



2001

Jury Consultant - Friend or Foe of Justice, The

Stephanie Leonard Yarbrough

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Stephanie Leonard Yarbrough, *Jury Consultant - Friend or Foe of Justice, The*, 54 SMU L. Rev. 1885 (2001)
<https://scholar.smu.edu/smulr/vol54/iss5/12>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE JURY CONSULTANT—FRIEND OR FOE OF JUSTICE

*Stephanie Leonard Yarbrough**

*We have not wings, we cannot soar;
But we have feet to scale and climb
By slow degrees, by more and more,
The cloudy summits of our time.
The mighty pyramids of stone
That wedge-like cleave the dessert airs,
When nearer seen, and better known,
Are by gigantic flights of stairs.
The distant mountains, that uprear
Their solid bastions to the skies,
Are crossed by pathways, that appear
As we to higher levels rise.
The heights by great men reached and kept
Were not attained by sudden flight,
But they, while their companions slept,
Were toiling upward in the night.¹*

I. INTRODUCTION

The year is 1963. Martin Luther King, Jr. is in solitary confinement in a Birmingham, Alabama jail for leading non-violent protests against racial discrimination.² If you were in his shoes in 1963, and facing prosecution for these actions, would you think the outcome of the trial was predictable? King said,

Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear-drenched communities, and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty.³

Hopefully, in 2001, juries are more compassionate, understanding, and free from prejudicial biases. Jury consultants' services are in demand, however, because potential jurors are not always such unbiased arbiters of justice. Juries are made up of ordinary people—some of who have

* Bachelor of Arts, College of Charleston, 1995; Master of Public Administration, University of Charleston, 1998; Juris Doctor, Southern Methodist University School of Law, 2001.

1. WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* 422-23 (Simon & Schuster ed., Simon & Schuster 1993) (quoting Henry Wadsworth Longfellow).

2. *See id.* at 258.

3. *Id.* at 262 (quoting Martin Luther King, Jr.).

predispositions towards certain groups of people based on their immutable characteristics.

Jury consultants know that each potential juror is magnificently unique. His or her ideology has been molded by unique circumstances such as background, age, education, race, gender, religion, and socioeconomic status. Every jury is unique as well. Group dynamics mold and shape the jury's decision. This dynamic is readily apparent from watching a jury deliberate in a mock trial exercise. When twelve men and women gather to decide the fate of the parties, a "leader" quickly sways the deliberations and course of discussion. For this reason, jury consultants recognize the importance of identifying this very important juror.

In an ideal world, all juries would be unbiased and fair. But what does that really mean? How does one define "unbiased" and "fair"? The very strength of the American jury system is also its' biggest weakness. Moreover, the strength of the jury system invites different points of view into the deliberative process. By embracing different viewpoints and inviting ordinary citizens to participate in the judicial process, our jury system helps ensure that one voice does not drown out the others. And, while the concept of a "jury of your peers" is very appealing, such a jury is hard to come by. Thus, one way to look at the role of a jury consultant is as a safeguard to help ensure that the client's case is as well developed and prepared as possible. The jury consultant's major task, if the case ends up going to trial, is to ensure that the client is represented by jurors that are sensitive and open to the issues presented in his or her case. This article will discuss the role of jury consultants and their impact on the American judicial system.

II. WHO USES JURY CONSULTANTS?

High profile cases are those that are likely to spark intense scrutiny and speculation within a community—either because of the emotions elicited by the fact scenario or the notoriety of the parties involved. The following case involves a fact pattern likely to bring a strong emotional response from the surrounding community. On November 24, 1997, a young couple frantically dialed 911. The Aisenbergs told the 911 operators that their five-month-old baby girl was missing from her crib.⁴ Based on evidence gained from conversations recorded by court-approved bugs strategically placed in the Aisenberg's home, the prosecutor charged the couple with conspiracy and lying to investigators.⁵ The Aisenberg's attorney, Barry Cohen, felt strongly that jury consultants were critical in gauging the public's reaction to the case.⁶ Likewise, the Oklahoma City bombing trial and the Eric and Lyle Menendez trial achieved so much fame and notoriety that the names of the individuals involved became

4. See Pamela Griner Leavy & Krista Reiner, *Lawyers Use Trial Consultants to Fine-Tune Tough Cases*, TAMPA BUS. J., June 1, 2000, at 28.

