

# Essential Strategies Preparing for Trial



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Northeast Corporate Counsel Forum 2016

April 21, 2016 | Atlantic City

## SPEAKERS

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## NOTE FROM HB

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During this session we showed two PowerPoints. They included video from depositions and deliberations. Video has been removed here, and the remaining slides have been combined.

The following several slides were prepared by Marinakis and the final two slides where prepared by Ohlemeyer.

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COURT ROOM

# Essential Strategies for Prepping for Trial

Christina Marinakis, J.D., Psy.D.

**Northeast Corporate Counsel Forum**  
**April 21, 2016 – Atlantic City, NJ**

**KANSAS CITY**  
**MINNEAPOLIS/ST. PAUL**  
**DALLAS/FORT WORTH**

# TOPICS

- Initial Case Evaluation
- Witness Assessment and Preparation
- Deliberation Groups and Mock Trials





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# Initial Case Evaluation

# CASE MANAGEMENT BENEFITS OF INITIAL CASE EVALUATION

## Initial Case Evaluation



### Reduce Costs

- *Really* know the case before you take action

### Leveraging Your Case Strategy

- Strengthen negotiation position

### Use Resources Efficiently

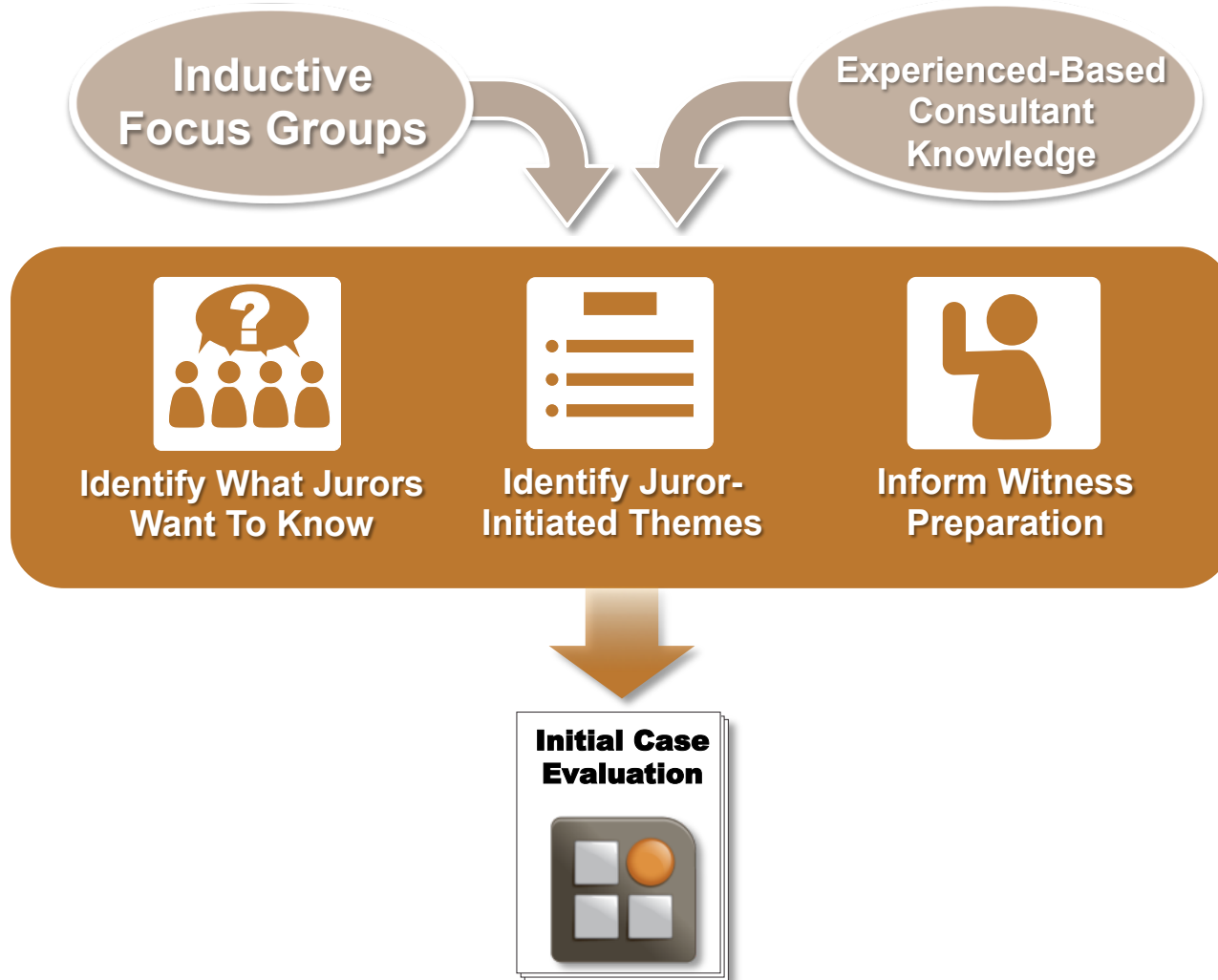
- Guide preparation and decision making

### Minimize Risks

- Reduce surprises
- “Depo proof” witnesses



# ADVOCACY BENEFITS OF INITIAL CASE EVALUATION





# BEFORE/DURING DISCOVERY

- Issue-Specific Focus Groups
  - Witness Focus Group (30b6)
  - Graphics Focus Group
  - Graphics for Hearings, Arbitrations, Mediations



