The Focal Point LLC

Teach Your Jurors Well
By G. Christopher Ritter, Esq., and Scott Hilton

Imagine this: Your star expert witness—you know, the one who not only understands but also taught you everything you know about prosthetic device microprocessors—has spent an hour on the stand discussing the history of prosthetics, the nature of integrated circuits, and the two-part test for determining "actual controversy." You're pleased with his performance; after all, he was calm, authoritative, and launched into his topic with obvious zeal.

But the jurors, you notice, aren't looking so happy. One is rubbing her temples, looking perplexed. Another appears dazed. And several others just look worried. This, in turn, is making you feel uneasy—as well it should. Your jurors are experiencing a form of anxiety we call the "Yikes alarm," and when jurors are anxious, they can't learn.

Anyone who has tried a complex patent infringement case has no doubt seen what happens when this alarm sounds off. Jurors (and even judges) who had been leaning forward to follow your argument, suddenly pull back, inhale sharply, and show evidence of thinking, "Yikes, there is no way I can understand this stuff!" Such alarms go off in courtrooms all the time–especially in courtrooms where complicated arguments about intellectual property are taking place. Despite the frequency, however, a "Yikes!" alarm in your own trial can be disastrous, because jurors will either stop listening to your argument (as in, "whoa, this is way over my head") or start resenting you (as in, "this attorney is wasting my time!"). Neither result is good, because even if you eventually bring these jurors back into the fold (as in, "oh, now I get it"), you and your case have suffered, because the jurors never got to hear crucial parts of your case.

That's the bad news. The good news is that it's possible to present material to jurors in a way that doesn't trigger their fear of not understanding you. You just have to understand how people process new information and what makes them sit up, listen, and understand.

The Nature of the "Yikes!" Alarm

Although you'll find no mention of it in a biological textbook, the "Yikes!" alarm is a naturally occurring phenomenon. The human brain can only process so much information; confronted with information overload, the brain begins to shut down. We've all experienced it—whether it was in a high school physics class, at a gas station getting directions, or at a CLE program on Trust Law. Too much information is hard to process.

Jurors feel alarmed when they are faced with complex facts about situations with which they have little experience. Unfortunately, in the world of intellectual property, that happens a lot. IP trials often involve complicated information; jurors rarely have much

time to study it. And if they don't "get it" quickly, they start worrying more about whether they are *capable* of understanding your information than analyzing the facts of your case. In fact, they might start ruminating on where they will get lunch, what they are missing back at the office, or how the kids will get picked up at daycare.
Yikes! You've lost them.

Getting to "I Get It"

Does this mean that jurors must understand every single fact in order to decide the case in your favor? Of course not. Jurors only want (and need) enough information to make what they feel is the right decision. Instead, the fact that new information makes people anxious means that new information must be presented in understandable (even reassuring) ways. And in order to do that, you need to work with the two-stage coping process that people use to learn new material.

In the **first stage**, jurors connect, at least some of the unfamiliar facts, to familiar concepts. Once these connections are made, jurors progress to the **second stage** of learning, in which the jurors add to their understanding incrementally by "layering" pieces of information over each other.

Here's another way of looking at it. The two-step process is really like using a garden lattice to grow plants. The lattice is the structure you'll use for presenting new ideas (i.e., familiar concepts, images, and ideas). Your new material is the new plant that is growing on that existing structure; each new plant adds complexity and new information. When your jurors step back, they'll see the "garden" (i.e., your argument) in its entirety.

A Tool Kit for Teaching
As an IP trial lawyer, you are first and foremost, a teacher. That is, in order to prove a concept, you have to teach what it means. And in order to do that, you have to develop courtroom teaching tools that will keep your jurors from getting so anxious they can't absorb your information. While these tools can take a variety of forms (e.g., trial graphics, tutorials, analogies) the most effective tools have the five following characteristics in common.

1) They are succinct: The tools get directly to the point by using every day, real-world language or concepts.
2) They employ familiar concepts and ideas: The tools relate to something the jurors already understand. In other words, jurors find ways to compare new facts to facts they already understand.
3) They leverage memorable imagery and stories: During deliberation, the jurors need to be able to recall the information that you presented during trial—even if the information was presented weeks earlier.
4) They create a "buzz": Your tools should make the jurors lean to the front of the jury box to learn more.
5) They employ "pacing" devices: "Pacing" is just another word for presenting important material incrementally.