5. See *id.*

6. See *id.*

household words. Decision Quest, a Los Angeles based trial consulting firm, assisted in both of these cases.⁷ Attorneys participating in litigation involving “celebrities,” such as O.J. Simpson, also routinely use social scientists to help prepare for a trial.⁸

As the damages in litigation become higher and higher, professional jury consultants are rapidly becoming more popular. It is not unusual to turn on the nightly news to hear about the latest multi-million dollar verdict awarded by a jury—a verdict that often baffles people, particularly in light of the circumstances at issue in the case. Juries are difficult to predict. Therefore, the professional assistance of a jury consultant does not come cheaply. Being well aware of the value of the services they provide to their often panic-stricken clients, jury consultants are in the driving seat when it comes to setting prices. After all, “[i]n a legal system starring a ‘jury of one’s peers,’ it is vital to understand how a dozen citizens will perceive your case.”⁹

III. HOW DO YOU KNOW IF YOU NEED A JURY CONSULTANT?

Jury consultants are often used in high-risk litigation. This makes sense, as it is illogical to spend large amounts of money on mock trials, witness preparation, and community profiling for litigation where only a small amount of money is at stake. When deciding whether or not a jury consultant’s services are needed, a risk manager should consider a few questions. First, how likely is it that damages will be awarded?¹⁰ If there is a good possibility damages will be awarded, what amount is likely to be awarded?¹¹ The most important question to consider at this point is whether or not the client can afford the potential damages. If the potential damage outcome is high, utilizing the services of a jury-consulting firm is a good idea.

IV. TIMING ISSUES—WHEN SHOULD YOU HIRE THE JURY CONSULTANT?

The decision of when to hire a jury consultant belongs to the attorney and the client. In the past, jury consultants were hired late in the trial preparation process. The role of the consultant, however, has changed from merely assisting in voir dire to involvement in virtually every stage of the litigation process. The limitations of the consultant’s involvement are usually determined only by the client’s ability to pay.

7. *See id.*

8. *See id.* (stating that Los Angeles based Decision Quest was employed by the plaintiff families in the O.J. Simpson civil suit).

9. Joseph A. Rice, Ph.D., *Twelve Angry Men? Think Again*, Jury Research Institute, at <http://www.jri-inc.com/PRIMA%20article.html> (last modified Jan. 21, 2001).

10. *See* Dorothy K. Kagehiro & Dale S. Frediani, *Do I Need Jury Research?*, 223 N.Y.L.J. 7, at *1 (2000).

11. *See id.*

One should wait to hire a jury consultant until the facts and issues in the case are fully developed. Retaining a jury consultant, however, should occur early enough to allow him or her ample time to properly analyze and use the information gathered during the research. Rather than a matter of strategy, the decision regarding when to hire the jury consultant is usually pre-determined by the client's financial resources, or lack thereof. Regardless, the jury research must be conducted before the pre-trial process so that any gaps that need to be filled can be addressed by additional research early enough for trial. If the issue is as simple as needing additional or different visual aids, time must be allotted for such tasks to be completed.¹² The value of the consultant is enveloped in his or her research findings. Proper planning will allow ample time for the jury consultant to not only complete his or her research, but it will allow time for the consultant's findings to play a key role in developing the trial strategy.¹³ One final note regarding timing—jury research does fall within, and is protected by, the attorney-client privilege. Therefore, if jury research is underway before a principal of the client is deposed, attorneys must ensure that the deponent does not reveal the existence or the findings of the jury research during the deposition.¹⁴

Now the client and his or her attorney must decide which jury services are needed.¹⁵ The traditional role of a professional jury consultant was to assist in voir dire. Today, that role has dramatically changed. Jury consulting firms now provide a variety of services, often tailor-made for the particular case at hand or molded around the specific needs of the law firm that hired the consultant. Services range from last-minute advice during jury selection to more extensive involvement, such as organizing mock trials and community profiling. As jury consultants' popularity continues to rise, clients will find that they have numerous consulting firms to choose from—and a limitless amount of services to consider.

