

Rachel Hartje, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 Cal. W. L. Rev. 479 (2005).

### **Evolution of Jury Consulting**

The birth of jury consulting is attributed to the successful defense of the “Harrisburg Seven.” [FN90] A group of Vietnam War protesters were accused of various acts of civil disobedience, including “conspiring to destroy selective service records and kidnap Henry Kissinger.” [FN91] Trial was set to take place in the highly conservative area of Harrisburg, Pennsylvania. [FN92] To combat the government's seemingly endless resources, a team of social scientists was hired by the defense. [FN93] Consisting mostly of antiwar student volunteers, [FN94] the social scientists \*492 conducted telephone polls and collected data on the types of people who shared the defendants' antiwar beliefs. [FN95] Once all data was compiled, a demographic profile was created of the type of individuals most likely to be sympathetic, or unsympathetic, to the defense. [FN96] The defense then used these profiles to assist them in the jury selection process.

The government spent \$2 million on the case and “[d]espite the investment of considerable time and money by the prosecution commensurate with the attention given the trial by the media . . . it ended with a hung jury,” a vote of 10-2 in favor of acquittal. [FN97] The hung jury was accredited in large part to the work of the social scientists hired by the defense and thus, the jury consulting industry was born.

Soon after the “Harrisburg Seven” were released, similar efforts were spawned throughout the country in an effort fueled “by an ethical sense that their help was merely allowing unpopular underdogs to get a fair and impartial jury.” [FN98] However, the apparent success of these efforts did not go unnoticed by commercial enterprises, and soon large corporations were seeking the assistance of jury consultants in civil suits. [FN99] Additionally, high-profile figures also began to enlist the help of jury consultants. For example, jury consultants are often credited with the acquittal of two former cabinet members of President Nixon during the Watergate scandal. [FN100]

Although jury consultants claim high success rates, little research has been conducted on the actual effect jury consultants have in the outcome of a case. Despite this fact, many prestigious firms consider the use of jury consultants essential to trial preparation. [FN101] As a result, the jury consulting industry has shown a remarkable growth in both size and pocketbook. [FN102] “Jury consultants already dominate big-\*493 money civil cases. They frequently play key roles in those criminal cases with the highest visibility and greatest implication for public policy.” [FN103] Cases with unrelenting media coverage are also prone to the use of jury consultants. Just to name a few recent cases, Martha Stewart, Scott Peterson, David Westerfield, O.J. Simpson, the Menendez brothers, the police officers in the Rodney King police brutality case, and basketball star Jayson Williams, have all used jury consultants. [FN104] In these cases, there were increased concerns over the complexity of the issues and the development of relationships with jurors, and jury consultants were utilized in all stages of litigation. [FN105]

There is an “inescapable irony” that follows the evolution of jury consulting. [FN106] The first beneficiaries were indigent defendants who were being prosecuted for their political beliefs during a volatile time in our history when a majority of jurors were not able to see beyond the guilt of the defendant. [FN107] By contrast, today's typical clients are “wealthy and

privileged: corporations and well-heeled, prominent individuals.” [FN108] How quickly the pendulum swings. [FN109]

### **Advantages of Jury Consulting**

Potential jurors “inevitably bring with them the views and biases built into their race, religion, age and gender. These preconceptions supposedly influence the eventual verdict as much, if not more than, the evidence presented at trial.” [FN143] If jury selection plays such a large role in the outcome of a trial, it is no surprise a jury consultant's assistance during voir dire has become almost commonplace. Jury consultants work to eliminate some of the guesswork that goes into selecting a sympathetic jury. Further, “[a]ttorneys have increasingly recognized what successful companies have known for a long time; rarely do large companies risk millions of dollars introducing a new product without pre-testing it on potential customers.” [FN144] This rationale is easily applied to the selection of jurors. Lawyers can spend as much money as they want on splashy presentations and coming up with catchphrases, but unless they have a receptive jury, all efforts are in vain.

