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## Jury Advice on a Small Scale

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As companies become more concerned with litigation costs, they are asking their attorneys to keep their budgets as lean as possible. As a result, some attorneys feel they can do without any kind of jury consulting.

But that reaction happens in part because many attorneys are unclear about what jury consultants do, how much their services cost, and in what kinds of cases it's appropriate to hire a consultant.

Fortunately, the jury consulting industry has responded to rising costs and shrinking budgets by developing a wide variety of services that focus on specific issues and are cost-effective. Even those with a small or medium-size budget can use some of the services of a jury consultant. Here are a few options attorneys can use without betting the farm in litigation.

## Issue study

One pared-down service is a mini focus group, known as an issue study. The study basically uses the same structure as a mock trial, testing case themes and arguments in front of surrogate jurors within the venue where the case is filed, but on an extremely abbreviated scale (such as with shorter presentations or fewer jurors) and at a fraction of the cost. This kind of exercise is most useful when there are one or two key issues that the team is particularly worried about, there is one discrete issue that can be easily separated from the rest of the case, or there is a particular document or difficult witness that is causing concern.

An issue study typically lasts three to four hours. A brief presentation is made to a small number of surrogate jurors in locations where the case has been filed. Most of the time is spent assessing jurors' reactions to the information. The objective is to spend a short amount of time on a small number of troublesome issues, rather than a lot of time and resources on testing the whole case.

For example, an attorney in a case involving premises liability was worried about whether a location within a building looked dangerous. A small group of surrogate jurors from the venue was shown photographs of the location and given short presentations on the danger or safety of the location. After the presentations, the jurors discussed whether the location looked dangerous to them or not.

In another case, an attorney in a case about a breach of contract was worried that jurors would sympathize with the plaintiff and be more inclined to find in his favor simply because of his friendly, "local boy" demeanor. Surrogate jurors were shown video clips from the plaintiff's

deposition and were asked about their reactions to his testimony.

Neither of these attorneys had much in the budget for jury research. But they were worried about one aspect of the case and didn't want to go to trial without testing the water first.

## Jury selection

Another key concern is jury selection. Some attorneys, for example, feel uncomfortable with their level of experience with jury selection, or are unfamiliar with the location and would like some local knowledge. Other attorneys would like another pair of eyes and ears, or simply don't have time to worry about it. An experienced consultant can help with the selection process.

In situations like this, the consultant is in court during the actual jury selection and gives his advice about what questions to ask and to whom, to try to get struck for cause, or how to prioritize peremptory strikes. Consultants can also simply draft voir dire questions for an attorney to either submit to the judge or ask himself.

There are many ways to ask potential jurors if they feel a certain way or subscribe to a certain belief. Some questions are more likely to be answered honestly than others. For example, there is a socially desirable answer to the question, "Do you have any negative biases against companies from China?" Asking about biases that way will not be very effective – everyone will know the "right" answer. A consultant can help develop a set of questions intended to identify jurors with certain biases, but in a less obvious way.

A consultant can also strategize with attorneys before the actual jury selection rather than be present during the jury selection. And most consultants have some flexibility on fee structure. It's not uncommon for an attorney to say, "I only have \$1,000 for this, so please write me some voir dire questions or let's discuss strategy until your bill hits \$1,000."

## Witness preparation

Another area of jury consulting that can be useful with a tight budget is assistance in preparing witnesses for deposition or trial testimony. This typically entails the consultant meeting with the attorney and the witness, seeing how the attorney and the witness interact with each other, and discussing tips and strategies for direct examination and cross-examination. This is usually followed with a few rounds of mock examination, using a video camera. The videotape is used to help discuss the

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witness's strengths and weaknesses.

In no way does a consultant's work replace the ways in which an attorney will prepare the witnesses; the consultant only helps the preparation to be more effective. Jury consultants have extensive exposure to how jurors (and judges) react to witnesses, how they decide what weight to give to a witness's testimony, and how to help a witness feel most comfortable and confident while testifying.

For example, a consultant can help identify behaviors and ways of answering questions that will make a witness look more credible and trustworthy. Jurors pay close attention to witnesses' verbal and nonverbal communications, and a consultant can help eliminate any uncomplimentary behaviors (such as tilting the head or frequently drinking water). They can also help an expert understand his audience's ability to comprehend complex information, and they can review public speaking techniques with a worried novice witness.

Jurors focus heavily on the messages in witnesses' testimony, but they also pay close attention to the messenger. Having a consultant spend a few hours with a witness is an inexpensive way to help that testimony be as powerful and persuasive as possible.

## Hourly consulting

Beyond assisting with witness preparation and jury selection, there are many other ways in which a jury consultant can offer help on an hourly, cost-controlled basis. Consultants often work with attorneys in crafting the all-important opening statement or closing argument to help ensure that the key themes and story lines are well incorporated.

For example, an attorney with a small, local breach-of-contract case knew he needed to help jurors understand why his client was attempting to enforce a contract in its customer service program for a product that didn't work. He knew jurors would ask, "Why should the defendant have to pay for something he will never be able to use?" It was critical for jurors to understand from the start that the product didn't work because of the defendant's actions, not the manufacturer's, and therefore, according to the contract, the defendant was still obligated to pay for the customer service program. The attorney decided the best use of his limited resources was to have a consultant assist with his opening statement to most effectively get that message across.

A consultant can also offer advice on witness order at trial, observe portions of the trial to see how key witnesses do on the stand, or simply spend a couple of hours strat-

egizing with the trial team about each party's strengths and weaknesses. The targeted use of hourly consulting allows for assistance in the areas it is most needed, and because consulting is done on an hourly basis, the cost is completely under the control of the attorney.

These services are all geared toward providing a peek through the keyhole at ways a jury might evaluate a piece of a case. They can be useful in any area of litigation (such as contract, employment or intellectual property), and in any size case. A general rule of thumb is that if \$2 million or more is at stake, jury research can fit within the budget. If there is less than \$2 million involved, a strategic use of hourly consulting services might be the better use of resources.

Cases are far less likely to be heard by a jury now than several years ago. In fact, only about 2 percent of all filed cases in both state and federal courts are tried before a jury. One common complaint about juries is that they are unpredictable. Taking advantage of the available jury consulting options can help attorneys reduce unpredictability and feel more comfortable with presenting their case to a jury.

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