Chapter 1

INTRODUCTION TO TRIAL CONSULTATION

THE CONSULTANT AS COACH: AN ORIENTING METAPHOR

Given how much attention is paid to trial consulting, including the widely publicized cases in which consultants are involved, and to jury selection and the outcomes of the trials themselves, it is sometimes startling how little is known about trial consultants. The media and the public think of trial consultants as pervasively influential (Tooher, 2005). More power, responsibility, and influence are attributed to consultants than they merit, and, occasionally, excessive blame is attributed as well.

There is a modest literature about trial consultation. Nobody knows how many trial consultants there are because they are not required to register in any jurisdiction. They are not regulated. They are not licensed. No particular credentials are needed to be a trial consultant. Although there is a U.S. organization of these practitioners, the American Society of Trial Consultants (ASTC) membership is optional for trial consultants. No professional or scholarly journal is published. At the same time, this is a profession with defined methods, with professional pride and collegiality, a profession that has a visible and profound influence on the perception of justice in the nation.

Trial consulting is like coaching a team sport. A relatively small number of people are actually playing and a much smaller number yet serve as coaches, whereas a great many people are invested emotionally or financially in the competition, in what occurs on the playing field, and especially in the outcome—who wins and who loses.

It is more apt to compare trial consultants to coaches than to the players, who are the attorneys who try the cases (as well as their clients and witnesses who also are participants). The trial consultants help to think of ways to proceed, diagram how the presentation of evidence and the arguments during the trial are going to unfold, think about home team advantages and disadvantages, and help select the jurors.

Of course, if one examines the trial consulting-as-coaching metaphor closely enough, the metaphor breaks down. Coaches in team sports more clearly make decisions about plays, and coaches take (or are given) the blame when things go badly, processes that are not necessarily true of trial consultants. A relevant example is former Alabama football coach Paul W. (Bear) Bryant from the University of Alabama, who explicitly took responsibility and was seen as bigger than life. In his book about Alabama football fans, St. John (2004) described how Bear Bryant always and excessively took responsibility for losses.

I agree with St. John that the players are heavily responsible for successes or failures. The talent of the players (up to a certain point) usually trumps coaching skill. Similarly, the talent of the attorneys and the strength of the evidence usually trump the skill of the consultants. When the attorneys are inexperienced, unprepared, or just barely adequate and the evidence supporting their side is weak, even the best trial consultants cannot win a favorable verdict. In the same sense, with savvy attorneys and strong evidence, it is not clear whether consultants add to the likelihood of a favorable verdict or settlement. Trial consultants may make the most difference when the attorneys are more or less matched in ability and the evidence is sufficiently equivocal that it can be read as favoring either side.

THE NATURE OF TRIAL CONSULTANTS AND CONSULTATION

Although this book is about the tasks and work of trial consultants, I want to comment first about what they are like as people. Being boring is the last thing that trial consultants are ever accused of, as people or as professionals. They are, by and large, an animated, charming, intelligent group of people who energize the cases in which they are involved. Furthermore, trial consultants are hardly alike. There are some consultants who take on small cases in a limited scope of work, and there are other consultants who work on civil actions filed against large corporations in which hundreds of millions of dollars are at stake.

A marked unfolding and exposition of the work of trial consultants has occurred in the last few years. In a field in which relative little had been written, an emerging body of knowledge is becoming available to other con-

sultants, to social scientists, and to the public. The books by Kressel and Kressel (2002), Posey and Wrightsman (2005), and Lieberman and Sales (2007) have made a difference in making public what had been private and sometimes proprietary and guarded.

The specific content areas in which trial consultants work include the general tasks of assisting in developing the theory of cases and how to present the theory, especially in opening statements and closing arguments. The work that trial consultants prepare for attorneys encompasses broad approaches to the various cases, as well as narrowly defined conceptualizations of key issues. The broad approaches begin with legal theory and concepts; the narrower focus is typically drawn from social science frames of references. These differences are elaborated further in Table 2.1 in Chapter 2.

