

MANAGING YOUR PRACTICE

COMPETITIVE ADVANTAGE

Five tips on the effective use of trial consultants

By Bruce Boyd and Chris Dominic

Gone are the times when trial attorneys were surprised to hear that opposing counsel had conducted a focus group or mock trial prior to mediation, arbitration or trial. Today judges even



in small civil cases are unfazed by an extra member of the trial team sitting at counsel table before voir dire.

Trial consultants are here to stay, and their services have expanded to meet the demands of trial attorneys. As the field has grown and the American Society of Trial Consultants (ASTC) has gained prominence, more litigators are making trial consultants part of their team.



Trial consultants offer services that can provide a competitive advantage in trial, mediation and arbitration preparation. The most commonly used services are case strategy, witness preparation for deposition and trial, graphics for evidentiary or demonstrative exhibits, focus groups, mock trials, community attitude surveys, jury selection and post verdict juror interviews.

How can you get the most out of a trial consultant?

COLLABORATE

No doubt there are efficiencies in delegating some trial preparation to trial consultants, but the greatest benefits lie in working together. The most obvious areas for collaboration are case strategy, witness preparation and mock trials.

Having diverse perspectives at the table while developing a case strategy can provide real benefits. While trial consultants are typically involved in this process, involving a paralegal — and, in many cases, the client, as well — can bring a fresh perspective and provide overall direction and focus. You'll save time in the long run because everyone on the trial team knows the big picture. Other services needed for the case, such as a mock trial or witness preparation, will proceed much more efficiently.

A team approach to witness preparation for either deposition or trial usually produces a more competent witness. These sessions usually carry the additional benefit of improving the trial lawyer's understanding of the case. Typically, the entire exercise helps clarify the case's presentation and identify language and images that jurors will readily understand.

Every consultant and/or firm does mock trials and focus groups differently. One benefit of either of these research exercises is the opportunity to

observe deliberations from a separate room using closed-circuit monitors. This gives the trial team access to otherwise unavailable information. In this situation they can see what goes on when the door to the jury room closes. They receive critical feedback on how jurors misunderstand arguments they thought were clear, and how topics the trial team thought were unimportant were pursued. They see how challenging it can be to convey information and concepts and learn to appreciate the critical difference between what individual jurors think and how a collective jury makes its way to a conclusion. Having this experience with the trial consultant in the room can provide useful information on how typical or atypical the juror behavior is. Armed with this information, you can change your approach during trial, mediation or arbitration.

START EARLY

While there is nothing unusual about a last-minute phone call for a mock trial or a witness preparation, you'll get more out of these services if you plan ahead.

The ASTC directory and website will tell you what services individual trial consultants and trial consulting firms

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offer. While the ASTC has established practice standards and guidelines, trial consultants, like trial lawyers, have different methodologies, styles and expertise. Fit matters. Take care to select a person or firm with the appropriate skills and approach.

A case strategy session should serve as a needs assessment and action plan for the conduct of a case. The trial team can frame and focus complex litigation more effectively with the facilitation, skills and experience of a trial consultant. Even a sole practitioner's relatively small case can benefit substantially from a few hours of case strategy work with a seasoned consultant.

Sometimes that session crystallizes a trial lawyer's approach and no further consultation is required. More often, the case strategy identifies difficult areas where services such as witness preparation, graphics, jury selection or other activities can be helpful.

It used to be that the need for witness preparation was recognized *after* a witness had created a deposition transcript more useful to opposing counsel than to his or her own. Today trial attorneys routinely budget time for deposition preparation and often use a trial consultant to streamline the process and help produce a clearer record for trial.

GET A PROPOSAL

Every case has a different level of complexity, potential recovery or exposure, and budget. The ideal time for both lawyer and client to budget for any consulting services that may be needed is immediately following development of case strategy.

All trial consultants can provide reasonable ranges for their services and solid estimates for their participation in a case. Reliable information on potential costs and benefits of services will make the job of the litigation manager

easier and lead to smoother decision-making for trial preparation.

ASSESS EFFECTIVENESS

Whether your case used only a four hour strategy session or a range of consulting services over a two year period, win or lose, it's important to assess the effectiveness of the effort.

In venues where it is permitted, post-verdict interviewing will help you

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discover what the jurors understood and what they relied on to reach their conclusions. While this obviously is not an option when trying cases in Oregon, it is something you should consider when working in other venues. Clearly, cases that are resolved before or during trial still deserve a collaborative examination by both trial team and consultant. This dialogue strengthens understanding and leads to even better trial preparation in the future.

CHECK YOUR ASSUMPTIONS

Most attorneys are experts in case law and have seen a jury deliberate only if they served on one. Most trial consultants are social scientists with advanced degrees and expertise in communication, presentation, psychology and/or group decision-making. They know comparatively little about case law compared to an attorney. This

is why trial consultants and attorneys in many ways perfectly complement each other and, working in partnership, are a formidable force.

The most effective trial consultants will ask the attorney they are working with about the law that pertains to the case at hand. Not surprisingly, the most effective attorneys will ask the trial consultant how to communicate their message most effectively, how to approach voir dire, etc.

For example, you might take it for granted that a jury makes up its mind after opening statement. This has been a maxim at law schools for decades, but it is rarely true. Will jurors see the use of courtroom graphics as too fancy? Unlikely. How important is it to find out during voir dire which jurors like you? Not very.

By collaborating, starting early, getting a proposal, assessing effectiveness and checking your assumptions, you will get the biggest benefit for the time and money spent with a trial consultant. In the ongoing effort to obtain a competitive advantage, these factors can make a significant difference. ■

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