Practice Tip

The Plaintiff's Perspective: Jury Research Can Win Your Case

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TIP
Attorneys risk an adverse verdict if they become wedded to evidence or arguments that jury research demonstrates should be adjusted or abandoned entirely.

Trial lawyers who obtain big verdicts in complex litigation are seldom surprised when the foreperson or judge publishes the verdict after many hours of deliberation. In the vast majority of these cases, the verdict confirms what hours of jury research and scientific analysis has demonstrated. While it is true that successful trial lawyers possess the inherent ability to understand how jurors make decisions about the weight of the evidence and credibility of the witnesses in any case, even the most seasoned trial lawyers scientifically test and learn what is required on a case-by-case basis to favorably persuade jurors. Quality pretrial research allows trial lawyers to understand how jurors construct decisions about the evidence based upon their preexisting biases, convictions, values, and experiences. Successful trial lawyers have become experts in developing a complete understanding of how to create a compelling factual jury presentation that markedly increases the likelihood of a substantial verdict.

Some trial lawyers believe that they can affect juror thinking solely through the force of personality and strategic decisions during trial. In doing so, they fail to effectively learn what evidence will be the most persuasive to the decision makers—and why. For success at trial, during preparation lawyers must be ready to abandon theories, themes, and components of evidence to which they may be wedded in order to make their case more palatable to a jury.

Data accumulated through jury research provides a critical tool in understanding how a jury is most likely to perceive the evidence you have marshaled during discovery and the arguments you craft. Today, jury research can determine how trial strategy is developed and teaches us how to present our most formidable case to a jury.

Three research techniques most commonly are applied to collect and analyze data relevant to trial case preparation: scientific surveys, focus groups, and mock juries. Implementing them properly and using jury research will substantially increase a trial lawyer's likelihood of success at trial.

Surveys

In high-profile cases, venue surveys can be extremely helpful to measure public awareness and perceptions of the facts underlying the litigation. Identifying the preexisting beliefs of the jury pool allows a trial lawyer to view his or her case from the vantage point of the local juror. A number of different techniques can be used to conduct surveys. These surveys require the expertise of specialized consultants who possess the training and the experience in conducting surveys to ensure that the scientific data obtained is reliable, and more importantly, can be applied.[1]

Surveys that are conducted telephonically in the same venue as the trial are the most reliable and provide assurances that the cross-section or "sampling" is drawn from a typical jury pool within the jurisdiction. A critical factor for accuracy is ensuring that the sample size is large enough to yield statistically reliable results. Depending on the jurisdiction, the type of case being analyzed, and the population density of the particular venue, the sample size may vary from 100 to over 3,000 participants. Established research centers in major cities maintain databases of over 1,000,000 potential participants to draw from.

Surveys must not only test and accumulate data pertaining to preconceived notions held by the group but should also strive to examine and identify preexisting beliefs the venue has about the judicial system itself, and it process, in addition to the subject matter of the litigation.

Listed below are samples of questions that elicit attitudes toward lawsuits and institutions:

Please tell me how strongly you either agree or disagree with the statement:

1. There are far too many frivolous lawsuits today.
2. People are too quick to blame others for things that happen to them.
3. Most corporations are more interested in making profits than in making safe products.
4. The federal government is more interested in protecting corporations than in protecting individuals.
5. Juries are awarding far too large amounts of money in civil cases these days.
6. We should have more laws to regulate corporate behavior.
7. Most people are pretty much in control of what happens to them.
8. Juries do a good job of determining the outcomes of lawsuits and assessing damages in civil trial.

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9. Most people who sue others in court have legitimate grievances.
10. Large corporations generally treat their employees well.
11. The ability of citizens to bring lawsuits has made this a safer society.

The survey should also inquire into the specific facts of your case. For example:

1. How do you view the FAA's responsibility for the ComAir crash in Lexington?
2. Have you ever read books about September 11th?
3. Have you read the 9/11 Commission Report?
4. Do you believe the 9/11 Commission Report is complete and credible?
5. Is air travel relatively safe today?
6. Airport security has improved since the September 11, 2001, hijackings.
7. I feel safer now than I did nine years ago.
8. Could anyone have predicted something as bad as September 11, 2001?
9. Do you believe pilots today are properly trained and qualified?

Such queries will impart significant data regarding the preexisting attitudes and beliefs potential jurors have regarding the justice system in general as well as the facts and parties to your case.

Focus Groups

Focus groups are designed to foster an in-depth discussion about evidence critical to the outcome of the case and to encourage participant interaction that skilled consultants use to explore the effectiveness of arguments and evidence critical to the case. Focus groups provide very valuable information as they emulate the small group deliberation that occurs in the jury room. Of course, all participants must sign appropriate confidentiality agreements in conjunction with their participation.

With most focus groups, a skilled consultant who is a neutral moderator leads the participants through a scripted discussion prepared by the trial lawyer and jury consultant that outlines the key evidence and arguments in the case. The sessions are videotaped, and afterward the consultant employs accepted methods to measure the participants' responses to the presentation. Typically, focus groups consist of six to 18 potential jurors, with the ultimate goal of providing far more in-depth information than is available through the survey process. Therefore focus groups are one of the best tools for developing case themes and determining pitfalls present in any case.

