

# Scientific Jury Selection: History, Practice, and Controversy

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*“Never forget, almost every case has been won or lost when the jury is sworn.”*  
– Clarence Darrow (defense attorney), 1936.

## **Introduction**

Juries decide thousands of cases every year. Even though the majority of court cases are not settled by juries, predictions about juries influence decisions to pursue or avoid jury trials (Greene, Chopra, Kovera, Penrod, Rose, Schuller et al., 2002); therefore, the jury system maintains a central importance in American law. Given this importance, it is not surprising that the selection of jurors has, for many, become a scientifically-rooted service for which attorneys and litigants will often pay handsome fees. Scientific jury selection – the application of behavioral and social scientific principles to the selection of jurors most sympathetic to a particular side in a court case – has experienced a growth spurt since its inception in the early 1970s. It has also received substantial publicity in the news media, e.g., for its use by the defense in the O.J. Simpson criminal trial in 1995. This relatively new field is controversial: questions exist about its effectiveness, its fairness and the fact that it is virtually unregulated. Evidence from academia largely indicates that scientific jury selection does no good, yet the market for such services continues to flourish. What methods do jury selection experts employ? What are the bases for the controversy surrounding this “hot” field? What, if any, solutions have been suggested to alleviate these concerns?

## **History of Jury Selection: The “Harrisburg Seven” and Subsequent Trials**

Scientific jury selection (SJS) was first applied in 1971 in the trial of Philip Berrigan and six other antiwar activists. Jay Schulman, a sociologist from Columbia University, signed on along with Richard Christie, Philip Shaver, and others to assist the defense team of these activists, the so-called “Harrisburg Seven,” who had been accused, among other things, of conspiring to destroy selective service records and kidnap then-Secretary of State Henry Kissinger.

These scholars volunteered because they believed in the activists' cause and suspected that the prosecutor (in this case, the government) had selected Harrisburg, Pennsylvania, as the venue for the trial because of its rampant political conservatism. Schulman believed that the people comprising a jury have as much, if not more, influence on the outcome of a trial as do the evidence and the attorneys' arguments (Kressel & Kressel, 2002). Because a jury biased in favor of the defense would not have been likely in that venue, Schulman's team set as their goal the procurement of a jury that would at least be fair to the defendants. Securing such a fair jury required extra effort: the attitudes largely held by Harrisburg residents indicated that a local jury would not be favorable for their side. Pretrial polling suggested that eight out of ten registered voters held views unfavorable to the defense (Kressel & Kressel, 2002). Schulman and his colleagues surveyed over 1,000 Harrisburg residents and conducted follow-up interviews. They came up with a demographic profile of individuals most and least likely to sympathize with the defense and used this profile to guide jury selection. The defense achieved a victory: the jury hung on most charges, delivering only a minor conviction (for smuggling letters out of prison) (Kressel & Kressel, 2002).

Throughout the 1970s, social scientists participated in jury selection in several politically charged trials. In the Joan Little criminal trial, a team of social scientists led by John McConahay, a Duke University psychology professor, assisted the defense in first granting a change of venue (Little was an African-American woman and surveys revealed that the North Carolina county where the trial was to be held was atypically racist) and then in jury selection by constructing a profile of the ideal juror for the defense. The jury acquitted Little of all charges after barely an hour of deliberations (Kressel & Kressel, 2002). Subsequent trials in which scientific jury selection was used include the Angela Davis trial, the Wounded Knee trials, trials stemming from the Attica prison riots, the trial of Mark David Chapman (John Lennon's assassin), Vietnam Veterans Against the War, Vietnam veterans against the manufacturers of Agent Orange, the trials of Attorney General John Mitchell and defendant Maurice Stans (Watergate), and Colombian drug lord Carlos Lehder, among others (Boudouris, 1993). Many of these trials ended with verdicts favorable to the side employing jury selection experts (Frederick, 1984). In 1980, MCI used scientific jury selection in its antitrust suit against fellow communications corporation AT&T, in which a jury awarded MCI a surprising \$600 million (Strier, 1999).

