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Fox Rothschild Podcast

Texas Family Law Podcast Series: Jury Consultants

Featuring Laura S. Hayes, Erin Garza and Jamie-Lee Denton of Fox Rothschild LLP and Ryan A. Malphurs, Ph.D., of Delphi Litigation Strategies

Laura Hayes: Hi, welcome to the Texas Family Law Podcast. I'm Laura Hayes, Partner in our Dallas Office, and I'm here today with our guest speaker, Dr. Ryan Malphurs, as well as my associates Jamie-Lee Denton and Erin Garza.

Dr. Ryan Malphurs is a jury consultant and litigation specialist with Delphi Litigation Strategies who specializes in training witnesses. He works extensively in Family Law, as well as complex commercial litigation and IP litigation across the country. Welcome, Ryan.

Ryan Malphurs: Thanks for having me, Laura.

Laura Hayes: Thanks for joining us today. So, I think one of the biggest questions we might have is, what is a jury consultant?

Ryan Malphurs: Sure. The term "jury consultant" generally refers to someone who picks a jury. It has expanded within our profession into a term that is kind of a trial consultant. That may be anybody from the trial technician that runs the graphics, to the graphic artist that is there. All of those sometimes fall under the umbrella of jury consultant. What I prefer is the more accurate terminology, that is somebody who comes in and actually picks the jury. They have experience picking the jury and assisting the attorney in that process. They usually have backgrounds in psychology or communication, some have backgrounds in theater, others have backgrounds in sociology. There is no real credentialling process in our industry, it is really those individuals who typically have a professional or graduate degree, and then experience within the field.

Laura Hayes: That makes sense. Texas is one of the few states that allows jury trials for family law-related cases, but I don't think that a lot of our potential litigants realize just how important it is to select the right jury, and how that can have a major effect on, whether it's your custody case, or property division, depending on which you're going to trial for. It's really important to analyze the jury and not just leave it to random selection.

Ryan Malphurs: It really is. The science around jury selection is a really critical process that has been integrated into the legal industry. It's become very helpful to identifying how you're trying your case and what is going to resonate within certain strata of the population.

Really, the process of jury selection is about de-selecting dangerous jurors—identifying those dangerous jurors and removing them. As much as we're identifying who is favorable for us on the panel, in all likelihood the opposition is going to be removing those folks who are favorable if they're keying in on voir dire questions, or they've done their own jury research to develop the profile. It's important to identify who is going to be dangerous because if your case issues and your themes are not resonating, or they are causing angst among certain jurors, those jurors are going to be working against you within the deliberation process and can derail what could otherwise be a successful verdict. That process of knowing who could be favorable, who could be unfavorable, is really a critical process when you're going into jury selection.

If you don't have the ability to conduct jury research through a mock trial, or through community attitude surveys, there are ways in which you can look at preexisting models that might overlay your case, or certain strategic voir dire questions that can identify who may be favorable, who may be unfavorable, or at least which individuals may be dangerous, and maybe leaders in your case. For example, I really like to ask during voir dire who holds leadership positions within a community, or who considers themselves to be a leader, because that is a very easy way for me to identify within a jury who is likely going to be a leader in that deliberation. Then, if they are going to be a leader, are they going to be favorable, or are they going to be a risk for us? If they're going to be a risk for us and they're a leader, in all likelihood we want to remove them from the panel because we don't want to roll the dice with a leader. We don't want to take a risk in that area.

There are some interesting dynamics once we get into voir dire—key questions that can identify which jurors may be favorable for you, which jurors may be dangerous for you, but it really depends upon the case posture at that time.

Laura Hayes: Right, and you mentioned something about mock trials and some other pre-trial preparation. Your work is not just selecting the actual jury when you actually get to trial, you can do a lot of preparation work, thinking about obviously which jurors you want to select or deselect, as you said. Running through mock trials and that sort of thing, can you explain what that process is?

Ryan Malphurs: Sure. A mock trial is an opportunity for attorneys to put on and test their case to a group of individuals that will act and represent a potential jury in a matter. It's very common for us to, in many of our cases, conduct a 24 to a 36-person panel mock trial. Then, from that 24 to 36 jurors, listen to presentations over the course of a day to three days, then they vote their own personal position after each presentation—who are you leaning, who are you supporting at this time and why? Plaintiff or defendant? We track that throughout the presentations so that, at the end of the day, we'll then cross-filter those individuals to pair them with opposing individuals—plaintiff jurors, defense jurors—and then provide them with the verdict form to deliberate over. So, we'll break a group of 24 into three groups of eight, we'll take a group of 26 and break them up into four groups of nine, and they'll actually deliberate over a verdict form.

