Do I Need a Jury Consultant?

Q&A with Harry Plotkin, Jury Consultant
By Ibiere N. Seck, Esq.

Many seasoned trial attorneys will tell you that a key to success in trial is getting a jury consultant involved in the case early and often. Increasingly, judges are limiting the time lawyers can spend on voir dire, making it difficult to ascertain which jurors could be fair to your client.

My experience with jury consultants has taught me that consultants can not only assist in evaluating the strengths and weaknesses of your case, but can also help identify trial themes, prep witnesses, and glean—through proper jury questions and juror observations—what a potential juror’s true feelings are about your client, the case and the law.

I sat down with renowned jury consultant, Harry Plotkin, to discuss the art of jury consultation and gain a better understanding of what he does and how consultants can serve young attorneys with little or no trial experience on their cases.

INS: What is a jury consultant?

HP: Half-jokingly, I often say that jury consultants are experts in jury misconduct. There is a lot of truth to that, because jury consultants understand that jurors interpret evidence and decide verdicts differently than the jury instructions and the law demand. A good jury consultant helps lawyers to see their case the way that real people see their case, not the way that the law or a judge or a lawyer sees the case.

A jury consultant can come from virtually any kind of background; some have a background in psychology, or communication, or marketing, or politics, or even law. The value of a good jury consultant lies in our insight and experience; most lawyers go to trial sporadically, but an experienced jury consultant studies juries in trial courtrooms and mock juries every week.

In practice, a jury consultant will help lawyers know which questions to ask during voir dire, sit beside the lawyer during jury selection to select a receptive jury, write a persuasive opening statement, mock test cases using focus groups and mock trials, prepare important witnesses to testify comfortably and credibly, and give all sorts of strategic advice about how best to present a case in front of a civil or criminal jury.

INS: There are many jury consultants out there. What makes a good/effective jury consultant?

HP: Being an effective jury consultant requires a balance of experience and insight into how people think, and how different people with different values and backgrounds think differently from one another. A good jury consultant can look past the law and the technical details and evidence to help the lawyer understand what normal people will be confused by, what normal people will be offended by, what normal people will believe and disbelieve, and how most people will react to the case. Frankly, one of the best qualities of a good jury consultant is the ability to be honest with lawyers. Most lawyers believe in their case, but a good jury consultant needs to point out the weaknesses and concerns that the jurors will immediately see that the lawyers don’t. And once a jury consultant has identified serious problems, a good jury consultant needs a lot of creativity and understanding of jurors to come up with ways to fix those problems and frame the case in a persuasive way.

INS: Once it is decided that a consultant should be hired, when is the best time to put the consultant in play?
HP: In an ideal world, not the Friday before a Monday trial, but it happens all the time to me and other jury consultants. We do understand that many clients assume that a case might settle before trial and prefer to wait until they are sure the case isn’t settling, but in many cases, I have been hired before discovery has even begun to help the lawyers understand what will ultimately be important to the jury, to develop trial themes that guide how the discovery and depositions are conducted, and to steer the lawyers in the right direction. For a lawyer who needs help only in jury selection, it might be safe to hire the jury consultant just a couple of weeks before trial. But for a complex, challenging case that needs to be mock tested or needs help with trial themes or an opening statement, you might want to consider getting in touch with a jury consultant a few months in advance or more.

INS: One major misconception is that jury consultants are only useful once jury selection has begun. What services can a jury consultant provide before trial?

HP: Most of my jury consulting takes place before trial: putting the jury selection strategy in place, developing trial themes that will shape how the opening statement and witness questioning are presented, preparing witnesses to testify, and mock testing cases to perfect all of our trial strategies. Once the jury has been selected and trial has begun, most of the plans should be firmly in place, and the lawyer has very little time to meet and strategize. So as exhausting and important as trying the case may be, the trial has in many ways been won or lost by the time the actual trial begins.

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INS: Is there a different approach in consulting on a trial with a seasoned attorney versus an attorney trying their first case?

HP: Having worked with all kinds of lawyers (some extremely experienced and some in their very first trial), there are advantages and disadvantages on both sides. Working with a skilled, experienced lawyer who is comfortable in front of a jury is terrific, because the lawyer can easily absorb my advice and execute the plan in front of the jury. But on the other hand, I might be a more valuable jury consultant when I work with inexperienced or younger lawyers who haven’t tried many cases. Certainly there is a lot more training involved in helping a younger, less-experienced lawyer.

INS: What are the biggest mistakes attorneys make in jury selection and how can a jury consultant help?

HP: Talking too much instead of letting the jurors talk and listening; a good jury consultant can help you ask voir dire questions...
that make jurors feel comfortable telling you how they really feel. Lecturing to the jury about what the law says and getting them to “promise” to follow the jury instructions; any good jury consultant knows this is a waste of your time. Asking the jurors leading questions and suggesting answers during jury selection; a good jury consultant will write neutral, open-ended voir dire questions for you and teach you to focus on how the jurors themselves feel, without pressuring them into telling you what you want to hear. Striking vocal, opinionated jurors too often and keeping friendly, likeable jurors too often; both sides tend to be scared off by loud, opinionated jurors and both sides tend to fall in love with jurors who seem “nice” or “smart,” but these characteristics have little to do with how receptive they are to your case. A good jury consultant will sit beside you, take notes of the jurors during voir dire, focus on the answers and attitudes that matter, and give you invaluable advice on who to strike and who to keep while you focus on being likeable during voir dire.

Some experienced lawyers are terrific at understanding how jurors think, selecting a jury, and persuading jurors during trial. But a single lawyer can only focus on so much during litigation and trial; you’re busy with the details of trial during discovery, writing and arguing motions, taking depositions, sifting through mountains of evidence, and trying the case. No lawyer should be expected to give the jury as much focus and attention as a jury consultant can give to the jury. And no lawyer, even the most experienced trial lawyer, can view their case as objectively as a juror will. That’s how good jury consultants help lawyers, by translating your strong evidence and strong trial skills into your jurors’ language.

INS: How can a small firm with little capital get the most bang for their buck in hiring a jury consultant?

HP: No doubt that I’m biased toward the value of jury consulting, but how can a lawyer afford not to hire a jury consultant in a challenging trial with a lot of damages on the line? Think about how much the losing side has to lose (both the client and the firm, especially a lawyer working on contingency); if it’s a small fraction of what you would pay a jury consultant to give you a dramatically better chance to win your case, hire the consultant. If I’m being purely objective, my advice would be to consider hiring a jury consultant on a smaller scope and have them spend limited time giving you advice on the key issues. That might be advice for jury selection, a few key voir dire questions, getting feedback on your opening statement, or their ideas and advice on your trial themes. There are times when I believe I make a big difference with just a couple hours of my time, giving the lawyer my initial reactions, a few creative ideas, and steering them in the right direction.