"Cheap" Research

The Case: A lawsuit was filed charging a major insurance carrier with bad faith. Two women had been involved in a relatively minor motor vehicle accident which resulted in soft tissue injuries. The women were struck in the rear by a vehicle operated by a person insured by the subject insurance company. They made no complaints of injuries at the scene and the vehicle damage was relatively minor; neither vehicle needed to be towed. An accident report was submitted and the driver of the striking vehicle was cited for a motor vehicle violation. Subsequent to the accident, both women received chiropractic treatment for soft tissue injury and were required to miss time at work. They filed a claim against the insurance company; the insurance company refused to pay. Ultimately, a claim of bad faith was made against the insurance company. At this point, what had been a relatively minor claim now involved the risk of millions of dollars in punitive damages.

The Research: The insurance company retained a defense team. This team determined it was appropriate to run a trial simulation. I was hired as a consultant to observe surrogate juror deliberations and make recommendations to counsel based upon those observations. I was not consulted in the research design and my role was relatively minor.

The research design contained typical questionnaires and presentation formats. Attorneys represented both sides of the case in an equal fashion. The jurors in both panels, after fairly rapid deliberations, found in favor of the defense. Observation of deliberations, as well as discussions with the surrogate jurors during debriefing, disclosed their views of the two plaintiffs. They were clearly viewed as malingerers who were either totally faking their injuries or exaggerating minor injuries to major proportions. The surrogates clearly believed the women were cheats and the insurance company was simply protecting itself.

The problem with the research design in this case was that the two women were not humanized or presented to the jury in a neutral light. Defense counsel made it clear that he believed the women were cheats. He inferred there was little or no injury and the women involved were simply out for money. The attorney playing the role of the plaintiff attorney presented them as having legitimate injuries, but was less than enthusiastic in his presentation.

A common mistake by attorneys is the tendency to view a trial simulation as something to be won or lost. It is in fact not a contest, but a social experiment. The only goal is to gather as much information as possible to enable the attorneys to be fully prepared for the actual trial. It is a time to conduct experiments on types of approaches, evidence and graphic presentations. Unfortunately, the attorneys in this case viewed it as a contest and were pleased with the result. Fortunately, they were experienced litigators and were quite open to constructive criticism. It was explained to the attorneys that what they did was assist the jurors in forming a cognitive belief, or perception, of these two women that would probably not be replicated at trial. The attorneys reported the two women would actually appear as fairly strong witnesses who were reasonable, articulate and well-presented. They would appear at trial as moderately attractive, reasonably educated, middle-class Americans. We were able to convince the attorneys and their client to redo the research, changing their method of plaintiff representation. Two likeable women from the law firm studied the deposition answers of the two women and a videotape was made of the staff members, acting as the plaintiffs, going through a video deposition. Their answers were factually correct and a close representation to what was actually said at the deposition. The women were poised, comfortable and confident in their presentation. The research was performed again, adding the new variable of well-presented, middle-class women.

The results were dramatically different. The jurors were far more responsive to the plaintiff's position. They awarded punitive damages in the millions of dollars and they were relatively outraged by the conduct of the insurance company. During deliberations, they clearly saw the case as two vulnerable women being run over by the faceless insurance company.

Case Findings: This case illustrates that research design is critical. Social science research must be carefully controlled and run by professionals. Every design should be case-specific and care should be given to reviewing the design with a trial consultant. One must be extremely wary of firms that use a general design over and over, without regard to case specifics. In this case, if the original research had been relied upon, the insurance company would have lost millions of dollars at trial. The second research design was accurate and allowed the client to take appropriate measures.

Cautionary Steps to Be Followed When Preparing Trial Simulations:

1. If a case is important enough to conduct pretrial research, place the research in the hands of professionals. Behavioral scientists are not properly suited to practice law, even though they know something about the law. Conversely, attorneys may know something about behavioral science, but they should not conduct research.
2. Consult with your consultant. Although this seems strange, some clients simply turn the research design over to the consultant. It is important the research be a collaborative effort. Every research design should be case-specific. Although some of the pre-presentation questions may be boilerplate, the design itself must be original for each case.
3. If you use the same consultant over and over and it seems every design is an instant replay of the previous one, it may be time to change consultants.
4. Expect your consultant to come up with ideas that have not occurred to you. If she or he is not coming up with original ideas, they will not have an original research design.
5. Pay attention to whom you speak when designing your research project. If you are talking to a marketer, you are talking to the wrong person. If the consultant does not think enough of your project to dedicate his or her time to personally designing the research with you, it is time to move on to another consultant.
6. You must remember that marketers are in the business of selling. The consultant who controls the research design should be in the business of behavioral science.
7. Always require your consultant to verify that he/she does not use the same surrogate jurors over and over.
8. Ask your consultant if he/she follows APA ethical guidelines about telling jurors if they have been misled during the research.

Trial consultants walk a very fine line between clients and attorneys. They must, in all cases, provide nothing but science and truth. The second a consulting firm begins coddling their clients and worrying about bruised feelings and egos, their trip to failure is assured. Such human mistakes can cost a client millions of dollars. While consultants must be diplomatic about certain aspects of the research, there is never an excuse for not being frank with their clients. We must remain in the business of increasing strengths and minimizing weaknesses. We must test and determine what strategies will work and which will not. Even in those circumstances where the client has a case that cannot be won, it is our function to tell that to the client before a trial jury does.

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