

DECISION ANALYSIS

Litigation Strategy

Statement of Purpose

We strive to:

- Improve the quality of information that clients use to make litigation and trial decisions.
- Improve the strategic positioning of the case for settlement and trial.
- Improve the quality of counsel's case communication effectiveness.

Persuasion & Trial Presentations Guiding Principles

STRATEGIC CASE DEVELOPMENT & GOALS

- In discovery, decide on how you want to gather information to support the client's strongest story of the case.
- Decide on how the case story that is developed in discovery is different from the trial story.
- Decide what you want the mediator, judge, or jury to focus on in making decisions.
- Define what background information is needed for mediator, judge, or jury to have context to understand the issues in the case.
- Look for how you can strengthen the answer to the question, "This case is about..."
- Look for a single piece of testimony, evidence, or exhibit that captures the essence of the case.
- Decide how you will turn your case's problems, weaknesses, and vulnerabilities into strengths.
- Decide on the real human and emotional values that are important to convey to the jury.

UNDERSTAND & ADDRESS DECISION-MAKERS

- Understand the values and the emotional undercurrents in the case.
- Define and address the anticipated confusion, misunderstandings, or biases that a mediator or factfinder might use in deciding the case.
- Understand that mediators, judges, and jurors use their experience, beliefs, values, preconceptions, and world view to interpret the evidence and law to make their decisions. There may be a large difference between the evidence and how the decision-maker might interpret that evidence.
- Identify the issues, evidence, personalities, or presentations that cause credibility problems or cause decision-makers to be resistant to your case.
- Understand that the decision-maker persuading themselves is much more powerful than you persuading them.
- Understand there is a difference between a mediator, judge or jury being engaged in your case than listening to your case. Active engagement is more powerful.
- Help your decision-maker understand the *meaning* of your evidence and how to use it to come to a favorable decision. Design your presentations to assist a decision-maker's comprehension, retention, and use of your evidence for optimal case impact.
- The intent / motives of the parties are always important to jurors to explain the conduct in the case.
- Differentiate the information that *you* think is important from information that the *jury* will think is important.

PERSUASIVE STORYTELLING & SEQUENCING

- Understand there is a difference between the evidence or timeline of a case and the story of the case.
- Understand that context, clarity, organization, and simplicity are your most persuasive tools.
- There is a difference between the legal/factual story and the authentic story of the case. Create the authentic story that uses the facts and law rather than focusing solely on facts and law. Look for interesting, unique, and unusual details to create the authentic story.
- Character is credibility. People are not one-dimensional – neither all good nor all bad. Create a thorough and nuanced portrait of the parties to help judges and jurors understand intent.
- Define the main, secondary, and bit players in the case.
- Create a vivid picture of the world where the disputed action takes place, so the mediator, judge, or jurors feel like they are actually in the world when they are listening to the case.
- Evaluate where you want to start the story and what is the best narrative sequence of events that will create the greatest impact. Assess the optimal order of witnesses at trial to enhance the narrative sequence.
- Decide who will be the best storyteller to communicate the story with the greatest impact.
- Decide how you will incorporate the other side's story, witnesses, and evidence into your own version of events.
- Investigate and solve the problem or mystery with the jury instead of telling them the solution. Create a partnership and a conversation with them.

PRESENTATION TECHNIQUES

- How you present the case is as, if not more, persuasive than what you present.
- Use visual and verbal signposts to help organize your case information so jurors know exactly where they are in the case.
- Understand that the amount of time you spend in trial on any issue conveys importance to the jury, whether they those issues are important or not.
- Give the mediator, judge, or jury a job to do. Siding with you on issues, motions, or verdict questions is not a job.
- Create a series of equations to lead a jury or judge to a desired verdict. (e.g., X evidence/testimony + Y evidence/testimony + Z exhibit/document = liable/not liable.)
- Design the visual elements (PowerPoints, boards, flipcharts, or whiteboards, etc.) that illustrate the strongest issues, concepts, and story in the case.
- Decide on other models, illustrations, demonstrations, or production values that will transform dry information into impactful evidence.
- Use the courtroom space to place your story. Be animated and energetic in telling the story of the case.
- Match the tone of your presentation to the message you want to convey and how you want the jury to feel.

