

## *Eureka! Moments on the Path to Successful Visual Presentations in the Courtroom*

BY SUANN INGLE AND NANCY J. GEENEN

*Suann Ingle, M.S., has been helping attorneys and executives deliver great presentations since the days before PowerPoint. Suann integrates the principles of graphic design, jury research and analysis, simple and purposeful communication techniques, and interactive presentation technology to achieve consistent messaging and effective representation of her clients.*

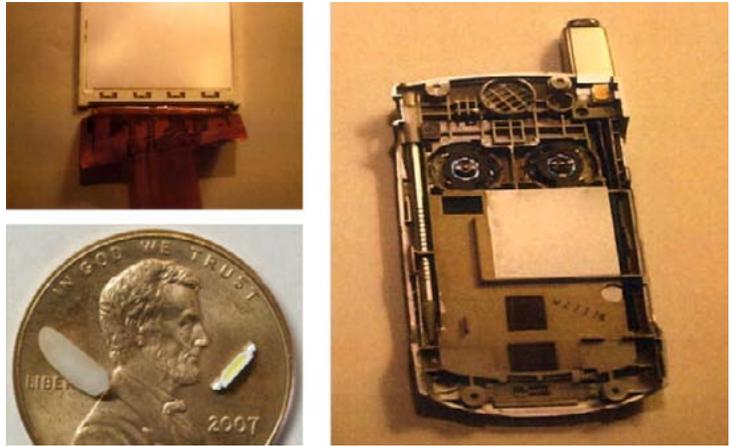
*Nancy Geenen, M.A. Ed. and J.D., joined Suann Ingle Communications after 23 years as a trial attorney in commercial and intellectual property cases in the United States and arbitrations for the United Nations in Geneva, Switzerland. Nancy trains clients to communicate effectively and persuasively in both formal and informal settings.*

Many trial consultants who have worked in this field attest to the fact that the truly rewarding, pivotal moment only happens in the context of the thousands of other pedestrian events while preparing for trial. This article explores the unique challenges of creating a visual strategy for courtroom presentation in a design patent infringement case.

As technology and presentation software improve in capability and ease of use, most everyone is able to produce a timeline, chart, or graphic. Even elementary school students are integrating multimedia, (photos, videos, illustrations and sound) into presentations for which many of their parents and grandparents used only pencil and paper. And more than timelines, exhibit excerpts, or technology animations, trial teams are using visual presentation techniques to test concepts, trends and other intangibles to evoke emotion while telling a story. In a courtroom or other litigation setting, attorney-made graphics are frequently one dimensional and unlikely to be as effective as graphics whose visual aesthetics find roots in purposeful, balanced, and sophisticated design. Understanding and using presentation software is not a substitute for strong visual communication techniques. Unsophisticated graphics might be more harmful than a blank or dark screen when presenting a story to a jury. More than pretty pictures, great presentations at trial are the result of time, attention, synthesis, and clarity of purpose and design.

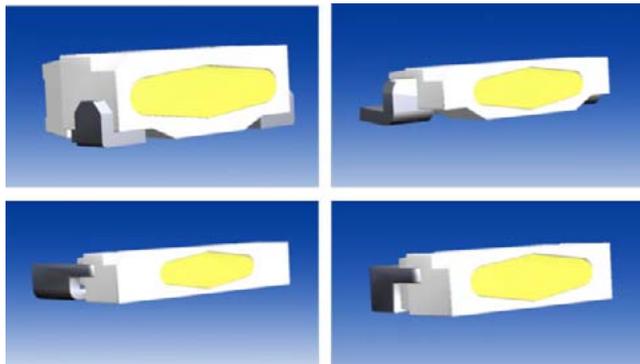
In a recent design patent infringement suit, the parties asked the jury to determine whether the shapes of electrodes on an LED were rounded or straight. The rounded shape was protected by a number of design patents held by the plaintiff. The plaintiff needed to convince the jury that the typical cell phone industry buyer of LEDs cared about the way the LED looked as much as it cared about its functionality.

The “penny/grain of rice” picture was developed to test one aspect of the case – whether jurors would understand the importance of design in a product that was barely visible to the naked eye and not visible in a final product. The penny/grain of rice picture provided a perspective that was completely lost on mock jurors who were only provided with the “guts of a cell phone” photos.



Clockwise from upper left: internal cell phone component housing 4 LED units, open cell phone unit exposing part of the backlit panel, penny with grain of rice and LED to show scale

Both parties used experienced and sophisticated trial consultant teams. Each side had experts with models and animations to “prove” the case. Animation software was used by the plaintiff as it tested the case in multi-phased jury research exercises. Specifications from other similar commercial LEDs were used to create artwork that could be manipulated in ways where “views” were similar enough to aid comparison in demonstrative charts.



