



THE JURY BOX

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The Jury Memo

Are you ready for some football? Now that the Red Sox have returned to their old ways of torturing the Fenway Faithful, we can turn our attention to the battles on the gridiron.

Football season has me feeling jacked and pumped and ready to tackle your toughest cases. I have hiked up the intensity for an all-out litigation blitz. Does your latest case have you feeling down and out? Call an audible and run it by me. I'll catch what's key to your case and we can refine your playbook to ensure victory. Your opponent will want to kick himself after we score big with the jury. Give me a call if you're ready to play to win!

Ouch. I think I pulled something typing out all those terrible puns.

We have added lots of new content to our website over the last few months and more stuff is being added all the time. So, be sure to bookmark www.eps-consulting.com and check in with us often.

Response has been very favorable to the electronic version of THE JURY BOX. I plan to switch most subscribers over to e-mail delivery in the next few weeks. If you really prefer to receive a paper copy, just visit the "subscribe" link at www.eps-consulting.com/jurybox to let us know.

— Edward P. Schwartz

Hello, this is Edward.

Mr. Schwartz, my name is Cliff Hanger and I'm an attorney here in Grand Rapids.

What can I do for you, Mr. Hanger.

Well, I read an article of yours in Lawyers Weekly and I think I could use your help on a case I have going to trial.

OK. Why don't you tell me a bit about the case and where you need some help.

Well, the case involves a defective snorkel design and some swallowed dentures. Here's the thing. I am not sure what themes to focus on, my client doesn't have the friendliest public persona, and my main expert is Belgian.

I see.

I was thinking that I could use some help with exhibits, a couple of focus groups, some witness prep, and maybe a mock trial.

Wow.

Did I just hear the "ka-ching" of a cash register?

Funny, I thought only I heard that. Anyway, Mr. Hanger, when does your case go to trial?

A week from Thursday.... Hello?

Most of my **first-time clients** are new, not only to my practice, but, to trial consulting altogether. Having never worked with someone like me, they are usually uncertain about what I can do for them and where to begin. I like to think that they are usually happy with what I have to tell them about my services, but occasionally I have to disappoint a client. The most common problem occurs when lawyers comes to me too late for me to be able to help them with their areas of greatest concern. To avoid this happening to you, I offer this brief primer on my services and when to call me if you think you might want my help.

A jury memo can be thought of like the "Blue Plate Special" offered by the mechanics on Car Talk. For a modest fee, I review the case briefly with the client. Then, I familiarize myself with the key materials available at that point in case preparation: depositions, motion memos, internal correspondence, expert evaluations, exhibits, etc. From this information, I draft a memorandum to the litigation team, outlining what I believe to be the strengths and weaknesses of the case, in terms of how it is likely to be received by a jury. I offer recommendations on strategies for jury selection, thematic development, expert testimony, jury instructions and the like. Finally, I provide a list of jury studies (surveys, focus groups, etc.) that would help the lawyers converge on a winning trial strategy. I prioritize these studies in terms of maximum "bang for the buck."

A jury memo can be commissioned at any point in the trial preparation process, but there are a couple of things to keep in mind. Discovery should be far enough along so that there is something for me to look at. On the other hand, if you wait too long, it might be too late to implement some of my recommendations. Ideally, you should first contact me at least three months before the trial date. If you wish to commission a jury memo in anticipation of mediation or arbitration, adjust your schedule accordingly. A jury memo typically can be completed in less than two weeks.

Pre-trial Jury Research

The biggest scheduling problem that I run into is the lawyer who is going to trial in two weeks and wants to run a mock trial or focus group. While it might only take a day or two to actually run a focus group session or mock trial or to conduct a telephone survey, it takes several weeks to prepare properly for such research. In addition to identifying an appropriate facility, the recruiters need time to put together an appropriate list of potential subjects. The yield rate on participation requests is quite low, so as many as 200 people need to be contacted to put 15 into a room on a particular day.

The recruiters aren't the only ones busy during the weeks leading up to a jury study. The lawyers and I need time to devise an appropriate study design. Anyone who offers you an "out of the box" focus group isn't doing your case justice. Each case implicates a unique set of questions and requires a study designed to answer those questions. Once the contours of the study have been defined, the actual case materials need to be developed, refined and prepared for presentation. Most cases will require a jury book, filled with a case summary, glossary of terms, copies of exhibits, witness bios, jury instructions, etc. You do not want these things thrown together at the last minute. Many of these items require the lawyers to do almost as much work as I do. Most lawyers are too busy to drop everything and work solely on putting together these materials.