Jury Selection Guiding Principles

PREPARATION & GOALS

- Have conversations with the Court about their normal jury selection procedures well in advance of trial. These issues include:
 1. Questionnaire use and timing
 2. Submission of voir dire questions
 3. Whether voir dire will be conducted by only the judge, attorneys, or both
 4. Length of time allowed for attorney conducted voir dire, if any
 5. How many jurors will be called in the pool
 6. How the judge or court handles hardship
 7. How the judge handles cause challenges
 8. The number of allowed peremptory challenges and how they are exercised
 9. Number and seating of alternates
- Jury selection is jury de-selection – you are eliminating negative and risky jurors.
- Identify the problematic issues in your case before designing questionnaire and voir dire questions. These should especially include non-substantive and non-legal issues.
- Anticipate how the opposing side will likely present their case, how that case presentation will be different than discovery and pre-trial motions, and how that will affect jurors.
- Understand the culture, values, and concerns of the venue where you are trying the case.
- Evaluate how jurors might respond to the personality, approaches, and style of the attorneys and witnesses when developing your jury profile.
- Get feedback on your opening statement before jury selection to adjust the jury profile to select a jury that is more favorable or receptive to your case story and themes.
- Practice, practice, practice your voir dire questions and especially your cause challenge sequence.

JURY SELECTION STRATEGY

- Create a jury selection plan well in advance of trial that includes a meaningful jury profile, dealing with court procedures, processing questionnaires and internet research, voir dire goals and procedures, developing cause challenges, and strike strategies.
- If available, discuss how jury research has informed your jury selection profile.
- Consider whether to ask for mini-opening statements prior to voir dire.
- Decide whether you want a consensus jury or a conflict jury.
- Don't be afraid to ask hard questions.
- Don't rehabilitate bad jurors.
- Think about what the jurors are not saying but thinking.
- Layer in an important theme in your case at the end of voir dire without exposing good jurors.
- Use juror words, experience, values, and beliefs when designing opening statements, examinations, and closing arguments.

VOIR DIRE COMMUNICATION SKILLS

- Don't lecture or sermonize to jurors – have a real conversation where you are truly interested and curious in jurors, their lives, and what they have to say.
- Aim for *jurors* (rather than attorneys) to spend at least 75% of voir dire time speaking. For this, ask mostly open-ended questions.
- Create a conversational tone which makes jurors feel safe to have a meaningful conversation about important and difficult issues.
- Many times, jurors don't know how to answer some questions. Help them explore.
- Acknowledge a juror's life experience and exercise your empathy.
- If permitted, make relevant self-disclosures to encourage jurors to reveal personal information.
- Practice open-ended or ambiguous questions to see how jurors think.
- Don't be afraid of silence when a juror is thinking of a response.
- Ask follow-up questions (“*Tell me more about that*”) to gain a deeper understanding of their response.
- Respond to what is happening in the jury. Don't just ask the scripted questions.
- Try to get everyone on the panel to speak.
- Please stop talking and listen.
- *Really* listen.
- Prompt jurors to respond to each other's answers to better understand how they may interact with each other in deliberations.

EVALUATING JURORS

- Jury profiles are built on a juror's personality, beliefs, and life experiences that they translate into their personal rules for how the world works. This is how they will interpret the evidence and the law.
- Demographics are only useful as a starting point in creating a jury profile.
- Focus on leadership traits when making strike decisions.
- Don't be overly reliant on a juror's single answer to a question. Look at *all* of their answers in context to get a more complete portrait of the juror.
- Use social media or internet searches to get more information about jurors and to see how they want the world to see them.
- Evaluate the nonverbal reactions of jurors to questions and responses.