### **Growth of an Industry**

During the 1980s, the jury selection market expanded into the industry today known as *trial consulting*. Firms that provide jury selection have greatly expanded

their services and consulting firms have grown in size and in volume of business (Cutler, 1990). The growth of the industry appeared to benefit both academicians and consultants: academic theories found a practical application, while consultants were able to derive legitimacy from their affiliation with research institutions. Trial consultants drew on academic principles as well as market research and advertising strategies, such as focus groups and consumer profiling. Despite this initial fusion of theory and practice, consulting today takes place largely outside of academia, and has lost the political charge it had in the 1970s. Consulting firms today offer a wide range of services, including in-court assessments, focus groups, change of venue surveys, mock trials, shadow juries, witness preparation, attorney communication evaluation, and evidence preparation. Scientific jury selection remains one of the more well-known and controversial of services offered by trial consultants.

### **Jury Selection Today**

The use of social scientists as jury selection consultants remains controversial in both the legal and social scientific communities (Stolle, Robbenolt & Wiener, 1996). Trial consultants have relied on a variety of methods in jury selection, including “scientific statistical methodology, folklore, pop psychology [and] astrology” (Boudouris, 1993, p. 4). The unscientific aspects of what is ostensibly a scientifically informed practice are illustrated in the self-reported methods of jury selection reported by trial consultants. For example, Jo-Ellan Dimitrius, who successfully “stacked” the jury in several well-known criminal cases, including the O.J. Simpson, Reginald Denny, John DuPont and McMartin preschool criminal trials, has remarked that, for her, “reading people is neither a science nor an innate gift. It is a matter of knowing what to look and listen for, having the curiosity and patience to gather the necessary information, and understanding how to recognize the patterns in a person’s appearance, body language, voice, and conduct” (Dimitrius & Mazzarella, 1998, p. xiii). Dimitrius’s claimed methods and the methods mentioned earlier are assumed to have varied degrees of legitimacy, thus lending further controversy to the profession. Despite this controversy, SJS remains prominent. Today, trial consultants are extremely common in high-stakes civil suits and are usually retained by both sides – in fact, many attorneys say that hiring a trial consultant is standard procedure when substantial amounts of money are involved. Trial consultants also help both sides in many criminal cases that have garnered substantial media attention (Kressel & Kressel, 2002). The 1995 criminal trial of the famous football player O.J. Simpson, the suspect in the murders of his ex-wife, Nicole Brown, and her friend, Ron Goldman, in June 1994, is one such example. Although jury selection has been an

expensive undertaking for attorneys in the post-Vietnam War era, low-cost consulting services have recently been introduced, making it possible for trial consultants to assist in smaller, lower budget cases than they had in the past (Kressel & Kressel, 2002).

Traditional jury selection in most jurisdictions consists of three stages. The first stage involves the creation of a list of citizens eligible for jury duty, followed by selection of a sample of those persons to be summoned to court. The third stage occurs in court. In a process called *voir dire*, potential jurors are questioned either individually or in a group, sometimes by attorneys but often by the presiding judge. When jury selection experts are called in to help, they use a variety of techniques to assist in the selection of the jury that will be most favorable to, or, usually, least biased against, their side (these techniques will be detailed in the next section). Diversity of techniques is not surprising, given that trial consultants themselves are professionally diverse. Trial consultants include in their ranks (but are not limited to) behavioral psychologists, sociologists, attorneys, and those with varying degrees of expertise in communications and marketing. Trial consulting is estimated to be a \$400 million industry, with over 400 firms and over 700 practitioners (Strier, 1999).

