



# **The Professional Code of the American Society of Trial Consultants**

*Updated October 13, 2008*

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## **PREAMBLE**

The Society recognizes there are many avenues and aspects of trial consulting. The Code provides enforceable standards and offers guidance in many areas common to trial consultants working in this diverse field. The Code applies only to work-related activities. This Preamble offers a framework for better understanding each of the Code's components. The Code provides for: Ethical Principles, Professional Standards, Practice Guidelines, and Commentary.

### ***Ethical Principles***

The Ethical Principles are a statement of shared values that are intended to inform the professional judgment of the working trial consultant striving for the highest professional ideals. Our Society is comprised of professionals with very diverse backgrounds from research science to the law, from applied work in psychology to marketing, advertising and public opinion research. We have members specializing in professional communication applications from drama, training and education to mass communications, behavioral science, linguistics and more. These professional disciplines have bodies of knowledge and ethical principles of their own, which were considered during the creation of our own Code. Our Ethical Principles are not intended to supplant the principles of any other profession, nor should they be seen as an attempt to adopt or incorporate them, in whole or in part.

### ***Professional Standards***

The Professional Standards set forth rules enforceable by the Society for professional conduct as a trial consultant. The Professional Standards are not exhaustive. Rather the Code through its Ethical Principles, Professional Standards and Practice Guidelines reflects a common set of evolving values upon which trial consultants strive to build their professional consulting work. In areas where recognized Professional Standards do not yet exist, trial consultants should exercise careful judgment and take appropriate precautions in their work.

### ***Practice Guidelines***

The ***Practice Guidelines*** consist of suggested business practices based on, but not limited to, the practical experiences of members, current research, the emergence of new techniques or practices, applicable case or statutory law and other sources of relevant information. The ASTC recognizes trial consultants draw on diverse professional backgrounds, often work in unique situations, and function in a variable context influenced by many factors. The Practice Guidelines are informative only and are not meant to be comprehensive, exclusive or to supplant the professional judgment of a consultant.

Although Ethical Principles and Practice Guidelines are not enforceable rules, they should be considered by trial consultants in choosing courses of action. Moreover, they may be considered by the Board of Directors or other designated Committee in interpreting the Professional Standards specifically and the Code generally.

## **PREAMBLE**

### ***Commentary***

Additional commentary is included to provide such added information that helps the reader clarify the meaning or context of particular Ethical Principles, Professional Standards or Practice Guidelines.

ASTC Professional Code  
**ETHICAL PRINCIPLES**

**I. Competence**

Trial consultants strive to maintain high standards of competence in their work. They recognize the boundaries of their particular competencies and the limitations of their expertise. When in the role of trial consultant, the member does not practice law but seeks to enhance the practice of law by facilitating the skills of the legal practitioner. Trial consultants are dedicated to providing the legal community with information on litigation related behavior and communication. They provide only those services and use only those techniques for which they are qualified by education, training, or experience. They maintain knowledge of relevant professional information related to the services they render.

**II. Integrity**

Trial consultants conduct themselves at all times with professional integrity, personal dignity and respect for the legal system.

**III. Professional Responsibility**

Trial consultants uphold professional standards of conduct and clarify their professional roles and obligations.

**IV. Social Responsibility**

Trial consultants comply with the law and encourage the development of law and social policy that serve the interests of their clients and the public generally.

Trial consultants strengthen and improve the legal system by offering pro bono services to indigent litigants, to law schools, and law firm training programs, to court systems and legislative bodies, and to training programs within our own profession.

ASTC Professional Code  
**GENERAL PROFESSIONAL STANDARDS**

**I. Consultant-Client Relationship**

The trial consultant is generally retained directly by the attorney, but may be employed by the litigant or insurer representing the litigant.

A. *Attorney as Client:*

The trial consultant who is retained by the attorney: (1) works under the direction and supervision of the attorney; (2) cooperates with the attorney to assure all consultant-attorney communication is subject, to the extent provided under the law, to attorney/client privilege and work-product doctrine.

B. *Litigant as Client:*

The trial consultant who is retained by the litigant informs the litigant, prior to retention that the consultant's work will be treated as professionally confidential, but probably is not subject to legal protection from disclosure under any attorney/client privilege, work-product, or other doctrine.

C. *Insurer as Client:*

The trial consultant who is retained by the insurer: (1) informs the attorney that the trial consultant works under the authority of the insurer; (2) cooperates with the attorney to assure all consultant-attorney communication is subject, to the extent possible under the law, to attorney/client privilege and work-product doctrine.

**II. Training and Provision of Services**

The trial consultant fully discloses academic qualifications and consulting experience to potential clients, specifies the services provided, and identifies the objectives of each consultation.

**III. Advertising and Publicity**

Trial consultants may advertise services. Such advertising avoids material misrepresentation of qualifications, experience, and research or trial outcomes. Client permission is obtained prior to the placement of any advertisement that identifies a client or case. The trial consultant does not publish a claim to a win-loss record.

**IV. Conflicts of Interest**

Trial consultants do not provide services for a client if those services appear to be in conflict with the interest of another client, unless the trial

ASTC Professional Code  
**GENERAL PROFESSIONAL STANDARDS**

consultant informs each client of the nature of the conflict and both clients give their consent. The trial consultant remains alert throughout the consultant-client relationship for potential conflicts with present and past clients, and with present and past clients of trial consultants employed within the same business or practice group.

**V. Integrity of the Jury Pool**

Trial consultants provide all services in a manner that will protect the integrity of the jury pool.

ASTC Professional Code  
**PRACTICE AREA A**  
**VENUE SURVEYS**

The standards, practice guidelines, and commentary for trial consultants' use of survey research in connection with motions addressed to pretrial juror bias are intended to be consistent with general accepted principles and standards of survey research. Where questions arise that are not covered by the standards set forth here, practitioners should refer to general principles and standards of other professional organizations.<sup>1</sup> In addition, academic survey research sources included in Appendix 1 to this document provide extensive support and guidance on survey research methodology.

The survey is the tool of choice for academics, journalists, marketing professionals, government agencies, and courts in measuring public opinion.<sup>2</sup> The American Bar Association identified "qualified opinion surveys" as a source of evidence for courts to use in deciding whether to grant a change of venue.<sup>3</sup>

The purpose of these standards, practice guidelines, and commentary is to provide a set of minimum principles for evaluating the quality of public opinion surveys submitted to courts in connection with motions to change venue or other motions addressing the problem of pretrial juror bias.<sup>4</sup> Motions to change venue may be made in criminal or civil cases. Since such motions are more commonly made in criminal cases, these practice guidelines make reference to criminal issues. However, the criteria for assessing reliability of survey methodology are the same whether the trial involves criminal charges or civil claims.

## VENUE SURVEYS: PROFESSIONAL STANDARDS

### I. Overview issues

#### A. Purpose of a Venue Survey

The purpose of a venue survey is to collect evidence for possible presentation to a court relevant to the question of whether there is a reasonable likelihood that a fair trial cannot be had in the original trial jurisdiction.<sup>1</sup>

Trial Consultants shall not participate in, sponsor, or conduct surveys known as “push polls,” that are primarily designed to influence survey respondents’ opinions in a particular direction by presenting systematically biased information. Such surveys are intended to shape rather than to measure public opinion.<sup>2</sup>

Trial Consultants conduct surveys that are generally designed to measure public opinion about a particular case by assessing the existing opinions of survey respondents.<sup>3</sup>

#### B. Report of Results

The trial consultant’s presentation of survey results to a court shall include The questionnaire that was used in the survey, identification of the primary persons who performed the work (including their qualifications), and descriptions of how each of the following standard steps for conducting a survey was completed:

- Design of the survey instrument.
- Determination of eligibility and sampling measures.
- Training of interviewers and supervisors to conduct the interviewing.
- Interviewing procedures.
- Dates of data collection
- Calculation of sample completion rate.
- Tabulation of survey data.

In the case of questions asked only of a subgroup of the sample interviewed, the report should make clear both numbers and percentages for both the entire sample and the subgroup asked the question.

### II. Basic Questionnaire Design

#### A. Basic Components of a Venue Survey Questionnaire

A venue survey questionnaire in a criminal case should include at least The following five categories of questions:

1. Screening. Questions to determine respondent eligibility.
2. Awareness of the case, the parties, or issues in dispute. Questions

## VENUE SURVEYS: PROFESSIONAL STANDARDS

designed to identify the proportion of the eligible population that has read or heard about the case.