Some trial consultants specialize in surveys, particularly of community attitudes and predispositions, as well as those that are used as parts of motions for changes of venue. Other trial consultants specialize in preparation of witnesses to testify, including expert witnesses, and in assisting attorneys in developing their examinations of witnesses. A number of trial consultants address the technical aspects of trials, including the preparation of graphic or video presentations. Others work with voir dire questions and jury selection. Leading focus groups and conducting other small-group research related to the trial issues are also frequent tasks. Almost no trial consultants perform all of these tasks. Still, most trial consultants take on multiple roles. Furthermore, almost all consultants are engaged in marketing or advertising their work.

An astute observer of the nature of trial consultation is Franklin Strier, a professor of law at the California State University at Dominguez Hills. As a scholar in business law, Strier (1999, 2004) observed that the practice of trial consultation is tied as closely to the field of marketing as it is to its behavioral psychology and legal roots. He wrote, "In essence, the trial consultant performs a marketing function in two basic ways. First, a target audience is identified—that is, those who will be most receptive to the client's case—in much the same way marketing experts would test public receptivity to new consumer products. Then, a strategy is devised to help persuade the jury *qua* consumers to 'buy' the client's product by emphasizing those case-specific factors having the most appeal to the particular individuals on the jury" (1999, p. 95). Strier also pointed out a fundamental irony in how trial consultation has evolved. When it began in the 1970s, trial consulting served either poor and indigent criminal defendants or defendants who typically were being prosecuted for antiwar protests against the Vietnam War. The majority of contemporary clients are the well-to-do and the privileged, the celebrities, the leaders of corporate America, and the insurance companies and corporations themselves.

TRIAL CONSULTATION AND FAIRNESS

The criticisms of trial consultation have been fierce. The critics argue that trial consultants stack the deck unfairly for the side that can afford to retain trial consultants, thus adding further unfairness to a system of civil and criminal trials in which much injustice is already present. Many critics have argued that the dice are already loaded against the poor and underprivileged. This issue of fairness is important to address. When I proposed to write this book, some reviewers outside the field of trial consultation raised the issue of whether it was even right to publish a book that would assist despicable people in getting acquitted. Do consultants help people who have committed contemptible acts get off? The answer is that the question is a non sequitur; what trial consultants do is help attorneys do their jobs better. Are there injustices in trial outcomes? Yes, there are. Is it the responsibility of trial consultants to ensure that justice is done? Not once they have agreed to consult on a particular case. Justice is what the courts decide. Promoting a good adversarial position is what attorneys and trial consultants do. Nevertheless, one of the prized values of the ASTC is to offer pro bono services to the needy and underserved.

At the most basic level, the question raised about trial consultants stacking the deck has to be asked generally about the system of justice. Should one assume that our system works well enough? Does the adversarial presentation of evidence and arguments as assessed by impartial juries or judges usually succeed in producing a fair and just verdict? There is no simple answer to those questions.

Recently, the graduate students in our psychology–law PhD concentration were listening to a series of speakers on the topic of occupational socialization in the law. Several of the speakers were defense attorneys, most of whom were asked by the students about the ethics of their profession. Each answered in a different way, but the underlying theme was that they each believed that the justice system was inherently good and it would serve justice well if all the players put their best efforts into their work. That is, even though some of the clients these defense attorneys were defending may have committed the offenses they were charged with, the defense attorneys believed they should do everything possible to defend a client. In the same way, the prosecuting attorneys do all they can to promote justice as they prosecute this person. The overarching belief among these speakers was that if everyone did his or her job well, justice would be served, and that injustices particularly occur when some parties don't do their jobs well. The case can be made that wide use of trial consulting would similarly allow both sides to be more effective in trials, and it has the potential to help improve their chances.

In this same spirit, Myers and Arena (2001) noted that the work of a

trial consultant may indeed place one side at a disadvantage, but that the same is true of the role of everyone else involved in the trial: "Attorneys, witnesses, experts, and judges all differ from case to case and allow for variations in the 'justice' associated with a judgment" (p. 389). They further argue that consultants actually serve to restore balance to the scales of justice. For instance, many jurors believe that if defendants are charged, they are likely to be guilty (Kassin & Wrightsman, 1983; Skitka & Houston, 2001) and that it is the defendants' job to prove their innocence. Trial consultants can help identify potential jurors with these and other biases that would preclude their serving impartially and working from a presumption of innocence.