Focus groups are most effectively used in the early stages of the case, allowing trial lawyers to identify the strengths and weaknesses inherent in the lawsuit. In unique circumstances, the lawyers and consultant can conduct the focus group before the filing of the suit or the start of discovery.[2] Accurately identifying the questions raised by participants is critical to successfully implementing focus group data. Attorneys can incorporate the feedback to target their discovery theories and themes they intend to present to the jury. Focus groups also assist in determining what individual components of evidence jurors find most persuasive. Most importantly, focus groups identify why and how jurors think and do what they do.[3]

Focus groups are most effective when skilled consultants lead group discussions on critical pieces of evidence—favorable and unfavorable—such as selected documents, demonstrative trial exhibits, and deposition videoclips of witnesses (when available) relevant to the issues a jury will consider during deliberations. By effectively testing the persuasiveness of certain evidence, conclusions will be made about how much weight a juror is likely to give to the components of evidence that drive the arguments on both sides of the case.

Skilled professionals also use focus group data to quantify in a meaningful fashion the reaction jurors most likely will have to expert testimony. Most respected jury consultants agree that juries become frustrated with the "battle of the experts" and often penalize parties for overreaching with experts. Jurors evaluate the credibility of expert witnesses as they do any other witness. They will place much greater weight on actual evidence—such as written standards, policies, protocols, and regulations—than an expert's opinion regarding those same items.[4] During postverdict interviews of jurors, one commonly hears statements like "The experts cancelled each other out and we relied on our own assessment of the facts." Focus groups (and mock juries) allow you the opportunity to later select and highlight evidence that buttresses the credibility of your experts based upon the feedback you receive from the panel(s).

Using technology during focus groups can yield incredibly valuable information. Perception analyzer dials allow participants to respond to evidentiary items by rating documents, videoclips, and demonstrative exhibits by rating them 1 through 10 on handheld paddles. The data is then analyzed to compute how persuasive each component of evidence is.

Of course, a scripted presentation of evidence and witness videoclips during a focus group must be fair and balanced for the exercise to develop meaningful themes and arguments for trial. In fact, it is not unusual for a trial lawyer to overload the defense case during focus group exercises to determine the strengths and weaknesses of his own case, assuming the worst case scenario. For instance, how would your case be received by a jury if every plaintiff's motion in limine was denied and every motion in limine filed by the defendants was granted? After a recent focus group where this approach was implemented through a highly skilled moderator who presented the best possible defense case, a participant approached the moderator at the conclusion and stated, "You did a wonderful job representing your clients today, but there is no way that a jury in this city is going to find that [the defendants] were not

responsible."

Mock Juries

Mock trials are the most common technique for evaluating and accurately predicting jury behavior. Professionals can use several approaches for mock jury research. Similar to focus groups, mock trial jurors are typically citizens selected to correlate with demographics that accurately represent a sample of the venue where the case will be tried. Your goal should never be to "win" a mock trial. Rather, it should be to learn how to present the most compelling case to a jury by educating your trial team about what factors construct the most favorable factual context that will drive juror decision making at the time of deliberations.

Mock trials are most effective when conducted in the later stages of expert discovery when you have defined your case strategy with more clarity. It is also important to extrapolate from depositions and discovery what your opponent's strategy is and to make sure to present the best defense case when doing mock trials.

Mock trials are frequently conducted at the direction of a seasoned jury consultant and take place in a facility that is designed for market and litigation research. The facility should provide the technology necessary to effectively present a condensed case to the panel(s) and then allow lawyers and professional analysts to observe the jury deliberations and later review a videotape of the deliberation. Unlike focus groups, mock trials provide the added benefit of allowing trial attorneys to present a multifaceted version of the case before the mock jury participants.

Most commonly, the plaintiff will proceed in a hybrid opening statement/closing argument presentation where actual documents and videoclips of testimony are shown to the jury. Key documents and the demonstrative evidence intended for trial must be used in order to allow trial lawyers and consultants to evaluate the reaction of the mock juror participants to the evidence and exhibits. Keen attention to juror responses allows counsel the opportunity to improve and refine arguments and to present the most compelling case at the time of trial. Quality time and analysis should be spent determining what order of proof will most effectively anchor jurors with the fundamental themes that make up the foundation of your case. Research has demonstrated that selecting the right order of proof can be the difference between winning and losing.[5] Determining the most persuasive order of proof will also substantially impact the jury's decision on damages.

Understanding the psychology that drives juror decision making gives a trial lawyer great advantage. Prominent trial consultant David Ball said it best:

> Jurors don't want you to tell them what to think. Doing so undermines—rather than builds—trust. Jurors want to hear what someone did, not what you think about it. They want to arrive at their own conclusions as to whether it was OK or not.[6]

Moreover, "what they pay attention to and what they ignore; what they consider, remember, throw out, use; how they interpret, distort, and weigh each argument, opinion, witness, and piece of evidence; and ultimately, what they do in deliberations"—is driven by a primacy of their beliefs.[7] When representing victims that have been needlessly and permanently harmed, gambling on how jurors will evaluate the strength and credibility of your evidence at trial without the benefit of mock jury research is an unacceptable risk.