3. Prejudgment. Questions designed to measure respondents' opinions about a defendant's guilt.
4. Sources of Information. Questions designed to explore respondents' sources of information about a case.
5. Demographics. Questions designed to obtain background characteristics of survey respondents. These are generally limited to questions that can be compared to available objective data in order to demonstrate representativeness.

### B. General Principles of Question Design

General principles of survey item construction including those that apply to fact or opinion items should be followed in venue surveys.<sup>1</sup> Questions should be as simple and as short as possible within the constraints of the information sought. Survey items with multiple interpretations or conflicting compound statements should not be used.

The validity of responses is enhanced by: omitting nonessential items from the interview; carefully pretesting the interview for comprehensibility and clarity; asking another experienced survey researcher to review the survey instrument and evaluate it for consistency and for compliance with generally accepted principles of survey research.

### C. Length of the Interview

The average venue survey interview can be completed in 10 minutes or less. As a general rule, a longer interview should be avoided because it will reduce the response rate and the reliability of data.

### D. Question Wording

Question wording that creates pressure to give answers of one kind or another should be avoided because it may cause ambiguous or invalid responses. Leading questions suggest the correct response and should be avoided.

All survey questions should be carefully assessed to attempt to determine the influence of the tendency to give socially desirable responses.<sup>2</sup> Efforts should be made to avoid context, wording or other influences that raise the likelihood of responses due to social desirability or other response bias.

### E. The Questionnaire Introduction

The survey introduction should include neutral explanations to potential respondents that describe: the purpose of the survey, the caller's identity and employer (or the auspices under which the survey is being conducted)<sup>3</sup>, how the phone number or household was selected, and how

## VENUE SURVEYS: PROFESSIONAL STANDARDS

confidentiality will be maintained<sup>4</sup>.

Respondents should not be told that the survey is being conducted in Connection with a motion to change venue as that information might result in biased responses.

Once an eligible respondent agrees to participate, the interview should begin with an instruction to the respondent that there are no right or wrong answers to the questions. The introduction should also inform respondents that they are free to answer “don’t know” or “no opinion” at any time.

- F. Questions to Measure Respondents’ Awareness of a Case  
Case awareness is usually measured with a closed-ended question Carefully designed to include a very short neutral description of the case based on information that appeared in the media.<sup>5</sup> Respondents who do not recognize the case in response to a single question may be asked an additional question or questions to tap awareness. Once awareness has been established, there is a variety of approaches to explore information, beliefs or knowledge more fully.
- G. Questions to Measure Respondents’ Prejudgment of a Case  
The wording of questions designed to measure guilt or prejudgment should not suggest the socially desirable response. For example, reference to the presumption of innocence should be avoided.
- Direct questions about a respondent’s ability to be fair and impartial if called to be a juror in the case should be avoided. Such questions and others that inquire whether the respondent can set aside prejudicial information and reach a verdict based on the evidence presented at trial yield inflated estimates of this ability.<sup>6</sup>
- H. Open-ended Questions  
When open-ended questions are used, responses should be recorded verbatim. Open-ended questions should not follow questions that provide information which could influence the content of responses.<sup>7</sup>
- I. “Don’t Know” Responses  
Respondents must be made aware that they can say they do not know or have no opinion. If respondents are instructed at the beginning of the interview that they are free to answer “don’t know” or “no opinion” at any time, they do not need to be given that response alternative when presented with response alternatives to individual questions.
- J. Context/Order Effects  
The survey questionnaire should be reviewed to identify and eliminate or Correct context and/or order effects. Attention should be paid to the

## VENUE SURVEYS: PROFESSIONAL STANDARDS

wording of individual questions and the order in which questions are asked because these factors can influence respondents' responses.<sup>8</sup> Context or order effects can be subtle and complex and may affect opinions, information, and judgments making responses ambiguous and interpretation difficult.

- K. **Pretesting the Questionnaire**  
Survey design should include a pretest and/or pilot test in which a small number of respondents are surveyed to assess length, comprehension, or other case specific design issues. Modifications may be made after a pilot test. If any changes are made in the survey questionnaire after the pilot test then the pilot data should not be included in the final survey data tabulations.

### III. **Basic Survey Procedures**

- A. **Respondent Selection**  
Potential survey respondents should be screened in three ways: 1) to Establish eligibility for jury service as defined by statute or local rule; 2) to establish that the respondent is included in source lists designated by the statute or local rule (e.g. voter registration, drivers license); and, 3) to maximize representative selection and distribution by age and gender within the universe of jury-eligible respondents.

- B. **Eligibility and Sampling**  
A simple random sample of households within the trial jurisdiction should be used for a venue study. A simple random sample is unbiased when all eligible households have an equal chance of being contacted and an eligible respondent interviewed. In a simple random sample every eligible household has a known and nonzero probability of being contacted.

The interview must be done with an eligible respondent within the household. For a venue study, eligible respondents are people who are eligible for jury service, as defined by statute, and who are included in the sources from which jurors are drawn.

- C. **Source of Sample**  
Survey respondents must be drawn from a representative random sample of the trial jurisdiction.

A representative sample may be created by one of many techniques Including random selection of phone numbers from telephone books or purchasing source lists. However the sample is created or obtained some method should be used to assure that unlisted numbers are included.

- D. **Sample Size**

## VENUE SURVEYS: PROFESSIONAL STANDARDS

Desirable sample size takes into account a number of issues, including extremity of opinion in the population being studied, the heterogeneity of the population being measured, the desired size of confidence interval, and resources available for conducting the survey.

- E. **Representativeness of the Survey Sample**  
Representativeness is measured by comparing the demographic composition of the survey respondents to the population of the trial jurisdiction as reported by the U.S. Census or other reputable source. The census is a surrogate for the jury pool but not a perfect one because it under represents demographic subgroups and includes individuals not eligible for jury service.
- F. **Completion Rates**  
Standard procedures should be used to obtain the highest possible Completion rates. Completion rate refers to the percentage of the completed interviews with eligible respondents among those who were actually contacted. The higher the proportion of eligible respondents interviewed the higher the reliability of the survey results.
- G. **Call-backs**  
Multiple call-backs should be used to obtain the highest possible completion rate. It is good practice to make three to four phone calls to each phone number that is busy, not answered, or answered by an answering machine indicating it is a residence. Those calls should be made at different times and on different days.
- H. **Refusal Conversion**  
Efforts should be made to convert refusals into completed interviews. Sometimes an initial refusal comes from a person who is not a member of the household or the call came at a bad time to a respondent who is willing to participate. However, people who clearly refuse to ever participate in phone surveys should not be subjected to repeated calling. Interviewers must be instructed to write down exactly what a potential respondent says when she/he refuses to participate and at what point in the process the refusal is made. Supervisors should select candidates for conversation attempts.
- I. **Training and Supervision of Callers**  
Interviewers must be instructed to read all questions exactly as written. Interviewers must also be instructed that they may not explain a question unless specifically worded explanations are provided for in the standardized interview. They are only allowed to re-read the question. All responses to open-ended questions must be recorded verbatim.

Supervision of interviewers should include monitoring of randomly

## VENUE SURVEYS: PROFESSIONAL STANDARDS

selected calls as they are being made to assure that interviewers are following the survey protocol.

- J. **Respondent Confidentiality**  
Professional survey research organizations require that confidentiality of respondents be protected.<sup>1</sup> Unless the respondent waives confidentiality, or is otherwise required by law, trial consultants shall hold as privileged and confidential all information that might connect a respondent's identity with his or her responses. If paper questionnaires or answer sheets are used, identifying information should be destroyed as soon as no longer necessary for follow-up.
- K. **Availability of Original Data**  
When requested, all appropriate data should be made available to opposing parties in the litigation. It is not appropriate to make available any information that might identify individual respondents.

