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NAVIGATING BETWEEN THE “HYPOTHETICAL NEGOTIATION” AND REAL WORLD FACTS IN PROVING PATENT DAMAGES



Jeanne E. Irving

While there are many differences between patent cases and other complex commercial litigation, one notable distinction is the use of a “hypothetical” transaction to prove patent damages.

As a remedy for infringement of its patent, a patentee is entitled to “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 35 U.S.C. § 284. A reasonable royalty is generally calculated by multiplying two separate and distinct amounts: (1) the royalty base, or the revenue pool implicated

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ATTORNEY COMPETENCE AND SOCIAL MEDIA IN AID OF JUROR INVESTIGATION AND MONITORING



Justice (Ret.)
J. Gary Hastings

In order to practice competently these days, a trial attorney may be required to use social media sources to investigate prospective jurors and monitor empanelled jurors’ Internet activities during trial. Such investigation and monitoring, however, may alert a prospective juror or a seated juror that the attorney is

reviewing his or her Internet presence. This article explores whether such contact traces constitute prohibited communications with prospective or actual jurors and whether judges should advise all jurors at the outset that such contacts may take place.

Because technology and social media have become essential parts of daily life, investigation into potential jurors’ online presence during jury selection is becoming an increasingly important part of an attorney’s ethical duty of competence. Professional rules of conduct provide that, in order to practice competently, a trial attorney must keep abreast of technological changes. For example, Comment No. 8 of Rule 1.1 of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) states: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

In California, the Digest from Formal Opinion Interim No. 11-0004 from the Standing Committee on Professional Responsibility and Conduct of the State Bar of California states: “An attorney’s obligations under the ethical duty of

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THE INSIGHT INTERVIEW



Seth Jaffe

The Insight Interview features interviews with leading jurists, lawyers and business executives. The series focuses specifically on practical, real-world advice for lawyers in their first 10 years of practice.

This installment features Seth Jaffe, Senior Vice President and General Counsel of Levi Strauss & Co. Mr. Jaffe was interviewed by Steven Feldman, a senior associate with Hueston Hennigan LLP in Los Angeles, CA.



Steven Feldman

Tell me why you wanted to become a lawyer.

Well, as a starry-eyed kid, I wanted to make the world a better place. I searched for an area of the law that would let me “do well,” but also “do good,” and I’ve tried to do that both while at a law firm and while in-house.

When you graduated from law school, before going in-house, you worked as an associate at McCutchen, Doyle, Brown & Enersen. What type of work did you focus on while there?

Primarily antitrust and intellectual property law. The clients I worked for included GM, Coca-Cola, and Levi Strauss & Co. One of my matters involved representing Levi Strauss & Co. in a trademark case against Jordache jeans. I must have impressed someone at Levi Strauss & Co., because after the case ended, they asked me to apply for a job, and I went in-house.

You are someone who left law firm life relatively early and has had great success in-house, do you have any advice for young lawyers about the “right time” to go in-house, if they want to do so?

First, it is important to get all the legal training you’re going to need while you’re at a law firm, because most companies – except for some with huge legal departments – don’t have the time or capacity to do high-level, structured, on-going legal training. Companies will often have good training in other areas, such as leadership, but legal training is less common.

Second, before going in-house, you need to know what it’s like to have responsibility for a client, so that when you go in-house and you deal with outside counsel, you can understand the relationship and be most effective.

Finally, you want to have developed enough expertise in your practice area that you bring something meaningful in-

house. Ultimately, you don’t want to be a “jack-of-all-trades and master of none”; rather, you want to be a “jack-of-all-trades and master of one” (at least) so that when you come in-house, you’re able to answer any issues at a high-level, but also have a really deep knowledge in one area.

Is there anything you miss about working in a law firm?

One of the great things about being in a law firm is that you are around really well-educated people, which challenges you and allows you to build your own abilities as a lawyer, writer, speaker and thinker. Before leaving to go in-house, I worried about whether I was leaving too early, and whether it would narrow my field of knowledge since I would be working for only one company at a time. But, it turns out that it actually broadened me and challenged me. And I really like being around smart business people.

