Behavioral trial consulting: What do practicing attorneys think?

Dr. Boyll presents the findings of a study which explored the opinions among practicing litigators regarding jury behavior and the use of trial consultants.

Dr. Jeffery R. Boyll

Jeffery R. Boyll is a licensed psychologist and trial consultant based in Phoenix, Arizona. He also maintains a clinical practice in psychology.

The use of trial consultants has long been the center of debate. Opponents propose that the work of trial consultants manipulates the thought processes of jurors and threatens the integrity of our jury system. Supporters contend that this manipulation has been employed by successful trial lawyers all along, whether consciously or not, and that as long as evidence is not tampered with, the integrity of the jury system will remain intact.

A discussion of this debate appeared in an October 1989 *Wall Street Journal* article which contended that the use of behavioral scientist consultants is rapidly proliferating: "In any high stakes case, you can be sure that one side or the other—or even both—is using litigation consultants."[1] One trial attorney was quoted as saying, "It's almost malpractice not to use them." The remainder of the article was devoted to discussing the presumed ethical dilemma resulting from this perceived manipulation of the jury system, affordable only to the wealthy.

With all the hoopla regarding jury behavior and trial consultants, this author was involved in a study designed to determine what practicing litigators believe to be true regarding this issue. A survey was conducted of 100 practicing litigators to obtain their responses to

questions related to research findings on jury behavior, as well as attitudes toward trial consulting. (One hundred randomly selected civil litigators were interviewed in a telephone survey in the greater Phoenix, Arizona metropolitan area. Respondents represented a wide variety of geographic origins and law school training sites. Other demographic features of the sample are available upon request from the author.) Results of this survey will be discussed below.

Assumptions Behind the Work of Trial Consultants

The rationale behind litigation consulting is based on some basic tenets still under debate among legal scholars and social scientists, as well as among attorneys themselves. These tenets have to do with how and when jurors reach verdicts, the relative importance of evidence versus extraneous or psychological factors, the effects of pre-existing juror bias, and so forth. Without these factors, there essentially would be no need for trial consultants. A thorough review of the psychology law literature lends some support to the following assumptions which are central theories behind the work of trial consultants:

1. Jurors formulate a decision quickly, often by the conclusion of the opening statement, and are then very resistant to attitude change.
2. Jurors are unable to fully put aside pre-existing beliefs, attitudes, and values, and these factors significantly affect how a juror will respond to the case. Consequently, voir dire and the ultimate composition of the jury is of critical importance to the trial's outcome.
3. Jurors formulate decisions to a significant degree by emotional or perceptual factors.
4. The outcome of trials is often dictated by nonlegal or extra-evidentiary factors, and controlling these can mean the difference between winning and losing.
5. The attorney's presentation style and persuasion skills can significantly affect the outcome of the trial.

Obviously, all of the above run in direct contrast to the ideal manner in which jurors are *supposed* to render verdicts: through unbiased considerations of facts and evidence following the completed presentation of the trial.

Survey Results: Attitudes Toward the Basic Tenets

Initially, the sample was polled regarding their attitudes toward these five basic tenets:

Do you believe jurors, on the average, are fairly effective at waiting until the end of the trial to formulate an opinion?

Yes - 41%

No - 57%

Sometimes - 2%

If no, at what stage in the trial do you feel jurors typically make up their minds?

Voir Dire - 1%

Opening Statements - 25%

Presentation of Evidence - 27%

Closing Arguments - 1%

Other - 8%

It is interesting to note the near even split to the first question, indicating that one half of the sample of trial attorneys did *not* agree with social science findings regarding early decisions by jurors. Of the 57 percent who believe jurors reach early decisions, more than one

quarter feel the verdict is essentially decided during opening statement.

It should be noted that the issue of whether verdicts are determined early in the proceedings is a complex question and is difficult to accurately determine experimentally. There is considerable ongoing debate on this issue, as evidenced by recent comments from Professor Hans Ziesel and Litigation Sciences founder Donald Vinson in the American Bar Association's *Litigation* magazine.[2] Professor Ziesel claims his original jury research has been misinterpreted, and truly, many subsequent articles have cited Professor Ziesel's studies in claims that 80 percent of jurors have determined their verdict by the conclusion of opening statement. He indicates this is absolutely false. Dr. Vinson, on the other hand, relying on a huge but reportedly proprietary database of thousands of post-trial interviews at Litigation Sciences, contends the early verdict phenomenon clearly exists.

Dr. David Island, president of Trial Behavior Consulting, Inc., of San Francisco examined the results of more than 700 post-trial interviews conducted by his firm.[3] The findings suggested that the issue of early jury verdicts is complex, with variance occurring as a function of verdict. Specifically, in defense verdicts, about half the jurors had significantly "leaned" toward their verdict by the conclusion of opening statement; in plaintiff verdicts, approximately 34 percent of the jurors were committed after opening statement. In both types of cases, however, a disturbingly small percentage (less than 20 percent) was noted to have reserved judgment until deliberations.