### IV. **Data Analysis Issues**

- A. **Analysis of Venue Survey Results**  
Analysis of venue survey data may be limited to a report of frequencies, or marginals, which list the number and percent of survey respondents giving each answer to each question.
- B. **Validity**  
Venue survey items must have "face validity," i.e., they must obviously deal with questions of case awareness and prejudgment.
  - 1. **Testing Validity**  
Questions of validity concern whether the interview items are measuring accurately what they purport to measure. Validity can be tested with data analyses to determine consistency within sets of responses, or to identify relationships among variables. Complete consistency within sets of responses is not to be expected. Nor is it necessary to analyze all possible relationships that bear on questions of validity.
  - 2. **Fact Recognition as a Test of Validity**  
One method of testing validity of venue survey results is to compare levels of recognition of low publicity issues to levels of recognition of facts that have been widely discussed in the media.

## VENUE SURVEYS: PRACTICE GUIDELINES

### I. Overview Issues

#### A. Purpose of a Venue Survey

Such evidence is sometimes submitted to courts in connection with motions to change or transfer venue or in support of a motion to use a “foreign” or “imported” jury, sometimes called a “change of venire,” or motions to modify voir dire procedures.<sup>1</sup>

Trial Consultants should use reasonable procedures to exclude from their surveys any individual who has been identified as a prospective juror or potential participant in a particular case in order to protect the right to trial by a fair and impartial jury. Such screening generally involves asking respondents if they have been summoned for jury service within the time frame of the trial date for the case in question. When prospective jurors cannot be screened out of a survey because they have not yet been notified of their upcoming dates of service, Trial Consultants should discuss with the attorney the possibility of inadvertent contact with a prospective juror, and consider ways to reduce the potential for such contact, such as adjusting the sample size or sampling in a population with similar characteristics outside the trial jurisdiction.

Trial consultants should accurately describe the purpose of the survey so that respondents can make an informed decision about their participation. Attempting to influence respondents’ opinions under the guise of conducting a survey violates the ethical principle of informed consent.

#### B. Report of Results

Presentation may be in the form of a written report, an affidavit, testimony, or some combination of the three. Decisions concerning format and timing of presentation are determined by local rules and case-specific orders. The information disclosed about a survey should be sufficient to permit evaluation and replication.<sup>2</sup>

### II. Basic Questionnaire Design

#### A. Basic Components of a Venue Survey Questionnaire

Venue survey design generally includes reviewing media coverage about a case, as it is usually the primary source of respondents’ information or knowledge of the case, and then drafting a questionnaire and conducting a pilot test in which a small number of respondents are surveyed to assess survey length and comprehension.

In a civil case, a venue survey might assess the extent of knowledge of and/or affiliation with a party or parties along with or instead of measuring awareness and prejudgment of a specific case.

## VENUE SURVEYS: PRACTICE GUIDELINES

There are many approaches to eliciting information about respondents' sources of information about a case. One approach is to ask direct closed-ended questions, inquiring, for example, whether the respondent read about the case in newspapers or on the Internet or has seen anything about the case on TV or heard about it on the radio. Another approach is to ask questions about media use (e.g., how frequently respondent reads, watches or listens to local news in newspapers, the Internet, TV, or radio) and to compare media use responses to case Awareness responses. Sometimes both approaches are used. Case awareness can also be assessed by exploring respondents' recall, reaction, or recognition.

**B. Length of the Interview**

Case specific factors such as the nature of the case and the publicity as well as the composition of the trial jurisdiction can all affect the length of the interview. As a general rule, excessive length should be avoided.

**C. Questionnaire Introduction**

A venue survey is typically described to potential respondents as a "public Opinion survey among residents of \_\_\_\_\_ County to obtain opinions about the criminal justice system and about a specific case." If no criminal justice questions are included, the introduction might explain that "We are conducting interviews with \_\_\_\_\_ County residents about a criminal case that has been in the news." Respondents should not be told the ultimate purpose of the survey (that it is being conducted in connection with a motion to change venue) as that information might result in biased responses.<sup>1</sup>

After the introduction some researchers may include a few "buffer" questions. Buffer questions are usually closed-ended questions concerning generic issues related to the survey such as criminal justice attitudes or media use. Buffer questions can serve several purposes: 1) demonstrating that the survey content really is as promised in the introduction; and 2) increasing respondent comfort by giving an opportunity to respond to questions that are easy to answer. It is standard practice to alternate the point of view of opinion statements so that opinion consistency would require agreement with some questions and disagreement with others.

**D. Questions to Measure Respondents' Awareness of a Case**

Approaches to eliciting respondents' information, beliefs or knowledge Include questions exploring recall of the case and reactions to what the respondent has read, seen or heard about the case. Respondents recall is usually explored with open-ended questions designed to elicit respondents' descriptions of what they have heard or read in the media. Respondents reactions to what they have read or heard are usually

## VENUE SURVEYS: PRACTICE GUIDELINES

explored with open-ended questions designed to let respondents express their opinions and feelings about the case, the defendant and/or the injured parties in their own words.

- E. **Questions to Measure Respondents' Prejudgment of a Case**  
A survey question aimed at measuring prejudice is not intended to predict trial outcome. The survey assesses pretrial bias or prejudice. Typically prejudice is measured with scaled response questions. For example, the respondent may be asked, "Based on what you have read or heard do you think that XXXX is...definitely not guilty, probably not guilty, probably guilty or definitely guilty. In accordance with generally accepted principles for survey research, the order in which predefined responses are offered to respondents should be varied. That is to say that half of the respondents should be given the response categories for the scale discussed here beginning with "definitely not guilty" while for the other half the scale should begin with "definitely guilty."
- F. **Open-ended Questions**  
Consistency between the content of open-ended questions used to probe respondents' recall of a case and responses to closed-ended questions about awareness or recognition can be indicators of survey validity. See Standard IV, B1.
- G. **"Don't Know" Responses**  
A "don't know" response to a prejudice question should be interpreted as a mid-scale or neutral response (between "guilty" and "not guilty", for example) rather than as a non-response.
- F. **Context/Order Effects**  
Context effects create artificially high or low thresholds for self-reports about the amount of information respondents have about a case, the strength or amount of evidence against/for a party in the litigation, or the outcomes that respondents favor for a particular defendant or party.
- G. **Pretesting the Questionnaire**  
The size of an adequate pretest can vary. Sometimes 10 – 50 interviews are completed for a pretest. Sometimes a predetermined percentage such as 5% – 10% of the planned total of survey sample is pretested.

### III. **Basic Survey Procedures**

- A. **Respondent Selection**  
A person who meets statutory eligibility requirements but who is not included in the lists from which jurors are summoned for qualification is not an eligible respondent for a venue survey. For example, an 18-year-old citizen who lives in the trial jurisdiction but is not registered to vote is eligible for jury service but is not an eligible venue survey respondent if

## VENUE SURVEYS: PRACTICE GUIDELINES

voter registration lists are used as the sole source of jurors.

Appropriate techniques for sampling within households may be used to Maximize distribution by age and gender. One such technique is known in the field as the “youngest male, oldest female” approach in which respondents are asked for in a fixed gender and age order.

### B. Eligibility and Sampling

A well-designed sample provides an efficient and economical way to discover the attitudes and characteristics of the target population. If a sample is properly designed, and designated procedures for selecting respondents are rigorously applied, survey results will reflect the attitudes and opinions of the population the sample represents within a known probability and range of error.

Generally, people who have been convicted of a felony are not eligible to serve as jurors. A convenient approach to excluding respondents who have been convicted of a felony is to ask respondents about this as a final question and to exclude as ineligible those who do not say no.

### C. Source of Sample

Where more than one source list is used by the courts, a single source list is not a good sample source as it may not include all who are eligible for jury service. Persons not included in one source list may be included in another.

### D. Sample Size

Representativeness of the survey sample is normally more important than Sample size. Where resources are limited or case awareness and prejudice are high or the jurisdiction is sparsely populated thus the risk of inadvertent contact with actual jurors is high, a small sample size can provide evidence as to whether a defendant is not likely to receive a fair trial. Under other circumstances, however, a sample size of 400, yielding a confidence interval of  $\pm 5\%$  for opinions that are evenly distributed in the population, serves as a point of reference.<sup>1</sup> For a description of factors to consider when determining sample size see, Rea, L. M., & Parker, R. A. (1992). Size of the population being surveyed is also relevant in smaller Rural jurisdictions where a larger sample may lead to interviewing an unnecessarily high proportion of the jury pool.

