

# The Benefits of Trial Consulting Services: Improving Your Chances of Success at Trial

“IF THE CASE is large enough, it’s almost malpractice not to use trial consultants.”<sup>1</sup> Is this hyperbole or a legitimate warning to be heeded by all? Maybe it’s fair to say that the statement is a little of both. Nonetheless, today, more

than ever before, civil and criminal trial lawyers have been turning to trial consultants for assistance with a variety of challenging tasks that litigation demands. Over the last two decades or so, trial consultants have become highly popularized for their involvement in high-stakes cases, such as the insider trading case against Martha Stewart, the beef libel case against Oprah Winfrey, the O.J. Simpson trials, the prosecution of Timothy McVeigh, the Oklahoma City bomber, and most recently, the prosecution of Conrad Murray, Michael Jackson’s doctor, for involuntary manslaughter.

Trial consultants are most widely known for the assistance they provide during the jury selection process. Before trial, consultants are used to assist attorneys by providing commentary and analytical information on how to select the best possible jurors in a given case. Consultants do this by helping attorneys develop questions used to extract information about potential jurors before the trial begins. After the jurors are selected, the consultant observes the remainder of the trial and provides feedback to the attorney on jurors’ reactions to witnesses’ testimony and the parties involved. Such feedback may include suggestions about areas on which counsel should focus when questioning witnesses and ways to deliver an effective closing argument.

Aside from assisting counsel during the jury selection process, trial consultants offer an array of other services, including providing case analysis and trial strategy, conducting survey research, running focus groups, staging mock trials, preparing witnesses, coordinating demonstrative exhibits, monitoring the trial, and working with shadow juries. Depending on the behavioral and psychological techniques employed by a particular consultant, these services can be used as a guide to analyzing juror attitudes, identifying the strengths and weaknesses of a case, evaluating demonstrative evidence, and predicting

the outcome of a case; in the case of civil trials, consultants can assist in estimating damage awards. All of this effort is a means to an end, which is to increase the likelihood of obtaining a favorable verdict at trial. Taking advantage of these types of services or learning about and perhaps even incorporating these techniques may help a litigator become better equipped to predict the results of litigation accurately and even shape the outcome of the trial.

With that being said, there are vastly different types of trial consultants, and each one employs varying techniques and relies on a unique set of experiences. When considering whether to hire a consultant, certain characteristics and qualities should be kept in mind. This article explores certain key issues and challenges attorneys face during litigation. The discussion also includes some pointers to consider when retaining a trial consultant as well as tips for attorneys who wish to improve their own jury selection skills, presentation of cases, and overall courtroom appearance.

### Challenges Facing Litigators: Jury Selection and Beyond

People are proficient at different things within their own various fields. While attorneys may be experts in the law, most trial consultants are experts at detecting and analyzing human behavior. When deciding to bring a case to trial, attorneys are faced with many challenges. Litigating requires incredible amounts of energy, concentration, and effort. Before and during trial, an attorney’s mind is inundated with thoughts about the legal technicalities of a case. There is only so much an attorney can do and see while giving an opening statement, questioning witnesses, presenting evidence, and engaging in sidebar conferences. The attorney’s eyes and mind cannot always be tending to his or her responsibilities during trial and observing jurors’ nonverbal behavior at the same time. Therefore, having a trial consultant present can alleviate some of the pressures of a trial, and the consultant can assist in monitoring all the action in the courtroom.

### Jury Selection

Many trial lawyers have been turning to a scientific approach to jury selection rather than merely relying on intuition or generalizations about jurors’ attitudes

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and biases. The scientific approach involves the application of behavioral and social scientific principles in order to select jurors who seem to be the most sympathetic to a particular side in any given case.<sup>2</sup> Certain studies have proven that scientifically based techniques yield more accurate results than does the traditional method of jury selection conducted by an attorney. Studies have shown that voir dire conducted by an attorney is less accurate in detecting juror bias and prejudice than scientifically based methods of jury selection are. For instance, studies evaluating the potential efficacy of attorneys' judgments when selecting jurors revealed that the factors attorneys used in voir dire did not prove to be powerful predictors of jurors' preferences.<sup>3</sup>