We'll record that deliberation and you can actually toggle back and forth between different groups and watch it as it's occurring live.

The great part about this is that it's a way for the attorneys to scientifically—and by scientifically, I mean in the social science research side of systematically testing your arguments, testing your themes to a group of people and finding out how that resonates. It may be that certain key evidence, or key themes, that you thought were going to sell actually aren't resonating with the group of individuals, and here's why. Maybe it takes a tweaking of the argument, maybe it takes a complete reformatting of it, but from the attorneys' side it's a great way to identify how your case is resonating with jurors, how you may need to adjust it. From the jury consultant's side, it's a great way to be able to offer you feedback, but also learn what individuals within that jury may or may not be dangerous for us, may be favorable for us, and identifying voir dire questions to draw those out.

Laura Hayes: I think that's fascinating. I think it would help the litigants, too. A lot of our clients come in and they say "oh, this is the best, you have to focus on this, you have to focus on that." You know, they'll have a specific document, or a specific circumstance, or an event that happened during the course of the marriage, or custody litigation. They want us, the lawyers, to focus on that, but sometimes if you do these mock trials or pre-planning, you realize that the jurors don't really care about that particular event that our client thinks is so important. That can help us focus on the factors that the jury will find much more important and could ultimately help us win the case, obviously.

Ryan Malphurs: Yeah, and conversely, evidence that they don't think is that impactful, right? Recorded conversations that include curse words, pictures of unfortunate situations or compromising positions. Some people just don't believe that those are of great consequence, so this is a great time to actually test that and see how it resonates.

I would also say it's a good way for your clients to learn how messy the litigation process is. As much as our clients see justice as the final product, believing they're going to get all of their attorneys' fees, and believing that they're completely right—as soon as you put in the hands of ten, 12, 36 strangers, they start hearing feedback than can be helpful to let them know that they may want to consider resolving this case or reaching some settlement terms that they can live with, rather than having a complete victory or a complete win. In almost all litigation, it's very rare to have a complete victory. It's challenging to be able to obtain that final goal and I think many people enter the space of litigation thinking "I'm going to get everything I want, the other side is absolutely wrong, the law is with me and there is no way that this can go any other way."

Laura Hayes: Right. You're absolutely right when you said it's very rare that one person wins everything that they want to win in a trial. I think that goes to why we would want to get someone like you involved early in the case. It's not just that you can help the jury selection—that's obviously very important if the case does go to jury, or like you said, gets close to a jury

that can help us settle. Starting out hiring someone like you, or hiring you, as a way that can help us get to that point much earlier on without spending as much money or before you get to such a point where there is a point of no return. Sometimes if you get that close to a trial, the other side is not willing to settle, they have the same theory of "oh we're going to win, we have such a good case." Then you're spending all this money, but if you come in early on, you can help with the preparation and the strategy from the very beginning. There is a lot that goes into preparation before you get to the jury trial. Witness training I think is one of the most important things that not as many family lawyers do with their clients, and you can see that when you first go to court—who has been trained and who hasn't. Sometimes there is some training and the clients don't realize it because they want their voice heard, they want their day in court, but really preparing the client for their first time they are in court—whether that's right in the beginning of the case, or not until the trial—is so important.

Ryan Malphurs: Yeah, I think it's important for folks to understand that jury consultants have sometimes been seen as this additional cost, or an exotic creature that you kind of trod out to either save your case, or help pick the jury when we're finally at the end. But what most experienced attorneys who have worked with jury consultants and folks that have backgrounds in training witnesses, what they realize is that the foundation of the case is really laid with the very first utterances of a client. That might be a temporary order hearing for family law cases, it might be in a deposition within the more traditional civil law cases, but it's a place where the success of a trial will begin at that first stage.

For attorneys, we have now been seeing that those attorneys that we're working with on a routine basis are using our services as kind of a force multiplier for their own firms—to be able to say, look who we will bring in, look who we will staff to make sure that you the client are well taken care of. They're using it as a way to differentiate themselves from other firms. It's been a very wise decision because there are ways that we can come in and help a case and get it resolved in a much easier fashion for the client, than going all the way to trial, or getting called on the eve of trial and having a bad deposition played and then having to present someone with a very different demeanor in the court and now we face the issue of behavioral consistency. The jury is seeing, well here is one person and how they are presenting, but suddenly they are a different person when they're on the stand now and who are we going to believe? Well, they are oftentimes going to defer to that deposition as the real person because they're not being polite, and the judge wasn't there, and this is the actual genuine person. It's hard to fight against that when we get to trial.

