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Slaying the Dragon:
Using Psychological Technology to Cut Litigation Costs

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Abstract: Conventional management of legal teams leaves the corporate client at the mercy of non-productive litigation efforts that are inefficient from an economic or cost perspective as well as from the standpoint of tactical positioning in the litigation. Application of proven psychological research methodology and its results ("psychological technology") in trial preparation produces substantially more cost-effective litigation efforts while simultaneously reducing the potential for large damage awards. Three key content domains are explored: 1) Estimation of exposure for settlement purposes; 2) Witness Training; and 3) General discovery activities. Examples are provided that demonstrate the potential for significantly reduced legal costs in conjunction with an improved defense posture in terms of trial preparedness.

OBSERVATION OF OVER THIRTY YEARS of litigation suggests strongly that most cases are settled at a time point very close to trial. At the same time, psychological research methodology has evolved to the point at which the financial exposure in cases is knowable in advance with considerable accuracy ("Trial by Science", *Risk & Insurance*, vol. 19, no. 13, 2008). Yet actual trial practice is lagging well behind the science: Despite the fact that jury awards are generally predictable, settlement figures continue to be derived through guessing or "hunches" that are generated far too close to the eve of trial and waste millions in the long run.

In the area of witness training, it has been well known for decades that most communication – in particular, the pivotal assessment of basic character – occurs on a nonverbal level (A. Mehrabian, *Nonverbal Communication*, De Gruyter Publishing, 1972). Inferences made by jurors as to the trustworthiness of a witness are generally *not* based on verbal content, but rather are generated in the subtle realm of facial expressions, body movements, and vocal intonation. Yet preparation for most depositions does not incorporate known principles of nonverbal communication, resulting in witness performance that undermines the tactical position of the defendant. These problems develop very early in the case, creating serious handicaps down the road in settlement posture and mediation settings. Poor witness performance is a pervasive vulnerability that ends up costing far more than it would take to properly prepare the witness in the first place.

Finally, discovery itself – the most expensive part of litigation – rarely has a plan, road map, or strategy behind it. However, it is possible to guide discovery based on what the ultimate fact-finders – the jury – will find to be important. Issues that jurors believe should determine the case are almost always fewer and simpler than those believed by the trial team to be important at the outset. The thematic framework that jurors use to problem-solve a case can actually be used to streamline discovery efforts, preventing initial theories of the case from becoming more clever than correct, and minimizing wasted efforts in discovery.

The Forest, Then The Trees

To start with, it is essential that we define some key terms: When we use the phrase "legal costs," we are referring to the combined costs of outside counsel,

associated vendors, and the monies spent to settle cases or pay damages. Therefore, in the discussion that follows, we address means in which all of the components of legal costs may be reduced. We begin with settlement issues, and proceed from there to the witness preparation and discovery issues as the focus is progressively narrowed and refined into more specific trial preparation activities – all with the key overriding impetus of finding waste and eliminating it through the use of science, or more specifically, *psychological technology*.

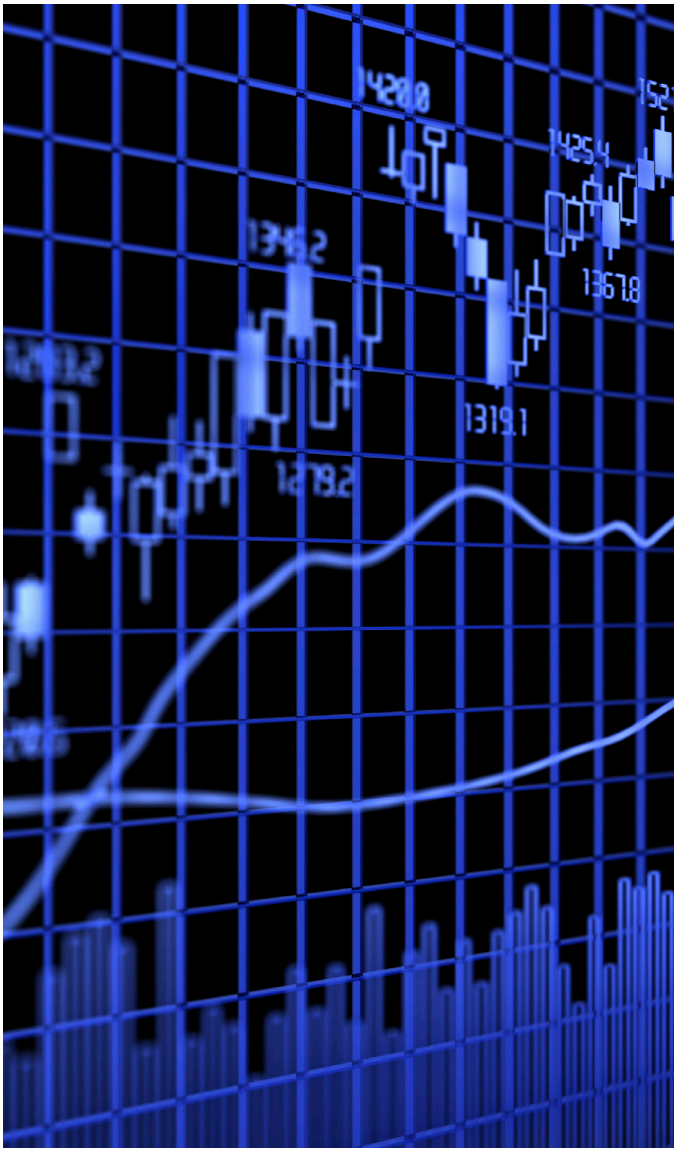
By "psychological technology," we refer to the scientific application of psychology and research design methodology to practical, real world problems -- in this case, litigation and its associated costs. In the same way that science can provide technology for more fuel efficient vehicles, psychological research methodology can provide the technology for more cost effective litigation efforts.

