



IP Litigation



UNDERSTANDING THE BIG PICTURE



What do juries think?

Jurors want to do the right thing. They want to understand what happened and render a decision that is fair and just. But, they generally do not view the case through the lens of the law, nor do they possess the specialized knowledge to capture and process all of the complexities or technical details.



Taking a step back, this should not be surprising. Typical juries are not made up of scientists, engineers, chemists, biologists, designers or inventors. As a result, when lawyers focus too much on the law or technology, and not enough on the underlying story, juries often become confused. They have difficulty making a “common sense” determination regarding what is just and fair.

WE'RE CLEAR. WE'RE CONCISE. WE COMMUNICATE. WE'RE HARNESS DICKEY.

HARNESS
DICKEY

Complex to simple.



Harness Dickey: We know juries and how to tell your story.

At Harness Dickey, we know the law inside and out. We also recognize that intellectual property disputes are usually complex, often encompassing legal and technical issues that are not easily understood by mediators, judges, much less juries. That's why we know how important it is to explain your position clearly, concisely, persuasively. These are skills we have been perfecting for over 90 years.

The starting point for any intellectual property case begins with carefully evaluating what ordinary people – the jury – will think when they hear the facts of your case and the story that develops from those facts. Understanding at the outset how people will process, react to and form opinions concerning the facts and corresponding story is critical in our view.

Is the result clarity? Is the result confusion? It all starts with how your story is told.

How the facts of your case are presented to mediators, judges and juries is crucial to whether the facts of the matter are processed in a way that is beneficial to your case.

What happens all too often. Juror confusion is common when the art of persuasively presenting an understandable and compelling story is overlooked. Here's what some jurors say about their experiences:

"The plaintiff's lawyers were nice enough, but I just didn't understand the points they were trying to make."

"We were shown pictures of both the plaintiff's and the defendant's products. We could see there were differences ... but we didn't understand which differences were important and which were not."

What should happen. We get results for plaintiffs and defendants by presenting a persuasive, compelling case, explaining the facts and technology using terminology that is as simple, clear, and concise as possible. We present these

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facts and technology in a way that helps guide juries to decide in favor of our clients, allowing them to be confident that their decisions reflect the fair and proper result.

“They could have used language and terminology that we didn’t understand. The fact that they spoke to us on our level made a significant difference in how we rendered our verdict.”

“One side clearly tried to overload us with a data-filled, scientific presentation that was way over our heads. The other side won us over by telling a story we understood and clearly explained the reasons we should determine an outcome in their favor.”

The Principles of Building a Good Case and Compelling Story.

We build solid cases and compelling stories. Our extensive experience in and out of the courtroom has provided many valuable lessons over the course of our firm’s history. Today, we develop each client’s story by following a simple set of principles.

1. In-depth Early Fact Gathering and Analysis: We perform in-depth fact gathering and analysis as early as possible to permit us to tell a persuasive story supported by the facts. From there, we develop themes around the facts and then ensure that our themes support the desired legal conclusion.

2. Get to the Heart of the Matter: We get to the heart of the matter. In patent infringement cases, many firms will simply present the features of the accused infringing product and argue patent principles in the hope that the jury will find infringement. Such an approach rarely evokes the emotion a jury needs to rule your way. Instead, the jury typically wants to understand what happened, and to understand the parties’ motives, so they can feel confident determining not just who is right and who is wrong, but why. We look at the facts of every case and bring out factors such as dedication to science, greed, copying, profiting from others’ efforts, independent development, accidental similarity and legitimate competition.

Solutions with teeth.

Case Study: CBC v. Major League Baseball: From a pure legal standpoint, the issue was whether the use of player statistics to play fantasy sports violated player rights of publicity and even if it did whether the First Amendment trumped any such state rights of publicity. By the time of suit, the fantasy industry was valued at \$1.5 billion annually.

