
ASK DR. K

Dr. K Sheds Some Light on Many Misconceptions About the Role of Trial Consultants

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Have questions about juries, witnesses, or courtroom dynamics? Well, just Ask Dr. K! In this article, Dr. K sheds some light on many misconceptions about the role of trial consultants in the legal arena. Barry G. Felder, a partner with the law firm of Brown Raysman Millstein Felder & Steiner LLP, and Chair of the firm's Litigation Department, recently interviewed Dr. Kuslansky and discussed with her the use of trial consultants and the crucial impact they can have on the success of a case.

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TRIAL GRAPHIX.

Felder: What is the most common misconception among attorneys concerning the use of trial consultants?

Dr. K: Contrary to what many attorneys think, trial consultants do not merely sit beside an attorney selecting a jury and whisper advice in the attorney's ear about which prospective jurors should be selected. Trial consultants bring much more to the table, including the ability to research issues in the case and determine how people in that venue would react to those issues, so that the attorney can make decisions about trial strategy such as developing major talking points, case themes, witness line-up, and avenues of attack. A trial consultant can also develop an important working tool, the jury profile, to assist in voir dire and juror selection.

Felder: What is a jury profile?

Dr. K: The jury profile is a document that identifies important traits and characteristics of potentially risky jurors and ways to find out who they are during voir dire.

Felder: What research methods do you use to develop tools like the jury profile?

Dr. K: While telephone surveys are best for jury profiling, one of the most effective research methods used by trial consultants is the mock jury trial. This process involves summarizing the parties' positions in the case and presenting key witness testimony and evidence to a surrogate group of jurors who approximate the actual jury pool. The mock jurors provide feedback through written questionnaires that uncover their pre-existing experiences, attitudes, biases and beliefs, and explain how they made decisions about the case. Based on this information, attorneys are able to create the jury profile, which indicates juror characteristics or traits that would be best or worst for the client's case. Furthermore, understanding a juror's decision-making process enables attorneys to formulate their trial strategy.

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Felder: Is the purpose of the mock trial to predict the result in the actual trial? **Dr. K:** That's another common misconception. The purpose of the mock trial is to focus on the actual jurors do not get hung up on the same concerns that troubled the mock jurors.

Felder: Isn't this type of evaluation of potential jurors something that experienced trial attorneys themselves should be able to do?

Dr. K: Attorneys and consultants offer completely different skill sets. Trial consultants are investigators. They investigate and collect data from the jury pool or mock jurors, analyze it, and present it to the attorney who then decides how to apply the information to the case. The collection and analysis of juror data is not something attorneys engage in, and the application of the data to the case is not

the job of the trial consultant.

Felder: What is your experience with current juror attitudes in general?

Dr. K: Recent events such as the attacks of September 11th and the numerous, high-profile corporate scandals have changed jurors' attitudes, which should be particularly noteworthy to trial attorneys, because old stereotypes concerning juror attitudes that may have been helpful during voir dire in the past are no longer reliable. Trial consultants understand these changes and know how to deal with them.

Felder: Can you give us an example?

Dr. K: Prior to these events, a defendant's ideal juror in a tort case was a young, white male, successful in the corporate world. But now, many such individuals are disenfranchised with corporate America because their dream is no longer a dream. Their portfolios have lost a third to a half of their value, so many of the things that made them feel invincible and, therefore likely to identify with a defense posture, have shifted. Another example of a change in attitudes is that in the past it was generally expected that jurors who had experienced hardship and victimization would identify with plaintiffs. However, the September 11th attacks and corporate scandals have created victims who typically wouldn't have been perceived as victims. Many categories such as this that we took for granted for a very long time have now shifted. And when your life experience shifts, it changes you.

The current economic downturn, including increased unemployment, has generally created a more sympathetic jury pool. In a discrimination case, for example, this may translate into an abundance of plaintiff-friendly jurors.

But there is a counterintuitive component to these trends, which is one of the reasons why it is imperative that trial consultants collect data specific to each case and venue. Despite the apparent increase in sympathetic jurors, ironically, these same jurors might actually be less sympathetic to plaintiffs seeking large awards. What might have seemed like a true hardship before September 11th and other events has now been dwarfed in comparison. Another trend is the desire in people to "make a difference," and this is reflected in juries in their desire to send a message.

Trial consultants are instrumental in detecting these tendencies in jurors and knowing how to incorporate them into the trial strategy.

Felder: Can you give us some idea of the kind of case

in which the cost-benefit analysis would argue in favor of using a jury consultant?

Dr. K: Historically, the benchmark for the use of mock jury research was roughly a \$1 million exposure or potential recovery. However, that isn't the best benchmark. You can have a case where your immediate exposure or potential recovery could be far less than a million, but the message of not winning the case could have intangible and tangible results down the road that far exceed that, so there are other considerations clients sometimes keep in mind.

There's a lot of litigation that doesn't meet those thresholds but still warrants our input. These are certainly difficult economic times, so consultants like myself have been very flexible and are able to offer hourly consulting. You don't need to retain a trial consultant on an "all or nothing" basis. Even with a limited budget, you can retain us for the wisdom and experience we can bring to case strategy based on the bulk of our research on other related cases and the venue for years, even absent jury research. Since our involvement in a lawsuit is shorter than the attorneys', we tend to be involved in many more cases in our career and to see trends emerge sooner.

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