The Trees, Part I: Settlement

Observation of trial teams for over 25 years leaves the impression that most cases are settled on the eve of trial, even though the basic claims, contentions, fact patterns, arguments, themes, evidence, and expert findings have been known for weeks, if not months, or even longer. Corporate clients – including in house counsel -- are at the mercy of assessments from outside counsel as to how much as case is "worth" and often even judgments as to when the settlement can occur. Too often, outside counsel do not have the opportunity to assess matters as outlined presently.

One irony here is that assessing what a case is worth amounts to predicting the future behavior of a group of individuals (in this case, a jury). It is not an archival database review: Unless the trial team is extremely lucky, a given case has likely not been tried before in the venue with the same judge, same facts, and same general conditions (for example, key witness testimony). Therefore, in terms of forecasting a trial outcome, the trial team is typically in uncharted waters, and is faced with the task of predicting the behavior of a group of individuals (i.e., the jury).

However, this behavior – in this case, a jury verdict, or more specifically, the ultimate verdict and damages – is a lawful function of the case evidence, themes and arguments, and the individuals chosen to assess them (again, the jury). As a result, the behavior – potential damages, or exposure -- is discoverable in advance through proper research design and with the cooperation of a willing trial team well versed in the case facts and issues. In other words, the forces that generate jury verdicts are knowable well before settlement discussions occur, as are the magnitudes of the damages themselves, within a certain margin of error.



As has been shown elsewhere (see "Trial by Science," *Risk & Insurance*, October 2008, in which, among others, accurate prediction of the *Exxon Valdez* verdict is discussed), application of proper research methods enables precise forecasting of jury verdicts, with research costs that are generally far lower than the typical margin of error involved in formulating "guesses" or "hunches." Knowing what the exact exposure is in advance provides ample opportunity to save enormous costs in mediation and settlement negotiations.

For example, I just received a call from a trial lawyer who is also a friend, who told me that he had just taken a hit for $2.1 million. Previously, his in house counsel had asked him what the forthcoming case was worth, and he provided his assessment: a 50% probability of damages, with a potential liability of about $1 million. They passed on a chance to settle for $800,000 and concluded that pre-trial research of the type described here was "too expensive." (Research costs for this case would have been about $30,000). The trial team subsequently went to trial and the jury came back with the $2.1 million verdict. In-house counsel lost $1.3 million by relying on a hunch instead of conducting the research. The in-house counsel was recently demoted as a result of the fact that this was the second time such an incident had occurred.

Examples of this type are all too frequent in our experience. However, the reader at this point may be thinking, "That's fine, I would have settled it for $800,000 anyway – that's what we do – so I never would have had that problem." The issue then becomes, how much should you settle your cases for? How do you know what this number should

be for a given case? Running the numbers shows unequivocally, in case after case, that guessing at settlement numbers – the common practice -- is much more expensive than conducting the research to find out what a case is actually worth.

An insurance adjuster was writing a check for $750,000 to settle a claim when his supervisor forced him to run a mock trial, which included 24 jurors split into three 8-member jury panels. The results yielded three mock juries with awards in the $125,000 -- $250,000 range. The insurance company returned to the plaintiffs and told them, "We have decided we will pay you $400,000 – take it or leave it." The plaintiffs took it, and the mock trials saved them $350,000 in the process, minus the cost of the research. That's an 800% return on investment with regard to research costs (about $40,000 in this case). That year the insurance carrier, using this research on virtually all of its cases, came in under budget against its loss reserves by about $80 million.

