

THE JURY CONSULTANT'S ROLE IN PREPARING ANTITRUST WITNESSES

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The jury consultant's role in witness preparation for trial is a continuation of her pre-trial role in theme development, *voir dire*, and opening statement. The jury consultant helps in identifying testimony that meshes with themes and stories that have already been introduced to the jury and testimony that is necessary to address juror comments during *voir dire*. With the jury consultant's assistance, potential problem areas and pitfalls can be recognized and avoided, and the witness can be provided guidance on providing clear communication of responses on cross-examination.

I. DIRECT EXAMINATION PREPARATION

1. The Witness Test:

- The jury consultant's role in witness preparation may begin as early as the selection of witnesses to call at trial.
- Jury consultants have learned that the best assessment of how an individual is likely to behave in a certain situation is to observe that individual under similar circumstances. Direct examination preparation, therefore, may begin with a witness test to evaluate lay and expert witnesses.
- A witness test involves a mock jury that observes direct and cross examination of a witness, then rates the witness on matters such as competency, trustworthiness, and likeability as well as providing narrative feedback. It is similar to a truncated mock trial involving just the one witness.
- A witness rated low on competency or likeability can be assisted by the jury consultant to enhance her communication skills and elicit more positive reactions from the jurors. Attorneys will also be able to re-evaluate whether to call a witness with poor ratings on trustworthiness.

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2. Non-Verbal Cues:

- The witness test may also be used to elicit cooperation from a difficult witness. For example, even when warned not to, a business executive accustomed to aggressive debate may try to match wits on cross-examination. The witness test gives the executive feedback from the mock jurors. Hearing jurors describe the executive's behavior as arrogant and argumentative can be more effective in curbing this behavior than simply having an attorney explain why it is problematic. Such witnesses frequently offer greater cooperation after hearing feedback from mock jurors. Even without a full blown witness test, a jury consultant sitting in on a witness preparation session may have helpful feedback on posture and other involuntary and non-verbal behavior which may distract from the substance of the witness' testimony.

3. Fitting The Witness Into The Story:

- Jury research shows that jurors often construct "stories" to help them organize and interpret the information they learn at trial. Long before *voir dire* and opening statement, the trial team, in concert with the jury consultant, has determined the story that will be offered to the jury as well as its supporting themes.
- The story should fit the common, simple story structure with which jurors are familiar. This means the story has a beginning, middle, and an end. A jury consultant actively involved in witness preparation can help each witness understand the role of that witness' testimony in the overarching story being told.
- Attorneys sometimes treat a case as a jigsaw puzzle and prepare a witness only on that witness' piece. The case is all one story, however, and a witness will be more effective if she has an understanding of how her testimony fits into the whole story.
- Helping a witness understand how her testimony fits into the story being told may also result in her more effectively communicating against the backdrop of the story introduced during *voir dire*, opening and other testimony.

Example: In the Microsoft indirect purchaser action in Iowa, an expert witness was used by the plaintiffs to explain the background and history of the development of the software industry. This testimony was necessary for the jurors as an orientation into a complex industry and also to help them begin to understand the market framework in which Microsoft's alleged anticompetitive conduct occurred. It was important for the trial team to elicit testimony concerning the background and historical information that was directly relevant to the plaintiffs' theories on liability

and the story which was being told. Thus, it was critical for this expert to understand both the themes and story of the case, and also his role in that story and how it fit with the other pieces.

4. Identifying Key Testimony and Pitfalls:

- Jury consultants work with attorneys to identify key facts and testimony. While attorneys need less help in identifying key legal issues and the facts and testimony relevant to them, it is important to remember that even minimally relevant facts may be of critical importance to the jury in building the story they will use to understand the case.
- Because each juror is constructing a story in his or her head, a “key” piece of testimony may be needed to fill a hole in that story. For example, motive (or the “why” question) is a critical element of any story, although it is often not a necessary element of certain claims. If evidence is not presented on that part of the story, the jurors will turn to your opponent, or fill in that hole in the story themselves through speculation or conjecture. Jury consultants can help identify facts and testimony which are critical to the story being told to the jury, even when minimally relevant from an element standpoint.
- Jury consultants also help identify areas that will be addressed on cross-examination. To avoid vulnerability on cross examination, the jury consultant may assist the trial team in developing a way for a witness to avoid being misunderstood by slanted cross-examination, and to avoid leaving holes in the evidence needed for the closing argument.

Example: In 1980 MCI went to trial in an antitrust suit against AT&T requesting \$900 million in damages. Jury consultants assisted MCI in deciding not to introduce evidence of its loss profits (\$100 million) because mock juries used that figure as a baseline for calculating damages which reduced the resulting recovery. Putting this information into practice in the courtroom, MCI obtained their requested \$900 million from the jury.² Although damages were not limited to lost profits as a legal matter, testimony regarding loss profits was important to the jury’s understanding of how MCI was harmed yet quantifying lost profits below requested damages created unexpected confusion.

5. Maintaining Consistency With Themes

- Jury consultant involvement in witness preparation ensures that the witnesses are asked questions on direct that are consistent with the themes and story developed during *voir dire* and opening.

² See Walter F. Abbott, *Surrogate Juries* § 1.01 (1990).

- In complex trials this may be aided by the use of symbols or icons. Symbols or icons can be used to invoke various themes.

6. Tailoring Testimony To Jury Responses In *Voir Dire*

- After being intimately involved in the *voir dire* process, jury consultants can assist the trial team in identifying direct testimony that will effectively embrace or respond to the background and pre-conceived notions of individual jurors, whether based on expressed values or experiences.

7. Developing Demonstratives

- Demonstratives are extremely witness specific. However, in general the jury consultant assists the trial team to determine the key information which must be conveyed for a jury to understand the factual (and legal) points the witness is presenting. That key information is then presented visually.

