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INSIDER TIP: MEETING YOUR CONSULTING NEEDS

As 2006 comes to a close, we reflect on the various work our firm has provided throughout the year. Of particular note are the number of seminars (CLE presentations, seminars for national and regional law organizations, etc.) that our consultants have presented. One of the most frequently requested topics was “how to use a trial consultant,” or what we often call “Trial Consulting 101.” As part of this seminar, an overview is given of all the services that full-service trial consulting firms offer and the ways that attorneys and businesses can benefit by those services. Looking at the list, there are services that many are quite familiar with and use repeatedly. For example, case strategy where two or more consultants work with the trial team (and, possibly the clients) to produce a 10-point story, themes, and an overarching case theory; and jury selection, because of its overall impact in the early stages of trial.

While these services are valuable and often indispensable, there are other, often-overlooked services that just might be exactly what your case needs. After taking an unscientific poll of those around our firm, the following list was generated of additional services that a trial consulting firm offers that might be the most valuable, but underutilized services available. A recent television promotion listed, “The best shows that you’re not watching”—consider this our list of “The best services that you aren’t using.”

First, the focus group. Dr. Craig New, Tsongas’ Director of Research says:

It’s so versatile. You can go big or small. You can test many issues or only one. I think it’s underused when a case has only one or two aspects that really need testing. Examples? We had one employment case where a key piece of information was how jurors were going to interpret an ambiguous phone call. We ran four groups, about one hour each, and just played the phone call and had them talk about it. Another good example is for trademark cases. Do jurors think the trademarks look the same? Well, show it to people and ask them. Listen to them talk about the similarities and differences in their own

words. We did one focus group to decide whether the plaintiff should file an infringement lawsuit on one trademark. Focus groups don’t have to take long and don’t have to be expensive. It doesn’t even have to take that much work on the part of attorneys to put it together.

Second, while most attorneys conduct some kind of witness preparation session either with or without a trial consultant, you might not be conducting a witness preparation session before deposition. According to Tsongas’ Founder, Joyce Tsongas,

Attorneys often don’t understand that an ounce of prevention is worth a pound of cure. When we do prep for trial, we see how badly witnesses were prepared for deposition. In the days of video depositions, that is even more true.

Attorneys often don’t understand that an ounce of prevention is worth a pound of cure.

—JOYCE TSONGAS

Instead of having to “clean-up” your witness for trial and work with them on impeachment issues, why not prevent the problem from happening in the first place?

Third, this was a banner year for us in trial monitoring, sometimes called “shadow juries.” Tom O’Toole, Tsongas Consultant, participated in two of our largest projects this year. Here is why he thinks trial monitoring just might be the “best service that you aren’t using:”

Trial monitoring provides immediate feedback at trial that is difficult to obtain on your own. It offers objective views of the case from individuals fresh on the scene. It allows attorneys to make adjustments on the fly. The best way to think about trial monitoring is to have attorneys reflect on their experiences with mock trials. How many times have we seen mock jurors focus in on, get confused by, or disregard information that we did not predict would be an issue? The universal finding of mock trials is that it is surprising what jurors tend to focus on. It is tough for us to see since we don’t have a fresh perspective on the case. Trial monitoring provides a means for attorneys to access such critical information and adjust their case in such a way as to reorient jurors, clear up any confusion, and address

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ARMING YOUR JURORS FOR DELIBERATION

Over the past fifty years, an extensive amount of literature has been devoted to an examination of the impact of “extra-legal” factors on a jury’s decision-making process. “Extra-legal” factors are those factors that lie outside the scope of what is deemed legally relevant to judgments of guilt and/or liability. While legal theory presumes jurors are only influenced by those elements formally presented at trial, extensive research shows that extra-legal factors can have a considerable influence upon a jury’s decision-making process. Examples of common extra-legal factors include attorney presentation style, hindsight bias, injury severity, implicit case themes, and juror personalities.

A well-known theory of persuasion, the Elaboration Likelihood Model (ELM) offers both a framework and a solution for addressing these confounding variables within the courtroom. ELM posits individuals process messages through two cognitive routes: central or peripheral, and depending upon which route is used, one’s opinions will be modified or changed differently.