Lieberman and Sales (2007) examined these fairness issues and they concluded:

> The practice of hiring consultants is legally permissible, and one could even argue inherently important for attorneys to do, if they are going to represent clients to the best of their abilities by using all the tools at their disposal. Any imbalance in the courtroom created by the disparate wealth between individuals or corporations involved in litigation would be present regardless of whether jury selection consultants were used. Indeed, as fairness is an important component of trials, it is worth considering steps that can be taken to increase the availability of scientific jury selection to a greater number of people or small businesses. (p. 200)

WORKING ASSUMPTIONS

Let us move to my basic working understandings about trial consultation in this book.

1. *Impossible cases are truly impossible to win.* No magic or arcane knowledge allows trial consultants or attorneys to win with lost causes; difficult cases are difficult to win. When the overwhelming weight of evidence is on one side or another, it is an uphill battle and expectations about the contributions of trial consultants should be modest, at best. At the same time, cases can be "won" in indirect ways. Sometimes a defendant is found guilty of a lesser included charge rather than the primary charge. A plea or settlement may be negotiated by both parties for a less risky or odious outcome than that which may emerge from a trial.

2. *Close cases offer the most potential.* It has been demonstrated that evidence is the major foundation of jury verdicts (e.g., Kalven & Zeizel, 1966; Fulero & Penrod, 1990). When the evidence is equivocal or hovers around the legal standard of preponderance of evidence or beyond reason-

able doubt, then consultation can make its best contribution. In close cases, a small edge matters. Kerr and Huang (1986) have observed that juror personality variables and demographic factors may account for as little as 5–15% of the variance, but enough to make a meaningful difference in many cases.

3. *Jury selection has an uncertain payoff in trial consultation.* The research on effectiveness of consultants in scientific jury selection has yielded mixed results. This specific application is especially attractive to attorneys, despite the uncertain payoffs. The research on jury selection has been summarized in the thoughtful review by Lieberman and Sales (2007), and we discuss this literature in various chapters throughout the book.

4. *Jury selection by attorneys typically is demographic, simplistic, and ill developed from a social science perspective.* Many attorneys are ill prepared to do careful and meaningful jury selection. Going back to the rules developed by Clarence Darrow in the 1930s, it has been common for defense attorneys in criminal cases and plaintiff attorneys in personal injury litigation to use their peremptory strikes to eliminate potential jurors who are Republican, rigid, right-wing, conservatively dressed, middle-class or wealthy, as well as being employed in occupations seen as impersonal, such as accountants and engineers (Darrow, 1936/1981). Prosecuting attorneys in criminal cases and defense attorneys in civil cases often use similar stereotypes as they strike Democrats, liberals, casually dressed, working or lower-class, apparently empathic persons who are employed in occupations seen as caring or helping, such as social workers, school counselors, and union organizers.

5. *Case conceptualization is seen as a desirable professional path.* The term *case conceptualization* refers to the patterns and theories used to organize the central issues in a forthcoming trial. The case conceptualization usually draws from social science thinking merged with legal concepts and trial advocacy. The resulting concepts are applications of knowledge and theory to case issues. A useful aspect of conceptualization is the focus in depth on central constructs and strategies; it is known by different names. For example, trial conceptualization has been called the *operating generalization* by Strier (1999), referring to the organizing themes around which the consultant's plans and attorney's decisions are made. The concept of constructs around which understandings and perceptions are organized and anticipated may be traced in part to George Kelly's personal construct theory (1955). Kelly wrote that all individuals have personal organizing constructs such as safe–dangerous, good–bad, or happy–unhappy.[1] Individuals

[1]Kelly's writings helped to found cognitive psychotherapy and actively continue to influence authors of articles in the journals, *Personal Construct Theory and Practice* and the *Journal of Constructivist Psychology.*

use them to cope, either successfully or poorly. Kelly described humans as informal scientists, always testing and modifying their core constructs. In trial consultation the Kelly ideas are part of a conceptual frame of reference that links case content with constructs about how people process evidence and make decisions.