Despite statistical issues of sampling error, practical experience has Repeatedly shown that survey results do not change dramatically after the first 100 interviews are completed. Where the research design involves comparison among several samples, smaller samples of less than 100 may be used, supported by tests of significance of the differences among them. Evidence of different levels of exposure or prejudice in

## VENUE SURVEYS: PRACTICE GUIDELINES

alternative jurisdictions can be useful in persuading a court that the risks of an unfair trial in the original venue are great and can be minimized by a change of venue. Such comparison surveys of alternative jurisdictions may be used when: (a) media may have influenced residents of alternative jurisdictions being considered as possible sites to receive the case; and/or, (b) a demonstration of the comparative magnitude of media influence is desired; and/or, (c) limited resources are available for the venue research and very large differences exist in awareness, prejudice, and other important trial factors between the original trial jurisdiction and alternative possible sites for the trial.

- E. **Representativeness of the Survey Sample**  
For example, most jury pools under represent young people. To compare Survey data with census data, attention should be paid to using the same formats in the survey as are used in the census for asking demographic questions and coding responses. Presentation of survey results to a court can include comparison of basic demographics of survey respondents with demographics of the trial jurisdiction, using census or other comparison data. Since attitudes and opinions of potential jurors are the focus of a venue survey, internal analysis of the data from a survey that is not demographically representative may nevertheless provide relevant evidence of juror bias. For example, having too many female respondents may not matter if levels of prejudice among males and among females are similar.
- F. **Completion Rates**  
One way to calculate completion rates is as follows: 1) identify the net effective eligible sample base by combining the numbers of completed interviews, refusals, and of those who terminated during the interview; and then 2) divide the total number of completed interviews by the net effective eligible sample base. There are additional ways to calculate completion rates.<sup>2</sup>
- G. **Call-backs**  
The more callbacks made to an unanswered phone number before retiring That number, the better. This is because the more callbacks that are made, the more likely it is to either complete an interview with an eligible respondent in the household or to determine that the phone number is not in an eligible household.

### IV. **Data Analysis Issues**

- A. **Analysis of Venue Survey Results**  
Frequencies, or marginals, report the count and percent of responses to Each question. Cross-tabulation or tests of significance such as chi squares or correlations can also be offered. Cross-tabulation compares

## **VENUE SURVEYS: PRACTICE GUIDELINES**

respondents' answers to two or more questions. For example, how many respondents (what percent of the sample) are aware of the case *and* read or make use of the media daily? In some instances, other data analysis techniques such as content analysis can be helpful to explain the survey results.

- B. Validity
- Consistency between respondents' answers to open-ended questions about what they recall about the case and their responses to questions about recognition of specific case facts can be an indicator of survey validity. Similarly, a positive relationship between case awareness and media exposure can also be an indicator of survey validity. False facts should generally not be used to test accuracy of other responses in venue surveys. If false facts are used, they must be clearly false, with no possibility that respondents who know about the case could confuse the false facts with true facts that have been publicized. General principles of survey item construction that apply to other fact/opinion items must be adhered to (e.g., emphasizing simple statements and avoiding compound statements).

ASTC Professional Code  
**VENUE SURVEYS: COMMENTARY**

**Preamble**

<sup>1</sup> For example see, American Association for Public Opinion Research (AAPOR), *Best Practices for Survey and Public Opinion Research* (2005), and Council of American Survey Research Organizations (CASRO), *Code of Standards and Ethics for Survey Research* (1997). Additional literature on survey research can be found by the following authors: Czaja, R., & Blair, J. (2005), Fowler, F.J. (2002), and Schuman, H., & Presser, S. (1981).

<sup>2</sup> Surveys have been accepted as evidence by courts for more than 40 years. For example in *Zippo Manufacturing Co., v. Rogers Imports*, 216 F. Supp. 670 (1963), the courts have stated, "The weight of case authority, the consensus of legal writers, and reasoned policy considerations all indicate that the hearsay rule should not bar the admission of properly conducted public opinion surveys."

<sup>3</sup> "'Qualified' means only that the survey be well-conceived, impartially conducted, and accurately recorded," see *ABA Standards for Criminal Justice: Fair Trial and Free Press Standard 8-3.3. Change of venue or continuance* (1992). "A survey should be acceptable even when it is conducted (as it usually is) at the behest and expense of an interested party," *Corona v. Superior Court*, 24 Cal. App. 3d 872 (1972).

<sup>4</sup> Such motions might include motions to improve voir dire conditions or to change voir dire procedures or to dismiss a case due to widespread pretrial opinion formation..

**Professional Standards**

**Overview Issues**

<sup>1</sup> In criminal matters the federal standard for change of venue is that venue ought to be changed where a "reasonable probability of prejudice" exists. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). The Supreme Court has also said that an accused who cannot obtain an impartial trial is entitled to a change of venue. *Groppi v. Wisconsin*, 400 U.S. 505, 510-511 (1971). The legal standards for the level of prejudice requiring a change of venue vary in the states.

<sup>2</sup> "Push" polls MAY be indicated by the presence of some of the following factors: dramatic over sampling, that is, contacting numbers of participants that are well beyond what is necessary for reliability; creating questions that work primarily to inform participants of alleged facts, as opposed to measuring reactions to them, (e.g., "If you learned that the candidate had an illegitimate child, then would you vote for him?").

<sup>3</sup> It is understood that some members of the ASTC provide non litigation related research services. These prohibitions relate to litigation related work only.

ASTC Professional Code  
**VENUE SURVEYS: COMMENTARY**

***Basic Questionnaire Design***

<sup>1</sup> See, Babbie, E.R. (1990), Sudman, S. & Bradburn, N. M. (1982), or Rea, L. M., & Parker, R. A. (1992).

<sup>2</sup> See, Fowler, F.J., (2002), Fowler, F.J. (1995), Wentland, E. J. & Smith, K. W. (1993).

<sup>3</sup> References to involvement of a court or to parties involved in the litigation should be avoided. Such references could affect responses.

<sup>4</sup> Maintaining respondent confidentiality is standard practice in survey research. AAPOR, *Code of Professional Ethics and Practice* (2005) states, "Unless the respondent explicitly requests otherwise, or waives confidentiality for specified uses, one should hold as privileged and confidential the identity of individual respondents and all information that might identify a respondent with his or her responses." CASRO, *Code of Standards and Ethics for Survey Research* (1997) states, "...[I]t is essential that Survey Research Organizations be responsible for protecting from disclosure to third parties--including Clients and members of the Public--the identity of individual Respondents as well as Respondent-identifiable information, unless the Respondent expressly requests or permits such disclosure."

<sup>5</sup> This approach does not apply in civil cases where the potential bias being explored may be identification or affiliation with a party or parties rather than case awareness and prejudice.

<sup>6</sup> Self-reported ability to be fair and impartial or to recognize and set aside bias and prejudice are suspect here, as in other contexts, such as the voir dire setting. See generally, Bronson, E. (1989).

<sup>7</sup> For discussion of the tradeoffs associated with the use of closed-ended and open-ended questions, see: Bradburn, N.M., & Sudman, S., & Blair, E. (1979) and Sheatsley, P. B. (1983).

<sup>8</sup> See, Sudman, S., Bradburn, N. M., & Schwarz, N. (1996), Sheatsley, P.B. (1983), Schuman, H. & Presser, S. (1981).

***Basic Survey Procedures***

<sup>1</sup> The AAPOR, *Code of Professional Ethics and Practices* (2005) states, "Unless the respondent waives confidentiality for specific uses, we shall hold as privileged and confidential all information that might identify a respondent with his or her responses." The same approach has been adopted by Council of American Survey Research Organizations CASRO in its *Code of Standards and Ethics for Survey Research* (1997), Responsibilities to Respondents, Standard A.

ASTC Professional Code  
**VENUE SURVEYS: COMMENTARY**

**Practice Guidelines**

***Overview Issues***

<sup>1</sup> The ABA Principles for Juries and Jury Trials (2005) recommend this approach as an alternative to a change of venue. Principle 9 C.

<sup>2</sup> Disclose all methods of the survey to permit evaluation and replication. See, AAPOR, *Best Practices for Survey and Public Opinion Research* (1996), or CASRO, *Code of Standards and Ethics for Survey Research* (1997).

***Basic Questionnaire Design***

<sup>1</sup> See Rea L. M., & Parker R. A. (1992).

***Basic Survey Procedures***

<sup>1</sup> Evenly distributed opinions are those which divide the population 50/50. As the distribution of an opinion departs from a 50/50 distribution, confidence increases.

