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INDUSTRY NEWS

The Slippery Slope of Allowing Discovery of Attorney Work Product

Guest Article By Richard Gabriel
President, American Society of Trial Consultants

Imagine that you are in your conference room, preparing a client for an upcoming trial, when your paralegal comes in to give you a message. Off the cuff, you ask him or her what a jury might think about the client's appearance, as a witness. The next thing you know, your paralegal is being served with a subpoena to testify about the nature of that conversation.

Or maybe you are meeting with an expert witness and a graphic consultant to prepare exhibits. You happen to exchange a few comments about the expert's testimony in the upcoming trial. Within days, your graphic consultant is subpoenaed for deposition about the nature of that conversation.

Sound far-fetched? Not as far as a couple of recent filings in lawsuits are concerned. More and more, attorney work product and attorney-client privileges are coming under attack. Instead of challenging the confidentiality afforded an attorney with a paralegal or graphics consultant, however, these filings presume that, somehow, the attorney work product is discoverable when it includes the use of a trial consultant in witness preparation. These lawsuits beg the fundamental question: *How much of an attorney's thought process should be discoverable?*

This was precisely the issue that the Third U.S. Circuit Court of Appeals considered when it ruled recently that the attorney work product privilege protects the efforts of trial consultants from the discovery process. The case of *In re Cendant Corporation Securities Litigation, No. 02-4386*, involving trial consultant and now ubiquitous media celebrity "Dr. Phil" McGraw, intensifies the spotlight on the expanding role of trial consultants in American jurisprudence.

The Appeals Court in the Cendant case reversed a ruling by U.S. District Court Judge William Walls that the attorney work product privilege does not cover pre-deposition preparation of a witness by a non-testifying trial consultant.

Earlier, Judge Walls' ruling had reversed a special discovery master's findings that the work product and attorney-client privileges protected Dr. McGraw's preparation of an Ernst & Young witness who had drawn up financial statements in litigation with Cendant.

While the Third Circuit's ruling may garner a collective shrug in upholding these core privileges, it highlights three important issues involving the work of trial consultants. First, the ruling demonstrates how highly the Court values the advocacy process and the protections afforded counsel as they prepare and present a case. Since the trial consultant's work involves testing,

clarifying and helping shape the presentation of the attorney's theories, evidence and case strategies, the work product privilege applies to our work—with a witness, a graphic artist or another member of the trial team. This ruling naturally extends the confidentiality of oral, written and electronic communication among attorneys, their employees and

their clients to the attorney's interaction with the trial consultants who help prepare their cases.

Second, although the opinion addresses the witness preparation conducted by Dr. McGraw, it can be interpreted as applying to all or most of the services that trial consultants provide, including strategy sessions, client discussions, jury research, demonstrative evidence development and jury selection. And while there may be attempts to interpret the law to exclude protection of our services, as long as the work is directed by counsel and pertains to counsel's thoughts, opinions and impressions, the work product protection applies.

Third, the ruling lays aside archaic misperceptions of the trial consultant as a kind of "charm school coach." The Third Court acknowledges that the trial consultant is not there merely to make witnesses look good, to give sound bites or to conduct seminars on general principles. Since much litigation involves complex, scientific,

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academic or legal information that can confuse a jury, the role of the trial consultant is to clarify and assimilate—to help the attorney untangle the enigmatic web of facts, to understand and communicate them clearly and accurately.

The assaults on attorneys' rights that are being mounted with relentless regularity in legislatures and courtrooms nationwide give serious cause for alarm. Had the Third Court ruled that the trial consultant's work was not protected by privilege, would it have been too long a stretch to say that discussions with your law partner or paralegal or spouse are subject to discovery? Once you allow even a small opening in this crucial protection, where would the assault on privilege end?

At the heart of legal advocacy are the thoughts, impressions and opinions of the attorney. In the coming months, members of the American Society of Trial Consultants will talk with the numerous state and national legal associations about ways to protect this most essential privilege. All of us must be vigilant, get involved and work together tenaciously to preserve our professional rights and protect our abilities to provide the most effective assistance for our clients.

The Third Court's full opinion can be downloaded from the American Society of Trial Consultants' web site at www.astcweb.org. Information about ASTC and its members also can be obtained at this site.