6. *Focused preparation can make both expert witnesses and lay witnesses more persuasive.* Much of witness preparation consists of attorneys meeting informally with witnesses and simply discussing the content of what will be presented on the stand. There tends to be little attention to the style of the testimony in terms of persuasion mechanisms and the general believability of the witnesses. Within trial consultation and related disciplines, a literature has emerged about the process of preparing witnesses to be more effective.[2] Witness preparation, training in the form of practicing testimony, and directive feedback about what works well or poorly can improve the effectiveness of testimony. Witnesses can learn to be more lucid, more responsive to questions, and better communicators with the jury.

7. *Social science research can sometimes be extrapolated to trial issues.* The key word is *extrapolated*, which means going beyond actual findings to anticipated applications. Thoughtful consultants stay acutely aware of the limitations of going from laboratory research, often conducted with undergraduate students, to actual trials and jurors. Changes of venue and jury selection consultations, in particular, often draw on these empirical foundations. In addition, when consultants conduct telephone surveys about how much pretrial publicity has influenced or contaminated a community, in preparation for change of venue motions, they typically utilize reliable and known methods.

8. *Thoughtful attorneys choose trial consultants with care. Thoughtful trial consultants accept cases with care.* Trial consultants are highly diverse in their backgrounds, experience, skills, and methods. Careful, detailed, focused approaches characterize the best consultants. Most attorneys select trial consultants via word-of-mouth recommendations; they rarely believe the glowing testimonials on consultants' websites or in their brochures, which are marketing tools. In turn, trial consultants encounter cases in which they may choose not to work because of the nature of the case issues or their own limits of competence. That is, some consultants choose not to work on issues involving sex crimes because of their own personal discomfort with the alleged offenses. Other trial consultants decline a case when they are approached by firms defending or suing for, say, industrial injuries because the case topic is in an area in which these consultants have no training or

[2]My books *Testifying in Court* (1991), *The Expert Expert Witness* (1999), and *Coping with Cross-Examination* (2004) are part of this literature.

experience. In other words, consultants sometimes decline a request because the allegations have to do with behaviors that are personally offensive, or they decline because they simply do not know enough to do a good job.

THE OBVIOUS AND BEYOND THE OBVIOUS

One of the ways trial consultants approach their work is to identify the obvious and then go beyond the obvious. For example, in jury selection two obvious juror characteristics to discern and weigh are juror occupation and appearance. Both lead to easy-to-draw but weak conclusions taken from a combination of stereotypes, personal experience, and shared understandings. The conclusions are obvious in the sense that they appear valid on their face to attorneys, but are usually drawn without knowledge of research into how specific occupations or grooming habits are related to trial predispositions.

A rich history of anecdotes and observations in our lives and culture supports the quick and superficial interpretation of appearance. There is a widely accepted belief that people are their appearances, and their appearances are who they are. In their analysis of questionnaire data from 10,000 men and women who had participated in HurryDate (a form of speed dating), Kurzban and Weeden (2005) reported that most of the judgments could have been made in 3 seconds, as opposed to the allocated 3 minutes. Men used relative thinness of women as a factor for judgments. Women used several elements of men's appearance, including shoulders tapering to narrower waists. Thus, appearance surely does matter in social approval, and the so-called beauty bias clearly shapes many judgments (Berry, 2007). It also influences inaccurate judgments in the courtroom that arise from the deceptively obvious.[3] That is, attorneys sometimes look at jurors and depend to some degree on their own subjective feelings of liking or disliking; such personal social judgments are not necessarily related in any way to predispositions or opinions that might be related to the case issues.

IS TRIAL CONSULTATION A PROFESSION?

The term *profession* is typically defined as an occupation in which there is a professed knowledge of a field or science, or as an occupation that involves both lengthy training and a formal test of qualification to practice (Cruess, Johnston, & Cruess, 2004). In his landmark book on professions,

[3]The book *Beauty Bias* by Bonnie Berry (2007) develops the full range of knowledge and influence of attractiveness and appearance on social influence and consequences.

Freidson (1953) observed that a profession is composed all at once of a body of knowledge, work activities, and occupational organization. However, he also wrote, "Virtually all self-conscious occupational groups apply it to themselves at one time or another either to flatter themselves or to try to persuade others of their importance" (pp. 3–4). If trial consultation is a profession, should it be regulated like medicine, psychology, and cosmetology?

