

Litigation Consultants Try to Transform an Art Into a Science

Much like the ancient alchemist who tried to transform lead into gold, today's "litigation consultants" attempt to make a science out of litigation, a field most lawyers consider to be a highly subjective art. Increasingly, however, such consultants are convincing lawyers and clients that lawsuits of all shapes and sizes — not just mammoth anti-trust battles — can benefit from the fresh and different perspective brought to a case by an outside source.

The field of litigation consultation is estimated to generate \$100 million in revenue each year. Companies are springing up across the country, and include large firms such as Litigation Science Inc. (Los Angeles) and Leo Shapiro & Associates (Chicago), as well as smaller firms such as Bodaken Associates (Paso Robles) and Litigation Evaluation Service (Newport Beach). The industry even has a trade association, The American Society of Trial Consultants, founded in 1983 and based in Tucson, Ariz. The society has 150 members.

Litigation consultants provide two well-known services and two lesser-known services. Most lawyers are familiar with the functions of settlement evaluation and trial preparation. In addition, however, some litigation consultants specialize in providing an independent look at the nature and risks for the existing litigation, for the purpose of telling potential buyers of companies just how much trouble they may be letting themselves in for. Evaluation of litigation disclosures, as an element of the purchase of a business, can have a significant impact on negotiations between the buyer and the seller of the enterprise.

The other lesser-known aspect of a litigation consultant's practice is evaluating the impact of litigation on processing loan applications. George Chelius, an attorney in private practice and a partner in Litigation Evaluation Service, says, "Existing litigation disclosed on applications, if resolved unfavorably to the loan applicant, could render uncollectable a proposed debt. LES is available to render an independent evaluation of the potential liability and judgment exposure in each lawsuit disclosed, and to report any undisclosed litigation pending against the loan applicant."

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Business Litigation

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The high-profile aspects of a litigation consultancy, of course, are settlement evaluation and trial preparation. Evaluation of settlement potential is an area where lawyers have traditionally resisted enlisting the help of consultants, but that's changing. Chelius of Litigation Evaluation Service reports that his firm sees a significant demand for analysis of what he calls "hot facts" and "cold facts"; namely, the good and bad fundamental aspects of a lawsuit that can be drawn out and identified by a fresh, independent look at litigation. LES provides an estimate of the likelihood that each party will prevail on various aspects of the case, and then offers an estimate of the present value of the litigation to each party.

LES's fees run from \$1,500 for a "simple case" (involving under a million dollars in damages, and one to one-and-a-half days' work by a consultant), to \$3,500 for an "involved case" (involving multi-party disputes and several issues, requiring three to four days' work by a consultant) to \$7,500 for "complex cases" (involving interviews and research, and five to six days' work by a consultant). For their money, clients receive a written litigation evaluation report discussing the facts, the law, impediments to settlement and LES's recommendations. Although the firm could continue to stay with the case on an hourly basis, that practice is rarely followed, as the client resists paying for attorneys as well as consultants on an ongoing basis.

Bodaken Associates is, in the words of principal Edward M. Bodaken, Ph.D., a "research and consulting firm specializing in the psychological and behavioral dimensions of litigation strategy, from discovery to verdict." Trial preparation is also a focus of the work done by Litigation Sciences Inc., the industry's largest operation, with profits of \$1.35 million in 1986. The elements of consulting for trial preparation include a wide variety of techniques, from body language analysis to public speaking classes, that gen-

erally fall into seven categories:

- **Mock Trials**

For anywhere from a few hundred dollars to \$80,000, consultants will provide services ranging from "focus groups" (consisting of hiring a small group of people to discuss issues), to a full-blown trial simulation, complete with a courtroom, lawyers and a judge. The idea, of course, is to elicit the reactions of people who hopefully think along the same lines as a jury. The consultants sometimes evaluate the deliberations of a mock jury live, sometimes review videotapes of the deliberations, and occasionally hire several juries and compare their reactions to issues and personalities.

- **Community Opinion Polls**

At a cost of \$35 per opinion, consultants will poll anywhere from 500 to 800 people (at a total cost of about \$18,000 to \$28,000), asking about trial issues, with the objective of producing the profile of a desirable jury.

The goal, of course, is to obtain information that presumably is not already obvious to the client or its attorneys. A recent study conducted by Litigation Sciences Inc. appeared to produce such an unexpected conclusion. It was found that product liability defendants who base their defense on claims of compliance with government- or industry-established quality and safety standards have a slim chance of persuading jurors. The survey results showed that only demonstrating that a defendant *substantially exceeded* such standards is effective. On the other hand, in a finding that hardly seems fair, LSI's survey concluded that plaintiffs had a substantial impact on juries by proving that a product liability defendant *failed* government standards.

- **Trial Strategy Consultation**

This type of assistance primarily involves taking a hard, realistic look at issues that the client may be too biased to evaluate objectively, and the attorney may be too close to for a realistic analysis.

- **Witness Preparation**

Old-fashioned "horseshedding" (so named for the frontier lawyers' practice of taking witnesses to the "horseshed" before testimony for a rehearsal session) by counsel is being replaced by videotaped run-throughs of a witness's testimony by a litigation consultant. Key witnesses are treated to the eye-opening experience of seeing themselves "as others see them," due to the magic of video-

tape, and consultants tackle the difficult task of transforming obnoxious impressions into appealing ones.

- **Opening Statement Assistance**

According to Bodaken, "More than 80 percent of jurors reach a decision by the end of opening statements." The assistance provided by a consultant with respect to opening statements involves a refresher course in the fundamentals of public speaking, advice on what issues to stress, and an analysis of how to convey the themes of a case without inviting the judge's admonishment against "argument."

- **Trial Observation**

Employing consultants who sit in during trial and review each day's events with the trial attorneys ventures into the worlds of body language and intuition. Consultants insist that during *voir dire*, a juror's mannerisms, tone of voice, and even how many times he or she looks toward the judge will give significant clues as to the juror's attitudes. Thus, consultants offer advice regarding preemptory challenges, as well as opinions as to reactions to various arguments.

- **Shadow Juries**

One of the most controversial arrows in the litigation consultant's quiver is the use of "shadow juries." Twelve people are hired to sit in on an entire trial. They are selected in an attempt to duplicate the traits of the real jury, and they are grilled at the end of each day's session in an attempt to determine who is scoring points. Generally, the shadow jury is not told which side hired them, in order to maximize the possibility of unbiased responses to the consultant's and trial attorney's questions (if an indigent is doing battle with General Motors, however, the shadow jurors probably have a pretty good idea as to the identity of their patron).

If the idea of hiring a trial consultant sounds feasible in one of your cases, you might consider contacting one of the following: Bodaken Associates, 2530 Vineyard Dr., Paso Robles, Calif., 93466, (805) 238-9090; Litigation Evaluation Service, 620 Newport Center Dr., Suite 1650, Newport Beach, Calif., 92660, (714) 759-0180; Leo Shapiro & Associates, 505 North Lake Shore Dr., Chicago, Ill., 60611, (312) 944-2111; Litigation Sciences Inc., 500 Silver Spur Road, Rolling Hills Estates, Calif., 90274, (213) 544-0503.