

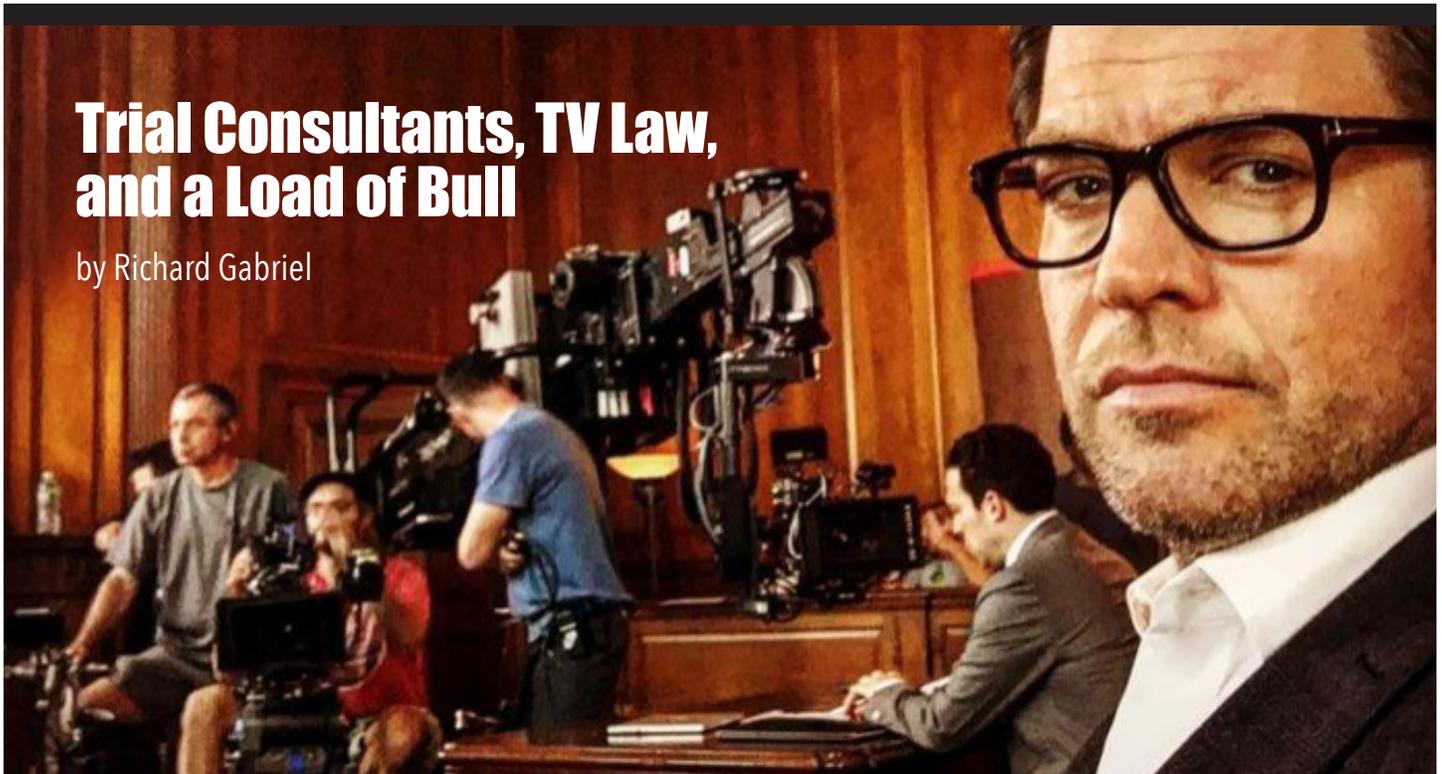
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Trial Consultants, TV Law, and a Load of Bull

by Richard Gabriel



WHEN PEOPLE ASK ME whether the new CBS show “Bull,” which features a prominent trial consultant, accurately portrays the work we do, I tell them “Absolutely. We have a stylist from Vogue on staff to dress our clients, we hack into jurors’ private computers, we steal and bug the watches of the attorneys we work with, and we always solve the crime.”

Seriously.

To criticize this now-popular show for its inaccurate portrayal of the law or trial consultants would be like criticizing “The Walking Dead” for not preparing us well enough for the zombie apocalypse. The purpose of traditional primetime shows is to entertain the masses and sell them cars, beer, and burgers.

However, as 12 to 15 million viewers watch the show every week, it is also unfair to simply dismiss it as entertainment with no consequence. The public has seen so many television shows about police, doctors, and lawyers for decades, so it is easier now for viewers to dismiss inaccuracies about these professions on modern television shows. But as the public has no reference

point for trial consultants, it is easier for them to accept what they see in these shows as, as Stephen Colbert put it, “truthiness” – the quality of seeming true, even if it is not necessarily true. Over the years, people have asked me in all seriousness whether the attorneys I work with wear ear pieces so that I can direct them on which jurors to pick or how to examine a witness, like Rankin Fitch, the Gene Hackman character in John Grisham’s *Runaway Jury* and, now, *Dr. Bull*.