### **Methods of Scientific Jury Selection**

The tools at a trial consultant's disposal include community surveys, focus groups, mock trials, pretrial investigations of prospective jurors, and *voir dire* assistance. The widespread use of these methods indicates that SJS experts rely to a greater extent on attitudes and values than on demographic predictors, such as race, ethnicity, age, gender, religion, socio-economic status and occupation, as predictors in jury decision-making (Kressel & Kressel, 2002). The community survey is one of the most common practices that trial consultants employ. The researcher randomly chooses between 200 and 300 names from the telephone book, phones these individuals, reads them a case summary, and asks a series of questions. To ensure representativeness, the sample should be limited to people who are eligible for jury duty. Survey questions are generally of three types: 1) questions about participants' attitudes about the particular case and issues to be raised therein, 2) questions about participants' familiarity with the case and the named defendants, and 3) questions concerning respondents' demographic characteristics and personality traits (Penrod, 1990). Sophisticated statistical techniques, including factor analysis and multiple regression, are often used to make predictions about jury decision-making from survey data.

The use of a focus group is a practice borrowed from marketing, the occupational origin of many jury selection experts. A focus group is intended to

represent a cross-section of the community, and the demographic characteristics of participants in the focus group should be similar to those of people in the jury pool or on the actual jury. This group is assembled to test specific parts of an attorney's case, much as a focus group would test a product about to be introduced on the market. When individuals with certain personality types can be identified by the focus group as amenable to an attorney's case, this information is often used in SJS and in approaches to other parts of the case. The mock trial, another service frequently offered by trial consultants, is an extension of the focus group and can be a "full dress rehearsal" (Strier, 1999, p. 96).

Trial consultants also frequently employ pretrial investigations of prospective jurors. This type of pretrial investigation, as depicted in fiction (e.g., the 2003 hit movie *Runaway Jury* and the novel by John Grisham (1996) on which it was based), may contribute to the popular perception of jury selection techniques. As in *Runaway Jury*, such investigations mainly take two forms: community network modeling and surveillance. Community network modeling consists of contacting prospective jurors' coworkers or neighbors, or people in the community who are affiliated with the same school, church, or club as a prospective juror. Surveillance includes drive-by observations and photograph-taking of a prospective juror, and checking public records of each prospective juror, such as those of voter registration, court proceedings, and property holdings. Not surprisingly, both techniques have met with accusations of privacy invasion (Strier, 1999). Trial consultants can assist attorneys with voir dire by using questionnaires to gather information about prospective jurors prior to in-court questioning and by observing prospective jurors' courtroom demeanor and nonverbal communication (Strier, 1999). Once a trial is underway, a trial consultant can use knowledge of the selected jury to assist the attorney with opening and closing arguments, witness preparation, case presentation, and evidence.

### **Issues with Jury Selection: Effectiveness, Fairness, and Lack of Regulation**

Franklin Strier (1999) has pointed out three issues which keep the practices of scientific jury selection steeped in controversy. The first issue concerns the effectiveness of such practices. It is difficult to answer questions about the effectiveness of SJS by analyzing court cases. It is not possible to claim with any certainty that a favorable verdict is completely due to scientific jury selection (Strier, 1999). Some have remarked (Hans & Vidmar, 1986) that jury verdicts are determined by many factors and that one cannot know the extent to which SJS contributed to the verdicts. Experimental research may be weak at detecting the interplay between various factors, such as the evidence presented, the persuasiveness of eyewitnesses, and attorney characteristics, affecting the outcome

of a jury trial. It is thus difficult to isolate the effectiveness (or lack thereof) of any one of these factors (Kressel & Kressel, 2002). In addition, factors affecting the use of SJS may also affect case outcomes. For example, a client who could afford a jury selection expert could probably also afford to retain superior attorneys; lawyers who are conscientious enough to hire a social scientist to help with their case are often thorough in other aspects of their case preparation. The absence of a non-SJS comparison group in past evaluations of SJS also presents a problem vis-à-vis evaluations of SJS effectiveness (Kressel & Kressel, 2002). Such a group might not even be feasible, however, given that, for a true test of the effectiveness of SJS, identical conditions would need to apply between the two experimental groups, and the probability that researchers could recreate such identical conditions between the two groups (the SJS treatment group and the control/non-SJS comparison group) is minimal to nonexistent. There is also a noticeable lack of scientific research evaluating newer trial consulting techniques that, in combination with SJS, could influence the outcome of a case (Stolle, Robbenolt & Wiener, 1996; Strier, 1999).

