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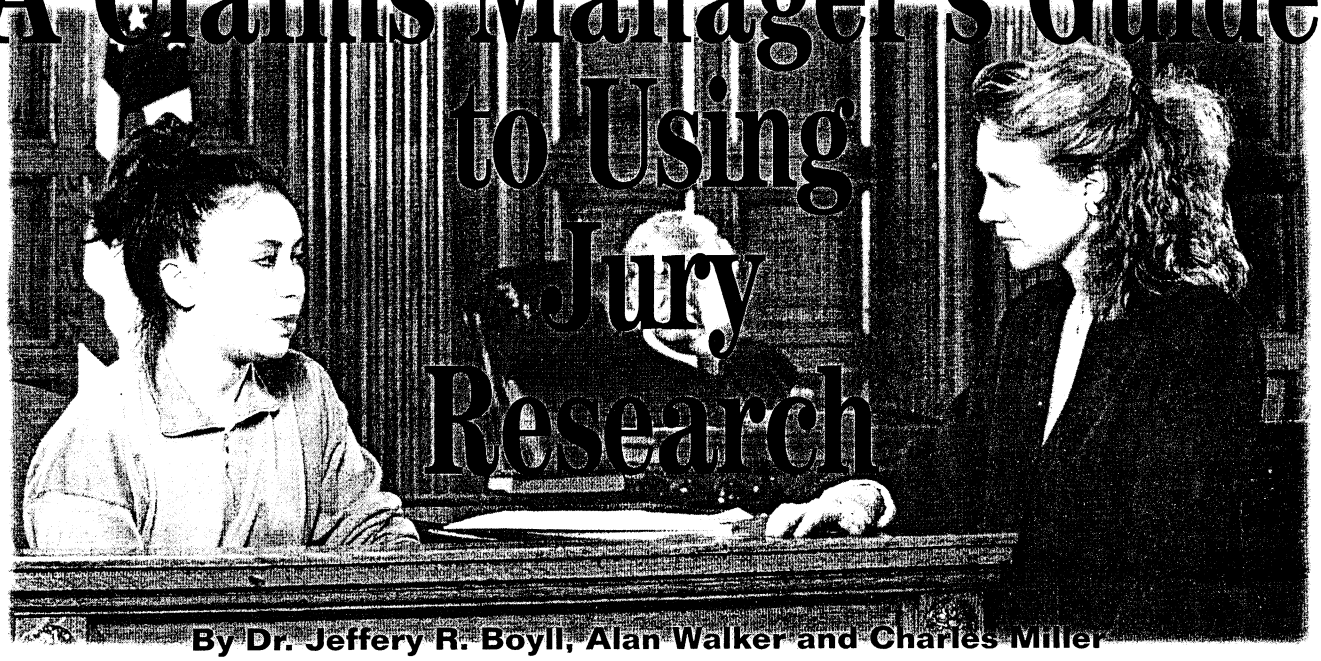
A Claims Manager's Guide to Using Jury Research



By Dr. Jeffery R. Boyll, Alan Walker and Charles Miller

The claims supervisor and defense counsel sit back, dejected. Shock and disbelief have faded to grudging acceptance as they watch, through a monitor, as the last of four pre-trial deliberation "mock jury" panels soundly rejects the defendant's position and awards sizeable damages. Although the panelists offer insightful suggestions on what would improve the defendant's position, the trial is only weeks away, and it is simply not possible to implement the strategy revisions.

"We should have done this process six months ago, but look on the bright side," the defense counsel comments. "Better to learn this now while we can still settle the case than to get whacked like this by the *real* jury."

From time to time, claims managers are faced with cases that are very difficult to evaluate from the standpoint of how the jury is likely to react. Others in the office may have differing opinions about it, and it may even appear that the defense counsel's case assessment is nothing more than a shot in the dark. It seems nobody can agree on what the jury will do with the case.

With this overriding question, it seems reasonable, though often overlooked, to utilize jury research — consisting of focus groups, deliberation panels or community attitude surveys (see sidebar) — to provide insight into how a real jury in the venue will decide the case. Also commonly overlooked is the fact that this analysis can be conducted at virtually any point in the litigation process, oftentimes much earlier than the traditional pre-trial approach. In fact, early jury research may result in an overall reduction in litigation costs and improve success at trial.

Conducting such jury research shortly before a trial, or only at the advice of defense counsel, fails to capitalize on a valuable resource. To use this tool, claims managers need to better understand the jury research procedures available well in advance of a court date, particularly for those interested in taking more control of when, why and how jury research will be conducted.