With “Bull,” it is less important to worry about the impact on jury consulting as a profession, and more important to examine how popular culture portrays jury trials and how it affects the public’s view of our justice system, including trial consultants. It is also important for those of us who work in jury trials to see what lessons we can learn from television in constructing trial narratives to better communicate our cases to *our* audience – the jury.

Television Law

In the late 1950s and 1960s, popular legal shows included *Perry Mason* and *The Defenders*, which featured criminal defense at-

torneys. However, as the violent crime rate in the U.S. climbed in the 1970s and 1980s, the focus of our legal television shows shifted. After various states began enacting “three strikes” laws, established stiffer sentencing guidelines for crimes, and increasing the use of the death penalty in the 1990s, television generally stopped focusing on defense attorneys and shifted to reflect the zeitgeist of the time. “Law and Order” and its spinoff series, premiering in 1990, became entertainment juggernauts representing America’s desire to get tough on crime.

Public sensibility has again undergone a change. We have the highest incarceration rates and most expensive penal system of any country in the world, and on top of that have placed a disproportionate number of minorities in prison. There is now bipartisan support for criminal justice reform and support for the death penalty amongst the public is the lowest it has ever been since the 1960s. Television shows always reflect our changing cultural sensibilities. Thus, it is interesting to note that the latest slate of television shows, including “Bull” and another new show “Conviction,” tend to focus on exonerating wrongfully accused defendants.

There are a number of important trial and justice issues that Bull, in concept, brings to the viewing public. First and foremost, that trials are more than just evidence and law. Although portrayed in a slick, cynical, and even illegal way, Dr. Bull’s Trial Science team recognizes that trials are not just about evidence, but about the psychology of human decisions. In their own gimmicky television way, this TV team endeavors to better understand and communicate with the jurors in their cases.

In that respect, Bull does a good job of capturing an interesting aspect of our work. Often, in interviewing witnesses, reading documents, or conducting jury research, a trial consultant discovers behavioral or psychological aspects of one of the parties that sometimes get overlooked in factual discovery or the timeline of events but are enormously important to jurors. While prosecutors are not legally obligated to prove motive in a criminal case, the jury always wants to know why a criminal defendant behaved the way he or she did. Likewise, jurors in civil cases always are looking at the motivation for the accused conduct of a doctor, an employer, a plaintiff, or a product manufacturer—even though it is not required by law. If jurors are going to judge individuals in a trial, they want to know *why* they act the way they do.

Bull usually tackles a social science issue per episode. In the second episode, the team addresses implicit bias against a female pilot accused of crashing a plane and causing the death of all the passengers. According to the National Center for State Courts, which has extensively studied this phenomenon:

“Implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional

control. The underlying implicit attitudes and stereotypes responsible for implicit bias are those beliefs or simple associations that a person makes between an object and its evaluation that “...are automatically activated by the mere presence (actual or symbolic) of the attitude object” (Dovidio, Gaertner, Kawakami, & Hudson, 2002, p. 94; also Banaji & Heiphetz, 2010). Although automatic, implicit biases are not completely inflexible: They are malleable to some degree and manifest in ways that are responsive to the perceiver’s motives and environment (Blair, 2002).”^[1]

U.S. District Court Judge Mark Bennett provides a detailed instruction to jurors on implicit bias^[2] and California has started using a more generic version of this instruction to make jurors aware of these potential biases. There is also a movement to instruct jurors on implicit bias to make them aware of how it can affect a witness’ cross-racial identification of a defendant. The ABA has launched an implicit bias website providing tools and resources for the Courts and litigants to help understand these pernicious biases that can affect the decision making of attorneys, witnesses, judges, and jurors. Indeed, implicit bias is at the core of most trial consultants’ work. While for decades the courts have only recognized explicit or conscious bias, trial consultants understand that a person’s life experiences, values, and belief systems profoundly affect how they interpret evidence and the law.

In another episode, The Bull team tackles the issue of pre-trial publicity in a case involving a woman accused of murdering her accused rapist, which has been publicized in a viral “Serial”-like podcast. The high profile trial, a part of the American justice system since Aaron Burr’s trial in 1807 for charges of treason and conspiracy, has been a challenging feature of our litigation landscape. Media trials threaten a defendant’s 6th Amendment right to an impartial jury as journalists tend to report a prosecutor’s allegations and facts of the investigation, some of which is either untrue and/or inadmissible in court. A defendant is only considered with the ineffectual disclaimers “alleged” or “presumed innocent until proven guilty”. Meanwhile, jurors struggle with separating what they have heard in the media and what they have seen on the news from the trial itself, and are told to merely “set it aside” by the judge. While Bull’s Trial Science team plants its own fake media stories to sway the jury (easily considered jury tampering) in one of the episodes, real trial consultants endeavor in these types of trials to identify how strongly jurors equate the media stories they have seen to actual evidence and whether they have actually already reached a verdict based on what they have heard.

