

Ethical Issues in the Use of Trial Consultants

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I. Introduction

Civil trial attorneys today increasingly turn to an empirical-based approach to jury selection as opposed to speculation and intuition into a juror's personal biases and attitudes. The result of this is hard to measure with precision, but the consensus of both plaintiff and defendant trial attorneys is that use of jury consultants and mock trials can yield successful results. Although jury consulting has its detractors, there are many more who believe "if the case is large enough, it's almost malpractice not to use trial consultants." Franklin Strier, *Paying the Piper: Proposed Reforms of the Increasingly Bountiful But Controversial profession of Trial Consulting* 44 San Diego L. Rev. 699.

Jury consultants offer a variety of services (i.e., mock trials, focus groups, jury selection, opening statement consultation, community attitude surveys, damage award assessment, jury instruction review, juror surveillance, just to name a few). All of this is geared toward anticipating/shaping a trial result. Leading practitioners of jury science "boast that they can predict with greater than ninety percent certitude the outcomes of trials before the evidence has been heard." Jeremy W. Barber, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom* 31 Am. Crim. L. Rev. 1225, 1232. That figure, ninety percent, may or may not be accurate, but it is a number that no doubt has led to a proliferation of individuals and companies offering such services.

Decision Quest, a leader in the trial consulting industry describes itself as "a strategic communications firm which applies the rigors of social science research and the persuasive powers of multimedia graphic design to the problems faced by law firms, corporations and public agencies. Whether you need to persuade a judge and jury, a board of directors, a government regulatory body or the public-at-large, Decision Quest can help convince the decision makers who matter most." <http://www.decisionquest.com>. This statement stops short of certain representation and employs strategic persuasion, the essence of litigation. This paper explores the sometimes fine line between the efficacy and ethical concerns raised in the use of jury science.

II. Do Jury Consultants Really Work? – Efficacy

- A. Observers question the reliability of current social science research while others doubt whether social science can ever be scientific. Barber, *supra*, at 1225. This seems to be a recurrent theme among those who lack real world or hands-on practice with jury consulting. Despite this view, the alternative is choosing jurors based on invidious stereotypes and biases which serve to perpetuate unseen discriminatory processes. If left unchecked, such stereotypical views will perpetuate biases thought to be relics of a turbulent past.

New trial preparation techniques used in conjunction with scientific jury selection may considerably increase the amount of variability in verdicts accounted for by trial consultant intervention. Dennis P. Stolle, Jenniffer K. Robbennolt and Richard L. Wiener, *The Perceived Fairness of the Psychologist Trial Consultant* 20 Law & Psychol. Rev. 139. The most appropriate empirical question is probably not "how effective is scientific jury selection," rather it is "how much

more effective is scientific jury selection than traditional attorney conducted jury selection.” *Id.* at n.24. Attorneys and litigants alike think that some competitive edge can be gained through the use of jury science and its selection methods. Barber, *supra*, at 1240. If the sole purpose of jury consulting was to root out unseen biases harbored by jurors, few would disagree that this industry was at very least a vanguard for impartial juries.

A major benefit of jury science is “that it helps attorneys see through dishonest answers by potential jurors during voir dire. Many studies have shown, when people are questioned before an authority figure (the judge or trial counsel) and a number of strangers, they tend to give socially acceptable answers to conceal or deny their prejudices. Through the use of demographic correlation of attitudes related to the trial, obtained from questionnaires and in-person interviews, attorneys can remove potential jurors during the voir dire process whom they believe to be cloaking biases.” Michele Galen, *The Best Jurors Money Can Pick*, *Bus. Wk.*, June 15, 1992, at 108.

- B. The dilemma is the assumption that there is a correlation between juror characteristics and the favoring of one party and that a particular juror will behave according to this relationship. A number of experts have demonstrated that the relationship between background characteristics and verdict preference is too weak to be of real use to the trial lawyer. 31 Barber, *supra*, at 1240. Recall that according to the literature, there is no empirical evidence to speak of that will validate this proposed lack of nexus.

