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Weird Science: How Misperceptions of Litigation Consulting Can Drive Juror Cynicism

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On March 1st, 2012, I wrote a post in our blog, *Persuasive Litigator*, taking aim at one author's tortured view of the process of "Scientific Jury Selection," and the author's subsequent question, "*Can I use science to get out of jury duty?* Since the essay appeared in Slate, a national on-line publication, and was based on a number of substantial misunderstandings of the litigation consultant's role during jury selection, I focused my response on correcting the record and explaining and justifying what a consultant actually does during jury selection.

But after sending that post into the world, I was struck by a larger thought: How is it, I wondered, that an author so focused on questioning the honesty and integrity of social scientists working in litigation would end up coaching his readers to make false statements to get out of jury duty? And what ties those two thoughts together?

The answer, I believe, is cynicism. If this potential juror believes the game is rigged due to the interference of questionable science, then that becomes a permission slip of sorts to opt out of the process by whatever means necessary. Psychologically, a panelist might feel greater cognitive consistency and comfort in resorting to unfair means to get out of a process if they believe that the process isn't fair to begin with. So in that way, the assumed lack of scruples on the part of trial consultants allows Mr. Warner, the Slate writer, to comfortably tell potential jurors to perjure themselves by claiming to have a bias that they don't in fact have. That is, in fact, how he ends the article.

That explanation may be at the root of this one article, but it also points to a larger problem: Many believe that the deck is stacked, and those armed with a little bit of knowledge about social scientists in the field may think that we are the ones stacking the deck. That casual attention, when

combined with popular perceptions of "bad verdicts" like the recent Casey Anthony decision, can lead to a number of toxic assumptions, suggesting that juries are capricious and unqualified. And if juries are just pawns in the hands of powerful lawyers and high-priced consultants, then what is the point of supporting the jury system through an oath, through honest voir dire, and through time in trial?

I don't want to overstate my case here. While the *decline of the jury trial* has many causes, popular cynicism about the jury trial plays a role in, at least, dampening the enthusiasm for a resurgence. It is here that legal organizations can and should be doing more to educate. The *American Society of Trial Consultants*, for example, needs to do more to teach lawyers, the media, and the public about what trial consultants do, and our role in promoting the most cherished goals of the uniquely American jury system: promoting a fair trial by more effectively identifying and eliminating bias. Using all of the tools of professional visibility – including publications like this one but also press releases, conference presentations, CLE's, blogging, and tweeting – the ASTC has the opportunity to tell the more accurate story of the relevance and value of social science in a legal realm.

My post regarding Warner's attack on Scientific Jury Selection is an admittedly modest step in that direction. The original post appears below:

Don't Mistake the Purpose of "Scientific Jury Selection"

(Originally Published in *Persuasive Litigator*, March 1, 2012)

The word "science" conjures up all kinds of images, and many of those images don't quite match the realities. One context in which scientific perceptions are at a mismatch with reality is the area of jury selection. A week ago, Joel Warner wrote an article for Slate, the online magazine, that began with the question, "*Why do so many people want to get out of jury duty?*" Casting a skeptical glance at the notion of scientific jury selection, Warner then broadened his critique to the jury consulting profession as a whole: "Since even the practitioners of scientific jury selection are reluctant to emphasize the science of what they do, some folks think it is time to get rid of the business altogether." Being one of those folks, Warner then suggested eliminating the peremptory challenge as a way to reduce the incentive for dealing with jury selection experts.

The suspicion illustrated in the Slate piece, and amplified in its comments, is that our legal system has been hijacked by a dubious form of science. The article, however, is founded on a number of significant misconceptions about both the purposes and the methods that are applied when a consultant is involved in jury selection. Because some attorneys, particularly those who have never used a consultant, might have the same misconceptions, I wanted to take a closer look at exactly what a communication or psychology expert does in court, and what we mean and don't mean by "scientific jury selection."

I typically avoid the phrase "scientific jury selection," not for Warner's attributed reason of being reluctant to emphasize the science of what I do, but because I know that the phrase is often subject to caricature and misunderstanding. In practice, the activities of someone in my line of work vary dramatically from the *Grisham-esque Hollywood image* referenced in *Slate's* title and boil down to more prosaic activities of profile, analysis, and recommendations. The profile is a carefully constructed list of attributes -- some demographics and experiences, but mostly attitudes - that general research and case-specific mock trials and focus groups tell us are likely to identify a potential juror that is a higher

risk for our side. The analysis is a careful tracking and weighting of everything we learn from potential jurors: the attitudes and other information that they share in surveys and oral questioning. The recommendations then apply that information to an attorney's decision to challenge a potential juror for cause or to exercise a strike.