The approach to mock juries may vary depending upon time and financial limitations. For example, the parties may present the case in a single evening and have deliberations take place over a couple of hours. Or, for more complex matters, the parties may present evidence over an entire day to a group of 50 or more mock jury participants who are later divided up into multiple panels. On the following day, the trial lawyers and consultants then watch the mock jury participants deliberate and carefully evaluate the common findings and inconsistencies between the multiple panels. The end result of this approach allows trial lawyers to identify and evaluate the strengths and weaknesses of the evidence. From this process, attorneys can adjust, adapt, and reconfigure evidence and demonstrative aids as required to increase the probability of success at trial.

In practice, many plaintiffs lawyers will have the attorney on the trial team who is most familiar with the intricate details of the case present the defense case in order to ensure that the strongest arguments are being made in opposition to the plaintiff. You also have the option of retaining a seasoned lawyer to present the defense case. By putting the best defense case forward and proceeding with a conservative presentation of the plaintiff's case, you are able to build in assurances that the responses and data collected are most accurate in terms of finalizing how best to present your case at trial.

Some plaintiffs lawyers actually perform focus and mock jury exercises to improve their settlement posture. This exercise is highly questionable. Most plaintiffs lawyers will not recommend this approach, as it will ultimately be viewed skeptically by the defense and the insurance companies evaluating the verdict value of a case. Moreover, you must be prepared to try your case in any event, and the time and resources spent preparing jury research for settlement purposes may not ultimately serve your client's best interests. Some have suggested that this sort of research can be used to convince a recalcitrant client to settle, but most remain dubious of this approach.

Damages require special attention during jury research as attorneys and consultants must be careful to allot proper time and attention to this portion of the presentation. This is especially true in aviation cases where liability is not admitted. Repeatedly, jury research has shown that liability and damages are not separate compartments in the minds of jurors. Even in admitted liability cases, jurors are inclined to base their damage awards in substantial part on their perceptions of who is responsible. Jurors often apportion fault to parties or the empty chair regardless of whether liability is admitted. In admitted liability aviation cases, jurors understand long before jury selection that planes are not supposed to fall out of the sky and do not give defendants a pat on the back for admitting liability. When enormous losses are caused by perceived egregious misconduct, jurors often quickly move past issues such as proximate cause or comparative fault and on to the issue of damages. This dynamic has been observed by many trial lawyers in failure

to diagnose cancer cases. Commonly, when the window of delay in diagnosis is limited, but the defendant physician nonetheless missed an obvious CT scan finding, jurors are much less likely to buy into a proximate cause defense. Therefore, it is imperative to allot appropriate time during research to both economic and noneconomic damages to ensure that you collect adequate feedback on damage issues for strategic use at trial. When damages are properly studied, you will have the creative discretion to keep harm and money on the jurors' minds throughout your case-in-chief, alternating between loss/harm/money witnesses and liability witnesses in a manner that buttresses your strongest arguments.[8]

Have a limited budget and feeling industrious? Hire an investigator to recruit a dozen people off the street for $100 and a free pizza dinner, and present the case in a condensed manner. This exercise will provide great insight into your case.

One of the most valuable components of a mock jury is to measure and evaluate a jury's reaction to the jury forms and instructions. Using mock juries to determine what jury instructions are most problematic is essential to effectively presenting your case to a jury. What do they get hung up on? Are we overthinking the effect that the defense instructions will have on deliberations? Can we seize upon an opportunity a defense instruction provides? Jury research can help answer these questions. For instance, by using a mock jury's reaction to an instruction on sole proximate cause, a plaintiffs lawyer may tailor arguments that are calculated to overcome the arguments the defense will make.

Conclusion

In complex litigation and/or serious catastrophic injury cases, the effective application of jury research is essential in ensuring that a jury hears the most formidable and compelling presentation of the evidence. Too often attorneys become wedded to certain evidence or arguments that jury research demonstrates should be adjusted or abandoned entirely. Trial lawyers who are willing to adapt and adjust based on the data jury research provides substantially increase their ability to prevail at trial. Those who fail to abandon old ideas and replace them with new ones are at risk for an adverse verdict. Jury research is useless to those who fail to keep an open mind.

Endnotes

1. *See* Sara Parikh & Terrence Lavin, *Lessons from Jury Research*, 96 ILL. B.J. 190 (2008).
2. *See* Greg Cusimano & Jim Lees, *Commanding the Courtroom* (Am. Ass'n for Justice: Trial Guides CD-ROM 2011).
3. *See* Parikh & Lavin, *supra* note 1, at 191.
4. *Id.* at 193.
5. HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN: ANATOMY OF A TRIAL 41, 215–20 (Aspen Law & Business 1999); Cusimano & Lees, *supra* note 2.
6. *See* DAVID BALL, DAVID BALL ON DAMAGES 113 (Nat'l Inst. for Trial Advocacy 3d ed. 2011).
7. *Id.* at 111.
8. *Id.* at 188.