Trial Consultation
Trial Consultants: Who are they and what do they do?

- Estimated that there are over 700 independent trial consultants and 400 trial consulting forms.

- Suggested that psychologists are uniquely prepared to work as trial consultants in both research methodology and understanding of human behavior and social science.

Trial Consultants: Who are they and what do they do?

- Can be a lucrative field with consultants charging from $75 to $300 per hour.

- Growth industry with over 900,000 practicing lawyers and 40,000 new lawyers each year; 18 million lawsuits filed each year.

- Majority of individuals who identify themselves as trial consultants are not psychologists; many have training in speech communications, political science and law and fewer than a third of ASTC list themselves as having a doctoral degree.
Role of Trial Consultants

- Legal psychology – distinction from first chapter between forensic psychology (the applied clinical aspect of psychology and the law) and legal psychology

- Some activities of trial consultants
  - Mediation – work as an arbitrator or mediator
  - Change of venue: pretrial publicity
  - Voir dire and jury selection
  - Selection of a trial strategy: mock juries
  - Witness preparation
  - Presentation of Evidence
Mediation

- Used in civil cases, not criminal cases (criminal cases do use plea bargaining)
- Backlog of civil cases: over 18 million new lawsuits each year
- *Alternative Dispute Resolution*: use a third party, impartial mediator to help the disputants reconcile their differences and avoid a lengthy trial
Mediation

- Sometimes this can be ordered by a judge, as in the case of divorce mediation and small claims.
- Frequently arbitration is written into contracts and prohibit lawsuits.
- Over 1500 law firms have signed an agreement to educate their lawyers about dispute resolution and for the lawyers to recommend it to clients when appropriate.
Distinguish between an Arbitrator and a Mediator

- **Arbitrator** – someone empowered to make binding recommendations for dispute settlement.

- **Arbitration**:
  - The amount of control that the disputants have over the process varies; they have no control over the decision; that rests with the arbitrator.
Distinguish between an Arbitrator and a Mediator

- Mediator – contractual mediator is someone who is hired as an impartial third party whose goal is for the disputants to determine the outcome.

- Mediation: the mediator can influence the process of negotiation but not the decision.
Effectiveness of Mediation

- Optimism for its effectiveness has diminished with empirical studies

- Problems recur after mediation

- Situations in which mediation does not work:
  - High level of hostility
  - Distrust of the mediator
  - Unequal power between the disputants
Change of Venue Requests

- Change of venue request is when the attorney (usually defense) asks that the trial be moved to a different jurisdiction.
- Usually due to pretrial publicity which is so pervasive that the attorney does not believe the jury can be neutral.
- Trial consultants can assess the impact of pretrial publicity by conducting surveys in the community.
Change of Venue Requests

- If a large percentage of people in the community are familiar with the case and also have already decided that the defendant is guilty, a change of venue is warranted.

- Research has shown that pretrial publicity can bias potential jurors.
Change of Venue Requests

- The trial consultant conducts the survey, prepares an affidavit for the court explaining the scientific literature regarding effects of pretrial publicity on juror bias, the survey methodology and his or her conclusions.

- As with all motions, the judge decides if the change of venue request is granted or denied.
Voir dire and Jury Selection

- *Voir dire* (French: *to speak the truth*) is a process in criminal and civil cases in which the judge and/or the attorneys formally examine groups of prospective jurors; process of elimination as opposed to selection.

- Exactly who questions the jurors depends on jurisdiction and type (civil versus criminal) of trial.
Voir dire and Jury Selection

- Primary purpose is to uncover any bias jurors might have that would prevent them from forming a fair and appropriate verdict.

- Other uses include:
  - Opportunity for lawyers to ingratiate themselves with the jury.
  - Opportunity to educate jury about relevant case law or issues of the case.
  - Whatever the purpose, the trial starts with the voir dire.
Type of Challenges to a Prospective Juror

- *Peremptory challenge* – the removal of a juror from the panel for no avowed reason

- Number of peremptory challenges varies by jurisdiction and type of trial; also in some states judges may grant additional peremptory challenges if deemed appropriate, such as in cases with intense pretrial publicity

- Defendants are usually granted more than the prosecution and as the severity of the case increases, more peremptory challenges are granted
Type of Challenges to a Prospective Juror

- Courts have ruled that peremptory challenges cannot be based solely for the purpose of striking individuals from specific groups including:
  - race (Batson v. Kentucky, 1986) or

- However, lawyers may be able to fabricate other reasons to circumvent the law.
Type of Challenges to a Prospective Juror

- *Challenges for cause* – if a prospective juror is biased, has disagreement with due process, or does not meet eligibility requirements, lawyers can challenge for cause

- Unlimited number of challenges for cause; either granted or denied by the judge, rarely granted as the judge can ask the juror to set aside their bias
Jury Selection

- Traditional jury selection versus scientific jury selection

- Traditional jury selection – “any strategy that has traditionally been used by attorneys to identify jurors who are favorable (or unfavorable) to their case.”

