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Mozart: a Good Patent Litigator; Beethoven: a Mean One

When skillfully performed, patent litigation is a symphony. The key to a successful patent litigation is an appreciation for the balance that must exist among several distinct parts.

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Many highly successful trial attorneys have taken on patent cases only to later find themselves in difficult conversations with disappointed clients. Similarly, many skilled patent attorneys have litigated cases only to find their seemingly ironclad scientific arguments fail. Frequently, this has more to do with the nature of patent litigation than with the merits of a particular case. In our view, the key to a successful patent litigation is an appreciation for the balance that must exist among several distinct parts.

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When skillfully performed, patent litigation is a symphony.

An orchestra has four main sections: brass, strings, percussion and woodwind. Patent litigation can also be viewed as having four essential elements: science, persuasion, theme and a unique set of laws. And like the composer, the patent litigator must recognize the strengths and weaknesses of each element and strike the proper balance at the proper time.

Brass Section: Science

Because every patent case includes technology, many patent attorneys mistakenly believe that a bulletproof technology-based argument will win the day. That is not necessarily true. Like the brass section of a symphony, the technology piece of a patent litigation should not be overplayed. A little goes a long way. And just as too much brass can offend the ears and turn off the listener, a heavy dose of

complex science can lose even the most conscientious judge and juror (remember to always assume that jurors have a ninth grade education).

The science should be heard, indeed, trumpeted at times. But there are also moments when the science must defer to the other elements in a balanced case—the persuasive aspects, the theme and the law.

String Section: Persuasion

The string section is the most versatile part of an orchestra and carries the melody to the listener. Equally versatile are the litigator's persuasive skills. And whether it's an audience member, a judge or a juror, the listener must be swayed, preferably by touching an emotional chord. The stronger the connection, the greater the chance for success.

Yet, there is as much danger in a trial attorney who relies too heavily on emotion as there is in a patent attorney who relies too heavily on science. Both elements are important and, like the brass and the strings, each must complement the other.

Percussion: Theme

Seasoned litigators know the importance of a story that ties the case together. It is the outline into which the jury places otherwise disparate facts. The theme can be positive (Mozart) and point out the invention's great discovery, or it can be dark (Beethoven) and highlight an evil that must be cured.

The percussion section provides the background for a symphony and, like a good story, is used to add drama. Firmly establishing the story with the jury early on sets the stage for the key cross-examination, just as the drum roll of a timpani demands that the listener pay attention to what happens next.

A good story is particularly important in patent cases, because the jury must digest new technology as well as esoteric patent laws. The story provides context for both the technology and the law. Indeed, the story is the rhythm of the case.

The story also dictates the amount of science to present. The technology must fit in with the story and be presented only with the level of detail necessary.

Woodwinds: Law

A persuasive and scientifically sound argument, coupled with a good story, is a powerful force in the district court. Yet, those arguments must be tethered to the law for any trial victory to survive on appeal. A balanced case looks beyond the problems of the moment and does not place clever arguments above the law. In the symphony, that is the role of the woodwinds.

The composer uses the woodwinds to restrain the piece from being drowned out by the brass or the strings. Similarly, the patent litigator embraces the patent laws, the rules of evidence and the cannons of ethics.

Symphonic Form: Case Strategy

A symphony is composed of several movements, each having its own character. Similarly, a patent litigation is composed of several battles, each requiring its own unique balance. For example, a claim construction hearing may emphasize the science, whereas a motion to dismiss may highlight the law. Like the composer, the patent litigator's task is to emphasize certain features of the case, when necessary, while maintaining fidelity to the overall story.

The Composer: Not a Committee

Like an orchestra, patent litigation is a team effort, comprised of highly skilled and extremely intelligent members. Those members will frequently differ, sometimes passionately, over the best strategy. The patent litigator finds comfort in these conflicts, indeed provokes them at times, because the biggest enemy of a highly cohesive team is "group think." While the patent litigator makes the final decision—and

we do not suggest a democratic process–the best decisions come from a sincere exchange of contrary views in an environment where members are comfortable speaking their minds.

The patent litigator also ensures that positions taken at one part of the case do not compromise (or worse) positions that need to be taken later on. The patent litigator sees the shortsightedness in presenting ill-prepared 30(b)(6) witnesses, and the opportunities presented by adversaries who hide discovery through meritless privilege claims.

Some choose to manage patent litigations with co-leaders, typically a trial attorney teamed with a patent attorney. However, cases run by such teams can erode as the inevitable conflicts arise. We have answered motions that were filed by one co-leader only to have their counterpart withdraw the motion after seeing the response. Co-leaders must operate in harmony. If there is one major conflict between them, the client knows it; two major conflicts, and the opposing counsel knows it; three, and the jury knows it. The co-leaders, therefore, have to be involved in all aspects of the decision-making. That means two attorneys at two billable rates, rather than just one patent litigator.

There is peril in having just a trial attorney or a patent attorney alone lead the litigation. The patent laws are a minefield in which the explosive consequences are not felt for some time. A trial attorney who is unfamiliar with the nuance of the patent laws can be led into taking positions that transform his client into a dead litigant walking. Similarly, it is common to see critical deposition testimony unusable at trial because the patent attorney who took the deposition tied all key questions to an inadmissible document.

A patent litigator must have common sense, a creative mind, the ability to read people quickly, and the internal strength to separate the message from the messenger (not every position taken by an adversary is without merit). And he or she must be able to communicate a message simply and forcefully. Most importantly, the patent litigator must have the ability to listen to criticism from trusted colleagues. What separates a patent litigator from those who merely litigate patents is an overall view of the process and the ability to strike the right balance at the right time between the science, the law and the persuasive arguments.

Conclusion

The symphony analogy is merely a tool, to be discarded if it interferes with the central message: patent cases should be litigated with an overall sense of balance. A patent litigator embraces the different aspects of the case and recognizes that each has a time to be heard and a time to defer. To ignore one of these key parts is to lose more than just its value: the patent case becomes merely an argument, and the orchestra merely a band. And neither Mozart nor Beethoven ever played in a band.

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