

Are trial consultants effective?

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Trial attorneys are trained and educated to prepare for many aspects of trial, and may reasonably ask, “Why would I need a trial consultant? Will it increase my chances of winning if I have one helping me?” Most often, our answer to the title question is a resounding “yes.” This paper attempts to explain the general benefits of hiring a trial consultant as well as the specific types of cases where trial consultants can be most helpful. To answer the questions posed above, we consider what trial consultants can do, examine empirical research about their effectiveness, and suggest what we think are the most useful services we can provide in specific situations.

Why would I need a trial consultant?

It is widely recognized within the legal community that lawyers must be trained to think differently than laypersons. In fact, one of the most frequently quoted goals of law school is to train students to think like a lawyer. This shift in thinking enables lawyers to view things differently from others—to see legal benefits and pitfalls that others would miss—and becomes crucial to a lawyer’s success. While adopting this legal perspective is vital and necessary, it is often not consistent with thinking like a juror.

Similarly, social scientists have been trained to think differently as well. They are taught to see how a person’s life experiences affect his current perspective, to grasp how group dynamics influence individual decision-making, and to recognize the malleability of someone’s attitudes regarding the topics most central to the case at hand. Just as lawyers are able to evaluate a case’s legal merits, social scientists can evaluate a case’s jury appeal. Additionally, we can assess an individual juror’s ability to be receptive to a specific case.

Most attorneys recognize the need to get a layperson’s perspective—after all, lawyers rarely go to trial without running their arguments past their staff or family

members—but they may not recognize the benefit of hiring a trial consultant. Rather than simply providing a lay perspective, trial consultants are trained to recognize the various ways your case may be perceived by various jurors. They use social science techniques to predict and interpret juror responses to a case. They examine juror responses to evidence and arguments in a mock trial/simulated trial setting to learn how the jurors process that information and give it meaning. And they look at juror characteristics like demographics, attitudes, and experience to see what influence these may have on a verdict. In the same way an attorney examines all of the legal nuances of a case, trial consultants examine all of the psychological nuances of a case to assist you in putting on the most persuasive case possible to the most receptive jury possible.

Will a trial consultant increase my chances of winning?

Joel Lieberman and Bruce Sales provide a richly detailed discussion of this question, summing up a great deal of the research on it, in their book on the trial consulting profession, *Scientific Jury Selection*. While there are many factors that contribute to trial success—and many of those factors are difficult to quantify, replicate, or measure—empirical studies have shown a benefit to utilizing social science in trial preparation, particularly in jury selection. Research into the effectiveness of trial consultants shows that using their techniques (known as “scientific jury selection”) can result in an improvement of 10% to 15% in prediction accuracy regarding jurors. Most trial lawyers would acknowledge that an increase in jury selection accuracy by 10% to 15% is both substantial and desirable. For many attorneys, this increased margin has been enough to convince them of the benefits of working closely with trial consultants.

However, all cases are not created equal and trial consultants can be more helpful in some cases than others. The primary determinate of how beneficial a trial consultant will be in a particular case is the evidence/case facts. Given that trial consultants specialize in persuasion and juror reactions to evidence, they can provide

the most assistance in cases in which the evidence is open to interpretation. In cases in which the evidence is strongly tilted in one side's favor (i.e., a criminal case where there is DNA and fingerprint evidence as well as eyewitness testimony), the strength of the evidence completely outweighs juror characteristics (Visher 1987). In such instances, jury selection choices—with or without a trial consultant—will rarely change the outcome of the trial. Therefore, a trial consultant provides the most value in cases where the evidence is ambiguous or in cases where a negative outcome is likely, but the goal is to lessen damages (or in a criminal case, to obtain a more favorable sentence).

Can't I rely on my previous jury research and trial successes?

Research into verdict predicting variables has demonstrated very little generalizability across cases (Penrod 1990). While attitudes and life experiences have been found to be much more reliable and predictive than demographic factors, the predictive attitudes and experiences tend to be case-specific, rather than general in nature. In short, a factor that is predictive in one case—attitudes toward tort reform, for example—cannot be assumed to be predictive in the next case.

This research not only illuminates the problems with relying on previous experiences or demographics to make jury selection decisions (“I don't want teachers on my juries, because I've been burned by a teacher in the past.”), but it highlights the importance of examining each case individually for any points of sensitivity or concern.

Further studies demonstrate that the more case-specific you can make your questions and your jury research, the more likely you are to accurately predict juror behavior (a point Davidson and Jaccard, 1979 make in a broader context). While there are instances in which you would want to use more generalized case facts—for example, when you are doing jury research to determine what attitudes and issues arise as problematic across the board in mass tort cases—nothing will more

accurately predict juror response to a particular case than a very detailed testing of the case-specific facts.

There are many instances where it may seem like asking a general question may help—“Do you like drug companies?” in a case involving a claim of failure to warn/injury from a drug—but we’ve found that jurors can dislike drug companies and still be skeptical of a plaintiff’s case. A specific case merits case-specific questions, and, as indicated by the discussion above, trial consultants have been trained and educated in analyzing a situation and developing questions that may prove predictive.

Are there benefits outside of jury selection?

So far, we’ve focused on the predictive part of social science relating mostly to jury selection, but jury research and trial consulting include an interpretive element as well. Interpretation involves analyzing juror/layperson responses to case issues and/or specific elements in the case, to discover what these mean to individual jurors. This information helps trial consultants understand how jurors filter information about a case. In addition to the direct effect juror attitudes can have on verdicts—as discussed above – additional research has shown that juror characteristics can also have an indirect effect on the verdict because they serve to influence and filter jurors’ perceptions of the evidence (Hepburn 1980).

For example, we have found that jurors can be presented with clear documentation that a doctor warned a patient about a potential risk or side effect, but jurors will argue that the plaintiff/patient either was not warned, or inadequately warned. How can they do this? (And, equally important, what type of juror is most likely to do this?) Or, as frequently occurs, jurors can be presented with testimony from an exceptionally qualified expert and completely disregard their testimony in favor of their own theories or explanations. Such circumstances frequently frustrate seasoned attorneys, leading them to conclude that jurors didn’t listen to or are willing

to ignore the evidence or that the jurors are uneducated/unintelligent. Social scientists, however, view these experiences differently.

Social scientists spend a lot of time studying how people process information and how they explain things to themselves and others. Trial consultants have the understanding that when jurors reject evidence or theories, they are often rejecting the presentation of that evidence or theory. Rather than simply concluding that the jurors did not understand the arguments or testimony, they are trained to examine why they weren't receptive to the case as it was presented—and to determine how the evidence can be presented in a way that's more accessible, credible, or noteworthy.

Trial consultants specialize in appreciating the perspective of jurors (even if it seems perplexing on the surface) and figuring out how to reach someone with that perspective. This allows them to offer insight into how jurors will interpret evidence based on how it is presented and in turn, to provide guidance as to which jurors should be deselected based on the themes and presentation strategies in a particular case.

At Carpenter Trial Consulting, we believe in the work we do and we understand that our greatest successes come from helping you achieve your greatest successes. Our goal is for you to feel comfortable with us and to know that you can trust us. Your interests are our interests and you can be confident that we will respect your insights and your style.

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**References available upon request*