

Order in the court

A growing number of law firms are using mock trials, rhetorical coaching, refinement of arguments and focus groups to prepare for high-stakes cases.

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In John Grisham's thriller *The Runaway Jury*, shady consultant Rankin Fitch plants cameras in the courtroom and investigates, manipulates and blackmails jurors from a CIA-like command center to help big tobacco lawyers defend a tort case.

You probably won't find the likes of Fitch in the Capital Region, but you will find a growing number of law firms using mock trials, rhetorical coaching, refinement of arguments, focus groups and other methods to prepare for high-stakes court cases.

"What I've seen emerge over the last five years is that it has become more affordable for firms to explore this option, whether it be for criminal or civil cases," says Franz Borghardt, a Baton Rouge attorney and public defender who also offers jury selection consultation and trial consulting for other firms. "It used to be considered decadent, but not so much anymore."

Fees can range from a few thousand dollars for minor consulting on jury selection to several thousands of dollars for a mock trial and ongoing consulting throughout the actual trial.

Jury consultants come from a variety of fields: business, law, marketing, communications, theater, statistics, psychology or sociology. Some consultants perform community polling to discern views on issues pertaining to a case based on demographics. And others oversee focus groups, where a small number of people are paid to test the impact of parts of their case: particular arguments, pieces of evidence or witnesses.

Some consultants stage full mock trials with the lawyers and actors and then scrutinize the "jurors" as they deliberate. Still others are watered-down versions of Rankin Fitch, working with lawyers through the entire jury selection process by researching potential jurors through public records, Facebook and other means, and interpreting body language during voir dire to ferret out unfavorable candidates.

The Baton Rouge law firm deGravelles, Palmintier, Holthaus & Fruge has been conducting focus groups to prepare for significant civil and criminal trials for nearly a decade.

The firm formed a separate corporation to purchase the equipment and pay participants and staff. Cameras are set up in two rooms, and a command room contains a number of recording devices and television screens.

When needed, the firm hires people to perform the role of jury so it can test out its arguments and evidence. One lawyer presents the firm's case to the group; another attorney presents the opposing side's case. The group is then split into two panels, which meet in separate rooms to deliberate the case while being recorded.

"We listen to their discussion so we can learn what regular folks think is important, think is not important, what they think is suspicious or a bad point or a good point," Frank Holthaus says. "Then they come to a result. Of course, the result is not the important thing. It's the insight that helps us improve our presentation."

There are times when one set of jurors comes to the opposite conclusion of the other. Nevertheless, Holthaus considers the practice to be a substantial aid in preparing for the real thing. Lawyers who have worked on a case for a long period of time—sometimes years—can lose sight of the key points that will convince a jury of the client's claim.



Photo By: Brian Baiamonte

JURY'S PRUDENCE: SCI Research consultants such as Elizabeth Cooke learn cases inside and out, put together a jury profile, suggest ways to handle sensitive information and organize focus groups.



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ROOM WITH A VIEW: SCI Research's facility includes three rooms, each of which can accommodate 20 to 50 jurors, and an observation room in which attorneys and their staff can observe mock deliberations from behind one-way glass or on live-streaming video monitors.

"The result is important, don't get me wrong," he says. "But even more important is what they say to each other. How they discuss it. Sometimes they say, 'That just sounded like lawyer talk to me. I'm not impressed by that.' We learn from listening to the kind of people that will wind up being on the jury. One of the things that is important in being an advocate for something is that the advocate believe in his cause. But that belief can also impair his judgment. That's where the focus group process comes in."

The specialists

SCI Research on Jamestown Avenue specializes in market research. They offer all the usual services—telephone and online polling, focus groups, secret shopping, competitive analysis and comment and complaint lines. But for a decade, the firm has also offered litigation consulting prior to a trial.

SCI has the largest focus group facility in Louisiana, with three rooms set up for this purpose, each of which can accommodate 20 to 50 jurors. Attorneys and their staff can observe mock deliberations from behind one-way glass or on live-streaming video monitors in an observation room.

The company will handle all the planning; research and recruitment of mock jurors from the community in which the trial will take place; coordination of the facility, including providing meals and refreshments; moderation of sessions; and reporting and analysis.

Two-hour sessions are available for those who simply require information on a single issue in the case, such as damage awards. Four-hour sessions typically are used by those who want to test themes, exhibits, attorney presentations, opening statements and closing arguments. And eight-hour sessions are used for a complete mini-trial experience, typically by those who want to test out witness testimony by showing clips from depositions to test believability and credibility.

SCI's Elizabeth Cooke, a graduate of LSU's Paul M. Hebert Law Center, says seasoned litigators who handle the same type of cases over and over again are not her typical client. More often, attorneys hire her when suddenly faced with a high-stakes case "they've never seen before."

"It's not a cheap service," she says. "But in the end, when you're talking about millions and sometimes billions of dollars that are up for grabs, if you will, in a lawsuit, it can end up being an efficient way to save money."

SCI consultants, who assist on cases all over the country, start by learning each case inside and out: reading all of the pleadings, depositions and testimony, and talking with the attorneys about the finer points of the case. From there, they put together a strategy: formulating sympathetic and unsympathetic jury profiles, suggesting ways to handle sensitive information and organizing focus groups, including a deep background questionnaire on each mock juror. After the focus group session or mock trial, SCI prepares a report of findings, including suggestions on how to divulge difficult facts in the case.

"Our experience with our clients has shown this process is very helpful," Cooke says. "If nothing else, it gives them an opportunity to come in and present their case before they get to the courtroom. That's just good practice to have under your belt before you walk in and have to do it for real."

Science or voodoo?

The 1972 trial of brothers Daniel Berrigan and Philip Berrigan is widely accepted as the first known use of jury consultants. The Berrigans were accused of conspiring to plan violent demonstrations against the Vietnam War. The defense attorneys decided that in order to have the best jury possible, they should poll those persons likely to qualify as jurors in Harrisburg, Pa.—the site of the trial—to determine which demographic groups would be most sympathetic to their clients.

Defense attorneys concluded Protestants—particularly those with a fundamentalist outlook—and college graduates would favor the prosecution because of their support for the position of the U.S. government on the Vietnam conflict. They were successful in having a jury selected that consisted of entirely blue-collar workers who would likely not have graduated from college and who were also of a different denomination. This jury deadlocked at 10-2 in favor of acquittal.

Since then, jury consultants have helped select the juries in the high-profile cases of Rodney King and O.J. Simpson, as well as those that have decided for or against major corporations and other well-known defendants.

But then there's the case of former hedge fund manager Raj Rajaratnam, who reportedly spent \$300,000 on jury consultants before the trial in which he was convicted on all 14 counts of securities law violations and sentenced to 11 years in prison.

Borghardt says it's difficult to measure the success of jury consulting because, like anything based on demographics, it isn't an exact science. Consultants can really only tell you what certain groups of people might be more likely to conclude given a certain set of facts or circumstances.

"You're dealing with a nonrepeatable science," he says. "The best you can do is approximation. The key to judging success is not necessarily accuracy, because what you're learning from these focus groups is how to ferret out information from people in a constructive way so that by the time you get to the real trial, you're able to present the information in a higher quality way than you were the first three times you did it before the mock jury."