Consequently, for the purposes of this author's study, the 41 percent of attorneys who feel jurors *do* wait until the conclusion of trial are clearly in disagreement with these other researchers' findings.

How important do you view voir dire in relation to the entire trial?

Little Importance - 10%

Somewhat Important - 34%

Very Important - 41%

Extremely Important - 15%

Of all the trials you've been involved with, on the average, what would you say is the relative importance of the composition of the jury?

Not Important - 3%

Somewhat Important - 26%

Important - 38%

Very Important - 33%

Responses to both of these questions suggest that jury selection is felt to be of significant importance to the majority of litigators. One-half to three-fourths of our sample agree that voir dire and the jury composition are important to extremely important. Trial consultants, with jury selection as a primary service, certainly promulgate the importance of jury composition. For example, attorney and trial consultant Margaret Covington Roberts states, "Seasoned litigators acknowledge that jury selection is the most vital component of the trial proceedings. In fact, once the last person on the jury is selected, I believe the outcome of the trial is essentially determined."[4]

Clearly, this author's data does *not* reveal clear-cut agreement among "seasoned" litigators regarding the importance of voir dire, with more than 25 percent viewing jury composition as less than important. In fact, attorneys who view jury selection as less than very important are again in frank disagreement with the social scientists.

On the average, what would you say is the relative importance of emotional or appearance factors?

Not Important - 10%

Somewhat Important - 21%

Important - 36%

Very Important - 33%

A fairly even spread is noted in this area, with an edge toward considering emotional factors to be quite important. Obviously, since trial consultants (or anyone else, for that matter) cannot change the facts of a case, they place considerable focus on variables that *can* be manipulated. From a consultant's standpoint, this ranges from "image consulting," concerned with the perceptual impact of counsel, witnesses, etc., to pretesting arguments for "emotional appeal." The above response suggests that at least 10 percent of attorneys view such a focus as a waste of time.

Apparently, research is needed determining the effects of attorney presentation style, as the majority of our sample views this factor as a determinant of trial outcome.

Have you ever won a jury trial in which your evidence was actually weaker than your opponent's?

Yes - 59%

No - 35%

Uncertain - 6%

If yes, what is your explanation of why this happened?

Superior presentation on my part - 38%

Poor presentation by opposing counsel - 35%

Credibility - 12%

Sympathy - 8%

Other - 7%

Nearly 60 percent of the sample had reportedly turned the tables on a "loser" case. This would suggest that it is not an entirely uncommon occurrence for nonevidentiary factors to influence the outcome of a trial. The major factor, noted in the second question, appears to be primarily related to attorney competence and presentation style.

Social scientists have made various attempts to measure the relative importance of extra-evidentiary factors. The task, however, is mediated by type of case as well as other factors. A consistent finding is, logically, that as the strength of the evidence increases, the effect of extra-legal factors decreases, and vice versa. Consequently, in cases where the facts and evidence are equivocal, the potential for a verdict influenced by extra-evidentiary features is greater.

Interestingly, the responses to our question indicate that many attorneys have been able to utilize nonevidentiary factors at times when they felt their evidence to be clearly weaker than their opponents'. Current research on the contribution of extra-evidentiary factors typically examines the effects of interpersonal attraction towards litigants and counsel, pre-existing attitudes, and so on. Apparently, research is needed determining the effects of attorney presentation style, as the majority of our sample views this factor as a determinant of trial outcome.

Of all the trials you've been involved with, on the average, what is the relative importance of the attorney's persuasiveness?

Not Important - 0%

Somewhat Important - 7%

Important - 32%

Very Important - 61%

As in the response to the preceding question, the ability of an attorney

to present his or her case in a persuasive manner is viewed as very important to the majority of our sample. Further, in the responses to the following question, it appears that attorney persuasiveness is seen as more important than jury composition, emotional factors, and other nonevidentiary aspects:

What makes a difference in jury trials?

Voir dire:

Less Important - 44%
Important - 56%

Jury Composition:

Less Important - 29%
Important - 21%

Emotional/Appearance Factors:

Less Important - 31%
Important - 69%

Attorney Persuasiveness:

Less Important - 17%
Important - 83%

Results indicate that attorneys with less trial experience tended to view nonevidentiary factors as more critical than experienced attorneys.

To summarize, the preceding questions reveal that practicing attorneys are quite divided in their opinions regarding the relative importance of various aspects of jury decision-making processes. We were interested to see what differences might exist between the "types" of attorneys, e.g., those that see jury composition, emotional factors, and so forth as important versus attorneys leaning towards the "ideal," rule-based decision-making model. Results indicate that attorneys with less trial experience tended to view nonevidentiary factors as *more* critical than experienced attorneys. Age and other demographic variables were not significantly correlated, however.

