



CURRENT ISSUE

PAST ISSUES ▾

SUBSCRIBE ▾

CONTACT ▾

ABOUT ▾

YOU ARE AT: [Home](#) » [Articles](#) » [Lawyers Can Benefit By Learning More About Jury Consulting](#)



## Lawyers Can Benefit By Learning More About Jury Consulting

BY NICHOLAS GAFFNEY ON NOVEMBER 13, 2020 ·



Jury consulting is becoming increasingly popular, with experts present in many high-profile criminal and civil trials in the U.S. These consultants, who specialize in how jurors think and process information, specialize in crafting compelling stories and developing strategies that can impact a case's outcome. In this

roundtable discussion, four prominent experts explore the opportunities and challenges facing jury consultants today.

## Our Moderator



**Nicholas Gaffney (NG)** is founder of Zumado Public Relations in San Francisco, CA and is a member of the Law Practice Today Editorial Board. Contact him at [ngaffney@zumado.com](mailto:ngaffney@zumado.com) or on Twitter [@nickgaffney](https://twitter.com/nickgaffney).

## Our Panelists



**Carol Bauss (CB)** has been a Senior Litigation Consultant with [NJP Litigation Consulting/West](#) for over 25 years. Drawing on her law and communications background, she advises attorneys on trial presentation and jury selection strategy, conducts mock juror research, and works with witnesses to improve their communication skills. She has an in-depth knowledge of juror attitudes, juror bias, and jury decision-making drawn from her years of experience conducting focus groups, mock trials, and post-verdict juror interviews and staying up to date on social science research. She works with legal teams to find the human story and universal themes within complex legal disputes and persuasively communicate those messages to the jury and other fact-finders. She has served on the Board of Directors of the American Society of Trial Consultants.

**Julie Campanini (JC)** is director and senior litigation consultant for [Magna Legal Services](#). She has been a trial consultant for 25 years and has amassed diverse and broad-ranging experience in a wide variety of complex matters and in all areas of trial consulting and jury research. Her practice is focused on complex commercial litigation and includes intellectual property, antitrust, securities, fraud, contract,



product liability, employment, and toxic tort. Julie works collaboratively with the trial team to come up with innovative and strategic solutions to the most complex trial issues.



**Rich Matthews (RM)**, a trial consultant and member of the California bar, received his J.D. from the University of Oregon School of Law, and brings an impressive background of litigation and negotiation to his trial consulting. His expertise encompasses jury issue analysis (as distinct from the *legal* issues of a case); theme and communication strategy, focus group research, story and frame development, voir dire and juror selection, courtroom presentation skills, and post-verdict juror research. He has appeared on national television and in major publications offering commentary on high profile trials. Rich has addressed thousands of lawyers, professionals, executives, and students. He is the author of *Juryology*, a blog for courtroom attorneys and others who make decisions about litigation. Rich works nationwide and is located in San Francisco.



**Richard Gabriel (RG)** is President of *Decision Analysis*, a national trial consulting firm. He has participated in more than 1,500 trials in both the civil and criminal arenas across the country. Mr. Gabriel has assisted counsel in the high-profile trials of O.J. Simpson, Casey Anthony, Aaron Hernandez, Phil Spector, Enron, Whitewater, and three cases he has participated in have resulted in United States Supreme Court decisions. Mr. Gabriel is the author of *Acquittal: An Insider Reveals the Stories and Strategies Behind Today's Most Infamous Verdicts* about his high-profile trial work and is the Founder of the Online Courtroom Project. He was the President of the American Society of Trial Consultants.

## **NG: How do you view the use of data science and analytics to access potential jurors?**

**CB:** The insights gained from using artificial intelligence and analytics on a prospective juror's social media and public records search should be taken with a grain of salt. A computer can scour a juror's social media and run their name through online databases faster and more efficiently than humans. When using juror research programs, it may be helpful to eyeball the risks and biases identified; for example, the juror has a conservative or religious worldview, and keep an eye out for those biases in assessing the data. But evaluating jurors is not an exact science. Someone with knowledge of the case and key juror biases must still synthesize the information gathered to determine what it means in the context of this juror and this case. Online juror searches can provide insights that may help round out the picture of a prospective juror, but the most useful information is always juror attitudes and experiences relevant to the case issues. For example, in a personal injury case, the plaintiff's attorney would learn more from asking prospective jurors what they think about personal injury lawsuits and compensating an injured person for pain and suffering and emotional distress than from relying on conclusions from algorithms.

