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Tactics For ITC Case Presentation

Law360, New York (July 27, 2009, 12:23 PM ET) -- In courtrooms across the country, judges are increasingly imposing strict time limits on case presentations. Nowhere is that trend more evident than in intellectual property law, particularly in those cases heard by the U.S. International Trade Commission.

The result of such constraints: Counsel can run short of time and thus be forced to make critical, real-time decisions that adversely affect the outcome to their cases.

Consider, for example, what happens with ITC Section 337 Investigations. The time between initial ITC filing and final ITC action is just 16 to 20 months.

ITC cases not only move speedily to hearing, but the hearings themselves are also run by the clock, with the Administrative Law Judges allocating a set amount of time to each party.

Given these time constraints, efficient case development and effective case presentation have become critical to success in this increasingly popular forum.

That means litigators seeking to enforce intellectual property rights before the ITC may need to adjust their case strategies and courtroom tactics to fit commission protocol.

Employing expert case-presentation techniques from the earliest stages can both enhance case development and streamline the presentation process, improving the chances of a favorable outcome.

The ITC has been gaining popularity because it offers both speedy trial and access to injunctive relief. Its focus: to regulate the unfair importation of infringing products into the U.S.

The products in question can range from plastic forks and baby diapers to digital televisions and cellular phone technology.

The ITC, however, is not the place for companies to go to receive damages from infringing competitors. Rather, the commission's power lies in its ability to issue an exclusion order prohibiting those products from passing through U.S. Customs.

Today's visual design methodologies — which include instructional, analytical and graphic imagery — can provide a real advantage here.

In a patent dispute, for example, two-dimensional drawings commonly provide the details of a particular invention. That information is often complex in concept as well as visually, spatially and temporally.

Chances are good that the various parties may misunderstand the invention or read those drawings differently. The lack of a shared vocabulary means they are often unable to

effectively communicate those differences to each other.

Use a 3D animation, however, and the novel aspects of the patent can become clearer, providing a better basis for understanding.

That animation can then be combined with video, graphic and text-based slides, interactive timelines and still photography to create a presentation that effectively and efficiently communicates and teaches the critical concepts. This approach conserves precious time for use in developing other aspects of the case.

Choosing the right presentation for any given situation calls for special skills. It requires not only the ability to quickly grasp complex and technical subject matter, but also a deep and broad understanding of visual design, adult learning and the litigation process.

Used in the early stages, application of case presentation's iterative process enables attorneys to more effectively analyze, assess and develop their cases.

Implementation of case-presentation design during these initial stages helps the litigation team visually test, evaluate and refine the themes, ideas, storylines and evidence as well as the choice of witnesses and experts that form the fabric of the case.

This emphasis on early visualization means that counsel isn't rushing to create its presentation a month before the hearing. Instead, it is spending the additional time honing the presentation.

Case presentation can provide a tactical edge to complainants, who can do much of their preparation in advance of filing.

Typically, the first ITC hearing is conducted just nine or 10 weeks after a complaint is filed, giving the parties only a brief period to both pull together a cohesive case presentation and prepare their witnesses.

By focusing on case presentation early in the process, complainants can logically and cohesively build their arguments before ever taking legal action. Even then, however, proceedings are compressed, making a streamlined hearing presentation essential.

For example, claim charts, which often are not necessary for several months in a district court proceeding, must be included with a complaint filed before the ITC. The commission is now also requiring that there be a claim chart for each independent claim asserted for infringement.

Once a complaint is filed, the ALJ may request nonargumentative tutorials on the technology at hand. This is yet another area where clear, concise graphic presentations can help to lay groundwork by putting the case arguments into context.

While such tutorials must be unbiased, they can effectively be used to introduce important case themes. The tutorial assets then become the basis of motion and hearing support, which informs the design of the hearing presentation.

When the hearing is concluded, both sides then go back to their offices to prepare post-trial briefs. It is these arguments, not the hearing itself, which provides the basis for the ALJ's ultimate decision.

Those that have incorporated visualization have a distinct advantage here. Building on hearing presentations, they can use digital documents, charts and graphics to adjust their arguments to address questions raised by the ALJ, the ITC staff attorney and opposing counsel.

Given the ITC's strictly enforced timetable and requirements for meeting burden of proof, insufficient preparation, improper budgeting of time and misuse of visualization tools and strategies inevitably result in missed opportunities and unfavorable results.

Capitalizing on visualization-based case preparation and presentation, attorneys with cases before the ITC can improve their chances for achieving successful outcomes.

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