What can trial lawyers learn from these results? Even though certain strategies are ineffective for selecting unbiased jurors at trial,<sup>4</sup> attorneys still tend to rely heavily on demographic characteristics and certain personality judgments or attitudes when selecting jurors. Attorneys' misplaced reliance on these methods may be at least partly attributed to incorrect or simplistic information found in textbooks focusing on trial strategy, as well as misconstrued ideas and generalizations about jurors' attitudes, personalities, and biases. Overall, attorneys tend to disagree about the importance and weight given to certain factors and how to interpret and use those factors in selecting jurors.<sup>5</sup>

Conversely, however, research indicates that clinical and behavioral psychologists tend to have positive results when given only a few cues on which to base their assessments.<sup>6</sup> When scientific selection methods are applied, they yield better results than conventional, speculative approaches that are based on intuition.<sup>7</sup> Based on this information, the conclusion that can be drawn is that attorneys are likely to yield more accurate results during voir dire when assisted by a trial consultant or, at a minimum, when applying the techniques that consultants use for jury selection.

This is not to say that attorneys are, by themselves, poor judges of character or human behavior. On the contrary, many attorneys are by their very nature intuitive and extremely perceptive. However, there is obviously room for improvement, and attorneys may be able to learn a few things from the techniques employed by trial consultants, regardless of whether or not a consultant is ultimately retained. The following list offers a few tips for attorneys to consider during jury selection.

- *Observe jurors' body language.* People will react differently to certain questions or information. Body language can be helpful in identifying potential jurors' feelings about issues in a case. In particular, watch out for body language that implies something different from what a potential juror may have said.

- *Do not keep people off the jury solely because of biases.* We all have biases—and that includes potential jurors. However, this alone should not be the reason for keeping a person off the jury. The true question is whether or not the person is capable of putting aside or controlling his or her biases. If individuals can forget their old biases and listen to all the testimony and evidence presented before coming to a decision, then they should be considered as jury candidates.
- *Learn to think like a layperson.* While questioning potential jurors, be sure to keep the questions as simple as possible. Do not overcomplicate things. Remember, jurors do not live in a world of litigation. The more you can simplify your questions and the overall theme of your case, the better the jurors will understand you. Simplifying the questions can also be a good way to make the jurors feel that you are one of them and that you are respectful of their thoughts and feelings.
- *Attend jury selection.* This suggestion is especially useful for young attorneys. Even though you can read about how to best select jurors, unless you observe jurors being selected before a trial or select them yourself, you will never truly understand the mechanics. Go to your local courthouse and find out when cases are going to trial (usually early in the week), and sit through the jury selection process.

### ***Beyond Jury Selection***

Trial consultants can provide great assistance to attorneys who are selecting a jury, but voir dire questioning by attorneys is not always permitted. In federal courts, for instance, the modern trend is to restrict attorneys' participation in voir dire and, instead, to allow the judge to do most—if not all—of the questioning. In such scenarios, attorneys have other tools that can be employed to make the best use of trial consulting time.

One of those tools is the persuasive presentation of evidence. Studies have shown that people are not very good auditory learners. Rather, people learn more effectively through the visual presentation of information. Using graphics during a trial helps to reinforce key themes and issues with jurors, thereby increasing jurors' retention level.<sup>8</sup> Experienced trial consultants are able to apply their research results as well as their experience in a way that effectively conveys a particular side's key themes and issues to the jurors. Even though many attorneys may want to retain a trial consultant to coordinate these types of services, economic constraints can sometimes make that approach impracticable. A suitable alternative would be to have a member of the trial team or a staff member in the law firm learn to use trial exhibit software, such as Trial Director.

Another valuable tool in the scientific jury selec-

tion process is the use of community attitude surveys and change of venue studies. Community attitude surveys can provide important information about the attitudes and biases of potential jurors and can assist in understanding how bias may affect jurors' reactions. Similarly, change of venue studies are used to support a change of venue in the struggle to obtain a fair trial. In both civil and criminal cases, parties face the danger of juror prejudice resulting from pre-trial publicity or pre-existing community attitudes. In civil cases, the economic variable can also affect jurors' attitudes. Thus, community attitude surveys and change of venue studies can help counsel determine how likely jurors are to award damages and whether jurors feel limitations should be placed on such awards. More generally, however, these studies are used to understand the mind-set of jurors who come from a particular venue before trial.

