Feedback Please! Working Effectively and Ethically with Litigation Consultants

By Jennifer Scullion and Johanna Carrane

The days are long gone when litigation consultants focus solely on jury selection and mock trials. Nowadays, litigation consultants have many potential roles at various stages of a case, from venue selection (or challenges), to discovery planning and assessment, and preparation of witnesses for deposition or pre-trial hearings. At each of these stages, a proven, reputable consultant can bring valuable expertise and experience in social research to complement and enhance your legal team's analysis, evaluation, and preparation of the case. That being said, with litigation budgets increasingly squeezed and scrutinized, it is more important today than ever to secure maximum value and impact from your litigation consulting dollars.

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Consider Potential Consultant Roles Throughout Your Case Evaluation

Social research is the key phrase when it comes to litigation consultants. A true litigation consultant is far more than someone with good "instincts" or an ability to "read people." A good litigation consultant does what a lawyer is not trained to do and adds information to the mix that the legal team cannot get. For example, the consultant knows how to conduct effective and reliable focus groups, and can also advise on the most meaningful and useful issues and evidence to test in such groups.[1] A high-quality consultant also knows how to evaluate the focus group results to separate "noise" from real information and to help your company and legal team understand what the participants said about an issue, what was driving their reactions, and what different approach or facts might change their reactions. Likewise, a worthwhile consultant has access to and knows how to use reliable demographic data, surveys, and similar information to help assess the potential jury pool in a venue and, more broadly, identify potentially useful or dangerous beliefs, concerns, or trends in thinking that may affect views of the case. Finally, a consultant's analysis and advice on all of the above should be informed by the most current research—i.e., real data—on how jurors actually think and act.[2]

As a practical matter, only a select breed of the highest-stake cases will warrant involving a consultant at every stage. But most high-stakes, complex, or difficult cases do warrant real consideration of potential roles for litigation consultants beyond mock trials. Discussion of those potential roles is an invaluable part of your strategic litigation planning with your outside counsel.

Potential roles for litigation consultants you and outside counsel should consider include:

- **Assessing and comparing jury profiles in potential venues, including when deciding where to file a case or when there is the potential to transfer venue or consolidate cases in a single venue**. In addition to demographics, a consultant can draw on existing public opinion polls, social media, and other sources to help your legal team assess the pros and cons of potentially trying a case in one venue over another. A litigation consulting firm will also be able to gather information on how jurors in the relevant venues have dealt with similar cases or issues.
- **Early focus group work to test major case themes and guide discovery**. These can be much less involved and less costly than a mock trial, but help the legal team and company executives to get real feedback early in the case and recalibrate if necessary. Early focus groups also help identify the important facts and issues potential jurors will want to hear about, allowing the legal team to ensure that those facts and issues are brought out and/or disclosed through discovery from the parties, non-parties, or experts—and not, for example, cut off through uninformed objections or insufficient discovery responses.
- **Preparation of witnesses for deposition or pre-trial hearings**. This is not about the witness giving "perfect," rehearsed or scripted answers or otherwise putting on a performance. Such efforts not only raise ethical concerns, but, as a practical matter, often backfire when a nervous witness blurts out "I know I'm not supposed to use this word, but ____." Good witness preparation is about helping the witness be seen and heard as a clear, credible, and competent individual. The exceptionally nervous or insecure witness can benefit from having a separate person (the consultant) supporting and helping them specifically with their presentation (demeanor, clarity and completeness of

answers, etc.), while the legal team focuses on the substance. Where the witness is also high-ranking or a particularly difficult client witness, it can be useful to have an "outsider" (the consultant) be the one to give frank presentation feedback so that the critical, underlying relationship of trust and loyalty with the legal team or in-house working relationships are not undermined.