In the central route, message processing involves a higher level of cognitive reasoning; there is more elaboration or more effort used to find and scrutinize material or arguments. In a trial setting, a juror who cognitively processes information using the central route more actively engages with the evidence put forth by each side and evaluates that evidence against the applicable laws as dictated by the Court, the attorneys, and the jury instructions. On the other hand, peripheral route information processing is low effort, less elaborative, with a focus on cues such as a speaker’s tone or appearance rather than the message or argument itself. A juror who cognitively processes information using the peripheral route allows peripheral cues or extra-legal factors (i.e., how the plaintiff interacts with his or her attorney while seated next to each other) to exert influence during the formation of that individual’s beliefs and attitudes towards the case.

At the heart of ELM, lie the issues of motivation and ability. Specifically, how “motivated” is the individual to actively engage in or process the information and arguments being presented? And, does the individual possess the “ability” to actively process the information and arguments being presented?” Motivation comes in a variety of ways: genuine interest in the information or material, belief that the information is personally relevant in some way, or the belief that they are participating in an exercise that is righting an injustice. Ability refers to one’s cognitive abilities—one’s skill level or aptitude for understanding the material being presented. Individuals who are both motivated and able to process a message will use the central route while others will rely upon peripheral cues to guide the formation of their attitudes.

This raises two important questions for attorneys: 1) Has the trial team effectively developed the necessary psychological motivations to compel jurors to apply the law in favor of their client? 2) Has the trial team devoted adequate consideration to ensuring the information is accessible and comprehensible?

ELM research has consistently shown that the strength and longevity of attitudes resulting from central processing are significantly more prevalent than attitudes resulting from peripheral processing. A natural extension of this finding is that jurors who use central processing in a way that favors your trial team will possess greater influence in the deliberation room because they are both motivated and able to be your advocate. In essence, you have armed your jurors to be your advocate at the most critical time—in the deliberation room.

The first issue the trial team must address is motivation; a juror will not become your advocate in the deliberation room unless the motivation exists to do so. Psychological motivation needs to be established early in the case—as early as opening statements. Remember, the goal is to compel jurors to process information in a manner that is favorable

to your client. If the psychological motivations are established late in trial, the jurors have missed out on a number of opportunities to arm themselves to effectively argue your case in the deliberation room. Or, even worse, they have interpreted the information to favor the other side.

To help establish motivation you might ask yourself: *“What can the jury feel good about if a verdict is rendered in my client’s favor?”* Playing a role in the making of a “just” or “right” verdict is a psychologically satisfying outcome that will motivate many jurors. Motives can vary across cases. In a medical malpractice case a physician who is well respected and highly regarded, and later appears likeable on the witness stand, may steer jurors towards a defense verdict. In this case, jurors might find it difficult to “punish” a physician they believe is a good person and one they could see as their own.

Another example involves a construction case. In a case where apartment building tenants are suing a construction company that built the apartment complex for injuries resulting from exposure to “toxic” mold, a jury could find it psychologically satisfying to steer the tenants in the right direction by finding that it was the lack of maintenance on the part of the apartment’s management team that led to the mold exposure and not negligence on the part of the construction company. By pointing the tenants in the right direction, the jury is allowing them to see the real source of the problem and take action to prevent similar injuries in the future. This is an outcome that jurors can feel good about.

The second issue to address is the jurors’ ability to process the message. Once the jury is motivated to embrace your case theory, they must possess the means to be your advocate. This requires that jurors be provided with the language and explanations to effectively argue your case in the deliberation room. Without this, your greatest supporters function as weak advocates during deliberations. In our mock jury research, we often witness mock jurors who are motivated to fight for one side but do not have the ability to articulate their strong feelings about the case because the attorney representing that side has

not armed them with sufficient language and themes. This makes it difficult for these mock jurors to fight back when facing strong mock juror advocates for the other side. Or even worse, the natural human tendency when lacking the confidence to articulate an opinion is to remain silent. Silent advocates do not lead to favorable verdicts!

A variety of studies have shown that when message comprehensibility is low, peripheral cues play a significantly greater role in the formation of attitudes. What this means for the trial team is that if your evidence and testimony is not accessible to the jury, they will look elsewhere for guidance in interpreting the case issues. This is where extra-legal factors tend to exert undue influence in the decision-making process and/or where the jury begins to embrace the other side’s story.