Mock trials and focus groups are perhaps the most essential pre-trial services that trial consultants provide. Lawyers may be skilled at giving opening statements and closing arguments, as well as questioning witnesses, but are not generally well trained in observing and interpreting jurors' behavioral cues or understanding their life experiences. A mock trial or focus group can help attorneys understand how jurors perceive and understand the themes, issues, and parties in any given case. These exercises serve as dress rehearsals for attorneys, giving them a better understanding of their case; in the end, such an understanding will enable the attorneys to detect the strengths and weaknesses of their trial strategy and leave them feeling confident that they have thoroughly prepared for many of trial's contingencies. Mock trials and focus groups are also useful ways to obtain a client's feedback and perspective. In addition, video footage of jury deliberations in a mock trial may be a valuable settlement tool if shown during settlement negotiations to demonstrate to the opposing side the pitfalls awaiting them at trial. Even though attorneys in high-stakes or complex cases would be wise to opt for lengthier mock trials, many trial consultants now offer abbreviated mock trials and focus groups when budget or scheduling constraints are at issue.

### **Trial: The Rule, Not the Exception**

Experienced consultants are good at what they do not only because most have a background in psychology or other behavioral sciences but also because this is what they do for a living. In short, a trial consultant generally has vastly more trial experience and insight than any one attorney may have. Whereas an attorney may be juggling a handful of cases at once, many of which will never end up going to trial, trial consultants are hired specifically to assist attorneys once a case is put on the trial docket. Thus, when a trial consultant becomes part of a case, the case is headed to trial and the trial consultant gains his or her experience in strictly pre-trial and trial settings. This is precisely

how the trial consultant develops the ability to foresee obstacles that may arise in litigation and sharpens his or her skills in helping attorneys overcome such hurdles.

This valuable experience proves vital for trial consultants as they fulfill one of their most important roles: that of the objective observer. Although attorneys know that the outcome of a trial is highly unpredictable, they can still sometimes develop an overconfidence about their chances of success at trial. A recent study illustrates the risk of relying on the attorney's confidence as an indicator of one's chances in the courtroom. When comparing attorneys' predictions of trial outcomes to actual trial results, the study revealed that 44 percent of the attorneys polled experienced worse outcomes than they had predicted.<sup>9</sup> This result indicates that "far more lawyers [are] susceptible to the overconfidence bias than to the underconfidence bias."<sup>10</sup> As noted by the author of the study, "Many of the most overconfident lawyers will be the senior partners who may not typically obtain third-party review or feedback in the course of their practice."<sup>11</sup> A trial consultant can help a trial team break through the blinding cloud of confidence. The trial consultant is not a "yes man" but a person who plays the role of devil's advocate. The consultant spots the holes in the case and helps the attorney fill them or tells the attorney that the holes are too big to fill. The trial consultant offers a fresh perspective and honest criticism.

### **A Few Final Thoughts**

Keeping all of this in mind, simply retaining a trial consultant does not by any means assure a favorable verdict for the attorney. Like attorneys, trial consultants come in varying shapes and sizes, and a great deal of the benefit of using a trial consultant will depend on the particular consultant being retained. In fact, a seasoned litigator may be more experienced and intuitive than a particular trial consultant. For this reason, it is imperative to keep certain characteristics and qualities in mind when retaining a trial consultant. The value of a trial consultant lies in his or her credentials and qualifications, practical and real-world experience, ability to perform well under pressure, ample understanding of substantive areas of the law, and, most important, his or her solid reputation in the field.

Although a trial consultant is not necessarily a line item in a trial lawyer's budget, the benefits of hiring one may be well worth the expense. However, even if it is cost-prohibitive to engage a trial consultant on a given case or if a trial attorney simply has reservations about doing so, there may be something to learn from scheduling a brief meeting with a trial consultant. At a minimum, it would not hurt to read up on the role of consultants and the techniques they use. Looking to online sources for insight is also a good idea. One

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\*1–2 (Ohio App. Div. May 25, 2007).

<sup>14</sup>*Id.*

<sup>15</sup>*Dockery v. Dockery*, No. E2009-01059-COA-R3-CV, 2009 WL 3486662 (Tenn. App. Div., Oct. 29, 2009).