<sup>2</sup> Even with the best efforts recent trends in home telephone service and usage (e.g. rejection of commercial sales calls, caller ID, answering machines and voice mail) have reduced average completion rates. For discussion, see, Czaja, R., & Blair, J. (2005), Fowler, F.J., Jr. (2002), or Lavrakas, P.J. (1993) and Babbie, E.R. (1990). However, recent research has shown that higher completion rates have little impact on survey accuracy. Langer, G. (2003).

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ASTC Professional Code  
**PRACTICE AREA B**  
**WITNESS PREPARATION**

Trial consultants recognize witness preparation involves the art and science of interpersonal communication, and therefore our professional approaches will take many different forms. ASTC recognizes the diversity of practice by its members within this area.

For the purposes of these Professional Standards and Practice Guidelines, witness preparation refers to the assistance trial consultants provide attorneys or other clients in their effort to increase witnesses' understanding, comfort and confidence in the process of testifying for deposition or in court, and to improve witnesses' ability to truthfully present testimony in a clear and effective manner.<sup>1</sup>

Techniques and methods employed by trial consultants, as well as the structure of the preparation sessions, are based on the goals of the attorney or other client, the assessed needs of the witness, and the training, experience and expertise of the consultant.<sup>2</sup> When preparing witnesses, ASTC members do not attempt to alter or conceal the truth of witness testimony, nor do they condone such attempts by others.

## **WITNESS PREPARATION: PROFESSIONAL STANDARDS**

### **I. Compliance with Laws and Rules**

- A. Trial consultants shall advocate that a witness tell the truth.
- B. Trial consultants shall familiarize themselves with applicable law and rules which may apply to witness preparation services.
- C. Trial consultants shall provide witness preparation services within the boundaries of their competence based upon education, training, or other appropriate professional experience.

### **II. Duty to Clients**

- A. Trial consultants shall clarify with the client the goals for witness preparation and the role of the trial consultant.
- B. Trial consultants shall describe the witness preparation process including techniques and their limitations.
- C. Trial consultants shall discuss with the client limitations on confidentiality in the provision of witness preparation services including but not limited to discovery requests.<sup>1</sup>

### **III. Duty to Witnesses**

- A. Trial consultants shall treat witnesses with respect and consideration at all times.

## WITNESS PREPARATION: PRACTICE GUIDELINES

### I. Compliance with Laws and Rules

- A. Trial consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome.<sup>1</sup>

### II. Duty to Clients

- A. Clarify goals of the attorney and trial consultant for each witness preparation session. Practices can include, but are not limited to:
  1. Discuss the possible limits on confidentiality of the work.
  2. Clarify reasonable expectations for preparation assistance, and discourage unrealistic expectations of a witness' capacities or the impact of any one witness' testimony.
  3. Review case material provided by the attorney or other client.
  4. Confirm the attorney's or other client's role in the session(s), likely including preparing mock direct and cross examinations.
  5. Agree how the trial consultant will be introduced in a manner appropriate to both the goal of witness credibility and the consultant's skill and training.
  6. Agree to review and revise goals for the witness preparation as necessary.

### III. Methods

- A. Methods used with the attorney or other client to meet the agreed upon goals for a witness preparation session can include, but are not limited to:
  1. Assess and address communication issues between the witness and the attorney.
  2. Where beneficial in assisting the witness, plan for the use of video-recorded mock examinations which will allow for attorney and consultant feedback. If video is used, agree with the attorney how video recordings and other materials will be handled afterwards.
  3. Agree that the attorney, if present, shall make a statement on any video or audio recording used indicating it is covered by the work-product doctrine.<sup>2</sup>
  4. Where beneficial in assisting the witness, plan for the use of demonstrative aids or other exhibits with the witness during mock examinations.
  5. When working with an attorney, agree the attorney will be present for the session, or confirm that no substantive testimony will be addressed outside the attorney's presence.<sup>3</sup>
  6. Agree with the attorney on an appropriate approach to prepare the witness to answer questions by opposing counsel about the

## **WITNESS PREPARATION: PRACTICE GUIDELINES**

preparation session(s), should such questions be permitted.

- B. Methods used with the witness to meet the agreed upon goals for a witness preparation session can include, but are not limited to:
1. Assess and address verbal and nonverbal communication strengths and limitations.
  2. Identify witness concerns about testimony and goals for preparation.
  3. Work to increase witness comfort and confidence in testimony.
  4. Work to strengthen and help develop witness communication skills.
  5. Whenever helpful, educate the witness on significant aspects of the process and procedures for testimony in deposition or in other forums.
  6. Clarify the consultant's role in the preparation process and address the possible limits of the confidentiality of the work.
  7. Address any issues with the physical appearance of the witness.
  8. Discuss assessment with witness.
  9. Discomfort or anxiety may be addressed by behavioral techniques, including, but not limited to: breathing exercises; relaxation or visualization techniques; reframing anxious reactions, fears or misperceptions; actual or facsimile courtroom visits; reviewing video recorded mock testimony.
  10. Work to improve witness' listening skills.
  11. Whenever possible, conduct and review a sufficient number of mock examinations to encourage the greatest improvement.

## WITNESS PREPARATION: COMMENTARY

### **Preamble**

<sup>1</sup> The ABA's model rules for maintaining ethical behavior by attorneys require that a lawyer never present a witness without knowing what his or her testimony will be. Witness preparation is an important tool to meet this duty. A decision in *State v. McCormick*, 259 S.E.2nd 880, 882 (N.C. 1979,) goes on to suggest "it is not improper" to prepare witnesses so they will be ready, be more at ease knowing what to expect, and to "give his testimony in the most effective manner that he can. Such preparation...is to be commended." Some general goals for proper areas to address in witness preparation can be found in a 1995 article in the *Cardozo Law Review* by Richard Wydick, (The Ethics of Witness Coaching, 17 *Cardozo Law Rev.* 1, 12-13, 1995) including to, "obtain information, clarify important points, expose or resolve misperceptions, and organize the presentation of the case".

<sup>2</sup> For an overview on assessing witness communication, methods for improving witness communication skills and witness preparation techniques, see "Witness Preparation", chapter 15, in *Jurywork*, Will Roundtree, associate editor and Elissa Krauss, general editor, West Publishing, 2nd Ed., St. Paul, MN, 2002). For additional resources, please refer to the Depository at [www.astcweb.org](http://www.astcweb.org).

### **Standards**

<sup>1</sup> For an overview on the subject of discovery of trial consultant work, see *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?* by Stanley Davis and Tom Beisecker (*American Journal of Trial Advocacy*, 17:581, 581-636, 1994). This article was referenced heavily in the decision of the United States 3rd District Court (In re: Cendant Corporation Securities Litigation, 343 F.3d 658) which upheld the work product protections established in the *Hickman v. Taylor* decision as applying to trial consultants' work, and, under certain circumstances, also extending the attorney-client privilege. (Note practice guidelines suggesting attorneys be present for the witness preparation sessions.) However, in most jurisdictions the ability to petition a court to discover trial consultant work product as it relates to witness preparation is not yet resolved. Cases such as U.S. 3rd Circuit, in re: Cendant Corporation, No. 02-4386, Sept. 16, 2003, 343 F.3d 658; *Adkins v. Elliot King County*, WA Cause NO. 02-2-15703-3; *Farmer v. Aoyama* case King County, WA Cause NO. 02-2-25720-8, among others should alert consultants to the need to fully understand and comply with best practices regarding the protection of confidentiality in their work with witnesses.

### **Guidelines**

<sup>1</sup> Preparing or orchestrating a witness's answers has been called "scripting", along the lines of *State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 1999-Ohio-199.

<sup>2</sup> Work-product doctrine is also commonly referred to as work-product privilege.

<sup>3</sup> The Federal Rules of Civil procedure provide that documents and tangible things prepared in anticipation of litigation or for trial are protected from discoverability under the "work product" doctrine. In some venues, this work product doctrine has been extended to non-tangible things such as the work of trial consultants preparing

## **WITNESS PREPARATION: COMMENTARY**

witnesses for deposition testimony or to testify at trial (see *In re Cendant*, above.) However, not all courts may agree that the work of trial consultants in preparing witnesses to testify is protected under the work product doctrine. Thus, working with a witness only in the presence of an attorney may provide an extra layer of protection under the attorney-client privilege. However, many consultants have handled items like reviews of concerns, education on the preparation and testimonial process, and various forms of assessing a witness' capacities out of the presence of the attorney. Certainly, at a minimum, any possible added risk to confidentiality of the work product should be addressed with the client.

