

## Consulting on a Budget

BY JESSICA HOFFMAN BRYLO

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The economy is hitting everyone hard and while attorneys still want to do what is best for their clients, budgets for working up cases have decreased. Plaintiff's attorneys are hesitant to front as many costs and defense attorneys want to keep costs down for clients who themselves may be feeling financial strain. Simply because budgets have been cut, however, does not mean that attorneys need to try their cases blind without the help of a skilled consultant. Many consultants are sensitive to the economic times and will work with clients to find a way to help attorneys better their cases without breaking the bank.

Consultants offer a variety of services and in order to understand how you can consult on a budget, you need to be knowledgeable about what options you have:

- **Case Analysis.** Case analysis can be anything from a one-hour phone conference to multiple meetings with a consultant. Using their experience interviewing jurors, preparing similar cases for trial, and running numerous focus groups, consultants can often provide valuable insights into how jurors are likely to view the case simply by knowing the case facts. Attorneys are often too entrenched in a case to be able to step into the role of an outsider lay person to understand where jurors are likely to get confused, what issues are likely to be detrimental, and how to best work around or address those issues. Case analyses can be used to identify and address those issues, including tips on what questions need to be asked in voir dire, how to structure the opening to deal with potential problems, or if done early enough, what other experts or witnesses you may need to hire.
- **Opening Statement & Closing Argument.** These are pivotal points in your case. The opening is your chance to frame the issues in a manner that allows jurors to see the rest of the case through the lens you create. Once jurors begin to believe something, they tend to continue to believe it. During opening statements, jurors are beginning to form opinions about the case, about who is right or wrong, and about what happened or how much it is worth. Once a juror begins to believe your side of the case, they will tend to filter the rest of the evidence through that lens. They will dismiss (or forget) evidence which contradicts that belief, hold tightly to evidence that supports that belief, and alter evidence in their minds to make it consistent with that belief. Consultants

can edit opening statements in a manner that is known to be most convincing to jurors, thus subtly and unconsciously beginning to alter how jurors will view the rest of the evidence in the case.

By closing arguments, most jurors have made up their minds, but this is the perfect opportunity to explain to jurors how your evidence fits into the jury instructions. Further, if done correctly, you can teach jurors how to argue for you in deliberations when you are no longer there to point them in the right direction. A good consultant can edit your closing argument and frame it in a way that sends jurors into the deliberation room ready to counter arguments from opposing jurors.

- **Jury Selection.** It has often been said that cases are won or lost at jury selection. While this may not be entirely true, there is a lot to be said for the importance of the jury selection process. Contrary to popular belief, jury selection is not about picking jurors. It IS about careful DE-selection of jurors, but it is also about establishing good rapport with jurors, neither of which can be done without some practice at asking the right types of questions which elicit truthful responses. Consultants can help with anything from drafting of jury selection questions, to putting on a mock jury selection where they can critique your skills, to accompanying you to jury selection to watch for jurors' body language and other cues which indicate which jurors are likely to be harmful to your case.
- **Focus Groups & Mock Trials.** The only true way to know what jurors are likely to think of you or your case is run a focus group or mock trial in the trial venue. The purpose of a focus group/mock trial is not to win; the purpose is to set up the exercise in a scientific manner which controls for all variables except the ones you want tested so that you can find the problems in your case. Although many attorneys run focus groups themselves, they are often doing themselves a disservice by doing them in an unscientific manner. The adage "junk in, junk out" applies and although attorneys can avoid expenses by doing focus groups themselves, they often are throwing away any money they are spending. The results of a focus group should always be worth the cost; you should recoup the expenses either at mediation or trial with insights learned from the focus group.

With those consulting services in mind, let's talk about how to use them on a budget. One possibility is a restructuring of fees. Many consultants are willing to do some services at a flat fee rather than hourly, which will give you a more concrete figure of what costs to expect. You can also ask for a combination of flat fees and hourly rates for various services.

If you are interested in doing a focus group or mock trial, there are additional ways to save on costs aside from fee structuring. One large cost in doing these projects is recruiting. Random recruiting is important in creating a reliable focus group with results you can trust, but recruiters charge high dollar for their services. You can bypass the recruiter by having a paralegal or legal assistant do the random recruiting for you. It takes patience and many hours of hard work making cold calls or typing up hundreds of letters and fielding follow-up calls and you will need a consultant to teach the assistant how to screen jurors properly, but it can save you thousands. Some consultants may offer to do the random recruiting for you at a lower cost than recruiters. Either of these options is preferable

to using Craigslist or unemployment or temp agencies to find mock jurors. Such methods give you a very biased group of people which will be significantly different from your real jurors. People who are unemployed, looking for temp work, or who regularly search Craigslist for small side jobs think differently from the rest of the population. If you watch a focus group with unreliable participants and compare it to one with reliable participants from random recruiting, they may look the same; in either case, you will see a group of people deliberating about a case. What you are not seeing is the unreliability of the one group when trying to test how a real jury will respond to your case. If you're going to cut out the recruiter, do not cut out random recruiting.