<sup>16</sup>*In re T.T.*, 228 S.W.3d 312, 322 (Tex. App. Div. 2007).

<sup>17</sup>*In re Welding Fume Products Liability Litigation*, MDL 1535, No. 03-17000 (N.D. Ohio).

<sup>18</sup>2009 WL 4730899 (N.D. Cal. 2009).

<sup>19</sup>*Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).

<sup>20</sup>*Id.* at 654.

<sup>21</sup>*Ledbetter v. Wal-Mart Stores Inc.*, No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, \*1 (D. Colo. Apr. 21, 2009).

<sup>22</sup>*Id.*

<sup>23</sup>*Murphy v. Perger*, [2007] 67 C.P.C. (6th) 245 (Can.).

<sup>24</sup>*Id.*

<sup>25</sup>2010 WL 2265668 (M.D. Tenn. 2010).

<sup>26</sup>See [www.fjc.gov/public/pdf.nsf/lookup/FedL1009.pdf/\\$file/FedL1009.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FedL1009.pdf/$file/FedL1009.pdf).

<sup>27</sup>[www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

<sup>28</sup>Facebook, Frequently Asked Questions, available at [www.facebook.com/help/?faq=17158](http://www.facebook.com/help/?faq=17158) (last visited Jan. 6, 2011).

<sup>29</sup>[thesportdigest.com/archive/article/athletic-departments-battle-facebook](http://thesportdigest.com/archive/article/athletic-departments-battle-facebook).

<sup>30</sup>*Torres v. Lexington Ins. Co.*, 237 F.R.D. 533 (D.P.R. 2006).

<sup>31</sup>*Id.* at 533–534.

<sup>32</sup>*Id.*

<sup>33</sup>See Eric B. Meyer, *How Facebook Can Make or Break Your Case*, available at [www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463917586&slreturn=1&hbxlogin=1](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463917586&slreturn=1&hbxlogin=1).

<sup>34</sup>Facebook, Frequently Asked Questions, *supra* note 28.

<sup>35</sup>*Id.*

<sup>36</sup>*United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000).

<sup>37</sup>Facebook, Frequently Asked Questions, *supra* note 28.

<sup>38</sup>*In re K.W.*, 666 S.E.2d 490, 494 (N.C. App. Div. 2008).

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such online source is a website entitled *The Jury Expert*, which is produced by the American Society of Trial Consultants ([www.thejuryexpert.com](http://www.thejuryexpert.com)). **TFL**



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### Endnotes

<sup>1</sup>Franklin Strier, *Paying the Piper: Proposed Reforms of the Increasingly Bountiful But Controversial Pro-*

*fession of Trial Consulting*, 44 SAN DIEGO L. REV. 699 (1999).

<sup>2</sup>Audrey Cleary, “Scientific Jury Selection: History, Practice, and Controversy,” 1 (unpublished) (available through Villanova University).

<sup>3</sup>Steven D. Penrod and Solomon M. Fulero, *Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?* 3 FORENSIC REP. 233, 234 (1990) (citing S. Penrod, “Study of Attorney and Scientific Jury Selection” (doctoral dissertation, 1979) (unpublished manuscript)) available at University of Minnesota Law School.

<sup>4</sup>Fulero and Penrod, *Attorney Jury Selection Folklore*.

<sup>5</sup>Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?* AMER. UNIV. L. REV. 703, 708 (1991).

<sup>6</sup>Paul V. Olczak, Martin F. Kaplan, and Steven Penrod, *Attorneys' Lay Psychology in Selecting Jurors and its Effectiveness: Three Empirical Studies*, 21 (1989) (unpublished manuscript).

<sup>7</sup>See generally *supra* note 5.

<sup>8</sup>One study found that evidence factors accounted for 34 percent of the variance in jury verdicts, whereas personality characteristics of the parties involved accounted for only 8 percent, and jurors' characteristics and attitudes only 2 percent of the variance. Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW AND HUM. BEHAV. 1–14 (1987).

<sup>9</sup>Jane Goodman-Delahunty, et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL., PUB. POL'Y & L. 133, 140–141 (2010).

<sup>10</sup>*Id.* at 141.

<sup>11</sup>*Id.* at 152.