The Flight of Comprehension
Let's say that you're defending an entrepreneur in a patent infringement case. And in order to defend her effectively, you need to explain the concept of "enablement." This is

an abstract concept with which most of your fledgling IP experts (i.e., your jurors) are not familiar. So your mission is to make an entirely new concept understandable—to make, in essence, the intangible tangible.

To start, you can explain that in patent law, coming up with a good idea is not enough. That is, you cannot get a patent for just having thought of a nifty idea, dreamed an impossible dream, or created an interesting sketch. Instead, in order to successfully patent an invention, the inventor must do more, including "enabling" the idea.

Now, you could have an expert witness explain that the patent system has three primary disclosure requirements. Those disclosure requirements consist of enablement, written description, and best mode. Enablement requirement requires that the patentee disclose the invention in a manner that would allow one of ordinary skill in the art to make and use the invention without an undue amount of experimentation. Your witness might even add, with the relish that comes from trotting out a really good acronym, that enablement is the only disclosure requirement internationally mandated by the agreement on Trade-Related Aspects of Intellectual Property, or "TRIPS."

But we can almost guarantee this approach will not fly well with your jury. In fact, your jury has no idea what your expert is talking about. Instead, they will start to feel irritated about being trapped in a hot, stuffy room listening to incomprehensible explanations for weeks on end. Moreover, they will come to believe that you don't care enough about them—or your case—to take the time to educate them in a way that would engage them. And that means you will have lost the very people you want to argue your side of the case during jury deliberations.

Imagine how much more effective your expert would be if she started off discussing the age-old human desire to fly. "Every person has longed to fly at some point," she might say. "Children try to fly off couches (sometimes with regrettable results); adults dream of flying at night; and the Greek myth of Icarus centers on what happens when the joy of flying overtakes common sense." Do you feel how much more engaging and appealing this introduction is? That's because the witness is *using familiar concepts* (Tool 2) and *memorable imagery* (Tool 3) to hook her audience.

Indeed, the witness might go on, "People tried for centuries to build contraptions that would enable the dense-boned, un-feathered human mammal to fly. Many people tried so hard they died. Even the genius Leonardo da Vinci tried to come up with a flying machine and ended up declaring, 'I have wasted my time.' Again, your expert has introduced a *familiar concept* (Tool 2)—a well-known artist. And the fact that he failed at something ("no one's perfect!") will *create a buzz* (Tool 4) in your jury box.

"None of these inventors could have received a patent under US law," your expert could explain, "because none of them had successfully 'enabled' the idea. In other words, (she might add with a slight smile,) their ideas didn't work." Now she is being *succinct* (Tool 1)*;* she is using *real-world language* (also Tool 1) to communicate with real-world people.

"But all of this changed," she could continue, "on December 17, 1903, when brothers Orville and Wilbur Wright built and, yes, successfully flew the first airplane. Unlike everyone before them, these two Ohio bicycle makers successfully 'enabled' the idea of a flying machine by making a machine that actually flew. As a result, the US Patent

Office granted the Wright brothers a patent to protect their years of hard work from any imitators."

Bringing It Down to Earth
To better support your witness's point, you could produce a graphic about the invention of flying machines. But instead of showing, say, an entire timeline to the jury all at once, you could "build" it, by adding understandable layers, bit by bit via a series of graphics. As your witness talks about early attempts to fly, you might show a picture of Leonardo Da Vinci's sketches from the 1400s. Then you could show pictures of later inventors—including Sir George Cayley Bart from the early 1800s and Givaudan and Bleriot from the early 1900s. You can end with a picture of the Wright Brothers' patent application and a historical photo of their machine actually taking flight. Your final graphic—which would show both failed ideas and the Wright brothers' final invention-- would show that inventors had tried, tried, and tried again to create something that would allow humans to fly. But it wasn't until the Wright brothers "enabled" the idea that humans were actually able to do so.

By creating a graphic that layers crucial information, you have created a presentation that is *paced* (Tool 5). This, in turn, allows your jury to focus on the overall concept of "enablement," without getting lost in technical definitions.

The Sound of Silence
Now the sound you hear is silence, not the "Yikes!" alarm. And when you hear that sweet sound, you can rest assured that your jury understands the scary topic of patent enablement, which lays the groundwork for you to explain the rest of your client's defense. You also know that they appreciate the fact that you took the time to explain a key concept to them in an understandable manner. And you know they'll remember and use what they've learned throughout jury deliberations, because you have taught them in a way that is engaging, entertaining, and effective. In other words, you have taught them well.

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