ASTC Professional Code  
**PRACTICE AREA C**  
**SMALL GROUP RESEARCH (SGR)**

For the purpose of these Professional Standards and Practice Guidelines, the following definition of Small Group Research (SGR) applies: Trial consultants use SGR to study individuals' beliefs, attitudes and opinions and behavior relevant to issues in litigation. SGR is characterized by participant interaction in a group setting. SGR can be used, for example, to help clients evaluate evidence, assess arguments, develop themes, and inform case strategy. Examples of possible SGR design components include but are not limited to arguments from opposing parties, questionnaire data collection, individual and group verdict decisions, and facilitated or non-facilitated participant group discussion about case-related issues. The specific form of SGR a trial consultant chooses to implement is based in part, but not limited to, the trial consultant's experience and expertise, the research questions the SGR project is designed to address, and the research methodology used to answer the research questions. Trial consultants recognize that SGR can take many different forms. The ASTC does not endorse one form of SGR methodology over another.

## **SMALL GROUP RESEARCH: PROFESSIONAL STANDARDS**

### **I. Appropriate Applications of SGR**

- A. Trial consultants shall recommend and employ small group research in those instances when, in their professional judgment, such research is well suited to the research problem at hand.
- B. Trial consultants shall not knowingly convey to the client that results of SGR be accorded greater confidence than the research design and findings warrant.

### **II. Duty to Clients**

- A. Except with the permission of the client, trial consultants shall not disclose, and shall use their best efforts to prevent disclosure, concerning: a) the fact that SGR was conducted or b) results associated with an SGR project.
- B. Trial consultants shall use best efforts to prevent the identity of the SGR client(s) from being disclosed unless and until the client(s) clearly indicate(s) they wish to be so identified to research participants.

### **III. Duty to Participants**

- A. Trial consultants shall inform SGR participants that their participation is voluntary.
- B. Trial consultants shall treat SGR participants with respect and consideration at all times.
- C. Trial consultants shall obtain written permission from participants when they may be observed and recording devices may be used or when their recorded image may be used for educational, marketing or for purposes other than the original research project.
- D. Trial consultants shall use their best efforts to protect the anonymity of research participants.

### **IV. Methodology**

- A. When reporting SGR results, trial consultants shall present the results accurately and draw inferences and make interpretations consistent with the research findings.

## **SMALL GROUP RESEARCH: PRACTICE GUIDELINES**

### **I. Appropriate Applications of SGR**

- A. Advise clients about the appropriate applications and strengths of SGR, such as assistance with case presentation planning.
- B. Inform clients about the limitations of using SGR to predict litigation outcomes.
- C. When appropriate, before conducting SGR, inform the client(s) of the purpose, estimated costs and appropriate uses of proposed SGR.
- D. Recognize that there are a variety of ways to design and implement SGR, and explore with clients the approach that best meets the client(s)' needs.
- E. When appropriate, advise client about the limitations of using SGR to design criteria for exercising challenges.

### **II. Duty to Clients**

- A. Obtain written agreement from SGR participants to maintain the confidentiality of any case specific information as a condition of participation.
- B. Examples of measures that may be implemented to maintain client confidentiality include, but are not limited to:
  - 1. Requiring recruiters, research facilities and other outside vendors to sign confidentiality agreements;
  - 2. Using additional "decoy" names when recruiting to shield the identities of the litigants;
  - 3. During the recruitment process, disqualifying participants with probable case-related connections;
  - 4. Overseeing the recruiting process on a frequent basis;
  - 5. Re-screening participants prior to the research exercise;
  - 6. Requiring participants to present identification on-site to ensure participants' identities;
  - 7. Using best efforts to avoid recruiting participants who could be called as prospective jurors in the case;
  - 8. Limiting exposure to the nature and findings of the research by limiting the amount of case-related information and participant discussion to which vendors and non-client assignees are exposed.
- C. In situations in which clients wish to disclose the SGR sponsor to SGR participants, discuss with the client(s) the pros and cons of revealing the sponsor(s)' identity.

## SMALL GROUP RESEARCH: PRACTICE GUIDELINES

- D. Discuss with the client(s) the pros and cons of presenting witness testimony to SGR participants, including the potential risks of discoverability.
- E. With the permission of the client, trial consultant may use SGR results which are presented in ways that protect the client, case and participant identities for marketing, education or other purposes.

### III. Duty to Participants

- A. Hold as confidential information that is likely to identify a participant with his or her responses, unless the participant requests or permits such disclosure.
- B. Inform SGR participants if it is probable that they will be exposed to emotionally-sensitive material and explain that participants are free to withdraw their participation from the research if they feel uncomfortable.
- C. When SGR participants have been deliberately misled, trial consultant conducts a final debriefing to mitigate potential harms, if the consultant believes any are likely.
- D. Inform participants of the person(s) responsible for on-site supervision of the SGR research to whom they may address any questions or concerns.
- E. Examples of ways that trial consultant may protect the confidentiality of SGR include, but are not limited to:
  - 1. Inform SGR participants that if called to serve as a juror on a case involving the same parties or the same case facts as addressed in the SGR, the prospective juror should request a conference with the judge concerning his/her knowledge of the case, outside the presence of other prospective jurors. Remind participants that while they should discuss their personal knowledge with the judge, they should not discuss their personal knowledge with other prospective jurors.
  - 2. If SGR participant names are sought through legal discovery, to protect participant anonymity, suggest that the client(s) seek to use attorney work-product or other privileges to protect against discovery of the SGR participant names.
- F. If SGR participant names are compelled by the Court, discuss the following options with the client(s):
  - 1. The client(s) can ask the judge to compare the venire list with the list of SGR participant names *in camera*.

## **SMALL GROUP RESEARCH: PRACTICE GUIDELINES**

2. The client(s) can offer to compare the venire list to the SGR participant list and submit an affidavit regarding the presence or absence of research participants in the venire.

### **IV. Methodology**

- A. Communicate to the client the limitations associated with the research design implemented.
- B. Communicate to the client the bases for research findings and recommendations.
- C. Communicate to the client the best means of using the research findings following the research project.
- D. Communicate to the client the research methodologies employed in the study design, juror-participant recruitment (insert footnote), data analysis and reporting of research results.

(footnote for insertion: Recruiters use various advertising and recruiting techniques that should be fully explored by the trial consultant.)

ASTC Professional Code  
**PRACTICE AREA D**  
**JURY SELECTION**

Trial consultants provide a wide variety of assistance in jury selection. ASTC recognizes the diversity of practice within this area by its members. For the purposes of these Professional Standards and Practice Guidelines, jury selection refers to the process of voir dire questioning and the exercise of peremptory challenges and challenges for cause and the attendant use, if any, of supplemental juror questionnaires, pretrial jury selection research, and background investigation of persons summoned for jury duty.

## **JURY SELECTION: PROFESSIONAL STANDARDS**

### **I. Compliance with Law and Rules**

- A. Trial consultants shall follow applicable law in the trial jurisdiction and instructions by the trial Court with respect to voir dire and jury selection procedures.<sup>1</sup>

### **II. Contact with Jurors**

- A. 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.<sup>2</sup>

### **III. Confidential Juror Information**

- A. Trial consultants shall respect the confidentiality of all information about jurors designated as confidential by the trial Court.<sup>3</sup>

### **IV. Discriminatory Use of Peremptory Challenges**

- A. Trial consultants shall not recommend the discriminatory use of peremptory challenges on the basis of the race, gender or any other factor deemed improper by applicable law in the trial jurisdiction.<sup>4</sup>

## **JURY SELECTION: PRACTICE GUIDELINES**

### **I. Compliance with Law and Rules**

- A. Because trial consultants may practice in a variety of trial jurisdictions it is important to become familiar with the laws and local rules regarding jury selection in the trial jurisdiction in which trial consultants are assisting trial counsel. Trial consultants should inform the attorney/client that ultimate responsibility for the exercise of challenges of jurors rests with the attorney.

