

Keeping Secrets— Protecting Privilege in Pretrial Research

by Kacy Miller

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In an age where technology rules, personal boundaries have narrowed and a man's word is not necessarily his bond, how can we ensure that confidential information *stays* confidential? In the world of litigation, there are rules, procedures and court opinions to preserve confidentiality. But how does that translate into the practice of trial consulting, and more importantly, pretrial research?

Is It Privileged?

Although many clients and attorneys recognize and appreciate how effective and beneficial pretrial research can be, questions regarding privilege and confidentiality continue to linger. Two key issues are typically raised: (1) Is pretrial research protected under the work product doctrine, and (2) What measures can be taken to ensure that the pretrial research process does not become discoverable?

In 2003, the U.S. Court of Appeals took issue with whether the work product of a non-testifying trial consultant is privileged. In an opinion stemming from *Cendant Corporation Securities Litigation*, the Third Circuit held that trial consultants fall within the scope of the work product doctrine and that "communications [with a trial consultant] merit work product protection." While the issue of attorney-client privilege was not specifically addressed in this opinion, the concurring opinion held that the "attorney-client privilege was implicated."

The *Cendant* opinion has become a critical ruling for trial consultants throughout the country but, like anything in the law, there are always exceptions. Generally speaking, unless you are conducting pretrial research in a format that rivals that of Gene Hackman in *Runaway Jury*, you should be just fine. However, there are issues inherent to research that, when addressed carefully, can help ensure that the *Cendant* ruling will apply to your practices.

Execute A Retention Letter

If the attorney and consultant do not already have a detailed engagement agreement, the parties should execute a written agreement formalizing the relationship and scope of assignment. A written engagement agreement leaves no room for questioning whether the consultant has been retained as a third-party, non-testifying expert. By memorializing the relationship, the consultant's work product becomes privileged and communications are protected from discovery.

In addition, in the event that pretrial research involves presentations or attendance by co-counsel or parties not named in the original retention agreement, the consultant is strongly encouraged to execute supplemental agreements with such individuals. These agreements can certainly be narrower in scope, but are nonetheless critical to preserving privilege should an issue arise down the road.



Require Vendor Confidentiality

Typically, one of the first steps in conducting pretrial research is hiring vendors. Depending on the project design, these vendors may include a professional recruiter, a technology team to videotape the process, and a facility site to provide meeting space.

It would be prudent to require each vendor to execute a written Confidentiality Agreement. While some may consider it overkill, there is certainly no harm in executing a basic agreement where the vendor pledges to treat any document, correspondence, process or mental impressions related to the project as confidential in nature. One can never be too careful, and it only takes a few minutes. In fact, if the vendor expresses resistance to entering into such an agreement, it should be a huge red flag.

In addition, by limiting the amount and type of information vendors receive about the actual case, the consultant maintains greater control of confidential information and consequently, minimizes the chance of any breach. Granted, conflicts must be run (depending on the vendor and scope of assignment) and vendors who attend the actual project obviously will be exposed to case-related details, but to the extent possible, consultants should provide specifics on a “need to know” basis.

Use Professional Recruiters

Typically, one of the first steps in conducting pretrial research is hiring a recruiter. While some attorneys choose to do their own recruiting, it is well worth the extra cost to retain a professional recruiter. They understand the confidential nature of the mock jury process, and they are very sensitive to the unique demographic needs that legal research requires.

When using an outside vendor for recruiting, a few measures can be taken to protect privilege.

1. As mentioned above, enter into a written Confidentiality Agreement with the recruiting company.
2. Refrain from providing detailed case information to the recruiter. Share detailed case information with the recruiter on a “need to know” basis. Professional recruiters are more than capable of staffing a project effectively without knowing details about the specific style of the case, parties, or the allegations.

3. Learn how the recruiter contacts participants. Do they have a database? Do they cold-call? Do they place ads in local newspapers? Work closely with the recruiter on what type of information is given to potential participants over the telephone, and if relevant, what information is placed in print. Maintain control of the process by approving advertising methods, if any.
4. Provide the recruiter with specific parameters and goals for the recruit, and monitor the process frequently. Do not assume that consultants with “in house” recruiters will implement first-class recruiting practices: monitor, communicate and oversee all aspects of the project.

Screen, Screen, Screen

Of course the best mock jury panels are those which match the demographic composition of your trial venue, but make no mistake: a good recruit involves *much* more than simply matching basic demographics.

No matter what type of research you are conducting, potential participants must be thoroughly screened before being formally recruited. Clearly every case is different, and the venue of the actual research may impact the complexity and length of the recruiting process, but a screener is always critical. In fact, participants should complete the screener not only during the recruiting process, but also during the morning of the actual project. This helps prevent anyone from slipping through the cracks.

A detailed screener can help identify participants who would not typically serve as an actual juror due to eligibility issues, cause or hardship; it also identifies participants who are a little “too close to the case” for comfort. In pretrial research, allowing a surrogate juror who in any way has a personal connection to the case is an invitation for a breach of confidentiality. Unfortunately, despite best efforts, we cannot control what surrogate jurors do once the project ends: a detailed screener helps minimize the chances of having a Chatty Cathy, Bob the Blogger, Media-Hungry Mike or Counsel’s Cousin on your panel. It also maximizes the chances of seating a panel more akin to what you might see in the actual venire.