Richard Gabriel is President of the American Society of Trial Consultants (ASTC), a professional association established in 1982 to advance the discipline and practice of trial consulting. A trial consultant since 1985, Gabriel has been involved in thousands of civil and criminal trials, including the O.J. Simpson, Heidi Fleiss and Whitewater trials. He also is an author with Thompson-West Publications.

VOICE OF EXPERIENCE

The Case Story and Jury Reasoning

In a recent mock trial, our clients were surprised to learn that jurors found two emails more persuasive than a statistically significant academic study, even though the emails and the study suggested the same thing. One might think scientifically based evidence would be more compelling, however, that was not the case. Why was the anecdotal evidence more persuasive than the scientific evidence? At first glance it seems odd, but not if we take a step back and consider how jurors reason.

Technical vs. Narrative Reasoning

There is a vast difference between technical or scientific reasoning and everyday practical reasoning. People use narrative rationality, or more simply put, stories to make sense of events.¹ Stories are part of our most basic and natural communication process, providing a principal way we learn and comprehend new ideas and information.²

But how does this account for the preference for anecdotal over statistical evidence? In short, the email messages are more compelling because ordinary people have more direct and concrete experiences with email, whereas, in general, they have little to no experience conducting or responding to a scientific study. The anecdotes are not complete stories, but they fit with jurors' cognitive schema for assessing information. They are easily translated into jurors' own experiences or, their pre-existing personal stories.

Social science research is replete with the findings that information overwhelms people and therefore, they choose to attend to some information and select out other information. So, while attorneys have been in the trenches dealing with boxes of evidence, facts and minutia for months or even years, jurors have limited time to consume, comprehend and then act on their perceptions. Jurors will try to make sense of and sort through complex and confusing facts using basic narrative schemes. Providing a strong and compelling story to help them comprehend, organize and prioritize the details, and to judge certain evidence as more or less salient than other evidence, is key to their understanding of your case.

So how do jurors assess stories?

By crafting a story that “rings true” you will establish a connection to your audience.

In very general terms, jurors assess stories, and thus themes and particular evidence, in terms of narrative probability and fidelity.³ Probability refers to the degree to which the event, account, evidence and/or witness is likely to be accurate

and believable. For example, is a witness's characterization of another person consistent with the observable behaviors of that person? Is a witness's account of why they took particular action consistent with a juror's own experience in the same or similar circumstances? Is the characterization of a person consistent with evidence of their behavior?

People also assess stories based on fidelity. Jurors use their attitudes

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PRACTICE TIPS

“Do I Need a Focus Group or a Mock Trial?”

The term “focus group” is widely misused to describe any pre-trial jury research. We often have clients asking for focus group research when what they really need is a mock trial. Tsongas, and many practicing trial consultants, make a clear distinction between focus group and mock trial research, and when to use each. Focus group research is designed to gauge a jury’s reaction to a number



of different issues in a case. While there are many different ways to design a focus group, the overall goal is to “focus” the research participants’ attention on specific issues, and conduct a facilitated discussion aimed at eliciting reactions to each issue. This is a very different goal from mock trial research, in which the mock juries attempt to reach a verdict in an un-facilitated, deliberative format. The mock trial format allows you to identify how jurors prioritize the importance of evidence, arguments and witness testimony when reaching their verdict. While a focus group gauges jurors’ responses to all issues presented, one of the findings of mock trial research might be that a jury does not discuss an issue you thought was pivotal to your case. The following list provides some tips as to when each type of research is warranted:

When to Conduct Focus Group Research:

1. When you are very early in the litigation process and your strategy is undeveloped.
2. When you want a general assessment of the case strengths and weaknesses.
3. When you want to decide what the most important areas for discovery are.
4. When you want to evaluate multiple case themes.
5. When you have multiple liability, causation or damages theories.
6. When you want to evaluate the merits of your case issues.
7. When there are competing strategy ideas among trial team members.
8. When you are unsure what the opposing counsels’ strategy will be, but you want to test the issues.
9. When it is unclear which claims will survive summary judgment.
10. When you want to identify questions for future research.

