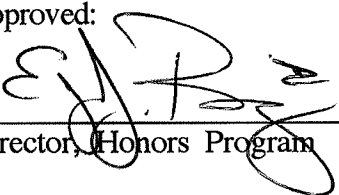


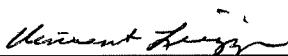
THE CONSTITUTIONAL, LEGAL, AND ETHICAL CONCERNS
OF EMPLOYING JURY CONSULTANTS TO ASSIST
IN THE JURY SELECTION PROCESS

Approved:


Supervising Professor

Approved:


Director, Honors Program


Second Reader

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HONORS THESIS

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By

Patricia L. Martinez

San Marcos, Texas

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The concept of jury trials came from England and for the past two hundred plus years has been considered [by many] the fairest instrument for justice within the American criminal and civil system.¹ The trial jury is one of the most long-lasting and revered of American Institutions and it is considered by many one of the most important duties that an American performs.² The goal of the jury system has been to bring together usually twelve impartial individuals from the community with varied interests, expertise, personal experiences, education, and family lives to deliberate the evidence presented in court, apply our laws and then reach a unanimous decision. The basic idea is that if twelve individuals from varied backgrounds reach the same conclusion; then justice is more likely to have been reached, than if a single judge weighed the evidence and rendered the verdict. The concept of our jury system is embedded in our people as well as, our federal Constitution in Article III, Section 2, which states that the trial of all crimes, except in cases of impeachment, shall be by jury; and the Sixth Amendment right to an impartial jury and the due process and equal protection clause of the Fourteenth Amendment; thus separating the people from the arbitrary will of the government. Each of us has been and will be affected by decisions reached in our courts. Therefore, how jurors are chosen or eliminated from the

¹ Journal of Police Science & Administration, Vol. 12, No.2, "Selecting a Jury of Peers: How Close Do We Get?" Knowles & Hickman, 1984.

² Journal of Social Issues, Vol. 34, 4, P. 137-164, 1978

jury pool, the questioning of jurors called voir dire (which literally means to speak the truth), the length of time allotted for voir dire, the use of challenges for cause (which eliminate potential jurors whose biases or prejudices may unduly influence their judgment), peremptory challenges (which allows each opposing attorney to eliminate a small number of potential jurors for any reason except, race, gender and socioeconomic factors), and the ethics and canons of attorneys and judges who enforce our laws have become very controversial topics because the outcome of criminal and civil cases rely on these components to protect our constitutional rights and liberties. Each of us has a vested interest because the decisions reached can alter our lives socially, politically, and economically. Thus, changes and controversies in our jury system must be weighed, balancing the pros and cons of each, analyzing the alternatives, and by deliberating the consequences if we choose not to alter our system. The latest controversy revolves around jury consultants and how they conduct their investigations, how their data is utilized in our jury system, and if it is possible to employ jury consultants and preserve our rights and liberties while not infringing upon others, or unbalancing our adversarial trial system and hindering the poor at the mercy of the rich. Although few trials are currently being conducted with jury consultants; the numbers are growing rapidly. Many ethical concerns are being raised by the general populace and those

in the legal field. First, is it ethical to employ jury consultants? Second, does the public view jury consultants and the lawyers who employ them as manipulative? Third, is the result an impartial jury or a moldable jury when the expertise of jury consultants is utilized? Fourth what should an attorney do when the other side employs a jury consultant? If the attorney does not employ a consultant is he or she breaking the fiduciary duty to the client to use every legal means possible to represent their client zealously? Is it ethical to analyze our jurors so meticulously? Lastly, are taxpayers willing to pay to employ jury consultants for the state and/or indigent defendants? Each of these questions deserves our attention in more depth, historically, constitutionally, and ethically, because “we the people” ultimately determine what system we have governing our jury system and our lives in criminal and civil proceedings.

