PSYCHOLOGY PRACTITIONER GUIDEBOOKS

PSYCHOLOGICAL CONSULTATION IN THE COURTROOM

Michael T. Nietzel
Ronald C. Dillehay

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To Geri and Val

Preface

The impetus for writing this book was our 10 years of experience in consulting with trial attorneys about jury selection, courtroom dynamics, and trial strategy. On the basis of this experience, we gradually developed a model of consultation, a set of interventions, and a program of research that addressed many of the practical and intellectual demands that face the courtroom consultant. Our ideas about juries and the courtroom come from many sources—attorney lore and logic, our own "clinical" intuitions, prior and ongoing empirical research, interviews with jurors, advice from other consultants, and analyses driven by psychological theory.

In writing this book, we aimed to (a) describe how we implement our model of consultation in criminal and civil litigation and (b) summarize the empirical, theoretical, and experiential bases for this work. Our intended audience includes professional psychologists and advanced graduate students who would like to expand their consulting activities to include the courtroom and who need a systematic but efficient guide on how to begin.

This book represents the contributions of many students, lawyers, judges, and colleagues, and we want to acknowledge the assistance and education they have given us over the several years of work described here. First, we wish to thank the attorneys who shared with us the challenges and problems of their litigation and who gave us the chance to participate in some exceedingly complex trials. Our special gratitude in this regard goes to Bob Reeves and other attorneys in the firm of Stites and Harbison (Lexington, KY); Pete Partee, the Public Defender for Greenville, South Carolina; the attorneys with the Kentucky Office of Public Advocacy, especially Vince Aprile, Bill Radigan, Ernie Lewis, Gail Robinson, Ed Monahan, and Kevin McNally; and Larry Roberts, former Fayette County Commonwealth's Attorney. Professors William Fortune and Robert Lawson of the University of Kentucky College of Law were helpful to us in many ways and were always willing to give us the benefit of their legal expertise on trial practice. Members of the National Jury Project, especially

Beth Bonora, Emily DeFalla, and Elissa Krauss, have provided both ideas and encouragement for consultation.

A number of graduate students assisted us on the research projects described throughout the book. We would like to recognize the practical and intellectual contributions of Ron Davis, Melissa Himelein, Greg Morrow, Mike Neises, and Glen Rogers, all from the University of Kentucky Department of Psychology and Mike Davidson from the UK College of Law. Our research also depended on the cooperation of many trial judges who gave us access to their courtrooms; special appreciation is expressed to James Park, Jr., Armand Angelucci, L. T. Grant, M. Mitchell Meade and their fellow judges from the Fayette County Circuit Court. Court administrator Donnie Taylor never failed to answer whatever requests we had for him during the several trials for which we impaneled an "alternative jury" (see chapter 3).

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Last, we want to thank two people who worked far beyond the call of duty in bringing the manuscript to final form: Kelly Hemmings who spent countless hours reading the manuscript, trudging to the library, and coordinating the bibliography, and Shirley Jacobs who does all jobs that need to be done and does them better than anyone has a right to expect.

Michael T. Nietzel
Ronald C. Dillehay
July, 1985
Lexington, Kentucky

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Chapter 1
Introduction: The Psychology-Law Interaction

Psychologists were already consulting on courtroom phenomena at the turn of the twentieth century. William Stern reported that he began to study the correctness of recollection in 1901 by presenting pictures to students for 45-second study, and then asking them to report on the content of the pictures they could remember at various intervals (Stern, 1939). These *aussage* (testimony) experiments were the antecedents of today's research on the reliability of eyewitness testimony and led Stern to conclude that "perfectly correct remembrance is not the rule but the exception" and that "leading questions are capable of exercising a well-nigh fatal power" (Stern, 1939).

Stern (1939) acknowledged that his *aussage* experiments were "determined by theoretical interests in the realm of memory rather than by practical considerations," but that he soon realized the importance of the results for evaluating trustworthiness of testimony at trial. As we intend to show in this book, the value of sound psychological theory as a basis for courtroom consultation remains as essential today as it was in Stern's time.

Although Hugo Munsterberg, the controversial Harvard psychologist, is often credited as the first forensic psychologist, his book, *On the Witness Stand*, was not published until 1908, several years after publication of Stern's work, and also after the discussion by Alfred Binet of the potential forensic utility of word association research (Whipple, 1909). In addition, as early as 1906, Freud proposed the use of reaction-time experiments and word association tests in determining the guilt or innocence of defendants (Rothgeb, 1973).