In response to this theory, even if jury science lacks predictive value, it remains a valuable weapon since the culled information gives additional insight into the biases and dynamics of a particular judicial district, and thus assists in voir dire. While not determinative, if used by only one side, it may help to tilt the balance of a trial. *Id.* at 1241. As further illustrated below, jury science employs tools that reach into the mindset of jurors with scientific analyses of gathered information. Such jury science tools depend on the nature and extent of litigation but can help to formulate a plan from initial jury questionnaires all the way through closing arguments. Consultants are able to look at the courtroom demeanor of prospective jurors during the entire selection process and apply psychological theory to physical cues and verbal and non-verbal communications. Armed with this interpreted information, pinpoint accuracy replaces guesswork and persuasive representation replaces speculation. Such expertly wielded tools can make the difference in high stakes litigation.

- C. Jury consultants often claim a high success rate in predicting the outcome of a trial. Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?* 32 *Suffolk U. L. Rev.* 463, 476. Though this may be rebutted by lack of clear empirical evidence, few will disagree that the litigant who employs trial consultant services from the pretrial stage through state-of-the art multimedia presentations in closing arguments may

hold a significant edge against the litigant who employs more traditional means of services.

Despite the lack of empirical evidence as to the success of jury science (as advanced by commentators and academic theorists), actual users of the service and real world practicing attorneys, are better able to assess the true value of trial consulting and its impact on the cases they have tried. Additionally, if the market is a barometer as to the efficacy of a given service, jury science has grown exponentially in popularity and has become a widely used litigation tool.

Although the detractors claim its uselessness and that jury science is nothing more than guesswork, others indicate “the fact that trial consultants have been able to thrive in the marketplace serves as a somewhat compelling indication that trial consulting is effective...Lawyers from the most prestigious firms in the world are increasingly relying on the services of trial consultants, with some firms even bringing consulting services in-house. It seems quite unlikely that lawyers in control of high stakes litigation would repeatedly pay the often high cost of scientific trial consulting services if such services were ineffective.” Stolle, *supra*, at 146.

III. Ethical Concerns

- A. One argument regarding equal access to services is that it is unfair and unjust that parties with adequate financial resources hire experts to, in essence, hand-pick jurors that will be most sympathetic towards the client’s position. Stephanie Leonard Yarborough, *The Jury Consultant – Friend or Foe of Justice?* 54 SMU L. Rev. 1885, 1895. Only large corporations and wealthy individuals will have access to the high-priced advantage of jury consultants, leaving the average litigant with second-class justice. Stolle, *supra*, at 139.

Additionally, it would appear that jury science and its high cost would run afoul of the Constitution’s impartiality mandate when only one side could afford access to consultant services. In the year 2001 Harvey Moore, owner of Trial Practices typically charged \$6,500 for a focus group and \$12-\$20,000 for a mock trial. For larger cases, consulting can reach over \$1,000,000. Yarborough, *supra*, at 1896.

In effect, what is unfair about trial consulting is a metaphor for what is unfair about the adversarial system. Mismatches of litigant resources result in a mismatch of affordable professional services across the board. Is it unfair to hire the very best legal counsel? Strier, *supra*, at 701-02. High-priced trial consulting is arguably no less fair than other fundamental aspects of our legal system which are also influenced by wealth, such as the traditionally high cost of legal services. Stolle, *supra*, at 146. If this argument is accepted, then the impartiality mandate would have to apply to hiring the best legal counsel, expert witnesses, conducting *sub rosa* investigation and employing the use of pricey visual graphics, just to mention a few. The level playing field argument could be made for any and all trial-related services, *ad nauseum*.

Fortunately, utilization of on-line research methods, such as virtual focus groups, dramatically reduces costs. Less affluent clients and smaller firms will benefit from jury research at a fraction of the cost. Yarborough, *supra*, at 1897. In order to have research results that are statistically significant, the sample size must be large enough to yield a representative sample. The internet has more than 150 million users with the numbers climbing. Robert Gordon, *Trial Research in the Age of Technology*, Trial, June 2000, at 64).

“With so many users representing a wide variety of demographic criteria, on-line research can yield large sample sizes consisting of demographic backgrounds truly representative of actual jurors.” *Id.* Another advantage besides being highly cost effective, is that the consultant or attorney can compile data from a wide variety of cross-sections or areas from around the world. This research eliminates the need for travel, expenses and extensive planning of focus group sessions in different areas. *Id.* Thus, trial consulting may be accessible to a wider pool of litigants and not just limited to the most affluent.