When to Conduct Mock Trial Research:

1. When you are in the late stages of discovery.
2. When you have a clearly defined case strategy.
3. When you are fairly certain of the other side’s strategy.
4. When you want to know how jurors will react to the overall case.
5. When you want to know which issues jurors focus on when determining their verdict.
6. When you want to know how a jury will decide liability and causation.
7. When you want to gauge a jury’s reaction to the verdict form questions.
8. When you want to know if and how a jury will use the anticipated jury instructions.
9. When you want to evaluate potential damages assessments.
10. When you want data to present to a mediator.



POST-TRIAL INTERVIEWS

Uncover valuable information about how jurors reached their decisions by using systematic juror debriefing following trial.

- **Discover why a jury reached the verdict it did and how jurors evaluated specific evidence, witnesses, arguments and theories.**
- **Develop strategic insight for future trials and development of strategy for future similar cases.**
- **Compile information which may be relevant for an appeal or to an issue of possible juror misconduct.**

(Voice of Experience cont'd)

and experiences to assess the case story. Will your case story “ring true” for jurors? Will your story align with jurors’ experiences and/or their attitudes and values? If not, your case could lack credibility in jurors’ minds. When stories seem suspect, jurors tend to default to pre-existing attitudes and biases.⁴ Quite often in our mock trial deliberations, we see jurors make sense of a party’s actions based on information beyond that which was presented by either party. What they are doing is relating the credibility of an account to their own experience and belief about what they would do themselves. By crafting a story that “rings true” you will establish a connection to your audience. It is a basic psychological maxim that people tend to seek out and pay attention to information that confirms who they are and what they believe. The converse is also true. People will avoid and potentially dismiss information that is contrary to their values and beliefs.

Implications

The implication is that an attorney is a storyteller, whether or not he or she recognizes it. The question you

should be asking is not if you are a storyteller, but rather, are you a good one? Are you thinking like a juror? If you don’t provide a coherent and compelling story to the jurors, they will invent their own. Or possibly even worse, may use your opposition’s story to frame their understanding and render their judgment. The trick is to capture their narrative imaginations and control the framework within which the evidence will be situated.

Always consider the key elements of a story as you prepare for trial. Jurors will use these basic elements as they attempt to understand and decide the case. A story has characters with motives. A story has a setting. A story has structure: a beginning, middle and end. A story has a plot, and often involves a conflict. A story has events that relate causally. A story may also have a moral, lesson or point. A story has action. Put differently, every case involves several competing versions of who, where, when, what, and why.

Care must be taken to craft a believable and compelling story. This is an inherently creative process. All

cases have strengths and weaknesses. Utilize your case strengths and account for the weaknesses through your narrative. Make your weaknesses your strengths. The overall story development should begin early in the litigation process. Having a good idea of your best story can help direct discovery and assist your ongoing assessment of information. Keep in mind that the story approach to litigation is not just for a jury. Judges, arbitrators and mediators are people too. They assess evidence in narrative fashion also. Having a strong and compelling story from the start makes every element of the litigation process easier.

(Endnotes)

¹ Walter Fisher, *The Narrative Paradigm: Toward a Philosophy of Reason, Value, and Action*. University of South Carolina Press, 1987.

² J. Bruner, *Acts of Meaning*, Harvard University Press, 1990.

³ Fisher.

⁴ For a discussion of juror attitudes in the Northwest see Chris Dominic and Craig C. New, Ph.D., “What Washington Jurors Really Think,” *Washington State Bar News*, December 2003, p. 25-30.

JURORS SAY THE DARNDEST THINGS

Over the last year we’ve collected statements from mock and actual jurors that would sink the heart of any defense attorney and put a smile on the face of most plaintiff’s attorneys.

Anti-Trust: “I would vote to give the plaintiff what he asks because the defendant is going to appeal it [and get it reduced.]”

Re: Proximate Cause in a Negligence Case: “Of course the defendants’ negligence was a proximate cause. [The defendants’] equipment was very close to the plaintiff at the time of the accident.”

Personal Injury: “\$20 million just seems like too much money. I think we need to be fair to both sides and reduce the prayer in half. Let’s just award \$10 million.”

Breach of Contract in a Construction Case: “It must have been a material breach. This building was made with cement, and cement is a material.”

Insurance Coverage: “After the lawyers get their third, then \$10 million is fair.”

These comments are from individual mock jurors and are not representative of final verdicts.

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