



Jurors: What they see trumps who they are

Pay attention to juror selection, but pay more attention to the story you tell them.

BY EDWARD P. SCHWARTZ

"You're a jury consultant, eh? Just like Gene Hackman in that movie! Hey, did you pick that O.J. jury? Man, you people really screw with the system. By the way, can you help my brother-in-law get out of jury duty?"

If only I had a nickel for every conversation at a cocktail party or on an airplane that started this way.

OK. Let's get a few things straight. Yes, I am a jury consultant, and I can help you choose a jury. That is, I can help you figure out which of your prospective jurors are likely to be unreceptive, unresponsive or unsympathetic to your case, or if they just won't understand it.

However, you should keep in mind what I always tell my clients: What the jurors *see* almost always trumps *who the jurors are*.

As a jury consultant, I help my clients present their cases more effectively. I do this by focusing on three key elements: clarity, coherence and comprehension.

Clarity

Every part of a lawyer's presentation and a witness's testimony must be clear and concise. It is vital that every juror understands exactly what each member of your trial team (including your client) is trying to say. Being clear is critical because you do not want jurors to think you are saying something that you are not.

Coherence

People love hearing stories. When trying to understand how events take place, most people are satisfied with the "story" if they have a complete picture of events and feel like they know what happened.

This is especially accurate when you are presenting your case to a jury. To make sure that the jury understands the complete story, do not give out only bits and pieces of evidence and testimony. Instead, tell the jury a compelling story about what your client experienced and the impact it has had on his or her life. Telling your "story" begins with opening statement and continues all the way through to closing argument. Keep in mind that you are not the only side telling a story. Your defense counsel is trying to get the jury to believe the defendant's story. Make sure your story is better.

Comprehension

When lawyers think about jury consultants, the image that often comes to mind is that of witch doctor or a snake oil salesman trying to twist the minds of the jurors. This is complete nonsense; jurors are quite capable of twisting their own minds!

During trial, the biggest obstacle a plaintiff's attorney must overcome is getting the jurors to understand the material presented to them. A smart, well-educated expert does not necessarily make a great witness. Instead, you should choose an expert witness who will also be a good teacher.

To help your expert witness become a good teacher, you should prepare exhibits for the expert witness to use while he or she is testifying at trial. To ensure that this works, make sure your expert understands the exhibits so that he or she can clearly explain what they mean to the jury. You must also make sure that the expert witness practices his or her testimony. Being able to hold a mock direct and cross-examination before a mock jury would be ideal.

However, if this isn't possible (and it may not be in many cases), you should at least rehearse with the expert and go over the questions that you will be asking your expert so that you can evaluate the testimony. Additionally, having an associate, paralegal or other staff member assist with this process is a good idea because you will have another person's view of the testimony, which will give you additional insight as to whether the expert's testimony is clear so that your story is understandable. Jurors cannot like your case if they cannot understand it.

Types of trial consultants and what they do

Trial consultants come from all kinds of professions and educational backgrounds and focus on a variety of trial elements. The American Society of Trial Consultants (ASTC) is the largest trial consulting organization in the United States and is home to three main categories of consultants.



• Behavioral consultants

I belong to this group of trial consultants. A behavioral trial consultant often has training in psychology and how the brain processes information. Our focus is to find out how jurors react to what they encounter at trial. For example:

- How do the jurors think?
- What preconceived biases are likely to come into play?
- How are the small-group dynamics of jury deliberation likely to turn out?

What we do to help attorneys is to design, implement and analyze the information obtained from pretrial research studies. We then make recommendations to our clients about what trial techniques will be effective and suggest some strategies.

• Visual consultants

Most people learn best visually. Using courtroom exhibits is an essential part of a successful trial strategy. Visual consultants use their artistic abilities and graphics skills to help attorneys create effective trial exhibits.

The things that visual consultants do include putting together an array of accident scene photos, creating timelines and preparing PowerPoint™ presentations using sophisticated computer animations. However, visual consultants are more than just graphic artists. They are visual communication experts that have experience designing exhibits specifically for jury trials.

• Trial technology consultants

Sometimes simple technology works well during trial, such as putting one page of a contract on an overhead projector. However, most of today's jurors expect a certain level of technological sophistication from litigators.