The second issue concerns the fairness of scientific jury selection. This question is particularly salient if, indeed, the effectiveness question is settled in favor of SJS. If SJS is effective enough to alter the composition of juries to affect the verdict, then its use could violate citizens' Constitutional right to an impartial jury. However, if SJS is not effective, it contributes unnecessarily to the time and cost of trials. Even if the effectiveness of SJS remains unclear or if SJS is determined not to be effective, the fairness question persists. It is important to maintain a *perception* of fairness, and even if SJS is not effective, it can still give the impression of interference with the jury process (Strier, 1999). The third issue on which Strier remarks is that the field of trial consulting is largely unregulated and lacks clear professional standards. These issues will be addressed in the following section.

## **Problems with Jury Selection**

### **A. It Does Not Work**

As previously mentioned, scientific jury selection has generated controversy in both the legal and social scientific communities. Some legal experts have argued against it by claiming that jury selection is an art rather than a science, and that the intuition of an experienced trial attorney is superior to any social scientific approach. Many social scientist critics have argued that, while approaches from their fields are likely no worse than reliance on lawyers' instincts, whatever discoverable benefit of social scientific approaches may still not outweigh their cost (Stolle, Robbenolt & Wiener, 1996).

In any event, opponents have advanced various positions converging on the purported ineffectiveness of SJS. It is possible that practitioners or academic advocates of SJS have not produced sufficient evidence that SJS works (Cutler, 1990). Results from academic research laboratories have not supported SJS practices. Trial attorneys have not outperformed undergraduates in studies of jury selection, lending doubt to the credibility of lawyers' instincts in deciding the suitability of jurors (Olczak, Kaplan, & Penrod, 1991). Dawn Lord, a critic of SJS, points out the instability of knowledge employed by jury selection experts. She writes that many jury selection experts ignore established psychological principles in their work. In selecting jurors, they rely on prospective jurors' explicit, verbally articulated knowledge, which is less durable and predictable than is implicit, automatic, if even conscious, knowledge. Lord also argues that SJS practitioners also do not take into account differences between the reactions of emotionally aroused jurors and those of jurors who are not upset. These differences could also affect what jurors take away from courtroom proceedings. As a result of these practices, she argues, attorneys and their clients do not reap the benefits of the behavioral and cognitive research on which the practice purports to be based (Lord, 2001).

A second point against the effectiveness of SJS is that quantitative studies of jury trials have estimated that jury selection accounts for between 5% and 15% of verdict variability; the extra-jury aspects of the trial therefore account for the vast majority of verdict variance (85%-95%) (Fulero & Penrod, 1990). These numbers suggest that, even if SJS practices were found to be influential, there is little room for SJS practices to have an effect if they only "count" for 15% of the final trial "grade."

### **Limits to SJS: Lack of Predictors**

One reason why SJS is often deemed ineffective is because certain limits to its exercise have been identified. As stated before, there is evidence that the ability of trial consultants to predict verdicts from jurors' demographic and personality variables accounts for at most 15% of the variance in verdicts. There do not appear to be any reliable predictive demographic variables – juror occupation, gender, income, religion and age have not been found to have consistent effects across cases (Greene et al., 2002) – and it has not been possible to identify a personality type or combination of types that can predict juror decisions across criminal or civil cases (Kressel & Kressel, 2002). General tendencies toward conviction among jurors have not been satisfactorily identified; only weak relationships have been found between convictions across case types between hypothetical robbery, murder, rape and negligence trials (Penrod, 1990). In general, personality traits are not valid predictors of jurors' voting predispositions. However, even those aspects