V. THE VALUE OF STATISTICAL ACCURACY

The jury consultant's price tag is often related to the caliber of research derived from his or her services. The client must determine what level of statistical accuracy he or she expects from the consultant's research. Specifically, what is the desired margin of error?¹⁶ The margin of error is the "difference between the results obtained from the sample (the number of participants in the jury research exercise) and results that would be obtained from the population of interest (the venire)."¹⁷ Sample sizes of less than ten participants are not advisable because the results obtained from such a small sample are not likely to accurately predict the outcome

12. *See id.*

13. *See id.* at *4.

14. *See id.*

15. *See id.* at *1.

16. *See id.* at *2.

17. *Id.* at *1.

at trial.¹⁸ Moreover, such a small sample size is not statistically significant and is a waste of the client's money.

If the client merely wants to gain an understanding of how the jury is likely to perceive the case as a whole, then a small sample size consisting of approximately twenty people can produce an accurate result.¹⁹ Mock trials, focus groups, and community questionnaires should contain a sample size of approximately thirty-six people to be statistically representative of the likely conclusion of specific issues at trial.²⁰ When the client demands in-depth and precise research, the sample size increases. For example, if the client wants a profile of potential defense-oriented jurors, as compared to potential plaintiff-oriented jurors, then a sample size of approximately 100 to 300 people is required.²¹

VI. WHAT SERVICES DO JURY CONSULTANTS PROVIDE?

A. VISUAL AIDS

The services provided vary by consulting firm. For example, the California-based Jury Research Institute provides services such as mock trials, focus groups, jury selection, opening statement consultation, community attitude surveys, damage award assessment, and jury instruction review.²² The Jury Research Institute also constructs visual aids for trial. Among other things, the consulting firm designs exhibits, produces videos, and develops computer animation.²³ Many consulting firms also provide assistance producing first-class visual aids. Video graphics, charts, photographs, and blow-ups of correspondence are effective, demonstrative tools that help clarify the facts and evidence to the jury.

While the quality of the presentation is very important, the visual aids must be tested before the actual trial. Mock trials provide a perfect opportunity to test the effectiveness of the visual aids.²⁴ Surrogate jurors should be questioned at length after the mock trial about their response to the different visual aids. If a particular aid was unclear or misleading, then it should be changed and re-tested before the trial.²⁵ While a visual aid's function may be unambiguous to the attorney, its purpose may be lost on the average juror. By testing the visual aids during a mock trial, the attorneys and consultants can modify the visual aids to guarantee their optimum effectiveness. Sometimes during a mock trial the surrogate jurors inform the consultants that a point is unclear and may be clearer if the attorney used a visual aid. Finally, it is important for the

18. *See id.*

19. *See id.* at *2.

20. *See id.*

21. *See id.*

22. *See* Jury Research Institute, at <http://www.jri-inc.com> (last visited January 23, 2001).

23. *See id.*

24. *See* Dorothy K. Kagehiro & Dale S. Frediani, *Do I Need Jury Research?*, 223 N.Y.L.J. 7, at *3 (2000).

25. *See id.*

consultant to understand which aids were well perceived by the surrogate jurors. Those particular charts, diagrams, or videos should receive heightened attention during the trial. The consultant must see to it that such high-profile visual aids are of the highest quality the client can afford.

B. WITNESS PREPARATION

Professional jury consulting firms also aid in witness preparation. Consultants and attorneys both realize that an ill-prepared witness can wreak havoc on a case. Thus, consulting firms go to great lengths to make certain that witnesses are well prepared, leaving almost nothing to chance. For instance, the consultant may take the witness to the courtroom before the actual trial. The witness's familiarity with the environment is likely to ease his or her anxiety on the day of the trial. Next, consultants work with the witness to make sure he or she conceptually understands the goal of their testimony.²⁶ The consulting firm's proper role is not to *instruct* the witness on what he or she should say, but rather to *aid* in streamlining the witness' testimony. The Jury Research Institute says it is vitally important that the witness understand the "theme" of his or her testimony. In other words, the witness must appreciate and take into account how each statement impacts this central theme.²⁷

Jury consultants use videotaping to prepare witnesses for trial. Most witnesses are not familiar with the dynamics of a courtroom or the tension of a trial setting, and are uncomfortable with the type of questioning they are certain to encounter. Unlike trial lawyers, witnesses are not well versed in the art of public speaking. Consequently, jury consultants will tape the witness and later play the tape for the witness. The witness, and the consultant, then have the unique opportunity to see how he or she "performed".