- B. As alluded to *supra*, if trial consulting is so effective as to significantly impact jury compositions it may violate the constitutional right to an impartial jury. Strier, *supra*, at 699. That is, if jury science is able to dictate the outcome of a trial by choosing the perfect jury, this would surely trample upon Constitutional principles and have to be immediately addressed. To date it has not.

However, there are no impartial jurors since jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case. Strier, *supra*, n.42. The task of the jury consultant is to ensure the client is represented by jurors that are sensitive and open to the issues presented in his/her case. This includes identifying the ideal juror and profiling them, which is a complex, research-intensive process. Yarborough, *supra*, at 1892. Consultant’s role is to provide research and advice. The jury has the final word. *Id.*

- C. The underside of trial consulting was demonstrated by consultant Amy Singer when she employed the “poison pill” tactic by deliberately picking jurors who would explode and hate each other. She hoped the personalities would combust, which they did, rendering a mistrial in the infamous Miami River Cops case in 1987. Strier, *supra*, n.2. This type of practice serves to undermine American jurisprudence by shifting the focus of trial consulting efficacy and ethics.

On the other hand, in death penalty cases, an ABA report indicated that consultants can help determine “what invisible but lethal amounts of prejudice may exist in the jury pool...” *Id.* at n.7. Again, the consultant’s role is simply to provide research and advice. As indicated previously, and tantamount to our judicial system, when all is said and done, the jury has the final word. Yarborough, *supra*, at 1896.

- D. Some opponents of jury science have argued that in selecting jurors, employing invidious stereotypes is inherently part of a jury consultant’s business. It is more

disturbing since they add scientific validity to these harmful stereotypes. Peremptories are the basic tool used by consultants to manipulate the selection. Harvard Law Review Association, *Jury Selection and Composition* 110 Harv. L. Rev.1443, 1465.

On the other hand, jury science may cause some attorneys to abandon the use of antiquated stereotypes in selecting a jury. Detailed research of a particular community revealed that education level or books read were more relevant to the defense than one's class or race. Old stereotypes and rules of jury selection may also foster undemocratic discrimination. Barber, *supra*, at 1244; *see also Id.* at n.55. Professor Alan Dershowitz indicated that "Lawyers' instincts are often the least trustworthy basis on which to pick jurors. All those neat rules of thumb, but no feedback. Ten years of accumulated experiences may be ten years of being wrong. I myself, even when I trust my instincts, like to have them scientifically confirmed." Saul M. Kassan & Lawrence S. Wrightman, *The American Jury On Trial* 50 (1988) (citing Morton Hunt, *Putting Juries On the Couch*, N.Y. Times Magazine, Nov. 28, 1982, at 82).

IV. Applying Professional Standards – Proposed Solutions

The trial consulting industry is presently unregulated. Anyone can enter the field and identify themselves as a trial consultant. The public needs assurance in ethically nebulous terrain. Practitioners must abide by some sort of moral compass. Strier, *supra*, at 703.

Many professions applying academically oriented skills (medicine, law, accounting, psychology) are regulated to the extent necessary to protect the public against unskilled and/or unscrupulous practitioners. *Id.* Comparable to an attorney touting past successes and implying a favorable outcome, as regulated by MRPC Rule 7.1 (b). As stated earlier, the market works to weed out the unscrupulous and less desirable element. In the interim, there are proposed solutions as well as drawbacks.

A. Proposed Solutions / Drawbacks to Solutions

1. A possible solution is requiring licensing and regulation of consultants. At first glance, this may appear to be a viable solution in separating the professionals from the upstarts.

However, licensing and regulation requires a regulatory body, demanding fees and driving up already exorbitant prices. Strier, *supra*, at 710. This may be detrimental to the pool of litigants who are now able to afford jury consulting via on-line access. Additionally, it is far too difficult to assess the level by which the industry should be regulated when there is conjecture as to whether jury science has a significant impact on trial outcomes and whether it is something more than guesswork but less than science. Barber, *supra*, at 1240.