Jury Research Guiding Principles

PREPARATION & GOALS

- The clients should learn as much in preparing for the research as they learn from the results of the research.
- There should be specific set goals for the research as to what you want to learn. The goals of the research should determine what type of project you conduct. Who wins and how much the case is worth are not specific enough goals.
- In preparation for research, considerable time should be spent identifying the issues that you want to learn about. This allows us to design the research to more precisely assess the issues that move the jury.
- As part of the planning, identify the various uses that you would like to use the research for (e.g., settlement or witness evaluation, trial preparation, theme, or story design, etc.)
- Counsel will naturally tend to bias the research toward their own case. In preparation, challenge yourself to uncomfortably consider all aspects of the opposing case, whether they are evidentiary, legal, or argumentative issues. That is part of the learning.
- Always try to test the “worst case scenario.” If there is even a small chance a judge will let in the opposing side’s evidence or arguments, test it.

ITERATIVE PROCESS

- Understand that jury research should be somewhat uncomfortable as you explore the potential vulnerabilities in your case or challenge assumptions about the evidentiary and legal strengths of your case.
- Jury research should be iterative as you are working with a consultant before, during, and after a project. If possible, consider conducting research in phases to test issues, get feedback, refine those issues, and re-test to achieve better result.

RESEARCH FORMAT, LOGISTICS, & PRESENTATIONS

- The format decided for the research (focus groups, mock trial, surveys) should be based on the identified goals and the case issues that need to be tested.
- Understand that there are numerous formats that can be designed in survey, focus group, and mock trial research to achieve your desired goals.
- Develop a precise preparation plan on what is going to be presented and who is going to do the presenting, as well as timing of drafts and final presentations well before the research date.
- In conducting research, have an in-depth discussion of the venue and how to obtain survey data or research respondents who are reflective of the actual jury pool.
- Be careful to screen out respondents who may have knowledge of or affiliation with the parties, attorneys, firms, and witnesses involved in the case or have specific knowledge of case issues which would preclude them from sitting as actual jurors on the case.
- If there are multiple parties involved in a research project, strive to achieve agreement on the goals, format, and participation in the project.

- Ensure that the presenters are balanced in their knowledge, experience, and skill in trial presentation.
- It is important to get consultant feedback on the prepared presentations prior to the research. That feedback ensures that you are not missing issues that need to be tested.
- Jurors are extremely visual, so time must be spent developing the visual content of the presentations in the form of PowerPoints, video clips, or other demonstratives.
- Presenters must do practice runs in order to stick to the allotted times in the research and to ensure fluidity in using presentation technology.

JUROR FEEDBACK & WHAT TO LEARN FROM RESEARCH

- Learn by losing. Whether you prevail on verdict issues or not, research should explore weaknesses or vulnerabilities that could adversely affect the trial outcome.
- As jurors decide cases based on a story model, jury research should not only focus on how jurors decide individual issues, but how they assemble the overall story of the case.
- It is more important to focus on what jurors are using (e.g., evidence, arguments, personal experiences or beliefs, expectations, etc.) to get to their verdict and damages than to focus on the verdicts and damages themselves.
- Jury research should be about discovering what jurors need to get to the desired verdict outcome as opposed to convincing them you are right.
- Understand that research results should reveal elements that have not previously been considered in the case or have not been deemed important. As a result, it is useful to conduct jury research before discovery is closed or before all witness depositions are conducted.
- It is as important to pay attention to what jurors are not saying as it is to consider what they are saying.
- Understand you are not just testing the opposing side's arguments; you are also testing what jurors will come up with on their own.
- Let the jurors tell you what they need in order to decide the case in your favor, even if you do not have the evidence to support that need.
- While jurors' final decisions are important, it is more critical to study the dynamic movement of their decision-making process.
- It is also important to study jurors' confusion, questions, and their overall comprehension of the relevant case issues.