C. PROSPECTIVE JUROR QUESTIONNAIRES

The traditional method of assessing a potential juror's outlook is by questioning the individual during voir dire. Many courts now allow "Prospective Juror Questionnaires" as a way to obtain more detailed information about potential jurors. While voir dire is a valuable tool, it is restricted in its capacity to obtain probing, in-depth information about an individual's psychological make-up. Jury consulting firms realize the value of utilizing questionnaires to assess potential jurors' attitudes towards the facts at issue in the approaching trial.²⁸ The questionnaires are most often utilized in cases where the facts are particularly complex or

26. See Jury Research Institute, *Frequently Asked Questions*, at <http://www.jri-com/FAQ.html> (last visited Jan. 23, 2001).

27. See *id.*

28. See Susan E. Jones, Ph.D., *Selecting Better Juries: The Prospective Juror Questionnaire*, Jury Research Institute, at <http://www.jri-inc.com/prospect.html> (last visited Jan. 24, 2001).

sensitive.²⁹

Procedurally, there are a few guidelines that the attorney and consultant should adhere to when dealing with such questionnaires. The questionnaires are typically ten to fifteen pages in length. Typical questions include basic demographic inquiries such as age, political affiliation, gender, occupation, and address. The questionnaires, however, also solicit responses that result in a more substantial and comprehensive profile of the individual. The most important questions are perhaps the broad, open-ended inquiries. It is here that the attorney and consultant will likely gain significant insight into the individual's belief system. The individuals are more likely to be forthcoming in the written questionnaire as opposed to oral questioning in voir dire. Public interrogation—particularly in a demanding situation such as voir dire—results in short, anxious responses. In contrast, responding to a questionnaire is a great deal less taxing and is likely to yield much more useful information about an individual.³⁰

After the questionnaire is drafted, it should be presented to the opposing party for review.³¹ After the evaluation is complete, the questionnaire is ready for distribution to the potential jurors. The judge often instructs the potential jurors on how to answer the questionnaire. Filling out the questionnaire usually takes approximately twenty-five minutes.³² After the potential jurors return the completed questionnaires, the jury consultant and the attorney review the responses. Then, the parties engage in voir dire.

The attorneys should streamline the questions they ask in voir dire based upon the responses given in the questionnaires. For example, information gained from the questionnaires may prompt the attorney to delve deeper into the questioning of a particular potential juror. This more focused, specific questioning allows the attorney to gain even more insight into this individual's decision-making tendencies. This process may discredit or confirm certain suspicions the attorney had about the individual's convictions. Finally, according to Susan E. Jones, Ph.D., prospective juror questionnaires are effective when it comes to identifying which potential juror may be the "leader" within the jury.³³ Learning more about this individual's viewpoints is incredibly important, since he or she may sway the votes of the other members of the jury.

29. See Jury Research Institute, *Voir Dire in the Age of Jury Questionnaires and Computer Profiles*, at <http://www.jri-inc.com/voirdire3.html> (last visited Jan. 24, 2001).

30. See *id.*

31. See Susan E. Jones, Ph.D., *Selecting Better Juries: The Prospective Juror Questionnaire*, Jury Research Institute, at <http://www.jri-inc.com/prospect.html> (last visited Jan. 24, 2001).

32. See *id.*

33. See *id.*

D. JURY SELECTION

The more traditional role of the jury consultant is to assist with the actual selection of the jury. The consultant's job is to come up with a profile of the type of person that would be most sensitive to his or her client's case. Clarence Darrow, a prominent Illinois lawyer, said, "[c]hoosing jurors is always a delicate task. Everything pertaining to the prospective juror needs to be questioned and weighted . . .".³⁴ Jury consultants say that the key demographic factors to take into account include the individual's politics, nationality, business, social standing, friends, habits, and the books and newspapers he or she reads.³⁵

Jury consultant Jo-Ellan Dimitrius assisted O.J. Simpson's lawyers in jury selection.³⁶ Dimitrius concluded from the research conducted during trial preparation that African-American women over thirty years old "would not necessarily believe spousal abuse leads to murder."³⁷ Dimitrius commented that Marcia Clark, the prosecutor in the Simpson case, discarded the conclusions of the research. After the trial ended, Dimitrius asked the African-American jurors if they thought spousal abuse necessarily lead to murder. Each and every one affirmed Dimitrius's conclusion.³⁸ Jury consultants know that while demographics are somewhat indicative of a person's ideology, such traits are not always dispositive of the person's belief system. "Jury selection is a process of rejection—and attorneys don't know whom to reject unless they know whom they are looking for."³⁹ Consequently, the job of the jury consultant is to identify the ideal juror, and begin profiling them, which is a complex, and research-intensive process.