- These approaches involve stereotypes, hunches, implicit personality theories, body language, style of dress and grooming, economic status, jobs, common sense, etc
Traditional Jury Selection

- Limited empirical research on the topic of traditional jury selection

- Research that does exist suggests it is no better than chance

- Attorneys do appear to be able to identify the most bias jurors against the defense or prosecution
Scientific Jury Selection

- *Scientific jury selection* – attempts to identify which characteristics (demographic as well as broad personality traits or attitudes) will be associated with a favorable verdict; main tool is the community survey

- *Community survey* – built around the particular case and involves 5 components
Five Components of the Community Survey

- Synopsis of the case including summary of the evidence and then questions assessing
- Case-specific attitudes
- Attitudes toward the legal system
- Defendant culpability
- Demographic information
Characteristics used to Predict Verdicts

- Demographic Variables – appear to be **weakly** associated with verdicts; at best demographic variables appear to be related to case-relevant attitudes
  - Race
  - Gender
  - Age
  - Socioeconomic status (education and income)
Case relevant attitudes and demographics

- Death penalty attitudes are an example of case-relevant attitudes that may be assessed through demographics (Whites, Republicans, & males are more pro-death penalty than Blacks, Democrats, and females)
Personality Traits

- Research suggests that personality traits as predictors of verdicts is weak at best

  - *Internal locus of control* – hold defendants responsible
  - *Belief in a just world* – may believe bad things happen to bad people
Personality Traits

- **Authoritarianism** – endorse conventional values, respect authority, and act punitively toward people who defy authority or conventional norms

  - Legal Attitudes Questionnaire assess authoritarian attitudes related to the legal system
  - More likely to vote for a conviction and recommend harsh sentences compared to non-authoritarian jurors
Attitudinal Predictors

- Attitudinal Predictors – attitudes toward issues relevant to the case
  - Attitudes toward tort reform predict verdict inclination; those favoring tort reform side with prosecution in criminal trials and defense in civil trials
  - Attitudes toward psychiatrists predict verdict inclinations in insanity cases
  - Attitudes toward drugs predict verdict inclinations in drug cases
Effectiveness of Scientific Jury Selection

- Two approaches to studying effectiveness:
  - Examine statistical relationship between variables (demographics, traits, etc) and verdict inclination
  - Examine predictive strength of these variables in trial simulations
Effectiveness of Scientific Jury Selection

- Need research to determine if scientific jury selection is better than traditional jury selection in order to justify the expense.

- Appears that the quality of the evidence is clearest determinant of jury verdicts.

- But in particularly close cases; attorneys want every possible edge and thus might be enough to justify use of a trial consultant.
Witness Preparation

- Trial consultants can examine both stylistic and substantive aspects of mock testimony and provide feedback and coaching.

- Procedure is to videotape mock testimony and then offer feedback on speech patterns, expressions of arrogance or defensiveness, etc.

- Can also use mock jurors to evaluate their reactions to mock testimony by the witness.

- Five topics on which the psychologist can contribute expertise
  - The facts to which the witness will testify
  - Witnesses feelings associated with the case and testifying
Witness Preparation

- Five topics on which the psychologist can contribute expertise
  - The facts to which the witness will testify
  - Witnesses feelings associated with the case and testifying
  - The courtroom environment
  - Direct examination
  - Cross-examination
Other Activities the Trial Consultant May Perform

- Selection of courtroom strategy using focus groups to try various arguments to see which work best
- Helping attorneys with the preparation of the case
- Helping with the presentation of evidence
Ethical Issues in Trial Consultation

- What are the limits regarding jury selection, witness preparation, use of mock juries, etc.
- No regulatory board for trial consultants
- Is this something that only benefits the wealthy and corporations?
Ethical Issues in Trial Consultation

- Is it ‘fair’ for one side to use a consultant for jury selection and the other side not to have the same benefit? Most courts assume that the lawyers for the two are never perfectly match in terms of abilities or resources.

- Currently, it is up to the individual attorney and consultant to decide on the ethical issues related to trial consultation.

- Still, there is the question as to whether what trial consultants do really makes a difference in jury verdicts.
Trial Consultation: Summary

- Mediation
- Change of venue
- Voir dire and jury selection
- Witness preparation
- Other activities of trial consultants
  - Courtroom strategy, preparation of case, use of mock juries, etc.
- Ethical Issues
Web Sites

- American Society of Trial Consultants
  - www.astcweb.org/public/index.cfm

- APA Career in Trial Consulting
  - www.astcweb.org/public/index.cfm