### **II. Contact with Jurors**

- A. Trial consultants who inadvertently have contact with a person summoned for jury duty or a sitting juror should attempt to avoid communication with that person.
- B. Trial consultants who have inadvertent contact with persons summoned for jury duty or sitting jurors should notify their party's trial counsel.
- C. Trial consultants should be aware of and follow the law in the trial jurisdiction, including local procedures and guidelines, regarding the investigation of juror backgrounds and the use of publicly available or privately obtained information about jurors.

ASTC Professional Code  
**JURY SELECTION: COMMENTARY**

This commentary section is provided to help clarify and offer a context for designated Professional Standards and guidelines. The headings below identify specific Professional Standards and Practice Guidelines to which the commentary applies. Commentary does not expand the scope of the above professional Standards or Practice Guidelines,

**Standards**

<sup>1</sup> In preparing these standards and practice guidelines, the committee took note of the ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Third Edition 3-7-2 (Prosecution) and 4-7-2 (Defense), among other documents, and the various functions, levels of participation, and roles of trial consultants, some of which are delineated below.

The function of aiding counsel's intelligent exercise of peremptory challenges and recommendations concerning challenges for cause is enhanced when a trial consultant is: (a) knowledgeable about the law of jury selection and voir dire generally; (b) familiar with the law governing the exercise of peremptory challenges and criteria for excuse for cause; and (c) aware of local rules and procedures that apply to voir dire and jury selection.

To effectively assist trial counsel during jury selection, trial consultants may review relevant case documents and materials, may make recommendations regarding the improvement of voir dire and jury selection procedures, and may discuss some or all of the following aspects with counsel prior to trial: (a) trial strategy; (b) jury selection strategy; (c) appropriate or inappropriate topics and questions for voir dire; (d) issues related to the discriminatory use of peremptory challenges; (e) use of a juror questionnaire; (f) procedures used to conduct voir dire and exercise cause and peremptory challenges; (g) consultant's role during jury selection; and (h) consultant's physical location in court during jury selection.

In preparation for jury selection, trial consultants may perform a variety of functions including, but not limited to: (a) conducting pretrial research (quantitative or qualitative research) with RESPONDENTS WHO MEET THE CRITERIA FOR JURY SERVICE IN THE TRIAL JURISDICTION; (b) preparing profiles of juror characteristics believed to be positive or negative for the client; (c) preparing voir dire questions to be submitted to the Court or to be used by counsel in conducting voir dire; (d) preparing a juror questionnaire to be submitted to the Court; and (e) making recommendations for improving voir dire conditions.

Finally, trial consultants' assistance during jury selection may include: (a) observing jurors in court during voir dire; (b) taking notes in court during voir dire; (c) assigning a specific rating or evaluation to prospective jurors; (d) making recommendations to counsel concerning follow-up questions to be asked by the judge or counsel; and (e) making recommendations to counsel concerning the exercise of challenges for cause and peremptory challenges.

ASTC Professional Code  
**JURY SELECTION: COMMENTARY**

<sup>2</sup> Trial consultants may pass jurors in a variety of settings (e.g., in hallways, elevators or dining facilities). When such passing contacts occur, it is important that trial consultants avoid conduct that is improper or that leads to the appearance of impropriety. Inadvertent contact with persons summoned for jury duty can arise in other situations such as when trial consultants conduct small group research or surveys. For example, see a discussion of such contact concerning small group research in Practice Area C – Small Group Research (SGR) Practice Guidelines II.B.7 and III.E.1 and 2.

<sup>3</sup> To promote respect for the jury system and the jurors who participate in it, it is important that trial consultants abide by the rulings of the Court regarding confidential information obtained and the proper disposal of any juror questionnaires and jury lists.

<sup>4</sup> The Batson and JEB line of cases (*Batson v. Kentucky*, 476 U.S. 79, 1986 and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 1994) concerning the discriminatory use of peremptory challenges may evolve beyond the categories of race, gender and Hispanic origin. However, at the time of this writing, these three categories were the only ones to be firmly established by the United States Supreme Court.

ASTC Professional Code  
**PRACTICE AREA E**  
**POST TRIAL JUROR INTERVIEWS (PTJI)**

For the purpose of these Professional Standards and Practice Guidelines, the following definition of Post Trial Juror Interviews (PTJI) applies: Trial consultants use juror interviews to study former jurors' opinions, attitudes, and/or behaviors and to gain insight into a jury's verdict and/or deliberation process. PTJI may be used for purposes that include, but are not limited to, understanding a particular jury verdict, making further litigation decisions, improving trial practice, developing strategies for similar cases, promoting education and training goals, and expanding understanding of jury decision making in general.<sup>1</sup> The ASTC recognizes that interview research methodology can take many different forms and, aside from the Professional Standards and Practice Guidelines identified herein, the ASTC does not endorse one interview technique over another.

## POST TRIAL JUROR INTERVIEWS: PROFESSIONAL STANDARDS

### I. Compliance with Law and Rules

- A. Trial consultants shall follow applicable laws in the trial jurisdiction and any instructions by the trial Court with respect to post trial juror interviews.<sup>1</sup>
- B. Trial consultants shall not seek interviews with jurors prior to the Court's official dismissal of the jury except as permitted by the court.<sup>2</sup>
- C. Trial consultants shall follow the laws of the jurisdiction pertaining to the use of recording devices when such devices are used during an interview.<sup>3</sup>

### II. Duty to Clients

- A. Trial consultants shall accurately report the results of PTJI to the client and make inferences consistent with PTJI responses.
- B. Trial consultants shall report to the client any information disclosed in an interview that potentially constitutes jury misconduct or jury tampering.
- C. Trial consultants shall obtain permission from the client prior to disclosing the client's identity to interview participants.<sup>4</sup>

### III. Duty to Participants

- A. Trial consultants shall treat PTJI participants with respect and consideration at all times.
- B. Trial consultants shall obtain permission from participants when recording devices may be used or if such recordings may be used for educational, marketing, or other purposes.<sup>5</sup>
- C. A trial consultant shall not bind participants in any contract or agreement prohibiting contact with anyone.
- D. A trial consultant shall not offer assurances that a juror's post trial statements, nor his or her identity, will remain completely confidential.

## POST TRIAL JUROR INTERVIEWS: PRACTICE GUIDELINES

### I. Compliance with Law and Rules

- A. Trial consultants should take reasonable measures to ensure that PTJI does not violate jurisdictional or court rules.<sup>1</sup> Practices may include, but are not limited to, the following:
  - 1. Review the law regarding PTJI in the relevant jurisdiction.
  - 2. Obtain the client's assurance of compliance with the jurisdiction's rules and any specific court orders.
  - 3. Request that the client provide the trial consultant with a copy of relevant statutes or rules.
  - 4. Verify with the court that there are no jurisdictional rules or court orders prohibiting post trial juror interviews.
  - 5. Advise the client to inform the Court or seek the presiding judge's permission to contact jurors.
  
- B. In instances in which a seated juror is dismissed prior to the Court's dismissal of the entire jury, trial consultants should request that the presiding judge's permission be obtained prior to pursuing interviews with dismissed jurors.
  - 1. Permission to interview persons excused from the venire panel without being sworn in need not be obtained.

### II. Duty to Clients

- A. Trial consultants should advise the client about the appropriate uses and limitations of conducting PTJI.
  
- B. In jurisdictions in which such interviews are permitted, trial consultants should discuss with the client the limitations of conducting PTJI for the primary purpose of discovering juror misconduct.<sup>2</sup>
  
- C. Trial consultants should discuss with the client the potential advantages and disadvantages of revealing client identity and the manner in which identity may or may not be revealed. Practices may include, but are not limited to, the following:
  - 1. Client identity may be disclosed at the beginning of the interview.
  - 2. Client identity may be disclosed only at end of the interview.
  - 3. Client identity may be disclosed only if interview participants ask.
  - 4. Client identity may be disclosed only if participants insist on such information before consenting to an interview.
  - 5. Participants are informed that consultant is not permitted to disclose client identity.

