

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 laws and standards in the trial jurisdiction and instructions by the trial Court with respect to voir dire and jury selection procedures.¹

II. Contact or Communication 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.²
- B. Trial consultants shall not use deception or falsely represent themselves to gain access to information that would not otherwise be available to them.

III. Confidential Juror Information

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

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.⁴

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 or Communication 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 or communication 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, guidelines and standards regarding the investigation of juror backgrounds and the use of publicly available or privately obtained information about jurors.¹

Unless otherwise restricted in the trial jurisdiction, trial consultants may use social media sites for juror research as long as no communication occurs between the consultant and the juror or prospective juror as a result of the research.²

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

¹ 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.

² 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.

³ 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.

⁴ 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.

Practice Guidelines

¹ Different phases of the trial may raise different ethical considerations such that procedures, guidelines, and standards concerning juror research or monitoring may differ depending on whether it is done pre-trial/during voir dire, during trial, or post-trial.

² Standards regarding what constitutes “communication” may vary by jurisdiction. In 2012, The New York City Bar Association issued Formal Opinion 20121-02 on Jury Research and Social Media. The Opinion includes extensive analysis of ethical issues relevant to juror research.

“Communication” should be interpreted broadly, including more than sending a direct or specific message. For example, sending a “friend” request or similar invitation to share information on a social network site may constitute a prohibited communication.

Some social media sites may generate a notification to jurors when they are being researched or monitored. The act or attempted act of viewing pages, posts, or comments could also be deemed communication if the consultant was aware that his or her actions would cause the juror or prospective juror to receive a message or notification alerting them to the consultant’s research.

These same attempts to research or monitor the juror or prospective juror might constitute prohibited communication even if inadvertent or unintended. Therefore, trial consultants should consider the functionality, properties, privacy settings, and policies of a website or service before conducting juror research.