E. FOCUS GROUPS

Another device jury consulting firms use are focus groups.⁴⁰ Focus groups are helpful in that they identify initial impressions and bad facts. Focus groups notify the consultant what the surrogate jurors consider to be the irrelevant and relevant issues. As most attorneys recall from the first semester of law school, the way a lawyer perceives the facts and issues in a case is likely to be different from the way a layperson will construe the same facts and issues.

Furthermore, since the jury is obviously going to be composed of average citizens, forming a "study group" of sorts is an excellent way to experiment with the facts of the case. The consultant leads the study group. The groups are kept small, consisting often of only ten participants. At the opening of the meeting, the consultant explains the details of the case,

34. Adrienne Drell, *Complex Decisions*, CHI. SUN TIMES, May 24, 2000, at 6.

35. *See id.*

36. *See id.*

37. *Id.*

38. *See id.*

39. Robert Gordon, *Trial Research in the Age of Technology*, TRIAL, June 2000, at 64.

40. *See id.*

and this is followed by an informal question and answer session.⁴¹ The observations of the focus group may be shocking, but it is much more desirable to deal with bombshells before, rather than during, trial. Clearly, the consultant's findings from the focus group can greatly influence and change the way the attorney prepares for trial.

F. MOCK TRIALS

Mock trials are one of the most popular instruments used by jury consultants. Consultants conduct mock trials in a courtroom setting, and since the surroundings strongly resemble the actual trial, mock jurors feel as if they are actually participating in a trial. Consultants find that the participants have little trouble assuming the role of a juror. Mock trials are an excellent way for the attorney and consultant to get a very real sense of what will happen during the actual trial.

It is important that the surrogate jurors are of the same general demographic composition as the jury pool in the real trial. A mock jury consisting of participants from a sleepy small town in Kansas will not likely reflect the viewpoints of an actual jury pool drawn from residents of Cambridge, Massachusetts. This is not to say that factors such as geographic location, race, gender, age, etc., are necessarily dispositive of an individual's ideology. A general effort, however, should be made to have the mock jury mirror the characteristics of the community from which the actual jury pool will be drawn. Before choosing surrogate jurors, jury consultants should research the demographics of the citizens of the community in which the trial will be held. It is a waste of time and money to conduct a mock trial with surrogate jurors that bear little resemblance to the actual jury.

Regarding accuracy, the goal of a mock trial is to produce information that is statistically significant. If a six-member surrogate jury is selected from a sample size of at least thirty-six people, and the result of this mock trial indicates that seventy-seven percent of the surrogate jurors would conclude that the plaintiff had the stronger case, the chances of getting a jury that would award damages to the plaintiff is ninety-seven percent.⁴²

Jury consultants often videotape the mock trials. This lets the attorney and consultant examine the tape to observe the jury's reactions during the trial and—even more revealing—to observe the jury's deliberations. The tape reveals what information the jury found compelling and which areas the jury found troublesome. Group dynamics within a jury is a critical factor to monitor, and viewing taped jury deliberations is an excellent way to let the consultant get a behind-the-scenes glimpse of what most outsiders never see.⁴³ The consultants take careful note of “[g]roup fac-

41. See Trial Behavior Consulting, Inc., *Trial Consulting and Jury Consulting Services Provided*, at <http://www.trialbehavior.com/services.html> (last visited Jan. 25, 2001).

42. See Dorothy K. Kagehiro & Dale S. Frediani, *Do I Need Jury Research?*, 223 N.Y.L.J. 7, at *2 (2000).

43. See *id.*

tors such as proportional composition of plaintiff-and-defense-oriented jurors, the effect of leadership characteristics among the jurors, and the degree of jurors' commitment to their decisions."⁴⁴ Upon conclusion of the mock jury's deliberations, the jury consultants may advise the attorney to select an alternate course regarding the trial strategy.