- **Mock Trials**: The format, scope, and cost of a "mock trial" can vary considerably—from a single-day exercise with a focus group assessment of "clopenings"[3] based on each side's key facts and arguments to something more akin to a real, multi-day trial with openings, key witnesses (by deposition video), and closings. A key consideration is timing. If time permits, a party may want to try to conduct some form of mock trial or focus group after "core" discovery and depositions have been completed, but before discovery closes so that additional party or non-party discovery might be taken if the mock exercise reveals a substantial "hole" in the case. A post-discovery mock trial is most useful not only for preparing for actual trial—which evidence, themes, witnesses, demonstratives, etc. work, what real-world concerns do the jurors have, what legal issues are confusing or troubling, etc.?—but for you and your trial team to engage in a realistic assessment (or, more typically, reassessment) of potential settlement value. (New York-based companies should be aware that some courts outside New York (e.g., certain federal courts in Colorado and Texas) require disclosure of the fact of a mock jury or focus group exercise and of the names of participants if the exercise draws from the court's jury pool or otherwise restrict exercises within the venue).
- **Jury Panel Research and Jury Selection**: Jury panel research and jury selection assistance are the bread and butter of litigation consultation. Even if this is the only role for which your outside counsel retains a consultant on a case, it pays to bring the consultant in early so that he or she can best tailor their research to the particular issues and circumstances of your case and so that you can work with the legal team and clearly discuss what options exist (i.e., will research go beyond public records,[4] will the team want live research during voir dire, etc.), how compliance with ethical and legal restraints (including local rules) will be ensured,[5] what the key issues are likely to be in juror selection, and the logistics of voir dire (who will participate, etc.).
- **Trial Witness Preparation**: The role of consultant for trial witness preparation is similar to deposition preparation, although the specific advice is tailored to suit a presentation to a jury and the different skills needed for effective direct and cross-examination testimony. Again, you can assure your executives and other key company witnesses that good, ethical preparation is not a concern. Research suggests that where witness preparation is disclosed, jurors are neither surprised to learn such preparation takes place, nor are they typically cynical about its purpose.
- **In-Trial Assessment/Shadow Jury**: When the case warrants the cost, a litigation consultant may run a "shadow jury" to provide real-time feedback on how the evidence and themes are coming across, allowing for adjustments, rehabilitation, and useful insights for closing arguments. Less costly, but also effective, is for the litigation consultant to provide real-time feedback, informed by pre-trial focus groups, mock trial, and/or voir dire.
- **Post-Verdict Juror Interviews**: If court rules permit, the litigation consultant may conduct post-verdict interviews with the jurors. This allows for a more neutral party to probe what guided the verdict, providing useful insight for the legal team and the clients on what worked, what did not, and potentially informing decisions about further, related, or similar proceedings. This can be particularly helpful where a company might be facing similar litigation by other potential plaintiffs or considering bringing suit against other defendants.

Ask for What You Need and Get What You Pay For

Having decided to instruct your outside counsel to hire a litigation consultant, you and your company should get the most from them. Though that seems like an obvious proposition, some common scenarios can get in the way.

As discussed above, one obstacle to working most effectively with a litigation consultant is engaging him or her later rather than earlier in the case. The most useful insights have no value if it is too late to get the necessary evidence in or positions and statements have thoroughly boxed a party in on an issue. If cost is the factor driving the timing to engage a consultant, ask the consultant (or 2-3 candidates) for a proposed solution that will get him or her involved early in the case on the key issues that will have the biggest impact on the shape and success of the case, whether its early testing of major themes, simplifying a complex core issue, or getting a candid, real-world assessment of a key witness and her story.

Relatedly, be demanding in budgeting. Get clear budget proposals for various potential projects, each broken down into professional fees and out-of-pocket expenses (which, in some cases, may far exceed professional fees). This allows a full and frank discussion about what proj-

ects make sense, which can be scaled back, and which can be tabled for later consideration. For example, you may decide to invest more upfront on early focus group research or witness preparation and scale back potential expenses in a later mock trial (by forgoing handheld electrocronic feedback devices, moving the exercise to a market-research facility, testing with fewer focus groups, etc.). Also, ask how much mark-up is added to out-of-pocket costs and whether any can be avoided by directly contracting (with a hotel, for example) or by paying invoices quickly (less than 30 days). Finally, to avoid crossed-wires, be sure to get clarification on what fees and expenses can and cannot be avoided if the case is dismissed or settles.

Issues within the legal team or at the company level can also dilute the value provided by litigation consultants. For example, it is important to set expectations realistically with those interested executives and employees about what the purpose and use of a focus group or mock trial is: it is much less about who "wins" or "loses" than about how and why the jury looks at key issues and evidence. While some of the feedback and results may be clear-cut, the bulk of the most useful information will be about tendencies and trends in thinking, as well as areas of surprising (to the lawyers) confusion and even "irrational" thinking. Most difficult of all can be really listening to candid data and comments that point to a major "disconnect" between how the case has been thought about for months (or longer) and how the jurors are seeing it. It is a mistake to allow such findings to be dismissed as "mumbo jumbo" or to fall into the trap of thinking "we'll just be more persuasive next time." If you truly believe you are getting unreliable or unhelpful analysis, you have hired the wrong consultant. But if you have done your homework and hired a proven professional, it is incumbent on you not to let your trial team (or executive or board members) play ostrich.