2. Limiting Voir Dire questioning by attorneys, since trial consultants usually extend voir dire beyond the norm whose object is to create non-representative panels.

This option would be detrimental to the litigation process as well, since voir dire allows attorneys to confirm hypotheses and assumptions concerning prospective jurors. Other than through jury questionnaires, this is the only opportunity for attorneys to interact with and assess prospective jurors.

3. Reducing or eliminating peremptory challenges – This is a frequently made trial and tort reform proposal. In the case of *Baton v. Kentucky*, 476 U.S. 79 (1986), Justice Thurgood Marshall voiced his desire for complete elimination of peremptory challenges by stating, “The decision today will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” *Id.* at 102-03. However, this drastic approach is unlikely to ever be the law of the land.

If the jurisdiction is one that limits voir dire examination or prospective jurors are not completely forthcoming in their answers, voir dire alone will likely not provide an adequate opportunity to seek to dismiss on a challenge for cause. Peremptories offer a valuable alternative means of dismissing a prospective juror whose suspected bias is not sufficiently manifested to support such a challenge. Barbara A. Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1175-76 (1993). Here jury science can reduce peremptories to absolute necessities according to the case and needs, and essentially serve to focus rather than broaden peremptory use. This can serve to delete the extremes of the spectrum, keeping in place those jurors that represent more closely a cross-section of society.

4. Allowing discovery of jury consultant surveys, questionnaires, etc. This solution has been proposed time and again in an effort to level the playing field for the less affluent lacking access to services of a jury consultant. As has been shown, this argument is no longer tenable as consulting in on-line format is available to a wider group of litigants at a fraction of the price. Also, the attorney work product doctrine dictates “It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary’s industry and efforts *Cal. Code Civ. Proc.* § 2018(a).

It would seem that the litigant who is unwilling to engage in his or her own efforts can sit back and wait for the adversary to hand over pricey

and valuable information under the guise of discoverable information. This approach cuts into the very heart of state policy of preserving privacy of attorneys and zealous representation of their clients.

5. Barring pretrial investigation of jurors. It would appear that jurors require a degree of privacy and that intrusion into their personal affairs would deter the average individual from actively engaging in the process of becoming a prospective juror. Jury duty already has a negative stigma causing people to side-step their civil duty at all costs. To become the target of surveillance and investigation by trial consulting firms would further undermine the jury system and likely spark a fervent public policy debate in favor of juror privacy.

On the other hand, barring pretrial investigation of jurors would limit an attorney's ability to independently verify truth of responses to voir dire. Attorneys would argue that this is just a mechanism to ensure that the justice system operates according to Constitutional and ethical mandate. The Supreme Court has ruled that a prospective juror's dishonest response to a material voir dire question can justify a new trial. This point may be moot as investigation of jurors may be costly and less frequently engaged in when the variety of consultant services available, other than surveillance, may be much less costly and highly beneficial.

V. Practical Application of Jury Consultants to Your Case

A. Mock Trials

These are rehearsals of the actual trial or the trial before the trial. Although time-consuming and expensive, mock trials have the potential of reaching into the bowels of the trial and shaping selection of jurors as well as practices to be employed in the course of the trial. This more formal approach allows attorneys to gauge and assess potential pitfalls in their case prior to the actual trial. When the jury deliberates, the attorneys have the luxury of witnessing and analyzing the discussion. The value of jury science in the context of mock trials is expert and scientific analysis of the data gathered during the presentation to the group and expert application of those data to the specific problems faced by the litigant.

B. Focus Groups

The group is drawn from the area where the case is pending. One or two issues are posited to the group to assess the response. For example, a closing statement may be simulated to the group who will then be divided into response groups and questioned accordingly in detail as to factors shaping their decision. "Focus groups have the advantage of being far more flexible and much less expensive than a full mock trial. Focus groups also may be guided to deliberate on specific issues." Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575, 591 (1985). The focus

group will segregate relevant from irrelevant facts. Here again, jury science is invaluable in scientific analysis of the data gathered and expert application of those data.