Trial Practices Inc., a professional jury-consulting firm, relies on mock trials as a method by which to measure the jury's potential response to the case.⁴⁵ Consultants locate surrogate jurors in a variety of ways, such as advertising in the local newspaper, random telemarketing, and referrals. These mock jurors are paid approximately ten dollars per hour for their services. Jury consulting firms use different methods to gather data from the mock jurors about their opinions of the mock trial. As explained above, many consulting firms choose to videotape the mock trial and the jury's deliberations. A number of jury consulting firms, however, rely on a more technologically-advanced method to gather data. The consultants give the jurors handheld computer devices. The participants are instructed to register their positive and negative responses during the mock trial by pressing certain keys on the device.⁴⁶ The handheld electronic devices have numbers ranging from one to ten.⁴⁷ The consultant instructs the jurors that registering a score of ten signifies maximum *approval*, while registering a score of one signifies maximum *disapproval*.⁴⁸ The electronic devices allow participating jurors to register their response without the influence of the other participants. Handheld electronic devices are useful because they gather the juror's instantaneous response, free from outside influence.⁴⁹

G. COMMUNITY SURVEYS

Jury consultants use community surveys to research how the jury is likely to perceive the case at trial. The common approach to community surveys involves contacting, via telephone, three hundred to five hundred residents of the community.⁵⁰ During the telephone interview, the surveyor gives the interviewee a brief summary of the facts of the case. Either before or after giving the interviewee the facts, the surveyor will ask the individual to provide personal, detailed demographic information. At the end of this process, the surveyor prompts the individual to render a verdict.⁵¹ The combination of the demographic information along with the interviewee's "verdict" yields general conclusions regarding what

44. *Id.*

45. See Pamela Griner Leavy & Krista Reiner, *Lawyers Use Trial Consultants to Fine-Tune Tough Cases*, TAMPA BUS. J., June 1, 2000, at 28.

46. *See id.*

47. See Robert Gordon, *Trial Research in the Age of Technology*, TRIAL, June 2000, at 64.

48. *See id.*

49. *See id.*

50. See Joseph A. Rice, Ph.D., *Twelve Angry Men? Think Again*, Jury Research Institute, at <http://www.jri-inc.com/PRIMA%20article.html> (last visited Feb. 18, 2001).

51. *See id.*

people in the community think about the case, thus making community surveying an extremely useful tool. After all, "due to the large sampling associated with this process, it has the highest level of predictive validity and is an extremely powerful tool for use in settlement and at trial."⁵²

H. SETTLEMENT DISCUSSIONS

After the conclusion of the mock trial, focus groups, community questionnaires, and other consultant services, the consultant and the attorney are left with a glimpse of the damages the actual jury is likely to assess. This information may prompt and facilitate settlement discussions. If a surrogate jury yields a high damage award against the jury-consulting firm's client, the attorneys, after reviewing the reasoning behind the jury's decision, may opt to pursue a settlement. The damage award from the mock trial gives the client a distinct advantage when entering settlement negotiations with the opposing party. At this stage in the litigation, the jury consultant's client clearly has the upper hand. Unlike the opposing party, the client has an actual assessment of the damages the jury is likely to award. The uninformed opposing party may settle by approving an amount that clearly gives the jury consultant's client a "win."

VII. HOW EFFECTIVE ARE JURY CONSULTANTS?

It may seem strange to pay sizeable amounts of money to a person who claims to have the ability to predict a person's psychological deportment simply by reading their body language, asking questions, and listening to them deliberate with others.⁵³ Regardless of the statistical accuracy of the research, the jury consultant's assessment is still merely a prediction. Every trial attorney knows that all the preparation and foresight in the world can still generate a jury that yields a bombshell verdict. While a jury consultant may mitigate some of the anxiety produced by juries, the element of the unknown still exists.