**RM:** I think it's a little over-rated. *Good* juror questionnaires and *good* oral questioning of potential jurors, combined with a good understanding of the psychological pathways toward eventual votes in your favor, will reveal what the trial team needs to know in order to exercise intelligent cause and peremptory challenges. Further, weighing out the relative importance of Trait A (which favors our side) versus Trait B (which favors the other side) cannot be reliably entrusted to an algorithm. We all have received some pretty weird product recommendations on Amazon or unwanted posts steered our way on social media because the algorithm produced wrong results, despite being very sophisticated and using many data points. Ultimately, I'd say jury selection is an analog task, not a digital one. The unspoken thing about this new tool is that lawyers are not widely very good at juror questioning and putting together what they have learned to make the right call. Some lawyers are superb, through practice and either unlearning what we were taught in law school or studying to fill the gap of what we were not taught in law school. So, out of fear, customers reach for a new tool. That's understandable.

**RG:** It depends on the type of data and analytics. Most juror data that used is based on demographics, quantitative information, or search categories that are not that useful. Qualitative analytics would be much more useful, such as juror life experiences, opinions, and beliefs structures are what really drive juror analysis and decision making. Although sophisticated algorithms that the large retailers use may reveal a more complete portrait of the juror, there are ethical and legal concerns about access to and use of that data. Most importantly, data design and interpretation of the data are more critical than the actual data itself.

**NG: What advantage do trial consultants add to a case that the trial attorney does not already have?**

**CB:** Litigation consultants bring fresh eyes, a lay perspective, and the ability to see the case as a juror sees it. Attorneys become entrenched in a case story they repeat in court filings and every time they talk about the case until they are stuck. A litigation consultant's job is to listen to jurors. We listen to jurors talk about case issues in pre-trial research, in jury selection, and in post-trial interviews. Litigation consultants understand what drives juror decision making. When working with clients, I put my juror hat on and ask questions I know jurors would ask to help identify the factors that will motivate a juror to find for and against my client. I can then help an attorney reframe her case to be more persuasive. Attorneys view a case from a legal perspective for so long that their view can become one-dimensional, and litigation consultants can help them see the case from a different perspective.

**JC:** While attorneys generally focus on fact-finding and motions when they are trying to resolve a case, a trial consultant can complement that with strategies for the most appealing narratives and best way to reach the audience. Having worked with thousands of prospective jurors and hundreds of actual jurors, trial consultants have deeper insights about storytelling, themes, and the presentation of evidence. Trial consultants typically work on more cases per year than trial attorneys, even the busiest ones, and therefore, have more exposure to how people think and use information. It is important to have the legal arguments identified for a particular case but understanding how to best present those is another story. One example of this is what a case is about. So often we hear a case being positioned as being "about two corporations fighting for justice." First, justice is a tricky word to use in the context of two corporations fighting, and secondly, will jurors care about the fight between these companies? What is the emotional hook for jurors? These are the types of things we work with counsel on when preparing for trial that they may not have spent a lot of time thinking about, for valid reasons.

**RM:** I tried some cases before becoming a trial consultant, and I can say flat-out that lawyers think about jury persuasion in ways that don't really track with how the human brain works and makes decisions. We're taught in law school that facts and law win cases, and therefore, persuasion is the inundation of the jurors with facts and logic, followed by more facts and logic, followed by instructions telling them they "must" find this or that particular verdict. So by starting with the question, "What would make laypeople vote this way or that," we're on the winning path, compared to the law-school-induced frame of "Here's what I will tell them so we win."

**RG:** As cases have become more substantively and legally complex, attorneys tend to focus most of their litigation time on research and procedural motions and arguments. Additionally, lawyers rarely go to trial anymore, so do not have considerable training or experience in jury selection, narrative design that affects opening statements, witness examination, and closing arguments. Trial consultants spend most of their time focusing on the psychological, behavioral, communication, and strategic elements of a case that drive the decision making of clients, counsel, witnesses, mediators, judges, and jurors. In other words, all of the

non-legal elements. Trial consultants help counsel to translate the factual/legal components of a case into a simple and compelling story that persuades the fact-finder.

**NG: What are the most important things you do to add value to a case?**

**CB:** Litigation consultants help attorneys identify their case story, help witnesses communicate that story, and remove jurors with the strongest biases against that story in jury selection. Mock juror research like focus groups and mock trials is an important tool that litigation consultants use to help attorneys develop their case story, test witness credibility, and identify potential juror biases. There is no substitute for testing a case in a focus group or mock trial with jurors like the types of jurors who will show up at your courthouse. Even during the pandemic, there is a jury research model for every case budget, from online Zoom focus groups to large sample size online surveys, to in-person research from a few hours to multiple days. Litigation consultants are experts in jury research and knowledgeable in social science research methods. It is their job to make sure the research is methodologically sound, and the results are valid. They have experience and training in conducting research and analyzing the data and translating it into actionable trial presentation and jury selection recommendations.