One episode deals with the challenges of bringing or defending a case in the hometown of the opposing party. The last episode dealt with certain police techniques that sometimes result in a suspect’s false confession. In most of the episodes, Dr. Bull tries to identify personality, emotional, or learning characteristics (such as “locus of control”) that may predispose jurors to one side or the other. He then endeavors to shape the themes and

focus of the case to appeal to the jury he has. He also works with witnesses to uncover aspects of the case the attorneys may not have unearthed and to help them communicate in a clearer and more authentic manner. All of these are all important areas that trial consultants and attorneys deal with in their practices.

However, this show also badly mischaracterizes the work that trial consultants perform in a number of areas:

- Dr. Bull's team will do multiple mock trials (18 in the first episode), all ending in the same negative verdict. Most consultants would advise changing trial themes and strategies after the first adverse mock trial outcome, and if they were lucky enough to do multiple research projects, they would keep refining their presentations until they obtained a better result.
- Marissa Morgan, Dr. Bull's research savant says that Dr. Bull's Trial Science firm has developed a juror research methodology that looks "into what we already know about each juror's behavioral patterns -- in life and especially on the Internet -- where they go, what they click, how long they stay, preferences, 'likes', keywords, avoidances -- it all gets plugged into a 400-factor matrix that is scary in its predictive efficiency." In the era of big data, this all sounds plausible but is ridiculous and unethical, if not downright illegal. This both presumes that the Bull team has access to jurors' private data and also presumes that data actually means something. Trial consultants also don't *predict* trial results. We look at the interaction between psychological, behavioral, and learning patterns and help our clients to navigate their factual and legal cases in that changeable weather.
- The Trial Science team uses galvanic skin response iPads, biometric watches, advanced Homeland Security computer technology, and Big Data algorithms to analyze juror responses. Because, you know, they have gadgets so they must be smart. In fact, trial consultants traffic in extremely low-tech tools: the simple psychology of what sounds right and what makes sense to a jury.
- The Bull team touts that they "know jurors down to their neurons" and that they "know what they are thinking before they do." Dr. Bull further states in one episode that he "changes minds for a living". And this is where the series is deeply disrespectful and flawed. Because it presumes that

pretty much everyone else in the justice system – jurors, judges, attorneys, police are pawns in the brilliantly manipulated game of psychological chess that Dr. Bull is playing. As a result, he treats the lawyers, the court system, and even jurors with disdain.

- The most frustrating thing about Bull is the consistently mixed messages it sends. In the first episode, Dr. Bull comments on a jurors' bumper sticker proclaiming that the "System is Rigged" by stating, "Wow, that's cynical." He then cynically but not ironically demonstrates how *he* can rig the system by hacking into jurors' personal data and stealing and bugging his own attorney-client's watch. On a recent episode, the writers meaningfully address how police can coerce false confessions while at the same time Bull and his team engage in jury tampering.

Now I told you I wasn't going to critique *Bull* for its accuracy, but television and popular culture can mythologize a profession that can have lasting effects. Prosecutors deal with some juror expectation about crime scene investigation as result of the CSI and Forensic Files series, doctors deal with expectations raised by Grey's Anatomy and Chicago Med.

Bull also perpetuates the manipulation myth – that jurors are passive observers to be pushed and prodded to a verdict by the whim of lawyers and gurus. However, trial consultants see the jury as partners in the trial story. In a trial I recently worked on, a man was suing his ex-in-laws for negligence because his two-year-old daughter drowned in their pool. In jury selection, a number of jurors spoke about how the case sounded like a tragedy for the whole family. That became our theme for the trial, with the defense attorneys treating the whole family, including the plaintiff father with respect for the grief they must be feeling. After the verdict, the jurors told us they appreciated our sensitivity. It allowed them to feel sympathy for the father, even if they did not ultimately find for him.

Trial consultants listen carefully to the jury and also watch for patterns in the case that will more clearly and accurately present the client's story to a jury. And that is the trial consultant's real art of trial persuasion, to listen for what evidence carries the ring of truth for the jury, the judge, the witnesses, and even opposing counsel.

In part two of this article, I will discuss how television can teach us how to tell better stories in trial. 

Richard Gabriel is a former President of the American Society of Trial Consultants and author of the book *Acquittal: An Insider Reveals the Stories and Strategies Behind Today's Most Infamous Verdicts* (Berkley Press) as well as the co-author of *Jury Selection: Strategy and Science* (Thomson West). Mr. Gabriel is a frequent commentator on high profile trials for CNN.

[1] Casey, P. et al. (2012) *Helping Courts Address implicit Bias: Resources for Education*. [Link](#)

[2] Bennett, M. (2010) *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*. *Harvard Law & Policy Review*, 4, 1207-1230.