One of the strongest arguments favoring the use of jury consultants is that the sophisticated methods used to profile jurors may actually decrease the use of stereotypes during voir dire, thereby allowing lawyers to stay within the constitutional limits established in *Strauder* and its progeny. [FN145] A lawyer who hires a jury consultant no longer relies on hunches or intuition based on blatant racial or ethnic stereotypes and “[f]ewer jurors will draw suspicion solely on the basis of their demographics.” [FN146]

[T]he less information attorneys have about potential jurors, the more attorneys have to rely on gross stereotypes in the exercise of their peremptories, and the likelihood increases that jurors will be excused on what are in reality race-based and gender-motivated challenges. . . .

\*498 [M]ore information about the jurors helps satisfy the goals of *Batson*. . . . [FN147]

The jury selected in the double murder trial of Scott Peterson was lauded by experts for its diversity and fairness. [FN148] Both the prosecution and defense hired jury consultants and after looking at nearly 1600 prospective jurors, the six men and six women who served on the jury included a social worker, a firefighter-paramedic, an accountant, a Teamster, a security guard and a woman whose husband is in jail for murder. [FN149] Diverse juries are more likely to be seen as objective, adding to the legitimacy of the outcome and increasing public confidence in the judicial system. [FN150]

Previously, the legitimacy of jury trials proceeded upon the assumption that such biases, predilections or emotional dispositions can be exposed in a voir dire inquiry that is comprehensive, case specific, and respectful of the complexities of both human attitudes and the capacity of average people to express themselves about such sensitive and personal matters in the heightened and stressful environment of a public courtroom. [FN151]

Moreover, trial attorneys often favor a detailed and thorough voir dire. [FN152] An extensive voir dire, however, makes trials more costly and lengthy. [FN153] A trial judge has broad discretion in the amount of time dedicated to voir dire and recently, “pressures on the judiciary to clear an already overburdened docket often force courts to provide limited attention to voir dire questioning.” [FN154] As this pressure grows, there is potential for a litigant's constitutional rights to be compromised as “lawyers will have less contact with potential jurors and will be able to learn less about them.” [FN155] Jury consultants help alleviate this \*499 problem by conducting research, creating juror questionnaires and developing juror profiles before voir dire even begins. [FN156]

Jury consultants are especially prevalent in high-profile cases. [FN167] High-profile cases present the special challenge of rooting out those who are “auditioning” to be on the jury. [FN168] These types of jurors are \*500 known in the legal community as “stealth jurors [or] people who lie to get chosen for the jury in a high-profile trial.” [FN169] Usually these individuals have their own agenda, and it does not include basing the verdict on the evidence presented but rather their own fifteen minutes of fame or retribution for a past crime. [FN170] For example, in the jury selection phase of the Scott Peterson trial, the defense team believed it found at least one such juror in the jury pool. [FN171] Defense attorney Mark Geragos repeatedly asked a retired secretary on the venire about a trip she had recently taken. [FN172] Geragos claimed the secretary was overheard saying Scott Peterson was “guilty as hell,” “he was going to get it,” and she was trying really hard to get on the jury. [FN173]

The enticement of possible celebrity status and monetary gain makes jury selection in high-profile trials even more important. Stealth jurors are more prevalent in high-profile trials as they often “become celebrity players in some kind of reality TV performance.” [FN174] Media attention has allowed many jurors on high-profile cases to capitalize on the experience. For example, jurors in high-profile cases have posed in Playboy Magazine, [FN175] received book deals detailing their experience and appeared on numerous television shows. [FN176] In a recent California case, after the first trial ended in a hung jury, nearly half of the jury in a highly controversial and publicized gang-rape case was retained by the defense to assist in preparations for the second trial. [FN177] While some consider the idea “novel and edgy,” critics argue adding money to the equation “taints \*501 the judicial process.” [FN178] The practice is “ethically debatable and [critics] wonder if jurors hoping to cash in on consultation fees might try to hang a jury.” [FN179] The concern is a legitimate one as “where jurors seek self-aggrandizing media exposure to personally profit from their jury service, trial by jury is severely impugned.” [FN180] Jury consultants help in ferreting out “stealth jurors” by developing voir dire questions aimed at eliciting subtle biases, conducting detailed research before voir dire, and observing juror reactions. [FN181]