Witness Preparation Guiding Principles

PREPARATION, APPROACH, & LOGISTICS

- Preparation sessions should include these four main elements:
 1. Discussion about the witness's background, experience, beliefs, and values.
 2. Discussion about the case events they are involved in (or have opinions on if an expert).
 3. Discussion of best testimony practices for witness communication clarity.
 4. Practice direct and/or cross examination.
- Whether preparing the witness for deposition or trial testimony, the approach should be the same, even if the format is different.
- If a consultant is involved in the preparation sessions, it is important for the consultant to review case documents, especially from the opposing side, prior to the scheduled sessions.
- Discuss the goals and schedule for the preparation sessions. This should include attorney perceptions of the witness, expectations, and impressions from previous sessions.
- Preparation sessions should not be too long or too short. Multiple sessions should be considered to ensure the witness fully absorbs new material or new skills.
- Do an initial evaluation of the witness's skill sets and the amount of case content they need to cover. This will help in planning the number and length of sessions. This will also help to plan how far in advance of deposition and trial you need to start meeting with them.
- Limit the number of voices that are giving feedback to the witness.

RELATIONSHIP DYNAMICS & WITNESS CONCERNS

- Understand that the witness's performance will be greatly affected by their relationship with the attorneys or other parties such as an employer that is being sued.
- The witness responds to the pace and tone of the attorney. Evaluate how to either match the witness's demeanor to build rapport or to lead them with your demeanor.
- Understand how the witness's fears or concerns, whether substantive or presentation/emotional may get in the way of them testifying accurately and clearly.
- There are four main components to watch for in evaluating witnesses: their attitude/personality, their demeanor, their listening skill, and their response skill.
- Build up the support system around the witness, whether it be a family member, company, or attorney team. Evaluate how to build up the witness's confidence in their own testimony.
- Understand that there may be a difference between what an attorney wants from a witness in their testimony and the genuine perspective of the witness. This potential tension can cause a witness to testify in a stilted, or inauthentic way. Identify their authentic voice as opposed to your scripted answer.
- Help the witness understand that they do not have to ignore their emotional state when testifying. It is okay for them to feel what they feel. However, caution should be taken to not express hostility or aggressive anger unless extreme circumstances warrant it.

AUTHENTIC WITNESS COMMUNICATION & CLARITY

- A percipient witness's memory of case events is affected by numerous variables. Witness preparation should be an exploration of the witness's accurate memory and their reactions to that memory, given their background, personality, and experience. This is *their* truth.
- Understand how the witness's truth may differ from the lawyers' desired case posture.
- Understand the whole witness and not just their testimony. Jurors assess credibility on how much they are getting an authentic response from the witness or whether they are parroting the attorney or the "party line."
- Understand the obstacles that get in the way of the witness clearly communicating their truth.
- If a witness is giving complex testimony, consider how to make the subject matter more understandable and accessible for a lay jury.
- Identify the context testimony that will help a witness's accuracy and credibility.
- Shift the focus of the witness from a defensive posture to one of affirmative clarity and helpfulness.
- Help the witness define their actual knowledge based on their memory, refreshed recollection, and experience rather than speculation.
- Prepare witnesses to give testimony that gives a full picture rather than a purely optimistic or pessimistic view of their background, actions, or company.
- Help the witness create a series of fundamental truths that they can keep coming back to if they get confused or lost in their testimony.

ADDITIONAL CONSIDERATIONS & EXPERT HANDLING

- Find out how their prior experience in legal cases or as a witness will affect their testimony.
- Help the witness have a comprehensive knowledge and control of the deposition room or courtroom setting, whether they are live or online.
- Help the witness understand how their mannerisms, dress, grooming, and demeanor may affect how their testimony is perceived.
- Evaluate how well the witness listens a question, pauses to give a considered answer, and then responds to the asked question.
- Help them understand different opposing counsel strategies to obtain favorable answers and how those answers might be misconstrued. Help them clarify the *issue* opposing counsel is asking about and how they can accurately answer the *issue* without being forced into false concessions.
- Help experts to teach the *jury* to be experts rather than testifying as opinion makers. Help the jury understand the process by which the expert arrived at their opinion.
- Consider minimizing how much you call experts "experts," as this may increase juror resistance.
- Help a 30(b)(6) or corporate representative do the research necessary to be responsive to the requested or anticipated topics.
- Help the witness correct mistakes and to be easy on themselves for making mistakes.