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IP Expert Advice:

Tips on creating a lab notebook that contains "convincing evidence"

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For anyone who is required to keep one, laboratory notebooks are a nuisance. Management insists on their use, and set all manner of rules that engineers must follow in using and retaining them. Have you ever wondered why this is so? Well, blame the lawyers!

From a legal standpoint, lab notebooks serve as important evidence of the date and substance of an invention. Obtaining a patent on an invention or discovery can provide valuable economic and commercial benefits to the patent holder.

But getting a patent is sometimes the easy part; defending the patent, when the owner seeks to enforce it against an infringer, can test the mettle of even the most resourceful enterprise. Success in such litigation often hinges on the strength of the patentee's evidence that supports the patented invention. That's where the lab notebook comes in.

Of course, not every notebook is going to be important, or perhaps *ever* required as evidentiary support. But every notebook must be prepared as though it's the one at the heart of that multibillion-dollar verdict; otherwise, it's a sure bet that none of them ever will. So how do you make sure that any notebook, if called upon, will compel a judge or jury to view it as authoritative, supporting evidence?

The first thing is to establish a set procedure for keeping notebooks. That's the easy part since most companies have established procedures for issuing, using and storing notebooks. The second—and here's the hard part—is to consistently *follow* those procedures. Understanding the reasons for these procedures will perhaps make them easier to follow.

Bound books with consecutively numbered, preferably pre-numbered, pages are the tools of choice. Bound volumes make it obvious when a page has been removed, and make it impossible to insert a page after the fact. Consecutively numbered pages further assure that no tampering with the notebook has occurred.

Similarly, a notebook must present reliable proof of the information that it contains. Reliability is enhanced when notes are entered into the book at roughly the same time that the described work was performed. Although the notes need not be written at the exact moment that the work is done, they should be entered as soon as practical thereafter, and certainly by the end of each day. The longer the time between the act and the writing, the greater the danger that the entry may be viewed by a judge or jury as inaccurate or, even worse, a subsequent reconstruction colored by later events or experiments. And, of course, every entry should be dated.

It goes without saying that each notebook entry must also be suitably detailed. The parameters of an experiment should be specified, for example, and all of the results noted—even if unsuccessful or requiring repetition. Where appropriate, sketches and graphs should be included, and photographic images or tangible samples may be attached. Alternatively, a notated reference with a unique identifier to a remotely stored sample can be entered in the notebook.

The more detail you include in the notebook, the greater its value as evidence. The nature of an experiment or work will dictate the type of information that should be entered. Yet although the person doing the work may perhaps seem best able to evaluate what, and in how much detail, should be recorded in a notebook, this may lead to the omission of facts which, in hindsight, proved important as a series of experiments continued.

It is therefore better to include in one's entries that which may appear to be of little importance, than to omit something that

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ultimately proves to be of great significance.

Notebook entries should also be witnessed. An entry is of more persuasive value if each page bears the signature and signing date of both the notebook's keeper *and* of one or more witnesses; although a single witness is sufficient, a second witness can provide support if the first is unavailable to authenticate her signature. The identity or stature of the witness is generally insignificant, but it *is* important that the witness be able to *read and understand* the page(s) being witnessed, and it is common to require that the witness so state adjacent her signature.

Each page of the notebook need not be witnessed by a third party every day, but undue delays should be avoided and the signing witness should in any event set forth the actual signing date rather than the entry date of the information.

Because the signature of a witness shows the individual's acknowledgement that the description on the notebook page was entered in the notebook as of the date of signature, the witness should not be anyone actively involved with that work. A supervisor, a manager, or a representative from the legal department are good choices for witnesses so long as the witness can truthfully state that the entries were "read and understood."

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Always think of how those notations in the notebook may be viewed by a judge or jury; all of the pertinent information and details should be present, set forth in a clear and understandable manner.

Using effective, standardized procedures to enter detailed information into laboratory notebooks assures that, when necessary, they will be perceived as convincing evidence of the work that was performed and the important and valuable discoveries that resulted from that work.

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