What happens when the mock trial research shows that the juries would award more than the contemplated settlement amount? What happens to cost effectiveness then? Two things -- first, you know your settlement amount is the one you want (instead of *hoping* that it's right); but second, in terms of cost effectiveness, consider this: Assume that, if every case was researched, half would show that your hunch was lower than what a real jury would ultimately award and half would show that your hunch was higher. Those with initial hunches that were lower would end up representing a cost to the company of the fees and expenses for the research itself, with no benefit except the certainty that you have the right figure. But those with hunches that were higher than the jury awards typically represent savings of many orders of magnitude greater than the cost of the research (as in the previous example, a multiplier of approximately eight).

In other words, *for the insurance carrier in the prior example, the company would have to run seven more mock trials with no benefit at all just to break even on the research cost/benefit ratio* – hardly a likely scenario. In essence, the research is so cost effective that the savings from abandoning the "hunch" or "guess" strategy end up funding other research efforts with plenty left over to spare. This is a numbers game in which the deck is stacked heavily in favor of the house – where the "house" is the party conducting the research.

In many cases the cost/benefit is completely astronomical. We recently finished a case in which the mock trials predicted an average award of $83 million (working for the plaintiff) and the defendant, during the actual jury deliberations, attempted to induce a settlement claiming "$20 million was tops" for a jury award. Our client held out based on the research findings and was subsequently rewarded with an actual verdict of $73 million. That is a $53 million benefit from holding out based on the research. It should be noted here that the defendant, who was "flying blind" without research in this case, had also dismissed the research option as "too expensive."

One may roughly consider the previous example as representing the higher end of the spectrum on the cost/benefit issue, while the insurance company example represents a case somewhere near the lower end. Indeed, from our experience, examples

of savings in the hundreds of thousands *per case* are *typical*, and savings in the millions are not uncommon at all. In one heavy equipment case in Philadelphia, one mock jury wanted to award $500 million and another $1 billion, but the defendant was able to settle the case for under $2 million – because he ran the research immediately and caught the plaintiff at a time when he would rather have a quick check than go to trial. This same manufacturer later settled another case for about the same amount, but this time there were additional co-defendants that did not do research and stayed in the case. The average damages from the mock trial were $58 million, and the real jury came back and hit the remaining defendants for $55 million.

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Add to these cost savings the potential for putting settlements on a "fast track" based on research findings, saving thousands in billing by eliminating the time spent by the trial team on the case between that point when the case facts, issues and arguments are known, and the point in time at which cases are typically settled (i.e., the eve of trial). Simply forcing settlement early based on valid research instead of at the last minute, on the courtroom steps, also saves hundreds of thousands in the long run.

Of course, the preceding is based on the supposition that the case should settle at all. Accurate pre-trial research is instrumental in determining whether such is indeed the case, or whether there is good reason to take the case to the jury. Scientifically valid research has unparalleled utility in assisting when to "choose your spots" in going to trial so as to avoid gifting plaintiff counsel with unwarranted settlement dollars that end up funding their war chests for yet more litigation in the future.

The Trees, Part II: Depositions

Notwithstanding the popular notion that "jurors make up their minds during opening statements," post trial interviews of jurors over the last several decades has unambiguously confirmed that, while jurors *create preferences* during opening, they *make up their minds* during the *testimony of the witnesses*. Witness credibility is, as previously discussed, a composite mixture of several psychological variables related to nonverbal behavior, including "body language," demeanor, and the like.