Constitutional and Federal Laws

Let us review first our constitutional and federal laws governing jury trials to ascertain whether jury profiling (which analyzes the propensities of potential jurors based on their backgrounds and personalities to render judgment of a case in favor of the opposing parties to benefit their employer) by jury consultants infringe upon our rights constitutionally or legally in any ways. First, a [speedy] trial by an impartial jury is [our] constitutional right [to have or to waive] under the Sixth

and Fourteenth Amendments in any criminal matters, federal or state, where a serious penalty, such as, a jail sentence or imprisonment of more than six months may be punished.³ Looking more closely at the Sixth Amendment, we must ask what constitutes an impartial jury? Gobert and Jordan, the authors of *Jury Selection-The Law, Art, and Science of Selecting A Jury*, define an impartial jury as a panel composed of jurors who “start off in neutral with no preconceived notions that would keep [them] from being totally fair and impartial. The ideal juror [would] in every way humanly possible [be able] to judge [the] case strictly on the facts and evidence presented and by the law as instructed by the judge. Impartiality does not require that jurors ignore their values, experiences, and training-these are indispensable qualities of the impartial juror. It does require that the juror be free from bias, receptive to arguments from both sides, and prepared to reach a verdict on the basis of the evidence. Bias may be either implied in law or actual. Examples of bias implied in law occur where the prospective juror is related to a party, or attorney, where the juror served on the grand jury that indicted the defendant, or where the prospective juror had a prior civil suit against the defendant. Actual bias is a state of mind that will prevent the juror from giving the defendant a fair trial.” The due process and equal protection clauses of the Fourteenth Amendment have led to numerous federal and state laws governing

³ Understanding the Law. 2d. Ed. Carper, Mietus, Shoemaker & West. P.115. 1995

jury trials. The federal legislature, the state legislatures and the courts have set the number of peremptory strikes in criminal and civil trials, the number of jurors, have granted us the right to represent ourselves (pro se), appeal our case if we feel we did not receive a fair and impartial jury, have granted unlimited challenges for cause, and the Federal Jury Selection Service Act of 1968, increases a cross-sectional representation of the community on the panel. Further, the Supreme Court has ruled on who cannot be arbitrarily eliminated from the jury panel by stating that, "gender, race, and socioeconomic factors [are] cognizable status for protection against discrimination in jury selection."⁴ Thus, peremptory strikes cannot arbitrarily be used to eliminate one of these protected classes without the attorney explaining his or her reasons to the court. "The purposes [of these] safeguards...is to minimize the risk of convicting innocent persons of crime."⁵ Additionally, these safeguards also minimize the chance of allowing criminals to continue victimizing others; however, none of them regulate who attorneys may employ to prepare or conduct their case.

Historical Changes

Since there are no constitutional, federal or state laws prohibiting attorneys from hiring jury consultants we should look at history and see how attorneys

⁴ Journal of Criminal Justice. Vol. 19. P 31-48. 1991

⁵ Understanding the Law. 2d. Ed. Carper, Mietus, Shoemaker & West. P. 271. 1995.

conducted voir dire before they emerged, what has changed, and if there is truly a need or advantage in employing jury consultants. Many attorneys prepared for a case by an “integrated approach to jury selection develop[ing] a cohesive theory of the case, analyz[ing] the strengths and weaknesses and general characteristics of the respective parties to the litigation, the witnesses who [would be] testify[ing] and the attorneys who [would] be trying the case.”⁶ The attorney relied on his or her intuition and experience in conducting voir dire. “The jury [was seen] as a partial corrective for any imbalance [with] both sides having an equal opportunity to ask questions and observe responses. Within the jury room, rich and poor were equal; neither had access. Cases were decided on merits.”⁷ Lawyers exercised their limited (by jurisdiction of the court) peremptory challenges and challenges for cause to eliminate potential jurors that they felt were prejudiced against their client or case. Basically, “early jury selection methods relied on relatively basic statistical techniques to determine the association amongst certain demographic or background characteristics and attitudes of the community.”⁸ Then in the winter of 1971-1972, a sociologist and a social psychologist assisted the defense counsel in the Harrisburg Seven Trial; selecting a jury by developing profiles of potential jurors

⁶ Jury Selection-The Law, Art, and Science of Selecting a Jury. 2d. Ed. Gobert & Jordan. P. 479. 1990.