## POST TRIAL JUROR INTERVIEWS: PRACTICE GUIDELINES

- D. Trial consultants should discuss with the client the potential advantages and disadvantages of compensating jurors for participating in post trial interviews.<sup>3</sup>
- E. Trial consultants should document interview responses in a manner that promotes accurate reporting of results. Practices include, but are not limited to, the following:<sup>4</sup>
  - 1. Take handwritten notes during and/or after the interview.
  - 2. Audio or video record the interview.
  - 3. Create a verbatim transcription of the interview.
- F. Subcontractors or other independent people hired by trial consultants to arrange or conduct interviews, or to compile their results should be informed of these standards and guidelines and advised to adhere to them.<sup>5</sup>
- G. Trial consultants should explain the PTJI process and results accurately. practices include, but are not limited to, the following:
  - 1. Communicate to the client the methodology employed in the design, analysis, and reporting of PTJI research.
  - 2. Communicate to the client the limitations associated with qualitative research and interview methods.<sup>6</sup>
  - 3. Communicate to the client the bases for PTJI research conclusions.
- H. With the permission of the client, trial consultants may use PTJI results which are presented in ways that protect the client, case, and participants' identities for marketing, education, or other purposes.<sup>7</sup>

### III. Duty to Participants

- A. Trial consultants should accurately represent the nature and purpose of the interview. Practices may include, but are not limited to, the following:
  - 1. Avoid explicitly stating or suggesting that a juror is required to participate in an interview.<sup>8</sup>
  - 2. Explicitly inform jurors that participation is voluntary.
  - 3. Avoid false statements regarding client identity.<sup>9</sup>
  - 4. Avoid false statements regarding the general purpose of the interview.<sup>10</sup>
  - 5. Obtain permission from participants when audio or video recording devices will be used during an interview.
  - 6. Reveal identity and contact information of trial consultant.<sup>11</sup>

## POST TRIAL JUROR INTERVIEWS: PRACTICE GUIDELINES

7. Describe how the trial consultant will work to maintain the confidentiality of interview participant identity and responses, unless otherwise required by law.
  8. Inform the participant that, if required by a legal ruling, interview responses may be produced to the court at some future date.
  9. Obtain permission from the interview participant to make future contact should the need arise.
- B. Trial consultants should avoid practices that would reasonably be perceived as confrontational or intimidating. Practices may include, but are not limited to, the following:
1. Once an interview has been refused, refrain from further follow-up efforts to elicit interview participation.<sup>12</sup>
  2. Avoid engaging in argument regarding participants' opinions or the jury's verdict.
  3. Avoid discouraging or influencing participants' future jury service.
- C. 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. Examples of acceptable practices include:
1. Providing a beverage and/or a simple meal.
  2. Offering payment or other benefits consistent with that offered in similar forms of research.
  3. Avoiding negotiation of a fee for participation with any individual participant.
  4. Not offering compensation of any kind.<sup>13</sup>

## POST TRIAL JUROR INTERVIEWS: COMMENTARY

### **Preamble**

<sup>1</sup> This preamble is modeled on the one preceding Small Group Research (SGR) Professional Standards previously approved by the ASTC members. It is not the intent of the PTJI Subcommittee to suggest that use of PTJI must be limited to only those purposes explicitly included here.

### **Standards**

<sup>1</sup> Trial consultants use different approaches for ensuring compliance with the law in a jurisdiction and/or any court order prohibiting juror interviews in a particular case. The PTJI Practice Guidelines provide examples of approaches consultants use in their effort to comply with the law and court orders. While the American Bar Association's *Principles for Juries and Jury Trials* (February 2005) advises courts to "ordinarily permit the parties to contact jurors after the terms of jury service have expired . . .", trial consultants must nevertheless be aware that many jurisdictions prohibit post trial juror interviews. Furthermore, where interviews are permitted, jurisdictional and court rules may vary on such issues as compensation of jurors, scope of interview questions, and when and how jurors may be contacted. This PTJI standard is consistent with the ASTC Ethical Principles set forth in this code that "trial consultants comply with the law" (Part IV Social Responsibility).

<sup>2</sup> In some instances, an individual juror is dismissed during the trial or jury deliberations but prior to a jury delivering a verdict or the judge's dismissal of the entire jury. This standard is not intended to prohibit all interviews of such dismissed jurors. Rather, the standard requires that trial consultants only conduct interviews with such jurors when the Court expressly permits.

<sup>3</sup> The laws pertaining to the issue of recording conversations without the knowledge and/or consent of one or both parties may vary among jurisdictions. Trial consultants should be aware of the relevant law when they intend to use recording devices to document interview responses. Note that *Part III Duty to Client*, within these Professional Standards, specifically requires that interview participants be explicitly informed of and consent to the use of any recording devices in all instances. This is consistent with a similar Small Group Research (SGR) Standard previously approved by the ASTC members.

<sup>4</sup> This standard is not intended to specifically require nor prohibit disclosure of client identity. It does require that a trial consultant know and abide by the client's wishes on the matter.

<sup>5</sup> Many post trial juror interviews are conducted over the telephone. Trial consultants should request and obtain consent in every instance in which a recording device is used during an interview. This standard is similar to a Small Group Research (SGR) Standard previously approved by ASTC members.

## POST TRIAL JUROR INTERVIEWS: COMMENTARY

### **Guidelines**

<sup>1</sup> Trial consultants often practice across many trial jurisdictions. Thus, trial consultants should become familiar with the laws and local rules regarding post trial interviews in the trial jurisdiction in which PTJI will be conducted. The list of options included here represents a range of approaches trial consultants might use to ensure compliance with the law and court orders. The PTJI Subcommittee does not intend to suggest that a trial consultant must use *all* of these approaches in each case.

<sup>2</sup> Rarely are interviews conducted for the express purpose of discovering jury misconduct. Rather, discovering juror misconduct may be an incidental byproduct of a post trial interview. The American Bar Association's *Principles for Juries and Jury Trials* (February 2005) advises that "Only under exceptional circumstances may a verdict be impeached upon information provided by jurors." Trial consultants should be aware that interviewing jurors for the express purpose of discovering jury misconduct may be specifically prohibited in some jurisdictions.

<sup>3</sup> There are often no specific jurisdictional rules prohibiting compensation of former jurors for participating in an interview. However, the impact of compensation on the perceived credibility of the responses should also be considered, particularly if the responses may be the basis for further court proceedings.

<sup>4</sup> Trial consultants often vary their method of documenting interview responses and may use different methods for different cases or clients.

<sup>5</sup> The need to monitor or supervise a contractor's adherence to ASTC professional standards and practice guidelines relevant to PTJI may vary according to the particular tasks assigned or the professional nature of the service provider.

<sup>6</sup> Trial consultants may need to inform clients that post trial juror interviews typically involve qualitative methods in which subjectivity is inherent in the collection and analysis of interview data and responses.

<sup>7</sup> This is consistent with a Small Group Research (SGR) Practice Guideline previously approved by ASTC members.

<sup>8</sup> Jurors usually implicitly understand that participation is voluntary. Principle 18 of the American Bar Association's *Principles for Juries and Jury Trials* advises that courts "instruct jurors that they have the right to either discuss or refuse to discuss the case with anyone . . ."

<sup>9</sup> Trial consultants should avoid the practice of making explicit statements or implying that a trial consultant is working on behalf of both parties or the court when that is not the case.

<sup>10</sup> Trial consultants should avoid explicit statements that falsely inform a participant that

## POST TRIAL JUROR INTERVIEWS: COMMENTARY

an interview is being conducted for general research purposes rather than on behalf of a client. However, trial consultants are not necessarily obligated to explain the purpose of an interview in detail. It may be sufficient to broadly explain the purpose of the interview to a participant. For example, an interview participant may be told that “interviews are conducted to better understand the jury decision-making process in general, to understand a particular verdict, and to improve the manner in which attorneys try cases.”

<sup>11</sup> While trial consultants are not ethically obligated to reveal client identity, trial consultants should be willing to provide accurate information about themselves, including consultant identity, name of firm, and consultant contact information.

<sup>12</sup> In many instances, a participant’s refusal may be very clear. When a juror’s initial response to an interview request is ambiguous, methods such as follow-up calls or letters may be appropriate. The American Bar Association’s *Principles for Juries and Jury Trials* (February 2005) suggests that “Courts inform jurors that they may ask for assistance in the event that individuals persist in questioning jurors, over their objections, about their jury service.”

<sup>13</sup> When considering providing any form of compensation it may be useful to recognize certain courts have had very strong, negative reactions to this practice, on occasion. Research is less than settled on the level of influence or distortion of responses the fact of payment may create. The ABA *Principles for Juries and Jury Trials* suggests “a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care” for jury service. That may well serve as a guide for post trial interview compensation during participant screening.