

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.¹ 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.¹
- 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.²
- 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.³

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.⁴

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.⁵
- 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.¹ 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.²
- 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.
- D. Trial consultants should discuss with the client the potential advantages and disadvantages of compensating jurors for participating in post-trial interviews.³
- 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:⁴
 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.⁵
- 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.⁶
 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.⁷

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.⁸
 2. Explicitly inform jurors that participation is voluntary.
 3. Avoid false statements regarding client identity.⁹
 4. Avoid false statements regarding the general purpose of the interview.¹⁰
 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.¹¹
 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.¹²
 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.¹³

POST TRIAL JUROR INTERVIEWS: COMMENTARY

Preamble

¹ 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

¹ 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).

² 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.

³ 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.

⁴ 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.

⁵ 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.

Guidelines

¹ 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.

² 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.

³ 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.

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

⁵ 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.

⁶ 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.

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

⁸ 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 . . ."

⁹ 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.

¹⁰ Trial consultants should avoid explicit statements that falsely inform a participant that 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.”

¹¹ 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.

¹² 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.”

¹³ 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.