ALM | LAW.COM

THE AM LAW LITIGATION DAILY

How Ryan Dykal of Shook, Hardy & Bacon Weaves Storytelling Into IP Trials

By Ross Todd
August 1, 2023

Even though patent trials can swing on highly technical subject matter, they often ultimately boil down to competing human stories.

We were reminded of that in reading an account from patent attorney **Conner Hutchisson** who sat in on the trial in Waco, Texas in July where Touchstream won nearly $339 million in damages against Google after the web giant's Chromecast devices were found to have infringed Touchstream patents.

Hutchisson wrote how Touchstream's lawyers at **Shook, Hardy & Bacon** put Google on the defensive by telling the company's story: Touchstream officials had met with Google under a non-disclosure agreement to discuss their technology prior to the 2013 launch of Chromecast. The IP theft narrative put Google's lawyers back on their heels, according to Hutchisson. "Usually the defendant focuses its story on being the victim of a patent attack rather than on not being the aggressor," he wrote.

That approach also showed what the patents meant to the plaintiff. The inventor at Touchstream cried on the stand, saying he gave all the money he had to a patent attorney to make sure the invention wouldn't be stolen. Another former employee testified he gave up a stable job, in part, because Touchstream's technology was patent-protected.

After hearing about how the Shook team harnessed storytelling elements in their patent-trial presentation, the Litigation Daily asked Shook's **Ryan Dykal**, lead counsel for Touchstream on the case, if he would be willing to discuss his approach. With post-trial proceedings and a potential appeal pending, Dykal declined to discuss the specifics of that particular trial. But he did share his general approach to getting a client's story out in the sorts of intellectual property matters he handles—whether as a plaintiff or defendant.

Courtesy photo

Ryan Dykal of Shook, Hardy & Bacon.

What follows has been edited for length and clarity.

Lit Daily: How central is storytelling to what you do in intellectual property cases?

Ryan Dykal: It's absolutely central leading up to trial, but especially at trial. We learned this a long time ago at Shook. We're almost 100% litigation, and we handle probably more trials than

any other firm in the country if you add up all the product liability and intellectual property trials. It's something that Shook teaches from the very beginning: When you get to trial and the jury, these are lay people. Especially in a patent case, it's really important that they understand what's at stake—how we got to the trial. They've seen a lot of legal shows on television, and that's kind of what they expect.

Sometimes we'll get to trial and we'll see presentations that are very focused on the patent claims. Obviously, those are vital. That is the heart of a patent case. But the jury needs to understand the context: Why are we talking about these patent claims? What does it mean to the plaintiff and the defendant? And so if you start with that focus, you can get the jury on board with your story. Then as long as you prove your case, one way or the other, they have a starting point to focus around.

In one instance where this really became clear, we had a case on the defense side. It was a very high-stakes case for our client. They were a software startup that was being sued by a much larger tech company, and it was really a bet-the-company case. We had an enormous number of mock trials. I won't say the number, but it was a lot!

We were just getting hammered at the beginning. And partially it's because we were defensive. We were responding to these accusations and the mock juries were coming back and just absolutely killing us. At one point, we just flipped it. We said, "Let's just tell our own story. Let's make this our narrative versus their narrative." We responded to their attacks, but in the context of: "This is the story of what's really going on here. This is why this company is coming after us. It's because they are worried about a startup competitor, who's starting to eat into their market share."

Once we oriented the jury that way—with the story behind what was really going on in this trial—it was really remarkable. I'm not going to say we were winning every mock trial, but at least we're getting this clash between the two.

Our jury consultants said it's kind of like politics. When you see politicians debating, it sounds like they're not even living in the same universe. And they're not. It's because those politicians and the political consultants have learned over time that that's the most effective way to get your story out there: To get people on your side, you don't respond to what the other side is saying. You tell your own story. You can weave in a defensive theme to those attacks, but it needs to be in the context of a larger story. That's really the way we approach all of our trials and all of our cases from the beginning. We look for that story.

How do you go about finding the story and the themes? Is the mock trial central to that process?

At the very beginning, we try to figure out what's at stake for a client. What's going on here? What's the bigger picture?

When we first intake a case, we talk to all of the players. We learn the background. Then throughout the case workup, when we're taking depositions obviously it's about the patent claims. But we also want to find out where this person came from: How do they fit into this puzzle? When did they first learn about the facts that are at issue in the trial? You kind of build the story over time.

If you're looking for your narrative at the time of the mock trial, it's probably too late. Those usually happen late in the case even after discovery is closed, and sometimes right before the trial. When the mock trials are really useful is when you're testing the themes. You can lay out a version of your theme and see how it clashes with what you suspect the other side's going to say. Once you've worked up a case for several years, you tend to lose perspective. We view the mock jury process really as a gut check to see if our story is actually resonating—if there's something that doesn't make sense.

What's really useful is when you just assume that everybody knows something and you find out in the mock exercise that actually this is something that people don't understand. Sometimes it's a piece of the technology. Sometimes it's a piece of the story. They'll say, "Well, why did they do this? Why didn't they sue them four years ago? Why did they not meet with this person?" We think the mock trials are really useful to understand what the jurors are thinking to fit their questions or their feedback into the story.

Is it any easier to harness storytelling when you are the plaintiff going first, and setting the order that the story is told? You opened with an example from the defense side, but it does strike me that as the plaintiff, you do have a storytelling advantage.

I have to admit it is more fun to be the plaintiff: You get to seize the narrative right out of the gate and hopefully put the defendant on their heels. But it's equally—if not more important—as the defendant.

I think often defense lawyers get in that trap where they are just responding to all of these accusations that the other person is throwing out. We've learned in that mock-jury exercise, it's really not an effective way to do it. Sometimes by responding, you're giving your weak points more attention than they deserve. There's a saying "If you're explaining you're losing."

That mock-jury exercise I referred to—where we did a bunch of them—was really enlightening. You really do want to respond to these things. You're like, "No, that's not fair! That email looks bad, but let me give you some context." But all of the time you spent doing that just gets more air to the other side.

In that instance, we just kind of flipped it. We went on the offense against this major company. We said: "They're accusing us of all this bad stuff. But what's really going on is they want to lock up this market for themselves because they don't want startups eating into their margin. And yes, there's intellectual property claims involved, et cetera, et cetera …" It let us get the jury listening to what's really going on.

Well, how do you as an intellectual property trial lawyer balance the storytelling aspects with the need to prove up your infringement case or defense?

That is the delicate balance there. Because obviously in a patent case, or any intellectual property case, there's a lot of work and facts and analysis that need to go into proving that claim. So what we usually do is, we preview it. We tell the jury, either an opening or some other point, "Look, there's going to be a point where we're going to prove this. We're going to walk through all the claim elements and this is what it's going to look like. And it might take all day and you might get very sleepy, but we have to do it. We're going to prove it up for you." But we make sure that the jury understands how that fits into the context. So you set the story out, you describe the patents, the importance of the patents, what this means to your client, and what this means in the bigger picture—the importance of patterns to the American system and the importance of innovation.

I find most jurors are really trying to do a good job and they do pay attention. A lot of it is very technical, but they really do their best and they follow along and they try to do their homework. Then, at the end, you button it back up. You say: "We've walked through all that. We've proved it. Again, why does this matter?" And just keep hitting that again and again so they understand that we're not just wasting their time. We're doing it because we have to and the reason we're doing it is to prove our claims which are obviously very important to our client.