The case for licensing trial consultation as a profession is dependent on how one thinks of the consultation work and what one concludes needs to be done to protect the public. Franklin Strier (2004) made a compelling case, first, that such consultation does influence the outcome of a trial and, second, that trial consultants are wholly unregulated—an accurate assertion—and nobody who retains a trial consultant can be assured that minimal training, knowledge of ethical practices, or relevant education have been attained. He wrote, "The trial consulting industry is completely unregulated; anyone can hold himself or herself out and practice as a trial consultant. There are no state licensing requirements, nor is there any binding or meaningful code of professional ethics" (p. 70). In an earlier review, Strier (1999) asserted that the practice of trial consultation is fraught with potential problems, not the least of which is how trial consultants may compromise the public perception of fairness in trial proceedings and outcomes.

In contrast to Strier's conclusion about there being no meaningful code of professional ethics, the ASTC (2008) does indeed maintain an ethical code. The code covers each of the major areas in which trial consultants work: change of venue assessments, witness preparation, jury selection, small-group research, and posttrial juror interviews. The following excerpts and paraphrases describe the ethical code in each major area of work:

> "In witness preparation, trial consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome."
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> In venue surveys, "trial consultants shall not participate in, sponsor, or conduct surveys known as 'push polls,' that are primarily designed to influence survey respondents' opinions by presenting systematically biased information."
>
> "In witness preparation, trial consultants in their professional capacity shall not intentionally communicate or have contact with persons summoned for jury duty or seated jurors except as permitted by the trial court."
>
> "When reporting small-group research (focus group) results, trial consultants shall present the results accurately and draw inferences and make interpretations consistent with the research findings."

> "In posttrial juror interviews, trial consultants should avoid offering excessive or inappropriate financial or other inducements for interview participants if such inducements are intended to unduly influence or coerce participation."

The ASTC code itself is ambivalent about how enforceable the standards are. At once it declares, "The code provides enforceable standards" and that the standards include "rules enforceable by the Society." At the same time it states, "Although Ethical Principles and Practice Guidelines are not enforceable rules, they should be considered by trial consultants in choosing courses of action."

An additional concern presented by Strier was licensure. If trial consultants were licensed, then at least minimal educational, knowledge, or experience standards would govern entry into the profession. Consultants who were inept or who acted unethically then could be disciplined, expelled, or have their licenses to practice revoked. Attorneys, physicians, social workers, and psychologists are all required to meet continuing education requirements to ensure that they have stayed current with professional and ethical knowledge. No such requirement is in effect among trial consultants. In contrast, Gary Moran (2004) observed that the successful origins of the profession of psychology came about in the absence of regulation. Moran held that the influence of trial consultants is greatly overstated, both by consultants themselves in the marketing of their services and by the general public. In place of licensure, with its restriction on offering services, he argued that consumers of such services need to be better informed about the nature and limitations of trial consultants.

DIFFERENCES BETWEEN JURISDICTIONS

This book describes the nature of trial consultation in general. I have tried to bring together practices and knowledge that are common across the country. Yet I recognize that there are major differences across jurisdictions in jury selection, in the use of supplemental jury questionnaires (SJQs),[4] in voir dire, and in access to the trial process by consultants. In the southeastern United States, where I work, it is not unusual for state courts to set aside an hour or so at most for the voir dire questioning and to deny use of SJQs in all but some capital murder trials, trials of major public figures, and a few large civil suits. The trials themselves usually last less than a week. In important cases in some California jurisdictions in which I have been involved, the

[4]A supplemental questionnaire is defined as structured questions added to the standard and limited questionnaires routinely used by the courts.

jury selection may go on for a week and the trial for many months. Take the voir dire. In a capital murder trial I watched last month, it took 90 minutes. Angela Dodge (personal communication, May 9, 2007) wrote how different it is where she practices:

> Trial consultants in the Pacific Northwest, beginning with the good work of Joyce Tsongas and Karen Lisko, have had a tremendous influence on the voir dire practices of judges in the Ninth Circuit. Not in all states, but in several, voir dire is for "as long as needed and remains productive," voir dire is staggered between plaintiff and defendant (i.e., each side gets several rounds of anywhere from 30 to 45 minutes), many judges allow and encourage SJQs (which often ask if there is any item on the questionnaire that the potential juror would prefer to speak about in private, and this is honored by in camera questioning), trial consultants are accepted/acknowledged by judges and often sit at counsel table, judges allow time for attorneys to confer with their trial consultants before strikes are exercised, the struck method is used, and it is not unusual for jury selection to take the better part of the first day. Let me say again that is not the case in every state.