When it comes to drafting a screener, sometimes less is best. A good rule of thumb? Be thorough, but judicious.

A fifteen-page screener will undoubtedly weed out potential conflicts, but it will also complicate the recruiting process and potentially eliminate participants who would otherwise make very good surrogates. An overly detailed screener also has the potential of inadvertently giving recruits more information about the case than you may really want to share. When screening for specific conflicts, consider adding a few “teasers” into the mix. For example, if the case involves a pharmaceutical company, include the names of multiple pharmaceutical companies so recruits cannot determine which party is involved in the project.

Even though a screener takes some effort to create, and certainly makes the recruiter’s job more arduous, it would be remiss to conduct small group research without one.



Choose the Project Location Carefully

Ideally, pretrial research is conducted in the actual trial venue. However, sometimes the project design allows for the research to be conducted in an alternate venue. In addition, some trial venues present very unique challenges that cause consultants and trial teams to reconsider project location.

When choosing a location, be sure you are informed of any standing orders or “unofficial” practices implemented by the trial judge. No client wants to invest thousands of dollars in pretrial research only to learn *after the fact* that he must disclose the participants’ names to opposing counsel and the trial court. For example, there is a standing order in the Eastern District of Texas that requires such disclosure under certain circumstances. Know your venue, and know it well.

When small group research is conducted remotely in a relatively small venue, the project is often held in a hotel conference room or public meeting center. These entities are employed by many, and it is impossible to know who-knows-whom. Who’s to say the maintenance supervisor isn’t a relative of the court reporter or local counsel? Chances are slim to none, but you never know. For obvious reasons, in small remote venues it is always a good idea to operate on a “need to know” basis. Be conservative with the type of information you provide to the facility site and its staff members.

In addition, it is also a good idea to work with the facility site on how they “label” the project. It is very common for hotels to display meeting names on signage as well as televised displays throughout the hotel. The last thing you want is a big, bold sign in the lobby stating that the “Smith Law Firm Mock Trial” will be held in Conference Center One. Discretion is imperative.

Lock Down Participant Confidentiality

One of the most important—if not *the* most important—aspects of conducting pretrial research involves the mock jury panel itself. On the morning of the project, you will be faced with a group of strangers about whom you know nothing. In a perfect world, the people we encounter would share our work ethic, our value system and our respect for the confidential nature of the mock jury process. However, we do not live in a perfect world.

The best way to maintain privilege and protect the research process is to conduct a thorough orientation of the participants *before* any case-related information is shared, and to require every participant to execute a written confidentiality agreement. Some consultants (myself included) take things a step further and require participants to verbally attest—on video—that they understand the confidentiality agreement and will abide by the terms. This serves two purposes: (1) it lets participants know we are dead serious about the confidentiality issues, and (2) should a juror violate the terms of the agreement, it lets the court know that we did our best to protect confidentiality.

A confidentiality agreement does not need to be full of legalese or overly detailed to be effective, but it does need to address a few core issues. Have an active discussion with the panel about the agreement; talk about the meaning and importance of each section, and try to candidly answer their questions. If surrogate jurors understand the agreement, they are much more likely to abide by it.

Be sure the written agreements contain clauses that address the following issues:

1. Participant acknowledges that he is being retained by Consulting Company, Law Firm(s) and/or Attorney(s) for research pertaining to a lawsuit pending in [insert appropriate trial venue] (*the actual names of the law firm(s) and/or attorney(s) are not contained in the agreement*);
2. Participant acknowledges that all information related to the project is Confidential. (*“Information” is thoroughly defined*);
3. Participant vows not to disclose any information, opinion or details about the project to any person, business or entity unless required by a court of law;
4. Participant promises not to submit any information about the project on blog sites, social networking sites, message boards, newspaper commentaries, email and/or any internet sources;
5. Participant promises to contact the appropriate party (*typically the consultant*) if he is contacted by anyone seeking information about the project or his participation in same;
6. Participant agrees to be videotaped and/or photographed;
7. Participant acknowledges that his participation, comments, photographs, videotaped media and written questionnaires become the property of the consulting firm;
8. If participant receives a jury summons, participant agrees to privately notify the court of a potential conflict if the case is in any way related to the information presented during the research; and
9. Participant agrees to abide by the terms outlined in the agreement.

The written confidentiality agreement can be quite overwhelming for the panel, and while we certainly want them to view the project and its rules seriously, we don't want the panel to be so intimidated that they refuse to actively participate. It is often helpful to assuage juror fears by offering them a verbal contract pledging to treat *their* feedback and personal information with the utmost respect. Video snippets, photographs and personal information will not be posted on YouTube or the internet, and all information gleaned from the project will only be shared with appropriate parties; it is *not* for public consumption. After all, how can we expect surrogate jurors to treat our information with the utmost care if we fail to do the same?

