

TABLE OF CONTENTS

Letter from Theodore O. Prorise....Pg. 1

Indicators of Quality.....Pg. 2

Practice Tips.....Pg. 3

Consultant Profile.....Pg. 4

Dear friends and colleagues,

We would like to thank all of you who made our open house celebration of our new consulting and jury research facility such a success. For those who could not make it, we want to extend an invitation to come by and see the mock courtroom, jury rooms, and state-of-the-art technology that can now be utilized in your litigation preparation.

It was an honor to have Tsongas' first ever Seattle client, Bill Bailey, in attendance. He was joined by many litigators from the State of Washington with whom we have worked over the years. Additionally, we were thrilled to have a number of our newer clients in attendance--litigators with whom we hope to have a long and rewarding relationship.



The opening of this facility marks another recent milestone for Tsongas. We have conducted more than 300 mock trials in Washington, and we are quickly approaching our 10,000th mock juror nationwide. It was also a pleasure to be able to introduce the newest member of the Tsongas team, Tom O'Toole, who is in the process of completing his Ph.D. from the University of Kansas, and who will join us full-time in the Seattle office in January of 2006.



Again, we would like to thank you all, and we are looking forward to many more years of continued success and partnership in your litigation efforts. We are confident that we have added a consulting and research facility that matches the quality of our people and the changing needs of the legal community.



Sincerely,

Theodore O. Prorise, Ph.D.
Director--Seattle Office
and Litigation Consultant



Please send any comments, questions or ideas to editor@tsongas.com.

If you would like to receive *The Advantage* via email as a PDF file please contact editor@tsongas.com.

©2005 Tsongas Litigation Consulting, Inc.
All rights reserved.

INDICATORS OF QUALITY

In Pretrial Small Group Research

All focus group and mock trial research is not created equal. With the growing prevalence of focus groups and mock trials as assessment tools prior to Alternative Dispute Resolution, it is important that attorneys are aware of what the indicators of quality are in what the American Society of Trial Consultants (ASTC) refers to as “Small Group Research” (SGR). After all, what your opponent calls a “mock trial” may have been the equivalent of a glorified dinner party with friends and family.

Small group research in legal settings typically takes the form of focus groups or mock trials. The terminology and methodological details used in SGR can vary greatly among practitioners. The American Society of Trial Consultants has adopted the following definition of SGR: *“Trial consultants use SGR to study an individual’s beliefs, attitudes and opinions, and behavior relevant to issues in litigation. SGR is characterized by participant interaction in a group setting.”*

One of the most important questions to ask about an opponent’s research, particularly when deliberations will be important, is, “How did you get your jurors?” Were they garnered from want ads? Were they a group of “professional” jurors recruited from a focus group facility’s database? Were they obtained from an employment agency? Are they college students?

Understanding indicators of quality in small group research is essential to your ability to be an educated consumer of these important practice areas within the trial consulting profession. This column provides some general guidelines for evaluating the quality of small group research and for determining the weight to give its results.¹

1. Larger sample sizes increase validity.

Sample size, in terms of both the total number of participants and the number of groups/mock juries, is a key consideration in determining the weight to ascribe to research results. A larger sample size, or an increased number of groups/mock juries, increases the chances that the data observed accurately reflect the true state of affairs. This is particularly true when evaluating verdicts or damage awards. Data from only one group should be viewed with caution since group characteristics cannot be ruled out as the primary cause of the outcome.

2. Random recruiting increases participant quality.

Random recruiting methods, such as random digit dialing (RDD), generally result in a more representative sample than other non-random methods. RDD provides superior coverage of the sampling frame and includes many potential participants that are unattainable in list-based sampling, such as individuals with new or unlisted numbers. SGR participants are sometimes obtained through placing an ad in the newspaper, or from a database of former research participants. These methods are particularly vulnerable to self-selection bias, and can produce results that are less generalizable to the population of interest.

3. Participant characteristics should approximate those of the actual jury pool.

The closer the characteristics of the research participants approximate those expected in the actual jury, the more valid the research results will be. Ideally, participants are recruited from the trial venue, although this is not feasible in some smaller venues. The demographic characteristic of the participants should also correspond to those of the venue in terms of race/ethnicity, age, and

sex. Quality further increases when participants are screened for probable hardships or other characteristics that would likely prevent them from serving as jurors at trial.

4. *The results of the research should be properly reported and not overstated.* The report should provide sufficient information to allow a reader to judge the quality of the research methodology. At a minimum, this information should include sample size, participant recruitment and qualifying procedures, an overview of how the project was conducted, and an explanation of the data analysis. The results of the research should not be given greater confidence than the research design and findings warrant.

5. *The anonymity of research participants should be protected.* Practitioners should always use their best efforts to protect the anonymity of research participants.

6. *The identity of the SGR client(s) should be protected.* Practitioners should use their best efforts to protect the identity of the SGR client(s).

7. *Deliberation versus discussion.* When considering the conclusions and decisions at which participants arrived, it is important to consider the level of facilitator or experimenter involvement. A facilitator, knowingly or unknowingly, can exert substantial influence in the conclusions of a group in subtle ways. Question wording, actively engaging or arguing with participants, or reframing testimony or evidence are tactics that can be used to influence a group. Although such tactics are not necessarily a sign of poor research quality, and can be used for certain purposes, their potential to influence outcomes should be noted and understood by anyone who is evaluating the research.