C. Jury Questionnaires

While voir dire is an excellent tool, it is limited in its *ability* to obtain underlying, probing information, especially since a roomful of prospective jurors are looking on along with the judge and counsel. Since questionnaires are often lengthy and detailed in contextual relation to issues in the trial, they garner invaluable information and insight into the profile of prospective jurors. Given this wealth and depth of information into the trier-of-fact, many attorneys will be lost without the knowledge and expertise with which to utilize obtained information. Prospective jurors are likely to elaborate and provide forthcoming answers to questionnaires as responses will not be readily exposed in open court, other than follow-up questions to written responses. Here jury science will be most beneficial in the drafting and interpretation of questionnaires as well as strategic follow-up questions to elicit the most information. This process could prove to be the most important aspect of the trial.

D. Jury Selection

This is the most traditional role of the jury consultant. Jury consultant Jo-Ellan Dimitrius, charged with assisting the O.J. Simpson defense team, concluded from the research conducted during trial preparation that African-American women over thirty years-old would not necessarily believe that spousal abuse leads to murder. Dimitrius commented that prosecutor Marcia Clark discarded the conclusions of the research. When the trial ended, Dimitrius asked the African-American jurors if they thought spousal abuse necessarily led to murder. Each and every one affirmed the conclusions of Dimitrius. Adrienne Drell, *Complex Decisions*, Chi. Sun Times, May 24, 2000, at 64.

This illustrates that even if we choose to rely on our own beliefs and biases, it will not hurt to have them scientifically confirmed. In jury selection, it is impossible to know who to reject unless you are first aware of exactly who you are looking for. While demographics play into creating a profile of a prospective juror, there are many other scientifically based factors that may come into play, depending on issues to be litigated .

E. Juror Surveillance

As indicated supra, despite the privacy intrusion and high price, surveillance can allow the attorney to independently verify truth of responses to voir dire. It can also give the jury consultant valuable information with which to profile the prospective jurors that cannot possibly be gleaned from other jury science practices. During surveillance, the investigated individual does not wear the

cloak of appearances and does not have to present a socially acceptable facade, as much as when under the probing, microscopic eye of courtroom observers.

VI. Conclusion

Social scientists have labeled jury science as “high-tech jury tampering.” If the outcome of a trial can be manipulated by simply choosing jurors acceptable by consultants, the trial jury would cease to function impartially and would ultimately have to be abandoned. If the science is effective, then the claim that jury science is not a true science or that it is posited on false assumptions is moot. If jury science is ineffective, then the tampering and fairness concerns dissipate. Given the limited critical data currently available, it is almost impossible to resolve this tension. Barber, *supra*, at 1242. Nevertheless, scholars have astutely cautioned with regard to jury science, “those who ignore the laws of science will be controlled by those who understand them.” Elizabeth F. Loftus & Edith Greene, *Twelve Angry people: The Collective Mind of the Jury, Inside the Jury*, 84 Colum. L. Rev. 1425, 1430 (1984).

One view opines that using jury science might imply that the jurors are incapable of drawing conclusions based upon evidence that they see and hear at trial. Use of science may tend to discredit the verdict in the eyes of the public. The rationality and autonomy of the jurors are fundamental to the American jury system. Barber, *supra*, at 1225. On the other hand, jury science preserves judicial autonomy by ensuring festering and hidden biases and prejudices are exposed and are not given the power to dictate the outcome of proceedings. Rather, the consultant allows persuasive evidence to dictate the outcome.

Still, jury science counters archaic stereotypes that have for so long guided attorneys in jury selection and replaces them with scientific demographic analyses. American society reaps the indirect benefit of having racist, and often malevolent, stereotypes rebuffed by jury consultants. *Id.* at 1250. For example, Clarence Darrow, quoted in the Oxford Book of Legal Anecdotes, stated “Never take a German; they are bullheaded. Rarely take a Swede; they are stubborn. Always take an Irishman or a Jew; they are the easiest to move to emotional sympathy. Old men are generally more charitable and kindly disposed than young men; they have seen more of the world and understand it.” *Id.* at n.55. Given these grossly generalistic statements attributed to a great lawyer, it is no wonder why the legal profession has moved toward wider use of jury consultants, even if only to confirm such sentiments.

Nevertheless, it is a litigant’s right and a lawyer’s duty to employ all legal means possible to try their case, and thus, should prevent any restrictions on hiring jury consultants. HLRA, *supra*, at 1465.