WINSTON & STRAWN LLP

BLOG

Six Key Patent Trial Insights from Judge Albright and Members of the American College of Trial Lawyers

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On December 15, 2020, Winston & Strawn former partner had the opportunity to discuss trial strategies for patent trials with Judge Alan D Albright and two other fellows of the American College of Trial Lawyers, Winston & Strawn's Tom Melsheimer and Matt Powers, founding partner of Tensegrity Law Group. The panel also included Rachel York Colangelo, Managing Director of Jury Consulting at Magna Legal Services (which hosted the panel discussion).

Law.com's Scott Graham praised the panel. "Maybe it was Winston & Strawn former partner easygoing style of moderating, or maybe it was Tensegrity Law partner Matt Powers' tranquil Zoom background. Whatever it was, Winston and Magna Legal Services' webinar … had the feel of IP trial veterans sharing tricks of the trade over cocktails—with some jury research science thrown in for good measure." "I felt like I learned more about IP trial strategy in one hour Wednesday from Alan Albright, Tom Melsheimer, Matt Powers, and Rachel York Colangelo than I did during the rest of 2020."

You can read Scott's Law.com article in more detail here and, as well as Law360's take on the panel here. The webinar itself can be viewed here.

Below are some of the key takeaways from this panel discussion.

Why do juries find the way they do?

Dr. Colangelo explained that, due to the complexity of patent cases, jurors will often make decisions based on their general feelings about the parties, e.g., in terms of their likeability and credibility. Jurors want a good story with a "good guy" and a "bad guy." Those gut feelings can stem, for example, from narratives regarding the invention story, relationships between the parties, etc.

Because of this, trial lawyers should focus their efforts on eloquent storytelling, while being judicious gatekeepers of the information that gets to a jury. Failing to streamline the number of themes presented to a jury, repeating themes too often, and overusing technical jargon can produce bad outcomes.

Streamlining a case to the themes that are most likely to win the day

Judge Albright noted that, based on his experience presiding over patent trials, he believes the quality of the lawyering matters a great deal in the outcome of a case. He noted the importance of coming into trial highly focused on a small number of issues.

Mr. Powers and Mr. Melsheimer discussed different approaches for streamlining a case. Mr. Powers discussed the importance of simplifying a case from the start and identifying a handful of issues that will result in a positive or negative outcome—i.e., "hinge" issues. By focusing the litigation team on these hinge issues, one can ensure that energy is focused on the issues that matter most and that facts that support the key themes are elicited during the discovery period. Juries will find it difficult if too many arguments are presented, and even good arguments will start to look like average arguments.

Mr. Melsheimer explained that a defense case often involves adjusting and streamlining themes over the course of many months, and he agreed that it is important to aggressively cut away arguments that are unlikely to succeed and focus on the strongest arguments.

Using mock trials strategically to improve trial presentation

Judge Albright noted that the use of consultants can be an effective way to winnow down issues to the most compelling ones. Mock juries can provide insight into how a lay jury will view key arguments.

However, Mr. Powers warned against the use of mock trials to predict trial outcomes. Rather, he stated that a mock trial is most useful for understanding how to present hinge issues and to figure out what works and what does not. He noted that at times, mock jurors will come up with arguments that drive deliberations even though neither party presented the argument, and that mock trials are also useful for witness preparation and helping witnesses understand how they present to a jury.

Dealing with the unexpected at trial

Mr. Melsheimer explained that, although this does not often happen in his experience, the ability to substantially change course at trial will turn on the length of the trial and whether there are time limits.

Mr. Powers echoed that changing course can be challenging and that it is important to consider what you can accomplish in the time allotted given a new landscape. Parties may be fairly fixed in terms of witnesses and expert reports but can redirect their time to reasons why they should win the case, even under the changed landscape.

Issues unique to multi-patent cases

Mr. Melsheimer emphasized the importance of having themes that run across patents and covering these themes in the opening statement and with expert witnesses. This strategy will give the jury something to hold on to before marching through the technical issues in the case.

Judge Albright explained that when there is more than one patent, the likelihood that the jury will care more about the performance of the lawyers and witnesses and less about the content of the presentation increases. Judge Albright explained that he tries to limit a trial to between 3 and 5 patents per trial and has previously split a case into two trials where 7 patents were at issue.

Mr. Powers noted that it is important to focus on a subset of the patents and to make the case about those patents. Mr. Powers emphasized the significance of the plaintiff carefully deciding which patents matter most and cutting away the weakest links.

Cross-examining experts

Mr. Melsheimer explained that, during cross examination of an expert, it is important focus on points that will be compelling to a jury, such as a lack of credibility or a failure by the expert to undertake an analysis that they should have performed. Mr. Melsheimer noted that it is often difficult to get an expert to answer a question directly. He discussed how some judges take a hands-off approach, while others mandate that an expert provide a direct answer to a direct question.

Judge Albright explained that he is in the latter camp and expects experts–and indeed all witnesses–to provide direct answers to leading questions.

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Thomas M. Melsheimer

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