Munsterberg was the first psychologist to insist that psychological methods surpassed existing legal tools in their ability to assess memory, uncover deception, evaluate confessions, and even to prevent crime. In contrast to teachers, physicians, artists, businessmen, ministers, soldiers, and politicians, attorneys, Munsterberg complained, were the most "obdurate" in accepting psychology as a help to them:

> The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. . . . They go on thinking that their legal instinct and their common sense supplies them with all that is needed. . . . (Munsterberg, 1908, pp. 10–11)

Munsterberg's bombast did not sit well with attorneys. In the best-known reply, Professor John Wigmore (1909), that era's leading expert on legal evidence, brought a mocking libel suit against Munsterberg for overselling the usefulness of psychology, for ignoring the difference between laboratory findings and legal requirements and realities, and for glossing over many disagreements among psychologists themselves. Wigmore entered his suit in the mythical Wundt County. Plantiffs were licensed attorneys represented by Mr. Simplicissimus Tyro. Munsterberg's counsel were "the celebrated Mr. R. E. Search, assisted by Mr. Si Kist and Mr. X. Perry Ment." The case was heard by one Judge Wiseman. Plaintiffs sought damages for injury to their good names in the sum of one dollar. After listening to lengthy crossexamination of Munsterberg by Mr. Tyro, "The jurors, after a few moments' whispering, announced that they did not need to retire, being already agreed on a verdict . . . for the plaintiffs with damages of one dollar."

The antagonisms contained in the Munsterberg–Wigmore exchange typified the psychology–law interaction through the 1920s and squelched any chance of a rapprochement. In his book, *Social Research in the Judicial Process*, Wallace Loh (1984) called this period the "Yellow Psychology" phase in which psychologists were ready to market their product but in which attorneys were not buying what the psychologists were selling.

Loh (1984) described the 1930s as the "Psychologism in the Law" stage in which psychology was applied to the practice of law and was used to critique legal doctrines and decisions. This period corresponded to the "legal realism" movement, which argued that the law was influenced by social, economic, personal, and psychological influences in addition to formalistic factors such as precedent, logic, deduction, and legal analysis.

During this period, Dwight McCarty's book, *Psychology for the Lawyer* (1929), presented "the new psychology," a science that "explain(s) the very thing with which the legal practitioner is dealing day by day." Harold Burtt's (1931) book, *Legal Psychology*, was organized into three sections: the psychology of testimony, the psychology of the criminal, and the psychology of crime prevention. Burtt, one of Munsterberg's students, attempted to present various psychology-in-law topics to "both the student with somewhat of a psychological background and the lawyer who has perhaps no formal psychological training but who may be a pretty good psychologist withal."

A major section of M. Ralph Brown's (1926) book, *Legal Psychology*, advised attorneys on "trial psychology" including such topics as examin-

ing witnesses, selecting juries, and presenting arguments. Brown believed that:

> Psychology can make justice more certain. If all lawyers were required to study the principles of psychology, and to learn the applications thereof so that both sides of every case were presented in the best psychological as well as best legal manner, the personal element would tend to become equal or eliminated. Greater justice would result. . . .

Edward Robinson's (1935) book, *Law and the Lawyers*, was important because it sought to apply the methods of naturalistic science to the law, decried by Robinson as an "unscientific science." Robinson was especially enthusiastic about the utility of behaviorism and believed that psychological "facts" had to be substituted for legal concepts.

Loh (1984) credits Robinson's book with introducing the idea that legal psychology should not attempt to apply existing psychological theories and knowledge to legal problems as, for example, Munsterberg had done, but that it should first conduct a psychological analysis of the legal problem concerned and then perform new empirical research on that problem. (Loh cites the research of Hutchins & Slesinger, 1929, on the psychology of evidence as an example of this perspective.) Of course, these two approaches to a psychology of the courtroom are compatible; they constitute two of the foundations for the consultation we describe in the remainder of this book.

The courtroom consultant can derive his or her recommendations from any one of three knowledge sources (Dillehay & Nietzel, 1980a). First, the consultant can draw on generic psychological theory and research. After evaluating the theory's potential for extrapolation to practical settings and judging the research on its methodological merits, the consultant can decide whether the theory and/or the research has something valid to say about the question at hand. This method was practiced by Munsterberg, except that he failed to restrain his tendency toward wholesale transportation of concepts beyond their justified range of applicability.

A second source of knowledge is derived from a careful diagnosis of the psychological issues at play in the courtroom followed by empirical examinations of those phenomena. This is the approach advocated by Robinson, and it is well represented by Thibaut and Walker's (1975) experimental analysis of adversary versus inquisitorial systems of dispute resolution.