VIII. WHAT ARE THE DISCRIMINATORY IMPLICATIONS, IF ANY, OF USING JURY CONSULTANTS?

Jury consultants have come under harsh criticism by the public. Opponents claim that it is unfair and unjust that parties with the adequate financial resources hire experts to, in essence, hand-pick the jurors that will be most sympathetic towards the client's position. Critics argue that a jury is to be comprised of the party's peers, not twelve men and women selected by a hired gun. Do jury consultants give an unfair advantage to the party with the most money? Many opponents of jury consultants claim that the consultants appear to be preparing a "show" instead of assisting in the development of relevant facts. While this perception may

52. *Id.*

53. See Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U.L. REV. 463 (1999).

be somewhat accurate, it is important to put yourself in the accused's shoes. If you, the average citizen, were wrongfully accused of a crime, you would likely want a jury consultant to help you prepare for trial. The consultant's role is to provide research and advice. But the jury has the final word.

Since, more often than not, it is the wealthy clients that can afford to hire a jury consultant, does it give the wealthy an unfair advantage in litigation? While jury consultants are expensive, they often donate their services to less affluent clients in need of their services. While this pro bono work does not make up for the disproportionate amount of affluent clients that hire jury consultants, consultants must continue to donate their valuable services to citizens in need. The legal community must remain mindful that the jury consultant's job is merely to ensure preparation. Likewise, the jury consultant must be careful to stay in that role, for they cannot be retained to prepare for a *show* at trial, nor to unethically *coach* witnesses.

IX. WHO USES JURY CONSULTANTS?

William LaTorre, a chiropractor, was charged with manslaughter for the deaths of four teenagers on an intercoastal waterway.⁵⁴ Four top Columbia/HCA executives were charged with Medicare fraud.⁵⁵ Dow Chemical has been involved in extensive litigation regarding its silicon breastimplants.⁵⁶ Walter Morris, a twenty-eight-year-old, was charged with the beating death of a two-year-old child.⁵⁷ What do these parties have in common with O.J. Simpson, Eric and Lyle Menendez, and Timothy McVeigh? Professional jury consultants were extensively involved in each of these cases.

Who can afford to pay for jury consultants? Harvey Moore, owner of Trial Practices, said, "it's the Ray Lewises of the world."⁵⁸ Ray Lewis is a Baltimore Ravens linebacker accused of the post-Super Bowl stabbing deaths of Jacinth Baker and Richard Lollar.⁵⁹ Lewis hired Trial Practices to assist in jury selection. Moore says it is important to remember that it is the *story* that matters. Attorneys devote much time to the details such as the brief, the pleadings, etc., when what matters to the jury is the *story*. The briefs may be stellar, and the case law may strongly support their clients' position, but the jury is often the wildcard that the attorneys have difficulty predicting. Jury consultants focus on the *theme*. How does this case relate to the jurors' personal experiences? How is the jury likely to perceive the client? How can the case be presented to the jury so that

54. See Pamela Griner Leavy & Krista Reiner, *Lawyers Use Trial Consultants to Fine-Tune Tough Cases*, TAMPA BUS. J., June 1, 2000, at 28.

55. *See id.*

56. *See id.*

57. *See id.*

58. *Id.*

59. *See id.*

they may relate to and connect with the client? This is the jury consultant's area of expertise, and this is where the case is won.

Moore's services do not come cheaply, as evidenced by his high-profile clients. He typically charges \$6,500 for a focus group, and \$12,000 to \$20,000 for a mock trial.⁶⁰ For larger cases, Moore's advice can cost over \$1,000,000.⁶¹ Trial Practices has a twelve-member staff consisting of a variety of professionals such as sociologists, criminal justice experts, psychologists, and technicians.⁶² Decision Quest is another larger, well-known jury-consulting firm. Its services were used in such high profile cases as the O.J. Simpson trial, the Menendez brothers' trial, and the Oklahoma City bombing trial.⁶³

Decision Quest, a California firm, charged \$100,000 for advising the defense team in a high profile case where former prosecutors and police officers were charged with "railroading Rolando Cruz onto Death Row."⁶⁴ For this large sum of money, Decision Quest conducted mock trials, focus groups, and telephone polls.⁶⁵ One of the defense attorneys, Terry Ekl, commented on the decision to hire Decision Quest and stated, "[w]e were very concerned whether we could get a fair trial because of all the pre-trial publicity, so we commissioned the jury consultants to help us identify people in the potential pool who could be prejudiced against our clients."⁶⁶

X. WHAT DOES THE FUTURE HOLD FOR JURY CONSULTANTS?

Jury consultants first became popular in the 1970s.⁶⁷ In 1982, when the American Society of Trial Consultants was founded, there were fifteen such consultants practicing in the United States.⁶⁸ Today, the American Society of Trial Consultants is made up of 350 members.⁶⁹ Advances in technology have increased the efficiency, convenience, and accuracy of jury research. On-line research yields immediate case study results.⁷⁰ 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

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. Adrienne Drell, *Complex Decisions*, CHI. SUN TIMES, May 24, 2000, at 6.