Survey Results: Use of Trial Consultants

To assess the frequency of attorneys' use of trial consultants, the sample was asked the following questions:

Have you ever retained the assistance of a behavioral trial consultant or social scientist in a case?

Yes - 21%

No - 79%

How helpful was it?

Little - 29%

Somewhat - 53%

Very - 18%

Would you use one again?

Yes - 94%

No - 6%

The preceding indicates slightly less than 25 percent of our sample had ever utilized the services of trial consultants. It is suspected, however, that a large percentage of these litigators had not had the opportunity to try the type of high-stakes cases that can reasonably afford trial consultant fees. Those attorneys that had utilized consultants appear to have been reasonably satisfied, and nearly all plan to use consultants again.

Of the 79 percent who had *not* utilized trial consultants, the following question was asked:

Do you believe a trial consultant would be of benefit to you?

Yes - 34%

Maybe - 44%

No - 22%

Again, responses were fairly mixed. Just under 25 percent did *not* see trial consulting as having any benefit,

with a slightly larger percentage believing they could benefit from a consultant's services. The majority of attorneys were undecided.

This group was also asked to rate the value of various services provided by trial consultants. The six services were defined as follows:

- **Scientific jury selection:** Community surveys are utilized to assess demographic and attitudinal information, resulting in statistical profiles of most and least desirable juror types.
- **Mock trials:** Also called trial simulations. Essentially a dry run or dress rehearsal prior to trial. The idea is to give attorneys and witnesses practice as well as to assess mock juror's reactions.
- **Pretrial research:** A condensed version of the trial or portions thereof are put on videotape and shown to surrogate jurors. The strength of issues and impact of counsel and witnesses can be tested and a prediction of the verdict and award determined.
- **Shadow jury:** Surrogate jurors who match the actual jurors are selected to view the trial as it takes place. Nightly reports assessing reactions, comprehension of issues, and so forth are conveyed to counsel each night.
- **Post-trial interviews:** Used to assess why and how jurors reached their verdict. The information can be utilized for similar or serial trials, decisions to appeal, and so forth.
- **Demographic information:** A listing of local attitudinal and demographic correlations. For example, "Male republicans over 45 tend to be pro-business and anti-tort reform."

Attorneys were asked to rate these services on a 1–10 scale, with 1 being "no value" and 10 being "extremely valuable." The averaged ratings were as follows:

Mock trials: 5.8

Pretrial research: 4.8

Shadow jury: 4.7

Demographic information: 4.7

Jury selection: 4.6

Post-trial interviews: 4.5

As can be surmised, the mean ratings for all of the services are not particularly high, with only mock trials averaging above a 5 on a 1–10 scale. Nor does any one service stand out as significantly more valuable than any others. This may suggest that the services of trial consultants, as well as the practice itself, generally receives a rather lukewarm response from attorneys in general. However, since the majority of this sample had not used trial consultants, these opinions are assumed to be based on other than actual experience utilizing these services.

Conclusion

The current study provides a first-ever empirical examination of practicing attorneys' attitudes regarding the use of behavioral trial consultants. Two significant findings clearly emerge. First, there are often discrepancies between consultants and litigators in the basic tenets that constitute the rationale for utilizing social science input. Specifically, consultants tend to view jury decisions as more heavily based on emotions, pre-existing attitudes and nonevidential factors. Attorneys agree with these sentiments to varying degrees. Our second, and even more startling, finding is that practicing litigators themselves vary widely in their attitudes regarding basic jury decision-making processes.

Do these attitudinal differences affect the manner in which litigators try

their cases? Common sense would suggest that such attitudes affect nearly all areas of trial preparation and presentation, including the emphasis placed on voir dire, opening statements, emotional appeals, and visual evidence. An attorney's attitude regarding juror decision making would also likely coincide with his or her belief in and use of the services offered by trial consultants. At their extremes, the schools of thought regarding jury decisions emerge as the "rule-based, evidential, logical" and the "emotional, attitudinal, perceptual."

Interestingly, however, the differing schools of thought generally agree on one issue: that the attorney's presentation style and persuasion skills can significantly affect the outcome of the trial. Consequently, while beliefs regarding the relative importance of various "nonevidentiary" factors differ widely among litigators, views regarding the extreme importance of attorney competence and persuasiveness are consistent.

Endnotes

1. Adler, *Consultants Dope Out the Mysteries of Jurors for Clients Being Sued*, Wall Street J., October 24, 1989, at 1, col. 1.
2. Vinson & Hanley, *Do Not Ignore This Opening Statement—Or Any Others: A Reply to Professor Ziesel*, LITIGATION, Winter 1989, at 1.
3. Island, *Research Notes*, newsletter of Trial Behavior Consulting, Inc., San Francisco, Fall 1989, at 1–2.
4. Roberts, *Is This the Case That Warrants a Jury and Trial Consultant?*, TRIAL DIPLOMACY J., Spring 1987, at 16.