¹ *These guidelines are derived from generally accepted social science practices and the code of Professional Standards of the American Society of Trial Consultants.*

PRACTICE TIPS

Fighting the Defensiveness Demon

“Attack Back!” – It’s usually a person’s first response to an attack. It is how the game is played—an offense and a defense. However, when you are looking to a jury or to the court for a win, simply defending against the opposition’s attacks does not get the job done.

When preparing for trial, it is easy for defensive thinking and strategy to contaminate your efforts. Instead of answering attacks, a sure sign of defensiveness, advance your story and your themes. Put the opposition on defense, or in the position to answer *your* themes, not the other way around. When confronted with an argument, evidence or theme that is likely to put you on the defensive, stop and think, “How can I reframe the story and replace it with a more effective, proactive and positive approach?”

Here are some suggestions and examples:

First, learn to identify and reframe defensive statements or themes. One way to help you identify them is to ask yourself, “Can this statement be prefaced by the phrase, ‘Yeah, but?’” Saying, “Yeah, but we didn’t think the problem was that serious” rather than, “In our professional judgment the problem was being fully addressed” is an example of reframing a statement from a defensive to a proactive position. Here’s another example: the phrase, “This accident has never happened before” could quite easily be prefaced with a “Yeah, but.” Instead, advance one of your key themes by reframing the statement to, “The evidence shows that no one could have predicted that this type of accident would have occurred.” “Yeah, but’s” are easily perceived as a list of excuses for your own bad conduct.

Identifying and reframing defensive statements or themes is essential in a number of pretrial and trial aspects. Specifically, if you are spending much of your time and focus defending bad facts and evidence while evaluating your case and going

(Continued on page 4)

(Practice Tips cont'd)

through discovery, you likely have a weak case. If, on the other hand, you see a positive, proactive story coming together, you have a stronger case. The “defensiveness meter” can be a basic gut check on how strong or weak your case is. All cases have both weak and strong arguments; find your story through a clear evaluation of both. Your themes and story should combine the two in such a way that you are not just presenting an answer to the weak, but a complete, compelling story that addresses each point in a complete, non-defensive manner.

Keep in mind, defendants do not have the corner on defensive thinking. It is common for plaintiffs to describe feeling more like the defendant as their case progresses. Also, plaintiffs can become very defensive in deposition or trial testimony, which undermines their case and their effectiveness as witnesses. Plaintiffs need serious testimony practice in order to help overcome the tendency to answer questions defensively. The same advice applies to defendants.

During witness preparation, it is very common for attorneys to tell witnesses to review their deposition in order to prepare for trial testimony. While a witness should be familiar with his or her deposition testimony, being prepared to defend deposition testimony does not move a witness beyond a defensive position. Depositions, by their very nature, are defensive; opposing counsel focus questions on your areas of weakness, not strength. When preparing witnesses for trial testimony, interview them in depth to discover their best, most persuasive story, which will ideally focus on positive facts and issues beyond the scope of the deposition. The goal is to avoid and reframe defensive responses to trial issues.

Finally, do not undermine all your work at not being defensive by beginning your case with these words: “Ladies and gentlemen of the jury, there are two sides to every story.” Such a statement places you squarely on a defensive path. You cannot be in your strongest position as a defendant if you simply refute the plaintiff’s case point by point. A stronger position is to take a proactive non-defensive approach. Just because a plaintiff goes first, does not mean that their story

sets the stage for what is to come. You do not want to be in the position of making your story fit theirs. Begin your opening with a statement like, “Ladies and gentlemen of the jury, let me describe for you exactly what the evidence will show happened throughout these business transactions.”

Remember, as always, the best defense can be a good offense.

THOMAS M. O'TOOLE, M.A.

Associate Litigation Consultant

Tsongas is pleased to announce the addition of Tom O'Toole as an Associate Litigation Consultant based in the Seattle office. Coming from the University of Kansas, Tsongas is adding a team member from one of the nation's only doctoral programs specializing in Legal Communication. Tom has completed his coursework and qualifying exams for his Ph.D., and is currently writing his dissertation. He will bring clients a focus on theory and practice of effective advocacy, persuasion, and interpersonal communication, specifically within the trial setting, helping them assess how particular communicative strategies inform the ways in which juries cognitively structure and interpret information.

For the past two years, while at the University of Kansas, O'Toole has been working as an intern for the Advocacy Research Institute, a Midwest litigation consulting firm, where he gained extensive experience conducting analyses of mock jury deliberations as an aid to the development of case strategy in both civil and criminal contexts.

O'Toole's interest in trial advocacy stems from a rich history of success in intercollegiate debate as a member of some of the nation's top debate programs. Honored as a former All-American, his resume includes two national championships. As an educator and coach of intercollegiate debate, his teams were ranked among the top in the nation.

O'Toole has taught argumentation, debate, and public speaking at the university level for over five years. He is a member of the American Society of Trial Consultants.

TSONGAS LITIGATION CONSULTING^{INC.}
STRATEGIC PARTNERS IN TRIAL PREPARATION

ONE SW COLUMBIA STREET, SUITE 600, PORTLAND, OREGON 97258
TELEPHONE (503) 225-0321 FAX (503) 225-0382

701 FIFTH AVENUE, SUITE 2450, SEATTLE, WASHINGTON 98104
TELEPHONE (206) 382-2121 FAX (206) 812-0590

TOLL FREE (888) 452-8019 EMAIL info@tsongas.com WEB SITE www.tsongas.com