**JC:** I bring a different perspective to the table. As attorneys are focused on their long list of tasks when ramping up for trial, I am thinking about the story that will resonate with jurors, preparing witnesses to be credible and likeable, and collaborating with artists to effectively communicate complex ideas. I take the case and look at it from a different angle, with years of interacting with jurors behind me, and in a holistic way.

**RM:** I think the single most important thing I do is help the attorney frame the case: come up with the themes and how to tell “the story”. The words. How to talk about it. How to think about it. Typically, by the time a consultant is brought in, the case has been around a long time, and counsel is captive to two sticky things: the voluminous facts that have been developed; and the way they have been thinking about it all along. Once we have figured out the lyrics, the themes, the frame, the beats of the story, then everything else follows: visuals; witness sequence and preparation; jury selection strategy; the opening and closing statements; and so on.

**RG:** We help clients gain perspective on their cases by helping them appreciate how a fact-finder (mediator, judge/arbitrator, or jury) will construct *their* version of the case. We help them evaluate the numerous variables in the case aside from the evidence and law that affect their risk and then tell them how they can mitigate that risk. We help them tell the best story of their cases and how to clearly and simply communicate that story with real impact. We help them identify jurors who will be most receptive to that story. Finally, with 35 years of experience and over 1,500 trials, we bring both breadth and depth of experience that informs various litigation strategies.

**NG: What don't stakeholders—the attorney, the insurer, clients, other litigation decision-makers—understand about the factors that lead to a favorable or unfavorable jury verdict?**

**RM:** Too often, the stakeholders focus on (their opinion of) who *should* win the case in some mechanistic way, and not the more important question of who *could* win the case at trial, based on a skillful telling of that side's story to a well-selected jury. As a result, I think all lawyers and consultants have seen both errors that arise from that: too many resources spent on a loser, and withheld from cases that could have been winners. I think early engagement of a trial consultant to pull out the "human factors" in the case would be a smart investment in forecasting the likely outcomes with eventual jurors.

**RG:** Jurors don't decide cases based on evidence and law. Jurors decide cases based on the story they create (using their own experiences and beliefs) about "what happened" and then use the evidence and law to justify that story. Stakeholders typically think of jurors as computer file folders, static and passively storing the data of the case as opposed to dynamic personalities, constantly investigating, interpreting, and trying to make sense of conflicting versions of the evidence. Often, the stakeholders also don't understand their own biases, myths, agendas and preconceptions in putting together their cases, thinking if it is important to them, it will obviously be important to the jury. They also don't understand how important *context* is to jurors: tutorial or educational modules about an industry or environment that will help the jury put the various claims in perspective. They also often ignore the real human factors in a case, the "why" someone did what they did as opposed to just the "what," the chronology of events in a case.

**NG: In terms of affecting the outcome of a case, what are the most important factors?**

**CB:** Two factors that affect the outcome of a case are biased jurors and poor witnesses. No matter how good your theory of the case is or how persuasive your arguments, you will not convince a biased juror to find in your favor. For example, as a plaintiff's attorney in a product liability case where the claim is that the defendant product manufacturer should have warned consumers, there is nothing you can argue to convince a juror who believes people ignore warnings that a lack of warnings caused the injury. Litigation consultants can help attorneys uncover those fundamental biases in voir dire. At trial, the story is told through witnesses, and if the witnesses are not credible and cannot communicate effectively, the trial story is weakened. Witnesses often are too nervous, anxious, or scared to communicate effectively. A litigation consultant can help a witness get in the right frame of mind to confidently tell his story.

**JC:** In no particular order: the narrative, the appeal of the narrative, the evidence, witness performance, and how much the facts/narrative align with jurors' worldviews. It is easier to mitigate bad evidence than it is to change a juror's worldview.