Moreover, why shouldn't they? If I can call people on my cell phone using my voice, is it too much to ask that lawyers use a computer to make their client's story more interesting and easier to understand?

Trial technology experts can help you do many things, including wiring a

Question of the Month: Do I need a trial consultant for my case?

By Katherine James

This question comes from the workshop that ACT of Communication taught for Plaintiff Magazine earlier this year:

"A mock jury, witness preparation, animation – I don't do cases that warrant that kind of expense. Someday I'll call a trial consultant when I have a big case.

Until then, I can't afford one . . . can I?"



James

What an attorney needs at trial varies significantly by the type of help or information needed and the cost of these services. For example, do you need ongoing help using technology to present your case or do you only need one question answered by a focus group before you pick the jury?

Many attorneys want to know what people think about a particular concept or witness. If this situation arises, you might work with a trial consultant to figure out the answers to these questions.

For example, a trial consultant might be able to conduct a community attitude survey on that one concept. Often, this type of assistance is very affordable, even for sole practitioners or lawyers from small firms. These types of surveys can be done over the phone or online, so they require a limited amount of time, effort and expense.

Once the trial consultant conducts the survey and analyzes the results, he or she makes a recommendation about how to deal with that witness or issue. Voila! You now have the answer to that one pesky question at a very minimal cost.

What if you only need help with one thing, like the testimony of a particular witness or how to effectively present one part of your case? Hiring a trial consultant in this situation would make sense and many trial consultants are willing to work on short projects for a reasonable cost. By visiting the American Society of Trial Consultants Web site at <http://www.astcweb.org>, you will be able to find someone to help you with that "little" job.

This column relies on you, our readers, to ask questions so that we can respond with articles aimed at answering those questions. If you have a question that requires an immediate answer, I will endeavor to make sure that it gets answered by me or by one of my colleagues at ASTC. Please feel free to email me at katherine@actofcommunication.com or call me at 310-391-9661.

Katherine James is the founder of ACT of Communication and a board member of The American Society of Trial Consultants. A trial consultant for 31 years, she has taught over 30,000 attorneys in her workshops and helped take almost 1,000 cases to trial as a part of the trial team.

19th century courtroom for a courtroom multimedia extravaganza. In addition, trial technology consultants are experts at using litigation software programs

such as Summation, Sanction and Trial Director.

The technology trial consultant is the person who will be sitting at counsel



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table operating the computer. With the technology consultant by your side, you will be able to immediately confront a witness with the text and video clip of his or her contradictory deposition testimony. Using technology in this way keeps the story moving so that the jurors don't lose focus and keeps them interested because they can both see and hear the contradictory information.

Using a technology consultant is valuable in any case. Even if you cannot afford to hire a technology consultant to attend trial, you might instead be able to have the technology consultant teach your staff how to actually use the expensive trial software that you bought. This is an effective use of financial resources because it will enable everyone in the office to become proficient at using Trial Director or Summation. This in turn will result in a better-organized case.

Which trial consultant should I select?

The trial consultant you select should be someone whose style and ap-

proach best fit with your own style and the needs of your case.

If you need an effective animation of how blood travels through the heart, you should not hire a trial consultant who focuses on using theatrical techniques at trial. If you need help preparing an interesting opening statement, do not hire a statistician.

An excellent overview of the trial-consulting industry, as well as a list of consultants from around the country, can be found at the American Society of Trial Consultant's Web site at <http://www.astcweb.org>.

What should I have the trial consultant do?

To figure out what you might have a trial consultant do, think about your caseload. What case is keeping you awake at night? What case is just not moving forward? What case makes you think, "I've done what I always do, and it just isn't working." Is there one case that makes you wonder, "I wish I didn't have to do this alone?"

If so, it may be the right time to try something new and put together your other team of experts: trial consultants.

Edward P. Schwartz, PhD, M.S.L. is a nationally recognized expert on jury decision-making. In addition to his trial consulting, he writes a regular column for Lawyers USA.

He has published numerous academic articles on the American jury system and capital punishment, and teaches a course on jury trials at Boston University Law School. A proud member of ASTC, he serves on the Pro Bono Committee.

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