# WITNESS ASSESSMENT



# WITNESS PREPARATION

- **Witness Preparation for Deposition**
  - Incorporation of **jury-friendly case themes** into testimony
  - Emphasize **vulnerabilities** identified for other side
  - Provide **safe harbor themes** that return to the research
  - **Reduce undesirable characteristics** to improve credibility
    - **Avoid sound bites** captured on video and leverage litigation position



# WHAT JURORS DO NOT LIKE

- Evasiveness – answer please!
  - Stall tactics
- “Verbose” answers
  - Includes “over-volunteering” information
- “Powerless” speech
  - Particularly experts/corporate witnesses
- Distracting non-verbal behavior
  - Lack of eye contact, fidgety
  - Inconsistency between direct/cross
- Distracting verbal behavior
  - Arrogant/condescending
  - Defensive/combatative/hostile
  - Unprepared/unknowledgeable



# WHAT JURORS LIKE

- Style of answering – reinforces perceptions of honesty
  - Short, direct, clear and consistent
  - Respectful and courteous
  - Consistent on direct and cross
- Thoroughness of research review
  - Familiarity and comfort with the information
  - Can answer the tough questions w/o hesitation
- Content
  - Gives good with the bad
  - Within scope, knowledge or expertise
  - Knows when to say “I don’t know”





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# Deliberation Groups and Mock Trials

# POST DISCOVERY

- **Deductive, Verdict-Driven Research**
  - Deliberation Group and/or Mock Trial
    - Test themes, graphics, witnesses
    - Develop core themes and graphics
    - Develop juror deselection profile
    - Help w/Juror Rationale for Damage Assessments
  - Arbitrations & Bench Trials



# WHAT YOU CAN LEARN: IDENTIFY STRENGTHS AND WEAKNESSES

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- Which facts are the most helpful and most damaging?
- What arguments resonate with jurors?
- What do jurors doubt or not believe about your case story?
- Which documents do jurors focus on?
- How do jurors fill in the gaps when there is ambiguity or unanswered questions?





# WHAT YOU CAN LEARN: ASSESS WITNESSES

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- Will jurors believe our witnesses?
- What testimony do jurors find to be untruthful?
- Which side's experts will the jury believe are the most credible?
- Does this witness' testimony help or hurt our case?



# WHAT YOU CAN LEARN: DEVELOP THEMES AND STRATEGIES

- How can we capitalize on case strengths and minimize the weaknesses?
- How do we weave the facts together to tell a convincing story that will connect w/jurors?
- How can each witness' testimony advance the defense story?
- How can we get jurors to remember the details most favorable to the defense?
- What juror-initiated themes are generated during deliberations?



# WHAT YOU CAN LEARN: DETERMINE CASE VALUE

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- Is this case “winnable?”
- What type of damages exposure might we face at trial?
  - Need three juries to extrapolate
  - Receive rationale and range, not predictive of actual award
- How might *in limine* rulings affect case value?



# JUROR DISTINGUISHERS/JUROR PROFILES

- Data collected prior to hearing about your case
- Demographics, Experiences (self and someone close), Attitudes
- Is there a statistical correlation between a juror's response and his or her leaning in the case?
- Which responses are the strongest predictors of a juror's leaning in the case?
- How closely does a juror at trial resemble the plaintiff or defense profile?



# VIDEOTAPED DEPOSITIONS: BAD THEATER

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- A Picture is Worth a Thousand Words (and requires fewer...)
- Success is the Residue of Design
- Production Promotes Persuasion
- Better Theater is Better

## The Company Favored Developing Indications Consecutively, Contrary to Industry Standards

17 Q. Well, I mean, correct me if I'm wrong, but  
18 -- but if you assume that -- that you desire and --  
19 and will try to commercialize Crofelemer for irritable  
20 -- irritable bowel syndrome, it does have a similar  
21 indication to some of your Xifaxan products; isn't  
22 that right?

1 A. The first indication, Counsel, is for

2 HIV-associated diarrhea, so we're focused on that  
3 right now.

4 Q. Well, you're not going to stop there, are  
5 you?

6 A. Hopefully not.

22 Q. But you're modeling your Crofelemer plan

1 on your success with Xifaxan and your efforts with  
2 Relistor?

3 A. Relistor.

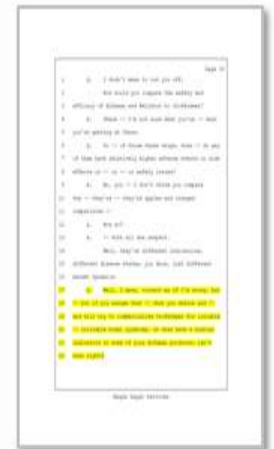
4 Q. Relistor.

5 A. It's -- it's okay. It -- I think they're

6 appropriate analogs just in terms of how -- how you  
7 cross the goal line and get that initial indication,  
8 and then you -- you're able to -- to get that behind  
9 you, you build a crescendo towards that first launch,  
10 and then you -- and then you're able to refocus and  
11 -- and -- and get geared up for potential indications  
12 down the road.



Dep. Tr. 39:17-40:6; 101:22-102:12



# SPEAKERS

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