**RM:** Abundant research shows that people learn, store information, and work with information in terms of story – not a factual syllogism. Aristotle might wish for us to consider A then B then C and reach conclusion D as a consequence, but even he didn't make decisions that way. In any fact pattern, there are 50 ways to tell that story . . . and 48 of them are probably lousy. One might be OK, and one is really good. So understanding how to frame your case and tell the right story so that laypeople will vote your way at the end is the key. Facts matter, but they don't win cases in the abstract; they must be put into a story with multiple themes to earn the votes. Visuals are crucial, in opening statements, witness testimony, and closing argument. It's not just that jurors expect it and that even elementary school kids now create PowerPoint presentations for their research projects – visuals help tell your story. Also critical is the performance of the witness on the stand. Do jurors find the witness trustworthy, likeable, competent? It turns out from the research that pages of c.v. for an expert witness is not at all impressive to jurors, but that person's ability to help them understand the material is everything. (As I tell seminars about expert witnesses, "Best teacher wins.") And percipient witnesses can be prepared to give their best presentation at trial.

**RG:** The story you tell, how you tell that story, and your understanding of the audience that is listening to that story.

**NG: What's the biggest difference between what attorneys think you do and what you actually do?**

**CB:** Many attorneys think of a litigation consultant only for assistance in jury selection, calling them on the eve of trial. A litigation consultant's role is much broader, however. Litigation consultants have to understand the case in all its nuances to help attorneys determine who the worst jurors are and how to identify them. In many jurisdictions, voir conditions are limited, with 30-60 minutes allocated per side for in-court questioning. Under those conditions, it may be difficult to learn enough about the jurors to identify and kick off all the bad jurors, so counsel should present a story that will resonate with the broadest group of jurors. A litigation consultant can help shape and frame the story from the very beginning.

**JC:** Attorneys tend to be hyper-focused on who they want on their juries. I am constantly being asked to profile and profile for their best jurors rather than their worst jurors. While I can do that, it isn't as helpful as crafting the right message in the right way for the case and, statistically speaking, the sample size has to be large enough to elicit the profiles, nor is it as helpful as designing some solid voir dire questions to identify potentially bad jurors. Jury research, the bulk of our work, is designed to assess case strengths and weaknesses and work with that information to allow counsel to put their best foot forward with themes and a good story.

**RM:** There's a little less of this now, but sometimes we still see lawyers who think we are shamans or divining rods who can either look at prospective jurors and sense how they would vote on this case, or

answer the same question given the prospective juror's gender, age, and apparent skin color. Instead, what matters is skillfully uncovering the relevant attitudes and opinions of the *individual*, and comparing that to our profile of factors that we have determined would favor or disfavor us.

**RG:** Most attorneys think we just pick juries or put on packaged mock trials where we just tell them juror reactions to the case. As you can see from the answers above, we do a great deal more to help attorneys and their clients to have a deeper appreciation of the issues and facts beyond the evidence and law that drive decisions to successfully position, settle or try a case.

**NG: Doesn't law school teach this stuff?**

**JC:** None that I have heard of!

**RM:** Not really. Some law schools have a trial practice class or clinic, which has great potential but falls short of delivering. We have learned more about how the human brain works in the last 20 years than in the previous 150 years, but it hasn't made its way into legal academia. For instance, law students are trained to learn the rules of evidence via methods that develop and reward instantaneous recall of the rule, its number, and how it applies to the given example. That's great, but students are only taught that, not the context and judgment of when *not* to object in court. Jurors do not like objections, and they don't know or care about the FRE or flashcards, so if counsel is going to object in court, it needs to be worth the cost they're going to pay with jurors, not just a honed reflex that law school gave us but which we haven't considered. Even medical school teaches surgeons when *not* to cut.

**RG:** Rarely or minimally.

## LAW PRACTICE TODAY EDITORIAL BOARD

### Editor-in-Chief

Micah Buchdahl, HTMLawyers

### Associate Editor

Ramón Viñas-Bueso, Viñas Law Office LLC

### Issue Editor

January 2022

Andrea Malone

Micah Buchdahl, HTMLawyers

Rodney Dowell, Rodney Dowell Office of Bar Counsel

Nicholas Gaffney, Zumado

Jonathon Israel, The Florida Bar

Michael Kraft, Kraft & Kennedy Inc

Jason Long, London & Amburn PC

Andrea Malone, White and Williams LLP

Jason Marsh, MARSH8

Mark Robertson, Robertson & Williams  
Ramón Viñas-Bueso, Viñas Law Office LLC  
Susan White, Mass LOMAP

[Current Issue](#) · [Past Issues](#) · [Terms of Use](#) · [Code of Conduct](#) · [Privacy Policy](#) · [Your Privacy Rights](#) · [Your California](#)  
· [Advertising & Sponsorship](#) · © 2015 ABA, All Rights Reserved