⁷ Jury Selection-The Law, Art, and Science of Selecting a Jury. 2d. Ed. Gobert & Jordan P. 486.

⁸ 6 A.L.B. L.J. SCI. & TECH. 383.

likely to be prejudiced against antiwar activists. This was the first basic version of scientific jury selection utilizing a community survey and developing profiles of potential jurors to assist an attorney with a case. The trial resulted in a hung jury on the major charges. Then people in the legal, psychology criminology, sociology, and market research fields started developing more comprehensive formulas and techniques. It was becoming obvious to those in the legal field that "the days of the relatively simple jury selection process had given way [gradually] to complex selection methods."⁹ This explains what happened, but not why many people started thinking that there was a need to employ jury consultants. Thus we need to look more closely at the data that jury consultants gather, the reliability of the information, how the information is calculated, their objectives and how it affects the outcome of cases and case strategy.

Consultant Roles and Training

The main role [of consultants] is to assist in the design of voir dire questions that will ferret out people's true thoughts and feelings to help develop cause challenges and effectively use peremptory challenges.¹⁰ They feel that their job is valuable to the legal profession because all persons have deeply ingrained values, attitudes, and biases which will resist certain claims and arguments and many

⁹ 6 A.L.B. L.J. SCI. & TECH. 383.

¹⁰ 6 A.L.B. L.J. SCI. & TECH. 383.

prejudices exist on a subconscious level.¹¹ Jury consultants have assisted attorney in many functions such as, proving that the community is hostile, and thus obtain a change of venue, to predict probable voting behavior, to eliminate misconceptions of the law in the jury panel, to predict the honesty of jurors, to ascertain the depth of a jurors feelings, to assist the attorney in bonding with the jury and to assist the attorney in developing a strategic plan that the jury will understand and be receptive to. "These social scientists can observe, record, and interpret kinesic [body language] and paralinguistic cues [such as, pauses, silences, syntax, choice of words or phrases, sudden change in pitch or tone of voice] of [potential or chosen jurors and jury panel while the attorney is concentrating on the application of the laws, familiarizing jurors with their responsibilities, and preparing jurors for evidence and testimony they will hear in the trial].¹² Jury consultants are trained to recognize the nuisances of a persons behavior such as, a gesture may indicate the depth of the juror's feelings on the subject; facial cues indicate what emotion an individual is feeling, [and] body cues indicate the intensity of that feeling to ascertain and judge the honesty of jurors [especially in high profile cases where jurors sometimes want to be picked for the notoriety

¹¹ Jury Selection-The Law, Art, & Science of Selecting a Jury. 2d. Ed. Gobert & Jordan P. 350, 460. 1990

¹² Jury Selection-The Law, Art, & Science of Selecting a Jury. 2d. Ed. Gobert & Jordan P. 481. 1990.

and monetary benefits that follow these trials].¹³ Jury consultants gather their information by community surveys, pre voir dire questionnaires, during voir dire (including during lunches and breaks), and throughout the trial. They design pretrial surveys to “investigate empathy, autonomy, alienation, internality, and approval dependence [and then] classify veniremembers on a broader range of demographic descriptors.”¹⁴ Then, they prepare a seating chart with juror names, occupations, and any other pertinent demographic data and add the kinesic and paralinguistic cues as each juror responds to the voir dire questioning (which can later be used in closing arguments to personalize the case to jurors). Next, they rank the jurors based upon the community survey to establish their valuableness and either propose their elimination or try to find ways to exploit the characteristics or experiences of each juror that make them partial to the side that is employing them. Thus each juror is profiled just as meticulously as the defendant, opposing attorney, witnesses, facts of the case, the applicable law and the precedent cases. There still remains many ethical and monetary considerations that we must weigh.

Monetary Considerations

The monetary considerations of employing jury consultants to both opposing parties, the state, and taxpayers must be weighed to decide if an impartial jury

¹³ 6 A.L.B. L.J. SCI & TECH. 383.