Finally, lawyers have the right to hire experts in order to fulfill their duty of providing the best representation for their client. [FN182] “The lawyer is the client's ‘champion against a hostile world’--the client's zealous advocate against the government it self [sic].” [FN183] A jury consultant is no different, and arguably no more persuasive, than a medical expert who takes the stand to explain a complex medical procedure or a psychologist put on the stand to create a defense for the client. [FN184] Whether you are being prosecuted for a crime or stand to lose millions of dollars in a civil trial, every client wants a lawyer to use all possible resources at their disposal to help prepare and present the best possible case. [FN185] Despite claims of exaggerated success, and “notwithstanding the absence of any guarantee of victory and the pricey costs of services,” [FN186] jury consultants are simply part of the modern arsenal at a trial lawyer's fingertips. [FN187]

Debra Sahler, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 Alb. L.J. Sci. & Tech. 383 (1996).

### **Trial Consultants and Their Role in Jury Selection**

Once used only in multi-million dollar cases, trial consultants have become fixtures in the courtroom. [FN10] Trial attorneys have become increasingly sophisticated in their use of research to select juries. [FN11] For example, in the O.J. Simpson trial, the defense hired

consultants to conduct pre-trial research. [FN12] The consultants wanted to know what demographics would predict favorable and unfavorable jurors, what the trial themes should be, how the panel would view the defendant, and the overall desired characteristics of the jury panel. [FN13]

Jury consultants assist with jury selection by utilizing and interpreting criteria such as demographic studies, mock juries, shadow juries and surveys. [FN14] The social sciences are the medium \*387 that the jury consultant uses to discern information about the probable response of actual jurors. [FN15] The consultants' goal is to design a jury panel that will be most sympathetic or most hostile to their side of the case. [FN16] Additionally, consultants aid in the formation of voir dire questions in order to ascertain people's predispositions, with the goal of effectively using cause challenges and peremptory challenges. [FN17] With the information obtained from the surveys and research, the consultant draws a portrait of the ideal juror. [FN18]

Surveys developed specifically for pre-trial research consider the specifics of the individual case. [FN19] These trial surveys assist in the development of the juror profile and the assessment of potential\*388 trial themes. [FN20] Consultants and attorneys may also use questionnaire data to determine the ideal composition of the jury. [FN21] The data obtained can be used to develop demographic profiles of jurors with favorable and unfavorable biases. [FN22] Another technique used by consultants is a "ranking scale," which assigns numeric values to instincts and stereotypes. [FN23] Based on information gathered in scientific community attitudinal surveys, this technique has been assessed as more accurate than acting on traditional preferences based merely on generalizations and stereotypes. [FN24]

Shadow juries consist of lay persons who sit in the courtroom, observe the trial in progress, listen to the evidence and obey the judge's instructions. [FN25] Shadow jurors are matched demographically with the actual members of the jury. [FN26] The objective is to create a group of persons that will undergo the same experience as the jurors. [FN27] The principal distinction between the actual jury and the shadow jury is that counsel may freely discuss the case with the shadow jury. [FN28]

Mock trials provide the attorneys and consultants with the opportunity to refine the potential juror profile. [FN29] During the mock trial, attorneys may observe third party reactions to the case that may help the attorney formulate trial strategies. [FN30] Restrictions of time and money often do not permit a mock jury to hear the entire trial, therefore the case often is shortened to a few \*389 hours. [FN31] Most importantly, the mock trial enables the attorney to devise a strategy for jury selection. [FN32]

Some jury consultants use "body language" to select jury members. [FN33] For example, research has suggested that people who touch their noses while speaking are liars. [FN34] Thus, the consultant who assists a lawyer with voir dire "will know what the odds say about which nefarious nose-touchers to strike." [FN35] One of the most successful consultants connects witnesses and mock jurors to galvanic skin-response machines, which measure the changes in skin temperature in order to assess responses. [FN36]

### **The Disadvantages of Using Jury Consultants**

There are two major disadvantages to using jury consultants. First, if jury consulting is effective, those without the means to afford jury consultants will be harmed. Second, the use of jury consultants abuses the jury system and threatens to impede the right to a fair and impartial jury. A consequence of the potential damage when using consultants is the implication that attorneys abuse the jury's function.