Protect Privilege and Confidentiality

A trusted litigation consultant can and should be an integral part of case assessment and trial preparation and facilitate trial counsel's ability to competently advise the client by effectively "translating" social research and data much as an accounting expert helps "translate" arcane accounting issues. As such, there are strong arguments that communications with and in the presence of consultants, and consultants' work product, fall within the scope of the attorney-client privilege and/or constitute core opinion work product shielded from discovery in all but the most compelling circumstances.[6] The case law both within New York and across the country, however, is sparse. What exists is mixed.[7] Thus, careful consideration should always be given to what information and opinions are shared with a litigation consultant and in what form, as well as who has access to the litigation consultant's work product, focus groups, etc. For example, while few would doubt that a mock trial presentation deserves the highest level of protection as core opinion work product, allowing expert or non-party witnesses to view or participate in the exercise could result in waiver of some or all of that protection.[8] This can be a difficult, but important, conversation to have with colleagues and company personnel who may be interested, but whose attendance is not vital to the mock jury exercise.

Best practices to maximally preserve confidentiality should at least include: (1) having outside counsel retain the litigation consultant expressly as their agents and non-testifying, consultants; (2) clearly discussing what work product the consultants will generate for any project and whether videotapes/written reports can be minimized or forgone; (3) limiting the audience and form for distribution of consultant work product—e.g., present detailed focus group results through PowerPoint presentation to core trial team, no potential witnesses in the room, and no hard copies; (4) have outside counsel present the core learnings from mock trials to the need-to-know internal company group; and (5) consistently maintain the structure of the consultant working as the lawyer's agent—e.g., the communication chain should be consultant to outside counsel to in-house personnel and vice versa (do not rely on cc: to counsel to preserve privilege) and the consultant should not be meeting with clients or witnesses other than in sessions set up and led by outside counsel.

Endnotes

1. For example, a trial team or those executives less familiar with the purposes of a focus group may sometimes want to use a focus group to predict a verdict or a damages award. While a focus group can be helpful to understand juror leanings and levels of anger and concern, they are best used to hone in on a select set of facts or themes to be tested. What to test varies based on the case but it is vital the consultant works with the trial team to identify and narrow the list of variables for an exercise.
2. For example, data collected by JuryScope research has shown that jurors are fairly evenly split on whether juries should be "sending a message" to corporations to improve their behavior, with about one-third each agreeing with, disagreeing with, or having no view on the proposition—and only a relatively small percentage strongly agreeing with the proposition.
3. A "clopening" is an opening statement that is supplemented for purposes of a mock exercise with additional documents and a persuasive tone, resulting in a combined "opening" and "closing" statement.
4. Social media searches can raise particularly thorny issues. The Formal Opinion 466 issued in 2014 by the ABA's Standing Committee on Ethics and Professional Responsibility permits "passive" searches of social media—i.e., viewing information available without "friending" or taking other affirmative action to request access from the panel member. By contrast, the New York City Bar Association issued an opinion in 2012 that reasoned that social media research may be improper if the particular platform (such as LinkedIn) alerts the panel member to the fact that their information has been reviewed. New York City Bar Ass'n Committee on Professional Ethics, Formal Op. 2012-2. Unlike the ABA, the NYC Bar Association was concerned that such notices may intimidate the panel member. Even when social

media or other research is permitted, care should be taken to avoid jurors feeling they (or their families and friends) are under "surveillance." Legal team members should avoid using printouts from or live access to social media, Google, etc. in ways that would be apparent to potential jurors.

5. For example, if research beyond public records is anticipated—private investigators, social media searches, and the like—care must be taken not to engage in any deception to gain access to information and not to cross the line into ex parte communications. Knowing the local court's written and unwritten rules on jury research is a must.

6. *See*, *e.g.*, *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1981) (communications involving accounting expert are privileged to the extent the expert was "at least highly useful" to provision of effective legal advice by helping with the "foreign language" of accounting concepts); *Hickman v. Taylor*, 329 U.S. 495 (1947) ("opinion" work product reflecting mental impressions and thought processes of counsel is subject to highest level of protection from discovery); *U.S. v. Nobles*, 422 U.S. 225 (1975) (work product protection extends to "investigators and other agents" assisting counsel in preparation for trial).

7. *See*, *e.g.*, *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658 (3d Cir. 2003) (advice provided to witness by litigation consultant during deposition preparation with counsel is protected opinion work product; limited questions permitted on whether testimony was practiced or rehearsed); *Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 397350 (N.D. Cal. 2008) (permitting "circumscribed inquiry" at jury trial on witness' preparation with litigation consultant). *Compare Southern Pac. Transp. Co. v. Banales*, 773 S.W.2d 693 (Tex. App. 1989) (allowing opposing counsel to view portions of practice deposition video showing advice "intended to mold the witness' testimony" as opposed to conveying case strategy).

8. *E.g.*, *In re Air Crash at Dubrovnik, Croatia on April 3, 1996*, 2001 WL 777433 (D. Conn. 2001) (notes taken by expert witness during mock trial were discoverable as information "considered" by expert in forming opinions).

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