of personality which have been revealed as modest predictors of juror predispositions often have inconsistent effects. For example, the personality attribute “belief in a just world” can lead jurors to harshly punish either crime victims or defendants (Stolle et al., 1996). Another example of the inability of established behavioral principles to predict the voting of jurors concerns the voting of jurors in criminal cases toward defendants similar to themselves. The similarity-leniency hypothesis advanced in social psychology suggests that a juror would not punish harshly a defendant similar to him/herself, and this is frequently the case. However, other times, a “black sheep effect” occurs when a juror reacts negatively to a similar defendant behaving badly, holding those more similar to themselves to a higher standard. It is difficult to predict with any certainty which of these two competing principles will operate in a given case. Preconceived attitudes and biases may generate more accurate predictions than will personality types, but people are often able to conceal such biases, especially when they may reflect negatively on the bias-holder (Kressel & Kressel, 2002).

### **Limits to SJS: The Operation of Other Factors**

Other factors can also affect trial outcomes, making jury selection less relevant as a verdict determinant. Certain areas are beyond the control of the trial consultant. These areas include the nature of the evidence, the acumen of the attorneys, the style of the presiding judge, and the complex group dynamic principles at work during jury deliberations (Boudouris, 1993). Perhaps the quality of the evidence, rather than the individual personality attributes of jurors, ultimately determines a trial outcome. The effect of presented evidence on jury decisions should not be too easily discounted. If evidence is the determining factor in jury decision-making, then SJS becomes much less relevant. Strier (1999) suggests that trial consultants may offer their most valuable assistance to attorneys with evidence presentation rather than jury selection. When a trial consultant is retained, other factors can limit the consultant’s effectiveness. For example, attorney communication is critically important: if an attorney does not inform the trial consultant of all the facts of the case, including evidence potentially harmful to their side, this omission can steer jury selection in a direction unfavorable to the attorney (Boudouris, 1993).

### **B. It is Fundamentally Unfair**

*“The jury system is distorted by demographics. It is compromised by consultants ... There doesn’t even seem to be a consensus anymore about what a ‘jury of one’s peers’ means. In fact, that’s the last thing many attorneys want and they’ll pay a*

*lot of money to make sure they don't get it.*" – George Cantor (critic of jury consulting), 1995 (following the O.J. Simpson criminal trial).

Today, concerns exist about the fairness of jury selection as a practice. The Jury Selection Service Act of 1968 explicitly states that criminal defendants have a right to trial by a jury selected "at random from a fair cross-section of the community." Some critics have argued that SJS corrupts the objective of a trial by jury to represent such a cross-section of values. Although some Americans, namely, persons who do not register to vote or hold driver's licenses, are regularly excluded from jury selection, SJS introduces exclusions with a scientific rationale in place of the aforementioned systematic exclusions (Strier, 1999). Another criticism of the fairness of SJS is that it is only affordable for wealthy corporations and individuals. Although some low-cost services have recently been offered, some as low as \$2,000, in other cases, a jury selection expert could cost an attorney between \$50,000 and \$100,000. Strier (1999) points out the irony in this issue of affordability: the first people to benefit from the principles of SJS were poor criminal defendants of the 1970s antiwar persuasion. Despite the highly publicized cases flooding Court TV and other popular media, depicting charismatic celebrity criminal defendants, a more typical SJS client today is a wealthy litigant, often a corporation, involved in a civil suit (Levine, 1992). As such, SJS can appear to be mainly a "service for the rich and a disservice for justice" (Stolle et al., 1996, p. 147). According to this argument, if trial consulting gives a litigant an advantage, then only large corporations and wealthy individuals would have this advantage, leaving the average litigant with a "second class justice" (Stolle et al., 1996, p. 147).