Laura Hayes: Right, and I know the cases we've worked on, some of the clients like you said, don't realize how important it is to get you involved at the beginning of a case because they think it's an added expense and "oh we don't need that, we're not going to go to trial we're going to settle." But I know for a fact that the cases where the clients who have been hesitant from the beginning to bring you in, then we have to, whether it's because of a poor position or a poor performance in temporary orders, or because we are getting closer to trial and they finally realize we need a jury consultant or a witness trainer. It's a lot harder to repair the damage that

has already been done—it's possible, but it's a lot harder, whereas if you had been brought in and that expense had been incurred from the beginning, it wouldn't be so much damage control as it would be staying proactive and being on top of things from the very beginning.

Ryan Malphurs: Yeah, and we might not even be at that point of trial, right? It's really important for many clients to understand oftentimes our involvement in a case early is less than $5,000 from talking to the attorneys, meeting the clients, spending some time with witness training and getting them understanding what I call the litigation game.

Laura Hayes: Ryan, you mentioned the word "game" and I think that's a good way to describe the process. Our clients have to learn how to play the game because being in the courtroom is kind of like being in the theater, it's a performance, it's a way you present yourself. I've seen you work with clients who are very timid, and you build the confidence so that they can present themselves well in a courtroom and not act so timid and shy. I've also seen you work with clients who have a much more aggressive and assertive personality and they need to tone that down a little bit in the courtroom. I've seen you work with both and it makes a huge difference because it's all about the presentation and how the litigants appear in front of the judge, the jury, or opposing counsel.

Ryan Malphurs: Yeah, I think what many witnesses don't understand is that there are rules for how they should behave that the judge expects of them and there are rules for how they have to behave that opposing counsel expects of them and that you expect of them. The legal communication environment has very specific rules, and that is why I like the analogy of a game, or it's why I like the analogy of a theater. They have a part to play. Their part is important, but it's not always as critical as they think it is. Sometimes they think "I need to argue with opposing counsel, I need to tell the judge what I think is right or wrong." Then all of a sudden, they're confusing the roles, or confusing the game. So I found it to be very effective to be able to explain the game to them, to teach them how they need to perform, how they need to behave in that environment so they're not confusing the legal environment with their professional environment, or they're not confusing the legal environment with their personal, at home environment, or they're not confusing the legal environment with how they fight with their spouse, or how they argue with their friends.

It is a very different type of communication process they have to learn. Once they learn that process, once they learn their role and their part in this case, things begin falling into place. It makes things much easier. It makes it easier for you as the attorney, it makes the lawsuit that much easier, it makes the process of resolving it far easier because they now understand from a meta, outside position of what is actually occurring. So often they come into this with the law and order, this is justice, here is what people need to hear, this is right, this is wrong vs. understanding the game, the theater, the strategy that goes into it.

Laura Hayes: Right, and one of the things I love about working with you, Ryan, and the way you work with our clients, is that, you know, clients don't necessarily want to come in, they want to air out the dirty laundry of their spouse, but they don't want to necessarily admit their own skeletons. When you are working with our clients and working with the process of how to communicate and teaching them and practicing with them in a one-on-one environment, or if the attorney is present, sometimes they are willing to give you more information that they're hesitant to give us. Of course, once you give that information to us, we're able to build the strategy—a different strategy, or perhaps learn how we need to approach a skeleton we didn't know existed. I find that's happened in pretty much every case that I've worked on with you. The client has shared something, if not many things, with you that they had previously not shared, or didn't think was important that ended up being one of the most important factors in either or case against the other side or how to protect our client against that particular fact.

Ryan Malphurs: Yeah, I think it's really important. You all as the attorneys have a very professional space that you occupy and get facts to establish the different arguments you're going to make, but I come from it almost as a therapist side, or as a sounding board, listening to the person so that I can learn their communication patterns. In that, it's also important for them to trust me and to provide me with information so that I can help them in different environments of stress, or when there are certain things that are getting under their skin and we need to talk about it.