65. *See id.*

66. *Id.*

67. *See* Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U.L. REV. 463 (1999).

68. *See* J. Stratton Shartel, *Litigators Describe Key Factors in Use of Jury Consultants*, 8 NO. 7 INSIDE LITIG. 1 (1994).

69. *See id.*

70. *See* Robert Gordon, *Trial Research in the Age of Technology*, TRIAL, June 2000, at 64.

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.⁷¹ 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.⁷²

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.⁷³ 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.⁷⁴

Where does one find surrogate jurors on the Internet? The jury consultant selects the surrogate jurors from an Internet database.⁷⁵ 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.⁷⁶ The consultant can choose the surrogate jurors either by stratified sampling, random sampling, or representative sampling.⁷⁷

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."⁷⁸ In random sampling, the consultant chooses the surrogate jurors from motor vehicle registration lists and voter registration lists.⁷⁹ 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."⁸⁰ While the result from this sample is

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. *See id.*

80. *See id.*

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.⁸¹ 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.

XI. CONCLUSION

Attorneys have an instrumental role in ensuring that jury consultants are utilized in a professional manner. Judges do not bear the responsibility for ensuring that the attorneys and jury consultants working on a case conduct themselves in an ethical manner. After all,

judges, like well-behaved children, do not speak unless spoken to. The first voice must be that of the lawyer. Lawyers provide Plato's leaping spark that enables judges to see their way out of Socrates' dark cave. The position of a judge is like that of an oyster: static, anchored in place, unable to take the initiative, digesting what the currents churned up by lawyers wash their way. Since *Marbury v. Madison*, lawyers have held the keys to the courthouse.⁸²

In the past, jury consultants were called upon shortly before trial for their assistance. Today, their role has greatly expanded.⁸³ It is not unusual for consulting firms to play an integral role in the trial process even before litigation is a reality. Larger law firms often establish a relationship with one or several jury-consulting firms and depend on their services regularly. A representative from a Des Moines, Iowa based firm stated that "[n]ow, the focus is more on pretrial research, including trial simulations or different kinds of mock trials."⁸⁴

Hopefully, jury consultants represent a move in the right direction. Perhaps potential jurors will be chosen to serve on a jury not merely because of stereotypical assumptions about their belief system such as the color of their skin or their gender. Perhaps attorneys will spend more time and effort utilizing jury consultants' services because they realize that the human psyche cannot be pre-determined by prejudicial assumptions. Most importantly, as the role of professional jury consultants increases, attorneys must keep in mind that,

What we do not value will not be valued, that what we do not change will not be changed, and that what we do not do will not be done. . . . Real lawyers are sensitive. They realize that justice demands equal-

81. *See id.*

82. Alexander M. Sanders, Jr., Address at the North Carolina Bar Association Annual Meeting (June 19, 1999).

83. *See id.*

84. J. Stratton Shartel, *Litigators Describe Key Factors in Use of Jury Consultants*, 8 No. 7 INSIDE LITIG. 1 (1994).

ity, and equality is brought about by application of the Golden Rule, as well as the Rule of Law. If we are serious about bringing everybody into full membership in our society, we must root out the prejudices in our own souls. Our noble profession demands no less. America demands no less.⁸⁵

Jury consultants know that jurors are complex individuals. This is why their journey in determining who is the "ideal juror" for their client is such a daunting task. Focus groups, mock trials, electronic monitoring devices, community research, and potential juror questionnaires are just a few of the tools the consultant uses to prepare for a trial. To put it simply, the "ideal" juror is a person who is sensitive to the issues presented, and an individual who cares about the good of the accused and the good of society. Thus, the ideal juror is one who "must imagine intensely and comprehensively; he must put himself in the place of another and of many others; the pains and pleasures of his species must become his own."⁸⁶

85. Alexander M. Sanders, Jr., Address at the North Carolina Bar Association Annual Meeting (June 19, 1999).

86. *Id.*

Appendix