Another criticism of SJS indirectly concerns the Constitutionality of its implementation. SJS critic Stephen Adler has questioned the trustworthiness of decisions made by a group selected for their biases. He argued that jury consulting is not protected by anything in the Constitution and that its use can and should be prohibited (Kressel & Kressel, 2002). Yet another criticism of SJS on grounds of fairness is that trial consultants often advertise a misleading win-loss record that cannot be confirmed or disconfirmed (Strier, 2001).

A final problem concerning the fairness of SJS actually has little to do with the actual fairness, but deals with the *perceived* fairness of the practice. Trial consulting can create the perception of "high-tech jury tampering," through which psychologists and other so-called jury experts manipulate the eventual composition and/or decision-making bias of the jury (Strier, 1999, p. 104). If jury selection techniques are seen as unfair, the legal system as a whole may be viewed as similarly unfair (Stolle et al., 1996). Data about the perceived fairness of a trial can be difficult to obtain due to problems assigning quantities to subjective qualities

like fairness (Stolle et al., 1996). Stolle and colleagues (1996) found that the use of a psychologist trial consultant tended to be viewed as unfair when one side employed a consultant and the other did not. When both sides hired a consultant, judgments of fairness were not affected.

### **C. The Industry is Unregulated**

The third major issue identified by Strier (1999) concerns the relative lack of standards unifying professionals in this field. He points out that many professions applying principles from academics, including law and psychology, are closely regulated to protect public interests. In addition, professional associations frequently mandate a code of behavior and ethics that all practitioners are bound to follow. However, there are no such checks on the field of trial consulting. Because there are no state licensing requirements, anyone can advertise and practice as a “trial consultant.” The professional association in the field, the American Society of Trial Consultants (ASTC), has a Code of Professional Standards, which Strier calls “anemic” and much less strenuous than the standards set forth by the American Psychological Association (APA) (Strier, 2001, p. 71). It has even been suggested that some trial consultant practices violate APA standards (Herbsleb, Sales & Berman, 1979).

### **Why Scientific Jury Selection Works: It Is Effective and Not Wholly Unfair**

*“It’s gotten to the point where if the case is large enough, it’s almost malpractice not to use [a jury consultant].” – Donald Zoeller (New York attorney), 1989.*

Despite the problems previously mentioned, scientific jury selection has many fervent advocates. Many argue that, contrary to empirical evidence, SJS is an effective practice, or, at the very least, should not be dismissed prematurely. Others point out flaws in the evidence against SJS to this point. As Brian L. Cutler put it, “Academic researchers have, based on early reviews of a small but methodologically unsophisticated body of literature, thrown out the baby with the bathwater” (Cutler, 1990, p. 230). Attacks have been advanced against the earlier cited discounting studies and others based on the limited applicability of research findings from small, atypical samples, to the public as a whole (Moran & Comfort, 1982). In particular, much research on SJS has relied on college student samples, when more representative community samples would be more appropriate if the findings are to be generalized across types of people and situations (Sears, 1986).

## **The Existence of Predictors of Jury Decision-Making**

Some advocates of SJS argue that, despite the arguments of opponents, there *are* juror aspects that can predict subsequent verdicts. For one, juror attitudes can predict verdicts better than can personality traits. Results from various studies are thus summarized: attitudes toward women predicted verdicts in rape cases (Weir & Wrightsman, 1990); attitudes toward psychiatrists and the insanity defense predicted verdicts in criminal cases where the insanity defense was invoked (Cutler, Moran & Narby, 1992); a relationship was found between attitudes toward the death penalty and verdict in capital punishment cases (Nietzel, McCarthy & Kern, 1999), and attitudes toward torts and lawsuits affect the amount of damages awarded in civil suits (Kressel & Kressel, 2002). Some personality traits can predict juror decision-making fairly consistently. For example, the presence of an authoritarian personality, defined as a strong preference for order, for clearly articulated rules, and for powerful leadership, is modestly related to individuals' likelihood to vote for conviction in criminal cases (Narby, Cutler & Moran, 1993). In general, juror disposition appears to have a mixed effect on verdicts, and effects of attitudes generally vary from case to case (Penrod, 1990).