A deeper dive into the facts revealed a much more compelling story for the fantasy industry and against Major League Baseball than that signaled by the pure legal issue. As it turns out, Major League Baseball played no part in thinking of or developing fantasy sports. An editor for the New York Times thought of it. In the 1980s, devoted fans created and managed their own statistical games with an estimation of about 500,000 fans playing annually. In the 1990s and moving forward, software companies like CBC developed state of the art software to manage the statistic interface and to create many forms

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Solutions with teeth.

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of interesting fantasy games. The software made it far easier for the average fan to play and track the games, dramatically increasing the popularity of fantasy sports. By 2005, at the time of suit, it was estimated that about 15 million fans played fantasy sports annually. CBC brought in many witnesses to explain in detail how fantasy sports had actually made Major League Baseball far more money by causing devoted fans to watch many more games than just those of their home town team and encouraging them to buy more merchandise, satellite television packages, and fantasy sports media, to name just some of the benefits. Indeed, the fantasy industry had helped Major League Baseball and its players; it had not damaged them in the least.

Based on this much more compelling story that transcended the mere legal issues, CBC prevailed at the district court level and was affirmed on appeal.

For example:

- While claim language is no doubt important, how close or different does the defendant's product look to the claimed invention?
- Did the defendant spend significant resources developing its competitive product, or did it produce a competitive product too quickly, suggesting copying?
- Are there aspects to the story that suggest that the defendant was tracking the plaintiff's product and copied it? Was the plaintiff's product taking market share from the defendant, thus providing a motive for the defendant to copy the product?
- From the defense perspective, is the plaintiff overreaching with its patent by trying to cover something that the plaintiff truly did not invent?
- Is the defendant's product one of many similar products and does this fact suggest it is a legitimate competitor in a highly competitive market?

3. Bringing the Story to Life: Presenting a persuasive case requires talent and creativity, not too much different than a great playwright or director. Bringing the story to life requires focus on two overriding concepts:

- **Witness Selection:** We select witnesses who can tell the story persuasively and who are comfortable in their testimony. While there may be times when there is no choice in the matter, all too often there are many aspects of the story that can be told by different witnesses and choosing a collection of witnesses that are interesting and compelling is very important. So too is choosing a diverse group of witnesses if at all possible to better appeal to the likely diverse group of jurors.
- **Visual Presentation:** Also important to retaining attention and persuading is the use of graphics and animations that bring cases to life and make the themes of the story easier to follow and understand. Pictures are truly worth a thousand words and it surprising how all too often attorneys fail to devote substantial time to carefully thinking through the animations, models and PowerPoint presentations.



4. Effective Case Management: We manage our cases effectively. While we are systematic in our approach to litigation to provide consistency, we are flexible and agile in our ability to process new facts and evidence that evolve during the course of a case. We employ software and procedures to ensure that as the massive amount of information and facts are exchanged during the course of litigation, we systematically account for developments in our theme. Falling in love with the original assessment of the case and not allowing themes to change and develop with the evolving evidence can be a deadly sin.

5. Persuasive Writing: We put pen to paper. We take pride in creative, intelligent writing that brings a case to life ... an important factor behind our consistent record of obtaining favorable court rulings prior to trial. Many intellectual property cases are decided at the summary judgment phase or by Markman hearing. Persuasive briefing drives these successes.

The End Result.

Results speak for themselves. The impressive record for success at Harness Dickey is one that our long-term clients have come to rely on and one that gives new clients confidence.

We are adept at assessing and organizing facts and material information in the early phases, thus allowing us to quickly and efficiently build your case. We routinely achieve client objectives through early settlement because we are positioned to persuade opposing counsel to make important concessions. We're proud of our high success rates for early settlements and mediation, favorable final court rulings at the Markman or summary judgment phase, and our outstanding trial results.

We communicate. Clearly. Concisely. Persuasively. Harness Dickey.



The difference between the two sides' presentations was like night and day. Clearly our ruling hinged on the ability of the defendant's counsel to tell us the facts and the history in a story that we could relate to.



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