Example: On market definition the defendant attempts to define the market broadly so an effective demonstrative visually illustrates the wide variety of choices available to a consumer. In a soft drink case that demonstrative may be a photo of the coolers at a convenience store.

- Demonstratives are helpful in developing themes and building meaning into symbols and icons.

II. CROSS EXAMINATION PREPARATION

1. Anticipation of Cross-Examination Topics

- The jury consultant has a role in identifying likely lines of questioning during cross examination. Once the likely areas of inquiry are identified, the jury consultant assists the witness in understanding how to avoid falling into credibility traps that are likely to be part of the cross examination.
 - Expertise: This cross examination strategy aims to show that the witness is not qualified, is not believable, or is not an expert on the issues which are core to her testimony.

Example: An obvious cross-examination technique seeks to elicit multiple “I don’t know” responses. The jury consultant works with the trial team to assist the witness with more accurate, explanatory responses. The prepared trial team devises other strategies to distinguish the topic about which the witness knows little from the core issue she is addressing.

- Consistency: This cross examination tactic aims to create an appearance of inconsistency between the witness' testimony and the testimony of other witnesses or, in the case of an expert, prior writings, etc.

Example: The jury consultant assists the trial team to become aware of what explanations jurors find acceptable for apparent inconsistencies. Of course, the team wants no inconsistencies. Some explanations include: (a) there is no inconsistency; (b) new information caused the witness to modify her testimony; (c) "I had an inaccurate memory of events and once I read (or saw) the material, I realized my memory was inaccurate"; (d) "I was just wrong. I reviewed the video again and saw. . . ." The witness must then provide a reasonable explanation of the event that triggered the change.

- Relevance: This tactic seeks to create the appearance that while the testimony may be credible and consistent, it is not relevant to the true issues in the case. What is relevant and not relevant for the jury is often a difference between the themes, strategies and theories offered by the opposing sides. This is one reason why the parties constantly argue over relevancy. The expert witness is generally allowed to determine what is or is not relevant to that witness' testimony.

Example: The jury consultant can help an expert more clearly communicate the bases for the expert's opinions. This factor may come into play when one expert relies on the testimony or report of another expert which is revealed to contain a mistake. The witness is entitled to take the fundamental piece of information from the other expert for which there were no errors, and testify that the relevant piece of testimony – the core piece – is the only piece upon which she relies. Having limited what she relied upon, anything else from the prior expert's report is not relevant to this expert's testimony.

- Character: If all else fails, cross examination may seek to impugn the witness' character. When a cross-examiner has been unsuccessful in attacking expertise, consistency, or relevance, the cross-examination may focus on character. A jury consultant can help an expert in professionally responding to unfair attacks.

2. Building Confidence

- Jury consultants can work with witnesses to address potential problem areas and pitfalls on which slanted cross-examination is likely to focus. The jury consultant helps a witness identify anticipated "trick" questions and how to answer fully and accurately, when such questions are raised during cross examination.

- When the witness hears one of these areas being raised, she can confidently provide complete and truthful answers as opposed to being limited by slanted cross- examination.

Example: In the tobacco cases, many industry witnesses believed that individual choice/responsibility was a strong defense. When confronted with certain tobacco industry documents describing cigarettes as “coffin nails” or “cancer sticks” the witness would not forget the basic theme of individual choice/responsibility, to the extent that the theme would be responsive to the specific question

III. CAVEAT REGARDING JURY CONSULTANTS

There is a caveat which must be observed when using jury consultants in witness preparation. Of course, caution and proper attorney supervision must be utilized to ensure ethical witness preparation. In addition, however, even when entirely ethical practices are used, thought must be given to public and judicial perceptions of the practices utilized.

- *Example:* In the *California Computer Products of Anaheim v. IBM*³ antitrust trial in 1976, IBM used a “shadow jury.” The shadow jury consisted of six surrogate jurors selected to reflect the profile of the actual jury who were kept ignorant of which side had hired them. The shadow jury sat in the courtroom and observed everything the actual jurors did, heard everything the actual jurors did, listened to the same admonitions, and left the courtroom when the actual jurors did. The jurors were interviewed every day regarding their impressions of the proceedings, the attorneys, the witnesses, the exhibits, and their general reactions to the case. The jury consultant then provided memoranda to IBM’s attorneys with specific inferences and recommendations.⁴ When the existence of this program became public there was a strong adverse public reaction and IBM’s attorneys disbanded their shadow jury.⁵ This example shows that careful thought must be given to how jury consultants may best be used to avoid becoming vulnerable to the charge of using science for jury manipulation.

References:

1. Walter F. Abbott, *Surrogate Juries*, ALI-ABA (1990).

³ After a fifty-four day trial, the case was ultimately resolved by directed verdict in 1976 and upheld on appeal. See *Calif. Computer Prod., Inc. v. IBM*, 613 F.2d 727 (9th Cir. 1979).

⁴ For a detailed discussion, see Walter F. Abbott, *Surrogate Juries* § 5.02 (1990).

⁵ See Walter F. Abbott, *A Handbook of Jury Research* § 28.09(d)(1) (1999).

2. Walter F. Abbott, *A Handbook of Jury Research*, ALI-ABA (1999).
3. Steven Babitsky, *How to Become a Dangerous Expert Witness*, SEAR (2005).
4. David Ball, *Theater Tips and Strategies for Jury Trials*, National Institute for Trial Advocacy (1993).
5. William Bryan, *The Work of the Advocate*, Little Brown (1911).
6. V. Hale Starr, *Witness Preparation*, Aspen Law, Aspen Publishers (1998).
7. Robert Warren, *Effective Expert Witness*, Gaynor Publishing (1996).