## **Trial Consultants Are Generally Better than Attorneys at Jury Selection**

*"I knew we had the case won when we seated the last bigot on the jury."* – Richard "Racehorse" Haynes (defense attorney), quoted 1979.

*"Never accept a juror whose occupation begins with a P. This includes pimps, prostitutes, preachers, plumbers, procurers, psychologists, physicians, psychiatrists, printers, painters, philosophers, professors, phoneys, parachutists, pipe-smokers, or part-time anythings."* – William Jennings Bryan (U.S. Congressman, Democratic presidential nominee, and former Secretary of State), 1973.

Many in favor of SJS argue that however its techniques may fare in the academic laboratory, SJS is successful because its methods are superior to those of trial attorneys. Perhaps attorneys typically rely on stereotypes of group attitudes, whereas trial consultants are able to draw on established psychological and behavioral principles (Strier, 1999) – though, as previously mentioned, how much they do so has been called into question. Another advantage that the SJS approach has over traditional lawyer methods is that trial consultants are able to use information that is case- and location-specific. They conduct focus groups and mock trials using representative samples from the community in which the trial is to be held. Jury consultants often work as a team, which allows them to exchange

ideas and consult with each other, thereby improving the quality of their work product. A trial attorney, on the other hand, often works alone, without the benefit of collaboration with others (Strier, 1999). One simple, but undeniable, benefit that trial consulting firms offer attorneys is the ability of the trial consultant to focus on jury selection when the lawyer, due to his or her involvement in the many aspects of a case, is not able to do so (Kressel & Kressel, 2002).

### **The Free Market is Proof of the Effectiveness of SJS**

Other scholars of the jury system have argued that the fact that trial consulting has flourished in today's marketplace is in itself proof of its effectiveness (Stolle et al, 1996). If attorneys and their clients are willing to spend what can amount to between \$75 and \$300 per hour for consultants – and larger cases can even run into the high six or even seven figures total – the service that these consultants provide must have some merit (Strier, 1999). Stolle et al. (1996) pointed out that some trial consultants and some SJS techniques are probably superior to others, and, over time, the market should select the more effective individuals and firms to continue practicing, thus ensuring a higher-quality product. Proponents of this view might argue that theoretical arguments about effectiveness should be put aside and the free market should be given the last word on whether SJS remains viable.

### **The Effectiveness of SJS is Situational**

It appears that the influence of SJS is situational: it has a stronger effect at some times than at others. Kressel and Kressel (2002) have identified several instances in which SJS is more likely to have an effect on the outcome of a trial. Such instances include: when cases are publicized; when the evidence is ambiguous and does not favor one side more than the other; when juror views are related to demographic characteristics and personality attributes that can be directly observed; when the predictors of juror voting are not immediately obvious to either attorney, even when they oppose lawyerly intuition; when attorneys are permitted to conduct a thorough voir dire; when the court is liberal in its allowance of peremptory challenges (attorneys are allowed to strike a limited number of jurors from the panel without having to give a reason. These allowances are referred to as *peremptory challenges*. Beyond that, attorneys are also allowed an unlimited number of *challenges for cause* – they may strike a juror, but must demonstrate that the prospective juror in question is biased or, based on some relationship to the case, is likely to be biased for or against one side); and when the budget for the trial allows for extensive pretrial research.

## **Trial Consultants as “Enablers of Justice”**

Advocates of SJS have also defended the practice on grounds of fairness, although such defenses are more difficult to corroborate than defenses of effectiveness. Trial consultants claim that their goal is to seat less biased juries, juries that are more likely to deliver a fair verdict (Kressel & Kressel, 2002). Adherents (e.g., Vinson, 1986; as cited in Penrod, 1990) claim that their methods help ensure that the ultimate goals of the jury system, including the right to trial by a fair and impartial jury, are realized. Jury consultants often present “themselves as enablers rather than disablers of the jury system” (Kressel & Kressel, 2002, p. 82).