¹⁴ Journal of Personality and Social Psychology. Vol. 43. No. 5. P. 1052-1063. 1982.

one of our most fundamental rights is being protected or if we are creating a system where the rich have influence in our courts and the poor or indigent defendant is guaranteed an attorney with inadequate tools to defend the client. First, we must come to the realization that money does indeed buy many things in our society and in our judicial system. Wealthy litigants hire the most expensive attorneys with the best track record or even a panel of attorneys; they can conduct their own tests, can hire several expert witnesses, they can hire investigators, and can hire jury consultants. The state (although usually overloaded with cases) also has many resources that they can utilize, including contacts within other agencies and the judicial system, knowledge of the proceedings and respectability. Thus the indigent defendant must usually face one of these opposing sides of the state or wealthy litigant. The playing field is leveled by the zealousness of the attorneys, the laws which equally apply to both in regards to evidence and testimony, equal access to the pre voir dire questionnaire responses, equal access to evidence and witnesses to be called, and equal access in court time with the opposing side. The final check of fairness or leveling of power resides with the jury panel to deliberate the totality of the case and make a judgment. Thus even if one side obtains more jurors initially more likely to be favorable to one side, the opposing side still has the duration of the trial to

convince the jury based on the evidence and testimony that judgment should be rendered in favor of their client. Money does talk in our system, but there are safeguards in effect to lessen their influence. The court cannot limit the rights of either side to present evidence on their behalf or call witnesses to testify, but can limit the duration of proceedings thereby pressuring attorneys to sift out the unnecessary elements that only delay judgment of their case, increase costs to both sides, confuse jurors, lengthen the court docket and place hardships on jurors lives leaving them frustrated and less likely to deliberate, which is a necessary component of our system.

Ethical Considerations

Now we need to review the ethics of attorneys, judges, and society to ascertain where our boundaries are and if attorneys or judges are regulated in any way to prevent or curb the practice of employing jury consultants. There are conflicting directions in the legal code that are applicable to the employment of jury consultants. The first view states that, "nothing in the applicable rules, canons, and codes governing professional responsibility explicitly bars the use of trial consultants. Rather, the rules encourage that all legal means reasonably available be used to advance a client's interest."¹⁵ Thus, according to this view, "lawyers have every right to hire experts in whatever field is needed to ensure that their clients

¹⁵ 6 A.L.B. L.J. SCI. & TECH. 383.

have the best representation.”¹⁶ The opposing view is that “even though the Code does not explicitly regulate consulting, it offers the following guidance: When explicit ethical guidance does not exist, a lawyer should determine his [or her] conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.”¹⁷ Thus, “every lawyer owes a solemn duty to...conduct himself so as to reflect credit on the legal profession and to aspire the confidence, respect, and trust of his [or her] clients and of the public.”¹⁸

I have separated these two views because currently the public and many in the legal field feel that jury consultants are manipulative and unduly influence our jury system unbalancing the impartiality and instead assist an attorney in finding a jury partial to his or her case. I am not suggesting that an attorney defend his or her client in an unzealous manner, however; I do feel that we need guidelines specifically designed to regulate jury consultants so we can improve the image of jury consultants and eliminate the negative consequences which sometimes result. Thereby, we also improve the image of attorneys who employ jury consultants and our jury system if there is accountability and perhaps even a certification program for jury consultants.

¹⁶ Sun Times. 11/22/95. P.38

¹⁷ Model Code of Professional Responsibility EC 9-2 (1983).

¹⁸ Model Code of Professional Responsibility EC 9-6 (1983).

The ethics and responsibilities of judges must also be addressed since it is the judge who enforces our procedural laws and rules on our statutory laws. The ethics and laws for judges and attorneys differ because attorneys are in an adversarial position representing their client and are usually employed in the private sector; while judges are decision makers and our government employees. "In addition to the high ethical standards required of judges in their private and public lives, they have been charged with the responsibilities concerning the behavior of others in the justice system. There is however; no judicial canon or ethic governing jury consultants.