Although the economical cost of using jury consultants varies with the services provided, [FN83] normally only wealthier litigants can afford the expense of expert assistance. [FN84] The personnel and labor costs involved in conducting a large survey and analysis of the data make consulting an investment of significant time and money. [FN85] Thus, those lacking the financial resources are barred from consulting services.

The jury system has been considered “a prized shield against oppression.” [FN86] Voir dire, or jury selection, exists to ensure that the jury is comprised of competent jurors who will weigh the evidence, decide the facts, and assess a witness' credibility without bias, prejudice, or partiality. [FN87] Ideally, those jurors who possess \*397 adverse beliefs about either party should be eliminated either for cause or with a peremptory strike. [FN88] In fact, peremptory challenges help produce fair and impartial juries. [FN89] By allowing each side to exclude those jurors it believes will be most partial toward the opposing side, peremptory challenges “are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.” [FN90]

We place faith in the jury, despite the preoccupation with the ethnic composition and socio-economic status of the jury. [FN91] Besides creating similar outcomes for litigants, the jury serves to “legitimize those [crucial] decisions.” [FN92] An outcome is legitimate not only because of its intrinsic value or accuracy, but because of lay participation and the jury's application of lay values to the impersonal, neutral laws. [FN93] However, if jury science can actually \*398 control the result of a trial, a defendant's right to a fair and impartial jury is threatened. [FN94]

Consulted or scientific jury selection may conflict with the above principles of a fair jury. [FN95] An impartial juror is one who can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [FN96] A juror who has previously formed an opinion cannot be impartial. [FN97] If the results of a trial can be controlled “simply by choosing jurors labeled acceptable by social scientists, then trial by jury would cease to function impartially and ultimately would have to be abandoned.” [FN98] If attorneys are to ensure an impartial jury, then the jury selection should be comprised of persons who can “live up to these ideals of blind justice.” [FN99] The selection of jurors with a high degree of reliability to acquit or convict may erode the Sixth Amendment's guarantee of an impartial jury. [FN100] Additionally, by selecting jurors who will convict with statistical reliability, jury consulting endangers the role of the jury in our democratic government.

Regardless of the jury consultants' rate of accuracy, jury selection by scientific consulting is a trial practice that undermines \*399 public confidence in the jury system. [FN101] Some people perceive the use of consultants as a way to predetermine the outcome and to represent someone else's version of justice -- a fair and impartial jury. [FN102] Additionally, some people believe that selecting a jury in such a way will lead to compromised representation. [FN103] The potential direct harm inflicted by jury consulting conflicts with our principles of the jury system. By conflicting with these principles, the legal profession must also share in some of the responsibility for the repercussions.

### **Proposed Model Rule**

Because the use of jury consultants results in a perception of unethical selection of juries and a corresponding loss of public faith, a new rule and comment should be incorporated into the American Bar Association's Model Rules of Professional Conduct. As part of the “framework for the ethical practice of law,” [FN128] a new rule will symbolically represent [FN129] the

professional recognition of \*404 a problem and its efforts to solve the problem. [FN130] An ethical rule could help to “persuade the general public that practitioners are especially deserving of confidence, respect, and substantial remuneration.” [FN131]

The following rule should be incorporated into the Model Rules of Professional Conduct:

3.45: Use of Consultants and Use of Social Science Research in Jury Selection

A lawyer shall not use jury selection information in a manner that is inconsistent with the responsibilities of a lawyer or in a manner that undermines faith in the jury system.