The third research strategy is to study, as directly as possible, courtroom phenomena as they naturally occur. Jury interviews, courtroom observation, and use of archival data are the means to this end. Some of the best known examples of this approach are represented by the research known as the Chicago Jury Project (e.g., Broeder, 1965).

The 1950s commenced what Loh (1984) termed "The Forensic Stage" where psychologists were predominantly occupied in offering expert testi-

mony to juries and appelate courts on various subjects. The two areas receiving the most attention were expert opinions on the relationship between mental disorders and responsibility for criminal conduct and testimony about the psychological effects of school segregation. Both topics sparked debate about the proper role of social scientists in adjudication, a conflict that continues today (Haney, 1980; Morse, 1978; Robinson, 1980). Chapter 4 presents the practical issues facing the psychologist who testifies as an expert in the courtroom and surveys several topics for such testimony.

Loh's (1984) fourth stage of psychology–law interaction was "New Research on Procedural Justice," a product of the political activism of the 1960s, which in the 1970s and 1980s concentrated on procedural issues in the trial process, particularly criminal trials. James Marshall's *Law and Psychology in Conflict* (1966) announced this research agenda, one that has been pursued in the last two decades—empirical evaluations of legal procedures and assumptions. Loh divided research in this stage into four categories that concentrated on jury functioning: pretrial influences on the jury, selection of the jury, presentations of testimony and law to the jury, and decision-making by the jury. We examine each of these topics in the remaining chapters because they provide much of the data with which the effective consultant should be acquainted.

This fourth era saw the emergence of specialists in psycholegal research, the beginning of interdisciplinary training programs for psychologist–lawyers, and the initiation of several publication outlets for psycholegal studies (e.g., *Law and Human Behavior, Criminal Justice Journal, Law and Psychology Review,* and *Criminal Justice and Behavior*). Finally, a large number of books analyzing psychological research on courtroom phenomena have been written in the past few years. Most of this scholarship attempts to integrate the psychological literature with the legal procedures one finds in daily courtroom use. In the best of these volumes, the psychologist is educated about the realities of the legal system, whereas the attorney is appraised of the potential application of social science methods to adjudication (Bartol, 1983; Ellison & Buckhout, 1981; Greenberg & Ruback, 1982; Hastie, Penrod, & Pennington, 1983; Horowitz & Willging, 1984; Kaplan, 1986; Kassin & Wrightsman, 1985; Kerr & Bray, 1982; Lippsitt & Sales, 1980; Monahan & Walker, 1985; Saks & Hastie, 1978; Sales, 1981).

TRIAL PROCEDURES

The right to a jury trial in a criminal matter is guaranteed by the Sixth Amendment to the U.S. Constitution. In civil disputes, the right to a jury trial is provided by the Seventh Amendment. Psychologists who consult in the courtroom must know the basic sequence of events in criminal and

civil litigation and must be knowledgeable about the differences between the two types of trials. Many of the questions that attorneys pose to consultants deal with variations in trial procedures that attorneys will try to turn to their advantage.

Adversary Model

Criminal and civil trials are conducted according to an *adversary model* of litigation. In an adversary system, the opposing attorneys contend against each other for a result favorable to themselves. The judge functions as an independent arbiter of the proceedings but has no responsibility for investigating or preparing the case as would a judge under the *inquisitorial system* that is practiced in many European countries. Presumably, this role frees the judge to be an impartial referee of the contest being waged by the contending advocates. The advocates are responsible for representing their clients as zealously as the law allows and are expected to use whatever tactics the rules allow in gaining a victory.

The adversary system has been likened to trial by battle, a "dramatic duelling of opposing counsel" (Wigmore, 1909), in which the less skillful advocate loses, an altogether acceptable outcome according to laissez-faire policy. There are some special obligations imposed on both counsel in a criminal trial. The prosecutor is responsible for seeing that justice is done, not for obtaining convictions at any cost. In the words of one court decision, "While [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones" (*Berger v. United States*).[1] On the other hand, the ethics of defense attorneys require them to defend the interests of their clients and to promote any permissible construction of the law that is favorable to their clients.

The adversary conduct of trials is often cited as one of the major philosophical differences that separates lawyers and psychologists in their respective approaches to "truth." As a scientist, the psychologist's search for truth is a public, objective, impersonal inquiry conducted according to methods that can be repeated by others, one that yields results that are interpreted by predetermined standards. "Truth" is reached only probabilistically; hypotheses and theories are always subject to the revisions required by the results of the next experiment. Trial advocates, on the other hand, require dichotomous answers (e.g., guilty vs. not guilty) and seek them through the use of artful persuasion, rational argument, emotional appeal, *ad hominem* attacks, and well-practiced theatrics.