## **Proposed Reforms**

Scholars have proposed solutions to address the issue of fairness of SJS. [Solutions to enhance the *effectiveness* of jury selection or to improve techniques are often closely guarded by trial consulting firms – even at ASTC conferences, trial consultants offer each other little in the way of trade sharing (Kressel & Kressel, 2002)]. Here are a few suggested solutions that Strier (1999) has outlined:

- Outlaw trial consulting by non-lawyers. (This suggestion would be difficult to implement, as it leads directly to a slippery slope argument. One could question, then, why not outlaw expert witnesses, investigators and all non-lawyer professions in litigation support?)
- Limit voir dire questioning by attorneys (who trial consultants could coach). Instead, judges should be the sole performers of this function.
- Reduce or eliminate peremptory challenges by attorneys. These challenges are not protected under the Constitution, nor are they essential to a fair trial. If peremptory challenges were outlawed, judges would be likely to expand the permitted challenges for cause, but at least those challenges are more easily justified.
- Make consultant surveys by one side available to the opponent side.
- Require disclosure of the use of a trial consultant. If this were a requirement, such disclosure would permit the other side to hire its own jury consultant or a criminal defendant could request a court-appointed consultant. (This proposed reform also gives way to a slippery slope, i.e., why not require disclosure of use of other types of litigation support?)
- Prohibit investigation of prospective and actual jurors.
- Require state licensing of trial consultants. Such a requirement would create minimum standards of competence and ethics for practitioners and would protect the public against incompetent or dishonest consultants (Strier, 2001).

- Appoint trial consultants for poor defendants. The Los Angeles Superior Court in the Reginald Denny trial did exactly this, but such appointments remain extremely rare. Perhaps this reform would bridge the gap between wealthy litigants who can afford trial consultants and typical litigants who cannot.
- Require consultants to perform a set percentage of pro bono work, ensuring greater accessibility of an often prohibitively expensive service.
- Develop a binding ethical code, superior to that set forth by the ASTC, for consultants (Stolle et al., 1996).

## **Conclusion**

Because it is a relatively young field, trial consulting and, more specifically, scientific jury selection, are still growing. SJS has come a long way in the past 30 years, and does not appear likely to stay the same for long. In particular, the discrepancy between the limited effectiveness of scientific jury selection in the academic laboratory, and the market demand for SJS that causes litigants to pay substantial amounts of money for such services, may come to be reconciled. It is not known what will happen to the profession in the future: whether it will come under stricter regulation and continue to gain legitimacy and stimulate scholarship, or whether, due to questionable effectiveness, practitioners will face reduced demand for their services. If the demand for SJS services is due not to the effectiveness of such services, but rather to a the tendency of attorneys and clients to simply feel more comfortable having “expert” input into the selection of a jury panel, then whether the market for SJS will stay strong or die out is unknown. Another very strong possibility is that SJS truly is effective, and that experimental research suggests otherwise because the elements that cause SJS to operate effectively in a courtroom cannot be adequately reproduced in the academic laboratory; therefore, research from academia argues against the effectiveness of SJS. Isolated examples of effective scientific jury selection, such as the consultant-assisted selection of jurors favorable to the defense in the O.J. Simpson criminal trial, can be found. The fairness issue surrounding the practice of SJS is not likely to clear up on its own. Some critics have suggested an overhaul of the practice, if not a complete ban, due to the fundamental injustice that some believe underlies its application. If the market for SJS stays strong and the outlawing of SJS remains unlikely, it is quite possible that it will come under stricter practice and ethics regulations to protect public interests. In any event, because scientific and practical interest in its principles and applications has been high, scientific jury selection will probably be a topic of study for decades to come.



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