A recent example of this problem was observed during a medical malpractice trial. The attorney, who has a very distinguished career representing defendants in medical malpractice litigation, rigorously examined the expert witnesses covering all the minute details of the case. While it was quite an impressive display of his medical knowledge, the information was communicated in a manner that made it inaccessible to the jurors. During post-trial interviews, jurors frequently commented on how impressed they were with the attorney’s knowledge on the medical issues. However, despite their awe, they were unable to adequately understand the complex medical issues that were being discussed. Jurors consistently stated their regret that he had not asked each of the experts to explain the medical issues in “layperson” terms. If jurors do not adequately understand your case issues, they are not equipped to argue your case in the deliberation room.

Focusing on these two issues: motivation and ability, is critical to the success of any litigation. Attorneys should address these issues early, not only early in the trial, but also early in the planning stages for trial. A strategy that incorporates these concerns can help guide discovery and the development of an appropriate case strategy, and is the first step towards a verdict in your favor.

(Insider Tip continued)

any important issues the jurors want answers to. We have had more than one attorney comment that, after using trial monitors, he/she can't imagine going to trial without them again.

Fourth, of course, is graphics. We've written numerous articles on the importance of graphics because, as most of you know, people are visual learners. But, have you ever thought about using graphics for mediation or arbitration? Dr. Ted Prorise, Senior Consultant and Director of Tsongas' Seattle Office advises,

Although the primary focus of litigation graphics has been for trial, we are seeing more and more use of litigation graphics for arbitration. These demonstrative exhibits can be driven by key arguments and themes, offering the panel more than just information, but information with a central persuasive point. For example, in a recent securities litigation case we chose to focus on a very aggressive strategy toward the plaintiff who was alleging he was an unsophisticated investor, but we produced several timelines based on his emails that displayed his heavy involvement in day-to-day decisions on his account, and the timelines presented in a visual manner the sheer volume of his involvement over several key months. The timeline included specific language and call-outs evincing his sophistication (e.g. "since we will likely miss on the IPO, make sure to pick some up after the pull-back"), so the graphic included both the visual quantity and the verbal quality of his involvement. This helped make the central point more meaningful and memorable. It was used by the litigators as well as key witnesses throughout the arbitration.

Finally, there is opening and closing preparation. Everyone knows the importance and everyone says they practice, but having a third party analyze and provide feedback can be invaluable. Dr. Jill Schmid, Tsongas Consultant, remarks,

Perhaps it is the public speaking teacher in me, but everyone from novice to senior attorney can benefit from having an "outsider" listen and critique his or her speech. Good feedback should not just focus on structure or the "theatrics" associated with movement or vocal quality. Feedback should help with the construction of powerful and persuasive arguments and include a focus on language, finding just the right balance of emotive, yet memorable phrases and words that will arm your jurors to be your advocate.

(For more information about Tsongas' CLE programs or having a consultant speak to your law firm, please contact Laura Dominic, Senior Consultant and Tsongas' Director of Education, at (503) 225-0321.)

JURORS' COMMON WISDOM: "ATTORNEYS TAKE A THIRD"

As much as we'd like to think that jurors adhere to the Court's instructions not to consider attorneys' fees when discussing damages, jurors invariably do. Our firm has conducted over 400 mock trials (approximately 1200 mock jury panels), and with very few exceptions jurors in every panel discussed how much of the award would end up in the plaintiff attorney's pocket. Also, with few exceptions, the common juror perception is that the plaintiff attorney takes at least one-third of the award. More than any other subject, jurors seem to talk about this topic with staunch certainty, as if the 33% contingency arrangement between attorney and client was a common household fact. Some representative comments from mock jurors include:

"You know the lawyer is going to walk with one-third of this award."

"The lawyer is going to take 33% of the money we award; that's just a fact."

"Everyone knows that the arrangement walking in the door is that you have to give one-third of the money to your attorney."

"We can't forget that the attorney gets one-third of this money; that's just the way it is."

The real question is: What do jurors actually do with this "knowledge"? Most of the time, if jurors are going to award money, they increase the award to account for attorneys' fees. They talk about damages in terms of the "bottom line" they want the plaintiff to receive.

Interestingly, jurors do not discuss topics such as state assistance, insurance, and settlements with other parties with the same certainty. Often, when these topics are raised in deliberation, some member of the jury will recite the judge's admonition that the jury is not to consider or speculate about other sources of compensation. This isn't to say that they don't speculate that a portion of the plaintiff's medical bills haven't been paid by other sources – they do – but this extra evidentiary evidence isn't as ubiquitous as the "one-third contingency fee."