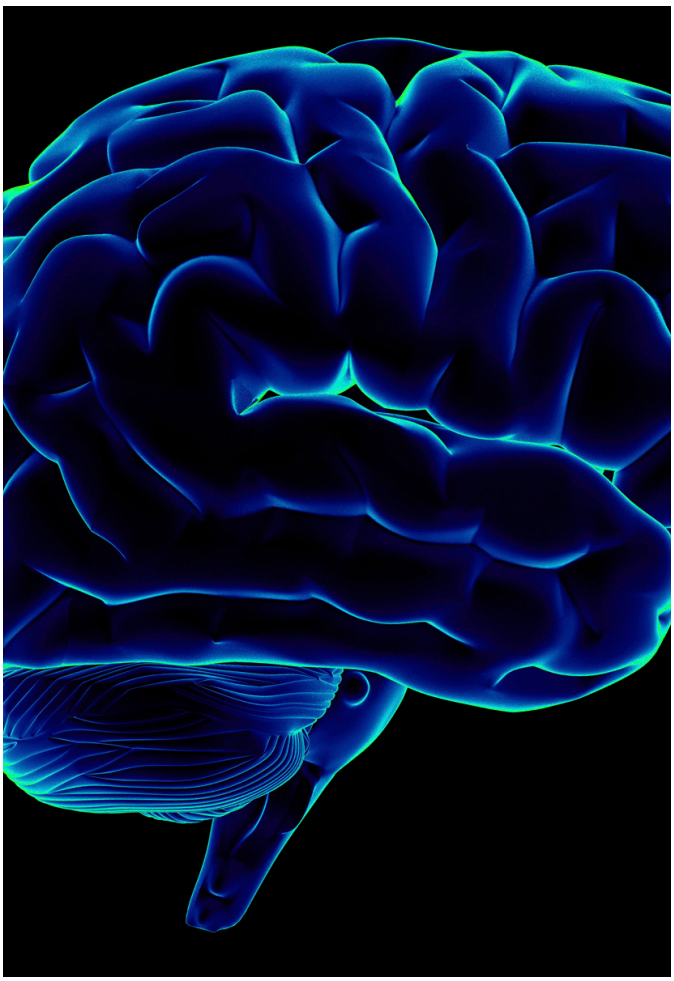
Experienced litigators know that establishing a favorable settlement position prior to mediation is to a large extent contingent on capturing favorable images on deposition videotape, or securing damaging testimony or admissions from opposing witnesses. Our experience in viewing videotapes of depositions in thousands of cases, however, suggests that witnesses are rarely trained in the area of optimizing nonverbal performance, and their credibility suffers as a result, sometimes dramatically.

Consequently, we routinely see disasters when key witnesses instead should be shoring up the client's position, putting a favorable image on the company, and thereby suppressing exposure during mediation.

Consider the quote from a frustrated General Counsel of a large Midwestern hospital chain: "*I am sick and tired of opposing attorneys using bad depositions against me during mediation and settlement discussions; I end up paying out more on that case than I should, which needs to stop. I hate surprises. I hate being told that a witness will do 'just fine' and then they go bomb the deposition. These 'bombs' end up costing an extraordinary amount of money.*" If this scenario is familiar to the reader, no additional explanation is necessary. If it is not, then it should be considered as a warning as to what can easily occur when deposition training is not given the proper attention.

Most in-house counsel expect their lawyers to be able to train witnesses adequately, but persuasive qualities of witnesses are a complex mixture of psychological variables predicated on nonverbal behavior – areas in which lawyers are simply not qualified to produce optimal results. Even a few days of passive observation in court yields the obvious conclusion that what is happening between the witness and the jury during the day's events is primarily psychological, not legal in nature. Witness credibility is a *psychological* issue, and the entire case exposure depends on it. Expecting lawyers to produce maximally effective witness training is not much different than expecting a therapist to write a convincing Motion for Summary Judgment.

Witness preparation by a trained psychologist is perhaps the most economical means of suppressing litigation costs for an impending case. Since exposure in the case is, in part, a direct function of witness credibility, enhancing this credibility has an immediate impact on ultimate litigation costs in terms of potential exposure. The cost of a "bad" witness can quickly run up hundreds of thousands, even millions in exposure. This vulnerability is readily



ameliorated, but only if in-house counsel recognizes that help is needed by its trial teams; that lawyers cannot be expected to be psychologists; and that the cost effectiveness of the situation warrants decisive action.

While examples of inappropriate or unhelpful *nonverbal* behavior in depositions do not lend themselves well to printed (verbal) summaries, an example of a recent class action race discrimination case provides an excellent reminder of how problems in depositions create enormous costs later in litigation. During his deposition, a key executive for the defendant company claimed that "The 'N' word could be considered as a term of endearment" while explaining his mistreatment of minorities. His smug demeanor ended up being one of the key reasons that the case ultimately settled for over $100 million. A simple gaff of this type creates inestimable cost, yet it is easily remedied with pre-trial planning and a dispassionate analysis of how resources should be allocated for maximum cost effectiveness.

The Trees, Part III: Discovery

Every case represents a huge ocean of information, only a fraction of which –comparatively, a few drops – will ultimately be understandable or meaningful to jurors. From an *a priori* standpoint to the trial team, far greater amounts of information appear to be relevant than the information that the jury actually attends to, or utilizes in its verdict decision-making process. Indeed, one of the most vital functions of pre-trial research is *information reduction*. Trial teams, in one very real sense, need *less* information, not *more*.