Embrace the Role of Facilitator

Project Sponsors

Surrogate jurors are innately curious about the research process and always want to know who is sponsoring the research. Informing the panel that the project is sponsored by the plaintiff, for example, raises a few concerns. First, it has the potential of causing surrogate jurors to modify their feedback or to withhold anti-plaintiff sentiment. Second, it introduces the potential for mock jurors to want to contact opposing parties and/or counsel to discuss the matter further,

especially if that juror votes against you. In the age of Google and search engine tools, the savvy and determined rogue juror could choose to violate the Confidentiality Agreement and become opposing counsel's new best friend.

Therefore, it is suggested that jurors simply be informed that all parties are working together in an effort to settle the dispute and that the facilitator has been retained to work with the parties in conducting the research. This approach not only minimizes potential bias, but it also places the plaintiff and defendant presentations on an even playing field. Neither has a more vested interest than the other does. In fact, by assigning the consultant a "moderator" role, the process becomes more balanced and the forum becomes a safer environment for honest, open feedback—no matter how good, bad or ugly.

Actual Names of Parties, Counsel and/or Witnesses

More often than not, the actual names of the litigating parties, attorneys and/or witnesses are divulged during the research process. This makes the research more authentic, and it certainly makes the process easier on the presenters. Documents do not have to be altered, video testimony can be played "as is" and the presenters and consultants do not need to rewire their brains.

However, there are rare circumstances where the case is so unique, the allegations so public or the parties so well-known in the community that actual names are changed. While this tactic certainly adds another layer of protection onto the privilege issue, it can be *extremely* challenging to implement. Slips of the tongue are almost certain, and after more than a couple, surrogate jurors start to question the authenticity of the process as well as the credibility of the presenters—which ultimately impacts the quality and validity of juror feedback.

Unless absolutely necessary, use the actual names of the parties throughout the research process.

Retrieve Documents, Papers and Trash

If jurors are allowed to take notes, provide notepads and collect them at the end of the project. Inevitably jurors will take their own notes if paper is not provided, and controlling where these notes ultimately end up becomes quite difficult if Jane Doe is writing case information on the back of her electric bill.

After the project is over and the meeting rooms have emptied, conduct a thorough walk-through. As mentally draining as these projects can be, do not be in such a rush to leave that you fail to destroy all case-related information that may have found its way to a corner, a trash can or the floor. Placing documents with identifying case or project information in a public trash can is an invitation for trouble. Carry them with you and destroy them appropriately... or box them up and FedEx them back to the office for shredding.

Notate Every Single Piece of Paper

As a general rule of thumb, it is always wise to include a footer on every single piece of paper that is generated as a result of the pretrial research. This includes recruiting screeners, confidentiality agreements, written questionnaires, payment forms, emails, formal reports, memos, letters—you get the gist. When creating a document, include a small footer claiming "confidential attorney work product" and put it on every single page, every single time. The devil is in the details.

Once the project has been completed, surrogate jurors have gone home, and the consultant has reviewed and analyzed the juror feedback, a written report is typically generated. In order to preserve the attorney-client and work product privilege, it is suggested that all written reports (and other similar documents) be distributed *directly* to trial counsel. Trial counsel can then distribute the materials to the client, the insurer and/or other appropriate parties as needed.

Final Thoughts

Pretrial research is an extremely valuable tool for litigants throughout the country. A professionally facilitated project custom-designed to meet the needs of your case can provide a road-map for theme development and trial strategy, as well as insight into potential settlement value. Although pretrial research poses some unique situations regarding confidentiality, concerns over privilege should not inhibit anyone from conducting the research or benefitting from the process. By implementing the suggestions outlined above, you can help keep your information secure, safe and privileged. As Elbert Hubbard once said, "Secrets are things we give to others to keep for us." Let's keep them wisely.

Citation for this article: *The Jury Expert*, 2009, 21(2), 26-32.



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Welcome to our March issue of *The Jury Expert*!

As spring moves in and brings new life to the world around us, so this issue of *TJE* is packed with new ideas and energy. Some ideas you may find to be things of beauty, others may make you go ‘hmmmm’, and still others may make you wrinkle your face with disgust. Our hope is that every article in *The Jury Expert* elicits some response in you--agreement, disagreement, aha moments, and yes, even disgust!

This issue is filled with contributions from ASTC member trial consultants and from the academics who actually perform the research upon which much of what we, as trial consultants, do is based. Flip through the pages of this pdf file or travel about on-line at our website and view all of *TJE* on the [web](#).

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-- [Rita R. Handrich, PhD](#)
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The Jury Expert [ISSN: 1943-2208] is published
bimonthly by the:

American Society of Trial Consultants

1941 Greenspring Drive
Timonium, MD 21093
Phone: (410) 560-7949
Fax: (410) 560-2563
<http://www.astcweb.org/>

The Jury Expert logo was designed in 2008 by:
Vince Plunkett of *Persuasium Consulting*
<http://www.persuasium.com/>

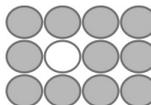
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