Interactive animation stills of models that were rotated and manipulated during preparation meetings

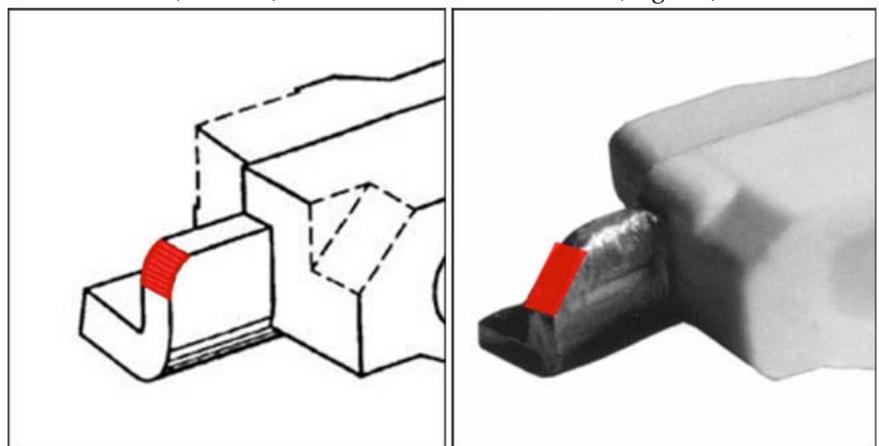
Live manipulation and “snapshots” taken during meetings helped the process of crafting the attorney presentations as more and more industry imagery was drawn from competitors in the multimillion dollar cell phone LED business. The early skirmishes over demonstrative exchanges rivaled the most contentious negotiations about jury instructions and exhibit lists.

After the initial demonstrative exchange, it was clear that both sides chose similar visual formats (light blue background with darker blue title band). One side produced a plethora of images with added lines that curved around the electrode, to help prove that “of course, this is rounded,” and the other side produced just as many images that drew straight edges over the electrodes to prove conversely that “of course, this edge is slanted, which makes it much different and non-infringing of the protected design.” The similarity of demonstratives contributed to the immediate worry that the visual strategies would cancel each other out.

Pictures and rendered drawings of the units (literally hundreds) were adorned by red “indicator” lines so similar that it caused a client to comment about litigation espionage. The only difference of course was that the indicator lines used

Figure 1 '784 Patent (rounded)

Figure 1 Product 902 (angular)



Patent drawing and accused product photograph

Pictures and rendered drawings of the units (literally hundreds) were adorned by red “indicator” lines so similar that it caused a client to comment about litigation espionage. The only difference of course was that the indicator lines used

by the defendant were sharp-edged, and the indicator lines used by the plaintiff were rounded and curved.

The weekend before jury selection, the trial consulting team decided to experiment with a fresh and gutsy approach. “Why not put all those photos aside and just show the actual units?” It would take finding a microscope that could be used in the projection system and some steady hands to toss the LEDs on the table like dice, using tweezers to turn each LED on its side for viewing. The trial attorneys wanted a simple, but effective presentation that did not require an expert or a \$5000 microscope rental. The team located and purchased a \$130 microscope at Toys-R-Us within 24 hours of opening statements. Members of the team took turns tossing a handful of the LEDs onto a table and turning each LED with the tweezers. The LEDs were so lightweight that they often stuck to the oil of the fingertips. The trial team practiced every evening still unsure whether and when the live demonstration might play itself out before the jury.

The plaintiff’s expert prepared photographs of the LEDs, but “touched up” the edges for greater contrast that emphasized the similarities and roundness of the actual product. Defense counsel questioned the expert’s credibility on cross because the photos were “altered.” The defense expert used a wood block model that he pieced together while on the stand with corresponding graphics to emphasize the slant of the electrodes. While the use of the scale model was effective, with its interlocking yet removable parts and tactile impact, it opened the door for plaintiff’s counsel to point out that the testimony also was based on an artistic representation of the LED at issue, and not the real thing. The moment had come to open the evidence bag and place the defendant’s sample LEDs under a microscope that sat at counsel table, only a feet away from the jurors.

The penny-shot was one of hundreds of images developed during trial preparation. The multi-million dollar shot was the photograph taken in full view of the jury with a hand-held microscope projected live onto a large screen across the courtroom.



*Left: handheld, USB powered microscope and camera, Right: picture of LEDs taken in court*

In post-verdict interviews, jurors commented that they decided for the plaintiff just as the defendant's expert witness paused to answer the question: "Do you think the defendant's LED looks the same as the design of the plaintiff's product?" If he replied "yes," he conceded that the actual electrodes selected from the defendant's exhibit bag showed a curved edge. If he said "no," his answer would require the juror's to discount their own observations and be in direct conflict with the image projected on the screen.

Perhaps most enlightening is the recognition of the journey that led to this moment. With each year of experience, trial veterans are increasingly resistant to trying new things. We should all be cautioned not to be locked into what "we always or never do." While it took great courage to come to the right solution with the live demonstration, it did not come without great debate and patient practice. The "winning" graphic is sometimes the one not used because the development process turns out to be as informative as the display of the final image. Weaving consistent visual images in synchronization with an advocate's style and point of view reinforces key trial themes. Putting in the time to create images as the team and case come together thematically provides for a solution that appears credible to the jury. Using a visual communication specialist allowed the team to be dynamic and nimble in the approach to the final trial presentation, freeing up the trial attorney to focus on strategy, witnesses and evidentiary disputes. The iteration process coupled with courtroom experience prepared the team and the jury for the Eureka! Moment; the one occasion when a trial team takes a breath, pulls out a blank sheet of paper (or a hand-held microscope), and continues the search for the right visual solution.