The socialization processes, the preferred style of communication, the educational experiences, and the rules of decorum are quite different for lawyers than for psychologists. The adversary system magnifies these discrepancies. However, we believe that many of the so-called fundamen-

tal differences between the two disciplines are not as divisive as is believed. We question first whether psychologists are unfamiliar with adversary approaches to decision-making or, second, whether they oppose an ethical position that emphasizes loyalty to one's client.

Bartol (1983) claims:

> The adversary model presents problems for empirical psychology, since it not only concentrates on one particular case at that particular point in time, but also encourages lawyers to dabble in and out of the data pool and pick and choose that segment of psychological information they wish to present in support of their position.

This is an accurate depiction of what lawyers do, but why it should be problematical to psychologists is less clear. Much psychological literature is rife with selective citation of studies, biased interpretation of data, and differential standards for methodology. Any psychologist familiar with the published controversies over the efficacy of psychotherapy or whether a psychologist should testify about the limited accuracy of eyewitness identification can attest to the presence of passion, subjectivity, and partiality in those scholarly debates. These characteristics will surprise few current philosophers of science (Feyerabend, 1970; Kuhn, 1962) who argue that science progresses through a clash of paradigms, not through the slow increments of empiricism; progress is guided by personal, political, and social factors as much as by the brute facts of careful empiricism. Psychology should not replace experimental methods with adversary ones, despite the arguments of some commentators (e.g., Levine, 1974). However, those who are most alarmed that psychologists "dirty their hands" in the courtroom may have an overly sanitized notion of what psychologists do outside it.

Consulting in the Adversary System

Psychologists may nonetheless still feel uneasy about the ethics of consulting in our adversary system of justice. They are reluctant to believe that the "fairest" outcome is achieved by having two opposing forces enter into combat against each other to achieve a result favorable to themselves. This reluctance often progresses to outright aversion when the psychologist is asked to enlist on one of the sides and act in a partisan fashion. Some experiments on bargaining show that the best joint outcome results from efforts by the negotiators to maximize their individual profits rather than to attempt to cooperate in pursuit of a mutual goal (Kelley & Schenitzki, 1972). Extensive experimental research conducted by Thibaut, Walker and their colleagues (Thibaut & Walker, 1975) on procedural variables in dispute resolution indicated that, as compared with "inquisitorial" systems in which disinterested third parties determine the

facts, the adversary system is favored for its fairness, satisfactory performance, and other features. Our training and many of our professional values, however, seem to contradict the expectations and the ethics of an adversary process. Yet our involvement as trial consultants forces us to evaluate whether we can function in the partisan fashion required by such work.

We do not believe there is a complete answer to many of the ethical dilemmas that will be faced by the trial consultant, as we discuss more fully in chapter 8. Colleagues whom we respect often resolve a problem such as defending a client they believe to be guilty differently than we do. We believe the principles of the adversary system are ethically defensible and, in many instances, are not far removed from the psychologists' ethical standards of respecting the integrity and protecting the welfare of the person or group with whom they work. However, we need not work for every client, nor need we work with every attorney. We believe our work as trial consultants must be viewed in the context of the adversary system, which *requires* that attorneys represent their clients zealously within the bounds of the law and professional regulations. Increasingly, this zealousness results in requests for consultation on the psychological dimensions of jury selection and case presentation. Although psychologists should not accept the ethics of attorneys as their own, trial consultants must reach some decision about whether the value the adversary system places on partisan functioning is sufficient justification for their own partisanship. Without some resolution of this question, consultants' days in court are likely to be numbered and unpleasant.[2]

Criminal Trials

Criminal trials are concerned with violations of the criminal law as set forward in federal, state, and local statutes that proscribe certain conduct and set penalties for those persons convicted of a transgression. Criminal law applies to violations against the state or public order; therefore, a criminal case is brought to trial by a representative of the federal, state, or local government (the *prosecutor*) who accuses the *defendant* of a violation of a specific law.

This process begins when a crime is reported and an alleged offender is arrested. The police collect evidence, and the suspect is either charged with an offense or released if there is insufficient incriminating evidence. Within days, a *preliminary hearing* may be held, in which the prosecutor must show *probable cause* that the accused is responsible for the crime charged. This hearing allows the accused and the defending attorney to hear some of the evidence the prosecutor has gathered to prove guilt, a process known as *pretrial discovery*.