COMMENT:

A central goal of the legal profession is to ensure “the impartial and efficient administration of justice.” [FN132] This rule seeks to prevent an advocate's utilization of information from jury consultants and social consultants to predetermine the jury's verdict. The use of social science information to select jury members may harm litigants and may undermine public confidence in our judicial system. [FN133] Using information in an attempt to predetermine the outcome of the verdict suggests an inability to fulfill the lawyer's professional role as a public citizen concerned with the fair administration of justice. [FN134] “Where juror questionnaires or other community attitudinal surveys are used by either the defense, the prosecution, [[or the plaintiff], the . . . data should be made available to both sides [[[prior to jury selection].” [FN135] Also prior to jury selection, “litigants [should be required] to inform the court and the members of the venire . . .” when they use jury consultants. [FN136] This requirement would provide the opposing party with notice of the use of a jury consultant. Informing the court that a jury consultant is being used would provide the opposing party the opportunity to decide whether to hire its \*405 own consultant and the indigent defendant could request that the court appoint one. [FN137]

This rule does not need enforcement in order to be effective. [FN138] Coercive and punitive sanctions are “by no means the sole, or even the most important means by which a profession uses a code to regulate the conduct of its members.” [FN139] By the establishment of this rule, the profession would be sending a message to the public that the profession does not seek to “stack” a jury. The mitigation of the effects and the disproportionate use of consultants by those who can afford them, better maintains the legitimacy of a jury system. This rule would be an appropriate response to the public, while helping to portray the profession as ethical. [FN140] Furthermore, the ethical rule would help to raise “the moral conscience of the legal profession.” [FN141]

Stephanie Leonard Yarbrough, *The Jury Consultant--Friend or Foe of Justice*, 54 SMU L. Rev. 1885 (2001).

### **What Does the Future Hold For Jury Consultants?**

Jury consultants first became popular in the 1970s. [FN67] In 1982, when the American Society of Trial Consultants was founded, there were fifteen such consultants practicing in the United States. [FN68] Today, the American Society of Trial Consultants is made up of 350 members. [FN69] Advances in technology have increased the efficiency, convenience, and accuracy of jury research. On-line research yields immediate case study results. [FN70] For example, the future of focus groups is changing. In a new type of focus group, participants are initially contacted by phone. The focus group participants then log on to the Internet and participate in an on-line focus group. Using the Internet for focus groups dramatically \*1898 reduces organization time. The potential downside, however, is that the consultant does not get the opportunity to witness the individual's body language, reactions, and general demeanor.

[FN71] Likewise, the surrogate juror bases his or her opinions on a written description of the case, rather than viewing the attorney's performance, the witnesses' performance, charts, photographs, and other trial exhibits. [FN72]

Since utilizing on-line research methods, such as virtual focus groups, dramatically cuts down on organization time, this reduces the cost of the research. Thus, clients and smaller law firms will benefit from jury research at a fraction of the cost. As mentioned earlier in this article, 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 over 150 million users. [FN73] With so many users representing such a wide variety of demographic criteria, on-line research can yield large sample sizes that consists of demographic backgrounds truly representative of the actual jurors. Another advantage of technology-driven research is that by simply logging on to the computer, the jury consultant or attorney can compile data from people from all over the country or even the world. On-line research saves time and money by eliminating the need for the extensive time and costs associated with travel and the planning of focus group sessions. [FN74]

Where does one find surrogate jurors on the Internet? The jury consultant selects the surrogate jurors from an Internet database. [FN75] After the consultant determines what demographic traits the actual jury is likely to have, he or she requests surrogate jurors from the database that have those specific traits. [FN76] The consultant can choose the surrogate jurors either by stratified sampling, random sampling, or representative sampling. [FN77]

In stratified sampling, the consultant chooses the surrogate jurors specifically by their "demographic characteristics, values and beliefs, opinions and attitudes, and life experiences that relate to events in the case." [FN78] In random sampling, the consultant chooses the surrogate jurors from motor vehicle registration lists and voter registration lists. [FN79] Clearly, this method is not as desirable as stratified sampling, since the findings from this group of surrogate jurors may not mirror the findings of the actual jury. Finally, in representative sampling, the surrogate jurors are chosen if their demographical information represents "potential jurors in the venue where the trial will be held." [FN80] While the result from this sample is \*1899 likely to be more representative of the actual jury than results gained from a sample chosen by random sampling, stratified sampling produces the more statistically-significant results. After the consultant selects the surrogate jurors, the consultant notifies the participants of the date, time, and website address of the upcoming on-line session. [FN81] At that time, the participants are given a password to use during their on-line session. Consequently, advances in technology are changing the future of jury consultants.