According to a survey of jury improvement efforts in the states, South Carolina had an average of 30 minutes for voir dire in felony cases, and a median length of 1 hour was reported for Alabama, Delaware, Maine, New Hampshire, and Virginia (Mize, Hannaford-Agor, & Waters, 2007). At the other end of the continuum, Connecticut had a median length of 10 hours and New York 5 hours. In civil trials South Carolina again anchored the low point with a half hour, and Connecticut anchored the high end with an average of 16 hours.

One measure of how likely jurors are to be free of social conformity effects that may compromise honesty is whether they are questioned privately, that is, at sidebar or in chambers. The Mize et al. (2007) report indicated a wide range of practices among states. Rhode Island and Connecticut, for example, had 66.1 and 63.7%, respectively, of respondents indicating that jurors were questioned out of hearing of other jurors. At the other extreme, North Carolina had 2.4% of respondents indicating that jurors were questioned privately; Oregon had 4.8% reporting private questioning.

These statistics just touch the surface of the differences between jurisdictions. Much of what is true in jury selection and trial procedures in Connecticut is not true in other states. As you read about the procedures of trial consultation, there may be occasions when you, as a knowledgeable reader, say, "Yes, but that is not so in my state." No single book can cover the differences between states on every dimension of trial consulting, so this volume has aimed at commonalities and at jurisdictions with which I am

most familiar, with the clear awareness that there will be exceptions in some jurisdictions. With that caution in mind, let us move now to the structure of this book.

CASE BUT NOT OUTCOME DRIVEN

This book is case driven. That is, the principles and issues I discuss are seated in actual consultation experiences. I describe cases and trials to illustrate how consultants work, as well as the practices and research that follow the natural contours of these cases.

When I started to write this book, I included information about how the cases or trials ended. That emphasis nudged me toward writing about cases that were successful because such cases seemed to be examples of what worked well. However, there are problems in being outcome driven.

In his data-based review of trial consultations, Selzer (2006) did not offer data about whether cases were won or lost. Among other reasons, Selzer pointed out that a member of a defense team sometimes "wings it" at the last moment and ignores advice from the trial consultant. Sometimes clients settle or plea bargain. Sometimes a client is convicted, but the verdict or award is more or less favorable than anticipated. He concluded that it is not clear how to interpret pleas, settlements, and other dispositions.

I would add another reservation. When one thinks of the outcome as the essential worth of the consultation, it diverts attention from the consultation activities themselves and the intrinsic nature and value of the work and information. As a result, I have not included most information about verdicts, pleas, settlements, and awards. In this way *res ipsa loquitor:* The methods and knowledge speak for themselves.

HOW THIS BOOK IS ORGANIZED

Chapter 2 deals with the concept of the case conceptualization in trial consulting, with a special emphasis on the story model and the qualitative small-group research that takes the form of focus groups and shadow juries. Chapter 3 follows with a presentation of the consultant's toolbox: the books, instruments, and measures that are useful tools. Chapters 4, 5, and 6 address witness preparation: preparing lay witnesses, preparing expert witnesses, helping witnesses cope with cross-examination, and research on the topics from the Witness Research Lab. Then Chapters 7, 8, 9, and 10 address jury selection and consider case-driven understandings of how to approach jury selection in terms of what to do and what one must know.

Chapters 11 and 12 discuss aspects of change of venue evaluations, followed by Chapters 13 and 14, in which case applications are used to illustrate an overall synthesis of consultation knowledge and case demands. Finally, the book concludes with Chapter 15 on the future of trial consultation, including the major challenges and imminent changes in the study and practice of trial consultation.