Lawyers are of course very intelligent, and the danger of being more clever than correct is always present in preparing for trial. The danger from an economical perspective is that issues that are deemed applicable by the trial team cost the client in terms of discovery or deposition time through pursuing and exploring the associated themes, but there is no assurance that the jury will care about or utilize those issues and themes. Moreover, if they are not meaningful or pertinent to the jury, the information will not be retained and utilized in the deliberation process, and *the end result is the same as if the information had never been pursued or explored at all.*

One of the most familiar functions of focus groups is the identification of relevant information versus information that is simply unimportant from the standpoint of the audience. Many industries and political groups use this type of research routinely, and indeed legal teams have been using these research approaches as well since the 1980's. What remains fundamentally unappreciated, however, is the potential for the research to identify "rabbit trails" that lead nowhere and end up costing the client thousands in wasted discovery and deposition time, when the case could be streamlined with a far greater degree of parsimony than previously contemplated based on the research results, resulting in not only greater effectiveness, but lower discovery costs.

Conclusions

Our observations within the legal profession suggest that there remains a question among many practitioners as to the true predictive utility of pre-trial research. Those who doubt that the research can actually predict verdicts are justified in a sense, because the field is full of results that do not predict verdict outcomes accurately.

The reader is cautioned that there are no barriers to entry in the trial consulting field, and that it is very much a "buyer beware" industry. Currently, "jury consultants" can be found selling "research" at rock bottom prices to meet the current demand for affordable services; however, a close examination of their backgrounds invariably shows that they do not have the qualifications to conduct such research. Just having a Ph. D. – even in psychology -- is not enough to achieve the kind of accuracy considered presently. Many of the Ph. D.'s currently in the field were, just a few years ago, managing pain centers, treating disturbed adolescents, or working with patients having learning disabilities – not testing and designing research for the prediction of behavior. A potential analogy would be in the medical field: If one needs laser surgery on one's eyes, one does not go to a gastroenterologist just because he is a "doctor."

A key prerequisite is that those conducting the research must have extensive training in research design and psychological measurement *as well* as extensive experience in the courtroom itself, since proper design of the research entails, among other things, an extensive familiarity with what happens in the courtroom. For example, knowing that jurors make up their minds based on the witness testimony means that proper depiction of the witness testimony represents a pivotal issue in research design. Research design must meet numerous diverse criteria to achieve predictive accuracy; however, those who hire and retain those who promote these services do not generally consider such criteria, but rather make the hiring decisions based on issues pertaining to established relationships ("Who does the trial team 'like'?") or administrative issues ("Who is on the company's 'preferred vendor list'?"). The result is typically research that may look good, but fails to predict accurately the real world events in the courtroom. Instead, the questions that need to be asked are, "What kind of background and training does the researcher have in psychological measurement and the prediction of behavior?" and, "How can I verify this?"

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Add to this scenario the following facts: 1) law firms make more money when they settle compared to when they go to trial; 2) defense firms have additional reason to avoid trials, since settlement is also "safer"; 3) insurance claims adjusters and in-house counsel are often rewarded for keeping their budgets in check, so there is ample motivation to deny short-term research expenses that bog down quarterly balance sheets (balance sheets that do not account for the types of savings considered presently); and 4) there is inherent appeal, especially among insurance people and trial lawyers, in the belief that their "hunch" or "guess" of exposure in a case is accurate, combined with the previously mentioned skepticism that the research can actually

predict. The result is a well-oiled machine that represents the status quo of corporate litigation – a status quo that keeps people comfortable, but wastes millions in the process.

It is acknowledged that settlement decisions often involve factors that are extrinsic to jury issues, such as image control, nuisance value, and similar considerations. However, the fact remains that an enormous amount of litigation that is still handled through the "well-oiled machine" that keeps the participants comfortable, yet wastes millions over the long run. Dismantling the machine and inserting science will require initiative, persistence and courage. Yet in the long run, it is the ethical thing to do, as well as the economical thing to do.

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About the Author

Dr. Speckart received his Ph.D. in Psychology from UCLA in 1984 with a specialization in personality measurement. He has been active in the jury consulting field since 1983, and has conducted over 600 mock trials and focus groups in pre-trial research for numerous types of litigation. Dr. Speckart has worked with litigators in over 150 jury selections, beginning with Dalkon Shields cases in 1983, the Agent Orange litigation in 1984, and Exxon Valdez litigation in 1994. His area of emphasis has shifted to patent litigation over the past decade as a result of increased demand for assistance in this complex area of jury psychology.

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