BUSINESS LITIGATION

How to Win a Patent Case (or Any Complex Litigation) Without Your Client Going Broke

By Courtland Merrill

According to the 2013 Economic Survey by the American Intellectual Property Law Association, the average cost of patent litigation in the United States for a case claiming between $1 million and $10 million in damages is $2.1 million. The average cost for patent cases claiming less than $1 million in damages is $968,000. In other words, when someone infringes your patent in the United States, on average, you'll spend about as much on the case as you get out of it. Business disputes – a breach of a contract, theft of confidential information, or even an employment dispute – can become just as expensive.

You can bring a complex case to trial, even a patent case, without putting more of your client's money into the case than they get out of it. I tested this hypothesis recently. My client invented a new way to make an existing method of manufacturing cost less, easier to use, and work more efficiently. The patent office awarded my client patents for the invention. Soon thereafter a competitor started selling a competing product that used my client's invention. Worse, the competitor sold infringing product to my client's customers. My client's business was profitable, but the company could not justify spending $2 million or more to get a lesser amount. We tried the case to verdict on a budget. Here is how we did it.

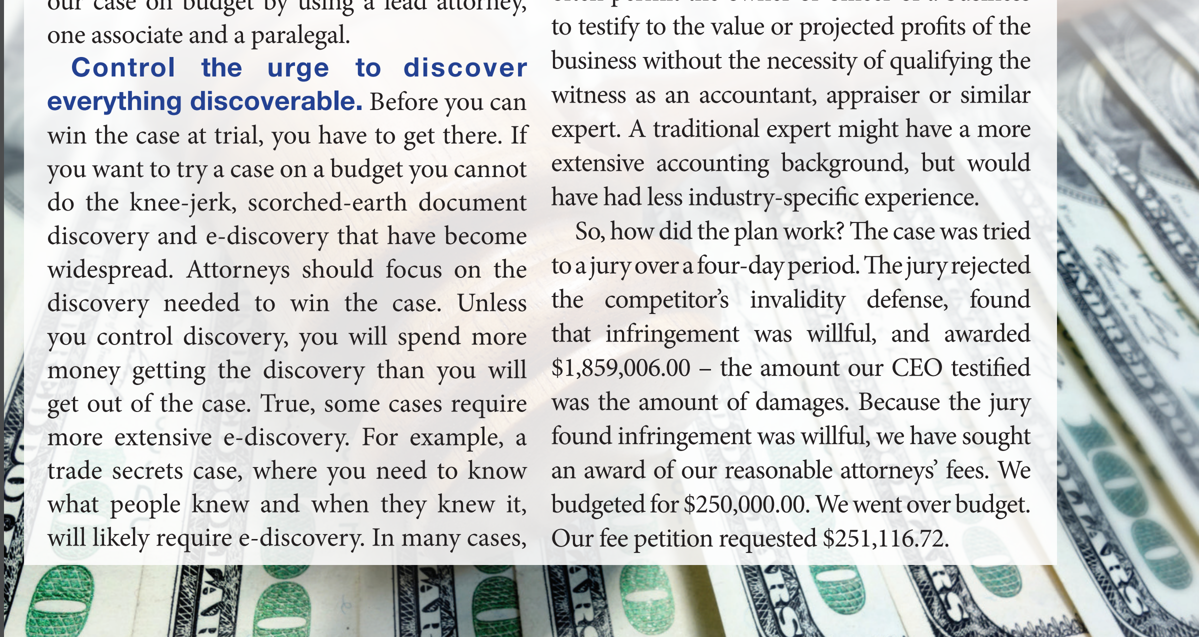
It starts with the lawyers. Clients need competent counsel to win a trial, but they don't need lawyers that charge $1,000 an hour for every case. According to the AIPLA, an average attorney with 10-14 years of IP experience charges $392 per hour – not necessarily cheap. A big way clients look to save money is by going to smaller firms where the case isn't staffed with 10 attorneys. We kept our case on budget by using a lead attorney, one associate and a paralegal.

Control the urge to discover everything discoverable. Before you can win the case at trial, you have to get there. If you want to try a case on a budget you cannot do the knee-jerk, scorched-earth document discovery and e-discovery that have become widespread. Attorneys should focus on the discovery needed to win the case. Unless you control discovery, you will spend more money getting the discovery than you will get out of the case. True, some cases require more extensive e-discovery. For example, a trade secrets case, where you need to know what people knew and when they knew it, will likely require e-discovery. In many cases, however, the metadata connected with a custodian's documents will not help you win. To win on a budget, you have to accept that you can go without all the discovery you have a right to get.

To win a case with a budget you also need to get over deposing everyone with any knowledge connected to the case. Yes, I am talking about cross-examining witnesses at trial who you have not deposed in discovery. In fact, depositions often help your opponent's witnesses prepare for and give better trial testimony. When someone has not been deposed, he often isn't ready for an ambush cross-examination. In our trial, the competitor offered testimony from an engineer and pioneer in the industry with lofty credentials. He testified my client's invention was worthless. The engineer had not been deposed in discovery. He was not ready for cross-examination and ended up looking like he got hit by a freight train.

Control the cost of expert witnesses. Experts are often necessary in patent cases and other business disputes. Experts cost money – lots of money. How can you successfully try a case without retained experts? The best expert may very well be your client or one of its employees. Courts routinely permit expert testimony by a party, employee, or others with an interest in the outcome of the litigation where the person has been identified as an expert and has complied with the disclosure requirements. You may be better off with your client or an employee as an expert—one who believes in the case and who will be very credible, if well prepared. In our case, the inventor testified regarding how the invention worked, why it was important, and why it was non-obvious. My client's CEO testified as to the amount of damages. Courts often permit the owner or officer of a business to testify to the value or projected profits of the business without the necessity of qualifying the witness as an accountant, appraiser or similar expert. A traditional expert might have a more extensive accounting background, but would have had less industry-specific experience.

So, how did the plan work? The case was tried to a jury over a four-day period. The jury rejected the competitor's invalidity defense, found that infringement was willful, and awarded $1,859,006.00 – the amount our CEO testified was the amount of damages. Because the jury found infringement was willful, we have sought an award of our reasonable attorneys' fees. We budgeted for $250,000.00. We went over budget. Our fee petition requested $251,116.72.



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