I have found it helpful for me to share my background. I went through an awful divorce process as a child. Growing up, I had my father who ended up being abused by his wife who is not my mother but is the woman he then married. The house was burned down, the children were taken away from him and put in a state foster care. I share with them a very colorful story in many ways to simply say, "hey look, everybody has screwed up lives. Yeah, we show up here in a suit and tie and we're here and from Dallas, but it doesn't mean that we haven't had a colorful background." So, whatever you're going through, I've been through parts of it and I want you to know that I'm not perfect, you're not perfect, and that's OK. So, breaking down those boundaries and just sharing parts of yourself because I'm asking them to tell some of the most intimate portions of their life. I feel like I'm investing a portion into them and they're investing a portion into me.

I think that's a different role than professionally what you all have to serve as attorneys. There are important boundaries and there are important boundaries with my role as well, but it's important for them to trust me and to provide me with information and of course for me to provide you all with that information. It doesn't help if I hear information and then not transmit it to you all. That's kind of the critical component as well that's important.

Laura Hayes: Right. Absolutely. You have the perspective of, like you said, a more psychological, therapist type background, whereas I can share yes, I'm a single mom, I've been through a divorce and I raise my kids, so I understand. I can share that level of detail, but it's not

my role and I can't share as much detail about my personal life because I'm there to protect the client and billing by the hour. You're in the environment to help them and to share with them and say if you share these intimate details it helps me to protect you and to build the strategy and the story and how we are going to present it to either in the deposition, or to the judge or to opposing counsel, whichever way it may be. It helps build that necessary, safe environment for the client to share those details. That, at the end of the day, helps us as the lawyers.

Ryan Malphurs: Yeah, and I think it's important to understand that in litigation and in family law in general, the words that a witness uses, the communication that they use, will define their lives in profound ways that doesn't occur in any other type of civil litigation. When you think about what happens in a family law case, it defines a future for your children, it defines a future for your finances, it defines the house you're living in, how you're going to interact with your children for the next x, y, z number of years. They are the most consequential words that you may ever speak in your entire life, so we try to tailor our communication process to what skills people have, identify what shortcomings they may have so that you're able to make somebody into somebody who can speak comfortably. They may not be a Barrack Obama, they may not be a Ronald Regan, but they can certainly speak and you can provide them with frameworks to be able to explain their case in an approachable fashion so they don't get flustered. So that there is not the cognitive flooding that they experience when opposing counsel is bearing down on them. There are ways that they can manage this and get through it so it can result in a successful outcome.

Laura Hayes: Right, and in family law cases, I guess any litigation, there is an emotional component, but especially in family law cases. Like you said, the decisions that are made in the family law case do affect the rest of these, the litigants, lives. Again, I think that goes back to why it's so important to get you involved from the get-go. In a lot of our cases, when you go into temporary orders, which usually occur within a couple of weeks of filing, or within 30 days or so, those decisions that are made in the temporary orders direct the rest of the litigation. That is not necessarily how it's going to end up, but it's how things are going to be throughout the litigation, whether that lasts for a couple months, or even a couple years, depending on how high conflict the case is. Even then, those decisions that are made by the court, temporary orders, it's usually the substantial majority of how the case ends up. Not always, there are cases where things flip and change entirely, but it at least provides the borders and the guideline for how the judge is going to rule ultimately. If our clients are prepared in advance and prepared for those early on hearings, or early depositions, and they know what the process is and they're comfortable with not defending themselves. That is one of the biggest things. In regular conversation, we're used to defending ourselves "yes, but I only did that because," or something along those lines. It's so important not to do that, but it's learning a completely different way to communicate when you're in the courtroom vs. when you're in your standard conversations.

Ryan Malphurs: Yeah, I think that's right. One of my friends used to say that lawsuits are a race for credibility. I think that is more so true in family law than anything else. When it's a "he said, she said" situation and the judge or the jury has to ultimately make a decision as to who they

believe and who are the kids and the assets and the x, y and z going to go to. Family law makes a unique situation because of these temporary order situations, like you said, where the judge sort of has a litmus test for how can I have these people successfully interact with each other. If over the course of 18 months, the temporary orders have been successful then that may be the guideline that the judge is most likely going to go with because it resulted in success already. The race to credibility factor is really critical in the family law cases.

Laura Hayes: Ryan, you have so much information to share and we want to make sure our clients and potential clients absorb all this information. Thank you for sharing the importance of a jury consultant in a family law case and introducing us to the strategies behind witness training from the beginning of a case. This is a great stopping point for part one of our series of two. Please stay tuned for part two, where Dr. Ryan Malphurs joins us in discussing all the nuances witness training, testifying in person and on Zoom, and how to present yourself most effectively to a judge or a jury.