If you go in-house at the right place, the range of issues can be enormously broad, from environmental to immigration to antitrust to trade secrets and IP to securities to privacy. And that’s just a partial list. In reality, it’s broader than what you do at a law firm.

After spending 15 years in the legal department at Levi Strauss & Co., you left and – after working at a startup for a couple of years – became the SVP and General Counsel of Williams-Sonoma, Inc. Tell me about the work you did while at Williams-Sonoma.

The general counsel at Williams-Sonoma had come out of retirement to take that job, and was looking for someone who could quickly get acclimated and succeed him, which is what happened.

While there, I worked on all kinds of issues. We built new businesses, we started our international business, we signed up franchisees. There was a fair bit of change at the

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top: I worked with four CEOs in 10 years. During the recession, William-Sonoma's stock had dropped from \$37/share down to \$4/share, so we had lots of securities law and corporate governance issues to deal with. On top of that, we had intellectual property issues, and since Williams-Sonoma had somewhere between 30,000 and 40,000 employees, we also dealt with a lot of employment challenges, including class actions.

After 10 years, what led you to leave Williams-Sonoma and return to Levi Strauss & Co. in your current role as SVP and General Counsel?

There were a few reasons: First, I saw the opportunity to get back into a brand that I really loved: Levi's®. I had also been on the team that founded the Dockers® brand. Brands are important to me, because they are about a consumer's emotional connection to a product and company. Second, I'd spent 10 years at a retailer (Williams-Sonoma) and I thought I could bring my deep experience in that area to a company (Levi Strauss & Co.) that was, at the time, trying to become a retailer. Levi Strauss & Co. has been in business since 1853, but has only become a retailer in the past 10 or 15 years. Third, I really believed in the vision that Chip Bergh (Levi Strauss & Co.'s CEO) had for making it into one of the greatest companies in the world.

Finally, I felt very strongly about using the opportunity in the law to do good for society and Levi Strauss & Co. has always had a deep commitment to giving back, including improving the lives of apparel workers around the world, and being involved in our local communities.

Tell me about your typical workday.

I work on everything from company strategy, to Board and shareholder issues, brand protection, employment and corporate governance. Levi Strauss & Co. does business in 110 countries; in fact, more than half our lawyers are overseas. Our job is to find solutions that will allow growth around the world, while at the same time protecting the company.

How large is Levi Strauss & Co.'s legal department?

In total, we have 50 people, which includes lawyers, paralegals, administrators, security professionals, at Levi Strauss & Co. and the Levi Strauss Foundation.

What advice do you have for associates on how to stand out to a client?

Really take the time—not billable time—to understand the client's business beyond the superficial. Very few lawyers do this. Understand the nuances and how the company works. It may mean spending time chatting with people other than just the in-house counsel about how the business functions, and the problems the company encounters.

Also, always think about solutions that will help ease the client's problems and make the in-house lawyer successful. The greatest thing outside counsel can do is to help the business succeed and help the in-house lawyer be successful in driving the business. That will create a loyalty that you can't get just from the nuts-and-bolts of the work.

Do you have any pet peeves about associates or junior partners?

There aren't a lot of things that get on my nerves, but one thing is billing for every single minute of time spent, even when the result does not justify it. This is rarely going to serve you well in working with general counsels. We are looking for value. So, think about the big picture and not the specific task.

You should also know how to work with all levels of people – it may turn out that your best contact at a client for getting things done is a paralegal, and not the general counsel.

What advice do you have for associates and even junior partners who are thinking about how they can generate business?

Start thinking about areas where a company is developing needs that haven't yet been met. Here is an example: many companies now have increasing needs in the privacy area – and they may not even realize it. Send people you know at the company helpful articles that are practical and will help companies assess that risk. Second, find mentors, whether in-house or outside, who will share insight into how companies work and how you can add value.

Steven Feldman is a senior associate with Hueston Hennigan LLP in Los Angeles.