If the lawyers are planning on live presentations, they need to script what they plan to say and practice in advance of the mock trial or focus group. If we plan to present subjects with recorded arguments and testimony, time must be set aside in advance to make and edit these recordings.

I was recently discussing scheduling issues with other trial consultants at the annual meetings of the American Society of Trial Consultants (ASTC) and there was a good deal of consistency in most people's practices. In general, we need about six weeks to schedule and conduct a focus group or mock trial. So, if you think that you might want to commission some jury research, you should contact me at least two months before your trial date. This should give us enough time to design and implement the right study and then meet again after I have analyzed the data.

Jury Selection

Ideally, an attorney starts thinking about jury selection well in advance of showing up in court. I have discussed in past issues of the Jury Box (and also in my Lawyers Weekly column) the advantages of supplemental juror questionnaires (SJQs). Obviously, you can't spring on a judge at the last minute your desire to use an SJQ. You need to submit such a request as part of your pre-trial motions. Such a motion should be accompanied by citations to studies on the efficacy of SJQs (which I can provide), as well as an outline of the type of questions you anticipate submitting. A smattering of sample questions would probably also be a good idea.

If you want to use an SJQ, you should give me at least a week to review case materials and formulate appropriate sample questions. If the judge grants your motion, we should start working right away on the final list of questions to submit.

Even with a well-crafted supplemental juror questionnaire, voir dire can be critical. I am happy to offer suggestions on types of questions to ask jurors and strategies to get them to open up to you on sensitive topics. While I can certainly offer this service at the last minute, the longer I have to digest the jury bios, questionnaire responses and case materials, the better I can tailor my advice to your particular case situation.

If you would like help with jury selection, it would be best if you contacted me at least two weeks before final written motions are due.

Witness Preparation

I can assist with witness preparation on fairly short notice. The actual session only requires the participants, a room, and recording equipment. I just need enough time to get up to speed on the case and to learn about the particular witness's role, strength and challenges. The legal team needs to prepare a set of questions to simulate direct and cross-examination.

You should make sure to leave a buffer between the prep session and the witness's actual testimony. It might be necessary to run another session after the witness has had an opportunity to internalize our recommendations.

Some witnesses are initially unable or unwilling to take advice about their testimonial style. This is where recording the session is crucial. Most witnesses come around after they have seen video of themselves on the stand. For the most recalcitrant, it might be necessary to show the testimony to a focus group. It is hard to be stubborn about your style when a dozen would-be jurors have indicated that they hate you.

So, while a witness preparation session can be arranged on short notice, make sure that you have adequate time to work with the witness afterwards to implement necessary changes.

Exhibit preparation

As soon as you have identified your expert witnesses, you should call me so that I can start working with them on their exhibits. An early start gives the litigation team maximum flexibility to modify the exhibits as need be.

An early start allows the expert to lend her creative expertise to the project, so that the final product is something that reflects her teaching style, while still adhering to sound principles of clarity and coherence. Similar logic applies when the exhibit will be used directly by one of the litigators.

Ideally, an exhibit should be tested for jury comprehension by running it by a focus group or two. When problems arise, the exhibit can be modified and retested. Testing before a focus group in this way also provides an opportunity for the expert or attorney to practice with the exhibit in advance of trial.

In the News

Hey, Mr. Postman...

In an earlier issue, I reported on a case in US District Court, here in Massachusetts, in which Judge Nancy Gertner ordered additional jury summonses be sent to the zip codes of previously undeliverable summonses. Her argument was that the problem of under-representation of minorities on juries was exacerbated by the difficulty of delivering summonses to poor and immigrant communities. For instance, African Americans make up approximately 7% of the population of the Federal District for Eastern Massachusetts, but constitute only 3% of jury panels.

The First Circuit struck down her order on the grounds that it would afford the defendants in her case a different jury selection method than others on trial in the same jurisdiction.

Then Chief Judge Young, who had taken favorable notice of Judge Gertner's idea, assembled a committee to study the problem of minority under-representation on the district's juries. This committee has reported out a plan for choosing jury panels that resembles Judge Gertner's original proposal. The comment period is now over and it will be interesting to how the plan will be implemented and whether other jurisdictions will follow suit.

Want to know more?

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