – to proceed in an orderly fashion. Know the case management deadlines and schedule and stick to them. Performing acts that can only upset that schedule will upset the judge as well as the progress of the case. The classic example is filing a lengthy summary judgment motion with enormous exhibits at the last possible momemnt before trial, a tactic that will anger the judge, or ensure that your motion does not get heard (or at

[39] David J.F. Gross & Charles F. Webber, THE POWER TRIAL METHOD 22 (2001).
[40] Mortimer J. Adler & Charles Van Doren, HOW TO READ A BOOK 33 (1972).

least not heard any time prior to trial) – and perhaps both. The following excerpt from an order vacating the summary judgment hearing, pretrial and trial dates in a patent infringement case shows exactly how judges feel about this tactic:

> When the Court granted the application for oversize briefs, it was not apprised of the veritable avalanche of supporting paper, exhibits, declarations, etc. with which it would be deluged by the parties. The parties have filed boxes of materials in support of and opposition to the motions. . . . [A]ll of this material has been filed virtually on the eve of trial. Moreover, because trial is imminent, the parties are now inundating the Court with in limine motions. The Court is left to ponder exactly how the parties anticipated that it, and its staff, would be expected to wade through all of this material, make reasoned rulings, prepare for trial and handle the wealth of other business generated by the Court calendar of other cases. The Court declines to ponder these issues, nor will it and its staff work day and night trying to distill all of this material and rule upon it in the short time frame before trial.[41]

If a change to a case schedule needs to be made – e.g., an unavoidable conflict arises – deal with it openly, honestly and promptly. Most judges understand that the best-laid schedules sometimes need adjustment; but they do not like last minute surprises. If you want the judge to be respectful of your schedule, be respectful of hers, too.

32. Simplification

Nothing further sets patent cases apart from other complex civil litigation than the technical complexity of the subject matter. Particularly where judges insist on tightly controlling the length of trials, there simply may not be enough time to educate the judge or jury in all the fine distinctions of the technology at issue. Hence, the importance of simplification. See the discussion on Analogy, Brevity, Clarity, Focus, Graphics and other Demonstratives, Help, Organization, Plain Speaking, Roadmaps and Persuasion, Themes, and Written Word Choice.

33. Themes

Identify a theme or a few simple themes early in the development of a case. Then prepare the case around those themes, introduce them in opening statement, bolster them throughout examination and cross-examination of witnesses, and return to them in closing argument. And "simple" means just that. "Jones just took Smith's invention with no intention of paying for it." "Smith didn't follow the rules in obtaining his patent." The theme is much more focused than the story of the case, or the theory of the case, which is the story of the case overlaid onto the legal issues involved.[42]

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[41] Civil Minute Order, *Kruse Technology Partnership v. Caterpillar Inc*., No. CV 04-10435 GPS(PMOx) (February 22, 2006).

[42] Steven Lubet, MODERN TRIAL ADVOCACY 7 (1993).

Thematically speaking, it has been said that the patentee tries the invention (telling the invention story and extolling the benefits of the invention), while the accused infringer tries the patent (extolling the prior art and detailing the limitations of the Patent Office). The patentee gets to define the inventive contribution of the patent in just a phrase, and hammer that phrase from opening statement to closing argument. The accused infringer has a harder job, namely, explaining why the Patent Office made a mistake in granting the patent, preferably in a single phrase.

34. Written Word Choice

As a nation, our writing favors big and awkward words. "It's bound to appeal to Americans," Florence King observed. "Awkward words always do."[43] Big words may feed a William F. Buckley complex, but they bog down writing, and when wielded by a lawyer can make a legal brief all but impenetrable. Lawyer-speak like "subsequent to," "prior to," "concurrently therewith," "hereinabove" and "hereinafter" will numb the most ardent reader. Weed out awkward words and phrases. Short words and phrases are best. And all of this applies with equal (if not greater) force to Latin phrases.[44] You may have committed some nifty Latin phrases to memory in law school, but you cannot assume that the judge did too. You gain nothing by forcing a judge to pick up a dictionary to understand what you are trying to say. And you run the risk that the judge will simply skip over the impenetrable prose and assume it will all become clear later in the brief.

CONCLUSION

Just as in other complex civil cases, in patent cases judges and juries expect and deserve counsel to behave courteously, ethically and professionally in all their interactions with the court and opposing counsel. They expect and deserve the highest quality of written and oral advocacy down to the most minute detail. They expect complex patent law and technology to be made simple and clear. Not living up to those expectations will jeopardize your case.

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[43] Florence King, WITH CHARITY TOWARD NONE 30 (1992).

[44] In particular, you should avoid the Latin legal maxims section in Black's Law Dictionary like the plague, except when trying to figure out what in the world your opponent is trying to say.