Another cost that can be cut for focus groups and mock trials is the venue. Most are conducted in hotels where there is a food and beverage minimum and you are paying for multiple rooms. Ask your consultant how you can cut this cost out of the equation. I have conducted focus groups in churches and court reporters offices before to save on costs. As long as the rooms can be set up such that your videographer can run cables from the cameras to the viewing room and participants in different deliberating groups cannot hear one another, it does not matter where you host the project. The caveat to that statement is that it should not be hosted in an attorney's office. Jurors will inevitably Google the attorney's name on their cell phones during breaks and find out if they do defense or plaintiff's work. As soon as the jurors know which side you work for, your results are compromised. Other than that, any neutral ground is fine.

A third cost-cutting measure is to run two half-day focus groups instead of day-long mock trials. This will save you money in the amount you pay jurors (you don't have to pay for as much of their time) as well as what you need to feed them. I will often do morning and afternoon groups. I feed the morning groups bagels and coffee and put out some snacks for the afternoon group. This cuts out costs of feeding breakfast and a full lunch. You can also fit more groups into a day without renting out additional rooms. For example, if you do one group in the morning and one in the afternoon, you only need a total of two rooms (one viewing room and one for the jurors) as opposed to three rooms if you did two groups at once for a full day and then split them up to deliberate (two juror rooms and one deliberation room). To do this, you will need to cut down on the amount of exhibits to show, the length of any deposition videos, and the length of statements, but if you can get the core of your case and the main arguments conveyed to the jurors, in most cases, this will be enough.

If you are comfortable doing your own video and have the equipment to do so, you can ask your consultant to eliminate the audio-video charges. I suggest this with great hesitation, however, as I have had attorneys elect to do the video themselves only to find out that their equipment did not pick up the audio well enough to decipher what jurors were saying. If you want to do your own video, I highly suggest that you have table microphones and sound-mixing equipment that you have tested. Otherwise, you may waste the rest of your money in having a useless focus group video.

If the budget is too low to conduct a focus group or mock trial, even with the cost-cutting suggestions above, you can still benefit from using a consultant for other services, such as help with your opening statement, closing argument, and/or jury selection. Simply by utilizing knowledge of juror psychology, consultants can point out probable weaknesses in your case that you may not have seen. They can help revamp your opening statement and voir dire questions to deal with these issues head-on. Buying a couple of hours of a consultant's time for a simple case analysis can leverage your case multiple times over. Some consultants may offer package deals that can be customized to include a case analysis, opening statement, and closing argument. Bottom line, do not assume that because you do not have thousands of dollars to spend on a focus group that you have to try your case without the aid of a consultant. Be up front with the consultant, tell them your budget, ask for ways they can be creative with fees, and most will suggest ways to make the most of your money, whether that's tens of thousands of dollars or a couple hundred.

## A Note From the Editor

*Race, gender, tears, rage, damages, communication, economy and emotion!*

*You cannot run the gamut of topics anymore than that! And that's what we have for you in the May 2011 issue of The Jury Expert! As trial consultants, we see the good, the bad, and the ugly. We are privy to the secrets, the dysfunction, the illicit wishes and wants of the parties and the anger and frustration of both litigants and lawyers. And that results in work that is sometimes exhausting but always invigorating and interesting.*

*You may have expected a piece in this issue about the way our heroes fall and how jurors [and the general public] respond. We think that topic is way too predictable for The Jury Expert. So instead, what you will see is emerging work on how the race and gender of the trial lawyer is related to the ultimate verdict for criminal defendants. (It isn't pretty.) And then you'll find lots more including some original research on damages and entitlement, product liability, juror emotions, and finally, narrative persuasion.*

*We are, naturally, attuned to the economy and your desires to save some money. So we have two pieces on how to save money on pre-trial research and on witness preparation. Why? Why, because we care about you and want to help.*

*You could help us too! Our authors work hard on their articles for The Jury Expert! You like reading them. So read. Enjoy. Gather nuggets. AND then become real—by writing a comment on our website or on your own blog so our authors know you are out there appreciating their hard work.*

*Next time you see us it will be in the dog days of summer. So enjoy this breath of spring and know that, before too long at all, "we'll be back".*

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