Jury Consultant Image

Thus, there are no constitutional, federal or state laws prohibiting jury consultants from assisting attorneys. Nor are there any concrete ethics forbidding attorneys from employing jury consultants or any ethics or rules governing a judge to forbid their use. Further, the monetary costs of employing jury consultants is only one of many tools utilized in trials by those with the funds to protect their interests. The remaining concern is the general perception by the public that jury consultants manipulate our jury selection process. This view no matter how real, is questionable because attorneys do not pick who is on a jury; they pick who is not on a jury with unlimited challenges for cause (where the jurors bias or

prejudice is proven to the court or highly likely based on their characteristics and experience) and limited peremptory challenges equal in number to both sides.

Therefore, one side cannot be more manipulative of the jury panel than the opposing side because both sides are treated equally. Each side can gather their information by different mechanisms and each side may have a different strategy, but each is limited by the law.

There are however, instances where a jury consultant over steps their bounds and seeks a hung jury instead of an impartial jury by weighing the propensities of jurors. This aspect is regulated by attorney ethics, but not the jury consultant profession and is very difficult to prove. Therefore, it seems it is the motives of jury consultants that is questionable, not the data that they gather.

We must ask ourselves, how do we diminish the negative consequences and perceptions of jury consultants and the attorneys who hire them? First, the attorney must take responsibility for how he or she uses the information and how it is gathered to uphold the integrity and dignity of the profession. Attorneys and prosecutors also need to be educated in the techniques that jury consultants utilize to protect the interests of their clients especially in cases where it is not feasible to hire a consultant, because both sides have access to the prevoir dire questionnaire and can utilize the information to the advantage of their clients, thus

balancing the sides more equally in their strategy with the jury panel. Attorneys can also have their client make notes of juror's kinesic and paralinguistic cues and make judgments as to their meanings later. This gives the attorney more information, helps the client psychologically by including them in their defense and educating them, and serves to gain public trust in our system. Additionally, the objective of the attorney and jury consultant must not be a hung jury that would eliminate justice, cause distrust in our jury system, free possibly guilty individuals, or keep innocent individuals from establishing their innocence (although innocence is assumed by law it is not always assumed by the public) in a respectable manner, and tie up court time to the detriment of all subsequent cases and parties on the docket.

Judges can also diminish negative perceptions of jury consultants and the degree of access that wealthy litigants have in our system by limiting the length of voir dire and encouraging more prevoir dire questionnaires that limit the burden of the court, the potential jurors, the employers of the jurors, the attorneys, and the clients.

One way to lessen potential abuse and negative consequences is through a well written contract between the attorney and the jury consultant firm clearly establishing legal and ethical guidelines and duties that consultants and attorneys

would adhere to. For example, the contract could explicitly state that the motivation of the legal profession is to impanel an impartial jury and that to purposely impanel a hung jury or purposely eliminate protected classes from the jury panel is a violation of legal ethics and is punishable by a variety of measures applicable to attorneys, paralegals, and jury consultants. I envision this as a temporary measure.

Eventually, it could also be established by educating consultants in legal ethics and certifying them statewide or nationally with penalties of probation, fines, suspension of their license, and revocation of their license and termination from the profession if they fail to follow established guidelines similar to the American Bar Association.

Ultimately, there is a potential for abuse in everything. The goal then is to regulate behavior, by clear professional legal regulations of jury consultants and a certification process for jury consultants. These provisions should include educational requirements, bar convicted felons from the profession, and forewarn the penalties for violations. The educational prerequisites could be that jury consultants have a BA or BS, and eighteen hours of legal ethics with ongoing yearly requirements of six hours of legal ethics to retain certification in their field. The penalties for a consultant's failure to comply with these regulations should be set

out. The process must provide for whistle blowing of legal ethics violations, reviewability of the profession, hearings, and an appeals process to forewarn penalties, such as, probation, fines, license suspension and revocation. Professional certifications for jury consultants would also help the legal profession to police themselves, weed out those in the profession who violate the standards, diminish the potential of abuse, stipulate the penalties, and retain the public trust and respectability of the profession without hindering our fundamental right to an impartial jury.

By forbidding the use of jury consultants we might run the risk of depriving criminal defendants, the state and civil litigants of a legitimate tool. By regulating the profession we should be able to preserve that tool while preserving fairness and protecting the image of the judicial system.