I've written in *greater detail* about these activities in prior posts, but the important reminder is that none of these are radical departures from the traditional trial process, but are instead just ways of helping the attorney do what the attorney is supposed to be doing already -- namely targeting and eliminating bias so their client gets a fair shake from the jury.

To be more specific, there are a number of misconceptions in the *Slate essay*.

Misperception One: Scientific Jury Selection Is Hard Science. When average people think of science, they may think of test tubes, precise measures, and solid maxims and proof. For example, when CSI matches a blood sample, then it is a match! The Slate article seems to be relying on those perceptions in making comments like "the jury box turns out to be a lousy laboratory for the study of human behavior." However, the popular image, as well as the "laboratory" language is drawn from the physical sciences, or hard sciences. Jury selection, on the other hand, swings from another branch of the scientific tree.

Reality: Scientific Jury Selection Is Social Science. The techniques applied are still "scientific" in the sense that they are methodical and replicable, but prone to the subjectivities of human interpretation and judgment. That is not a limitation or a reason to see social science as "soft," but is instead a realistic concession to the fact that we are dealing with individual attitudes and group dynamics. For example, Mr. Warner argues that "to truly understand how group dynamics play out leading up to a verdict, researchers would need access to jury deliberations, and that's strictly off-limits in real trials." Yes, but that is precisely the reason why mock trials and the close observation of those deliberations play such a central role in developing recommendations for trial preparation.

Misperception Two: Scientific Jury Selection Aims to Determine Trial Results. The article refers to industry critic Neil Kressel in order to argue that, "The preponderance of academic researchers agree that it is extremely difficult to figure out how a jury is going to decide." Yes, but so do a preponderance of litigation consultants. The implication from Warner is that since you can't know with certainty how a jury will decide, an analytic approach to jury selection is worthless. But that presumes that the goal of jury selection is to decide the case. Put simply, it isn't.

Reality: Scientific Jury Selection Aims to Reduce Bias. The entire reason that the courts allow a voir dire process in the first place is to reduce bias and promote an environment where the facts win out. As Warner notes, lawyers and consultants don't get to "pick" juries, they get to "unpick" them by exercising challenges and strikes. That means that there is no opportunity to "stack" juries, but instead only an opportunity to "unstack" them by eliminating those who pose the greatest risk of bringing a bias to the decision. The article notes, "there's something disconcerting about an expert being able to calculate how they're going to decide a case based on their gender, background, and other characteristics," but we aren't calculating how they'll decide, we are estimating the risk of bias. And it isn't generally based on gender or background, but on expressed attitudes about issues that bear on the case. Psychologists

have known for many decades that, even in the social sciences, it is possible to measure bias in reliable ways, and I've *written in the past* on ways consultants apply this approach as well.

Misperception Three: Scientific Jury Selection Pollutes the Goals and Ethics of Trial. Central to Slate's critique, and most critiques of jury consulting, is the idea that it is somehow a foreign toxin that corrupts the pure ideals of justice. As another critic, law professor Franklin Strier, notes, "It's either expensive or a waste of time if its ineffective, or if it is effective, then it is unfair." The claim of unfairness assumes that jury selection assistance introduces an extra legal element into the process that skews the results. But if what consultants are actually doing is more effectively eliminating jurors with the most evident biases, then it is hard to see where the unfairness is.

Reality: Scientific Jury Selection Encourages a Focus on the Legally Appropriate Factors of Bias. Think about how jury selection occurred before the invasion of the social scientists: Attorneys would often rely on what they could most easily see -- race, gender, age, education -- factors that we now know generally bear little reliable relationship to bias. By involving someone who actually works with and measures attitudes for a living, attorneys are taking a step toward focusing more effectively on actual bias and not stereotype. And that is exactly what the legal system is supposed to be focusing on all along.

Of course, the ultimate irony is that all of this criticism comes in the context of an article on how to get out of jury duty. The questions on the ethics of trial consulting are coming from someone who uses the platform of a national publication in order to coach perjury. Mr. Warner's advice when you're under oath is to simply "be biased" and "say you can't be fair and impartial," and then hold your ground when the judge questions you. Effective, maybe. Honest and helpful to the process, no. Litigation consultants, on the other hand, do tend to be honest about both the benefits and limitations of their methods, and helpful to the process as that process is designed to operate. Warner makes a fair point when he calls trial consultants "unregulated and certification-devoid." Many of us have long argued for professional certification and we are getting there. But in the meantime, the American Society of Trial Consultants (mentioned by Warner) has a professional code including *standards and practice guidelines* for jury selection (not mentioned by Warner) that bear on many of the problems that he and other critics see. Conducted properly and conveyed honestly, the involvement of a social scientist improves the process and keeps it focused where the law says it ought to be focused: the reduction of bias.

References

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