Evaluation of difficult cases

Consider the following example: A parolee with a history of petty theft and burglary murders an elderly couple shortly after his release from prison. A state department is sued under a negligence claim for alleged improper supervision. Essentially, the parole officer failed to make a required home visit, and a few scheduled appointments were missed by the parolee. Parole was not revoked. An adult daughter sues for loss of consortium. It is assumed that the jury will understand how difficult, if not impossible, it is for any governmental body to predict and prevent such an occurrence, and place the vast majority of fault on the perpetrator and no more than a small percentage of fault, if any, on the state. A review of similar cases from a verdict reporter suggested this would be the case. Yet the jury returns a verdict of over $3 million, with the majority of blame attributed to the gov-

ernmental entity, as opposed to the perpetrator of the crime.

Was this a rogue jury? Is this type of outrageous, runaway verdict something that is simply a matter of life when dealing with juries? Not necessarily. In a related case, in which the state was again sued for negligence after another previously nonviolent probationer went on a rape and murder spree, pre-trial jury research panels revealed that a similar disastrous jury outcome was highly predictable. Consistently, it was found that jurors from that particular venue believed strongly that:

- A parolee or probationer is not unlike a "ward of the court," in which the agency assumes full responsibility for knowing of the parolee's whereabouts at all times.
- The "harsh realities of life" or "overburdened, under-staffed bureaucracy" themes are not accepted by the average juror, who wants very much to believe that such a tragedy is preventable, not random. For jurors, it is psychologically more comforting to believe it can't and won't happen unless somebody "screws up" and lets it happen.
- Most jurors found failure to follow each and every procedural item a "breach of policy" and tantamount to negligence.
- Most shocking were juror comments to the effect that, since the perpetrator is in prison, he has received his penalty and can't and won't pay anyway as a non-party at fault; therefore, "the case is really about the negligence of the government." Consequently, several test panels placed a small percentage of actual comparative fault on the perpetrator, despite acknowledging in debriefing that "of course he is mostly to blame."

The results of the jury research helped to identify better defense themes and approaches, although it was consistently found that cases concerning breach of policy were unlikely to be defended successfully, and usually led to settlements. Importantly, however, jury panels reacted quite differently under only slightly different fact scenarios, clearly demonstrating the danger of relying too heavily on past cases, trial verdict reporters or other "apparently" similar cases. Post-verdict reporters fail to assess the impact that jury perception of liability has on damage awards (see sidebar, p. 46). Finally, in bureaucratic settings, where opinions and case evaluations may vary widely, the results of objective jury research are revealing. For example, a highly adverse jury response may provide the necessary insight to settle these internal disputes.

While jury research can assist in red-flagging dangerous cases and thereby result in settlement below the anticipated jury award, the flip-side may also occur. It is not uncommon in cases with catastrophic injuries to place some amount on the settlement table. While it seems logical to pay $500,000 to settle a case that has a potential $5 million exposure, the logic quickly fades if the true value of the case is $0.

For example, in a recent "bad baby" case, a university teaching hospital was sued for alleged medical malpractice, primarily for allowing a relatively inexperienced intern to attempt the delivery unassisted. When complications arose during the delivery, it was alleged that the wrong measures were taken and, in fact, the intern admitted there were procedures that, in hindsight, might have made a difference that he simply "didn't think of." The defendants asserted that an infectious disease process resulted in a highly compromised baby that was doomed from the onset, and it was actually the superb medical intervention by the hospital staff that saved the infant's life.

When plaintiffs can blackboard a $15 million life-care plan for the child's future needs, and assert a $20 million jury verdict is a likely result, the temptation to settle such a case for a "few" million dollars is great. However, what if your jury research panels, even under "worst case scenario" trial presentation, reveal consistent defense verdicts, easily reached by numerous panels? In the above case, the consistently favorable verdicts obtained by jury research panels provided that added degree of confidence to maintain a tough negotiating stance, proceed to trial and ultimately obtain a defense verdict. While jury research is sometimes criticized for being expensive (roughly $20,000 in the above example), the cost-benefit ratio may be significant with just one case result such as this. In addition to providing support and justification for the defense costs in proceeding to trial, the ability to ensure that the defense themes are properly focused enhances the prospects for success.

Reduction of litigation costs

The fact that roughly 96 percent of all lawsuits are ultimately disposed of without the need for a jury trial suggests that a great deal of litigation expenses, including lawyer and expert fees expended during the iscovery process, are "wasted." Obviously, in some cases, due to plaintiffs' unrealistic demands or insufficient case information, it isn't possible to achieve settlement without positioning the case for trial. There are other cases, however, in which the case issues and evidence are quite well defined, but uncertainty about the jury's reaction to the case prevents an early settlement. Early focus group research can be a surprisingly useful tool in this instance.

Consider the following example: A juvenile with a long history of drug abuse and gang involvement is released from juvenile detention under the willing supervision of his step-mother and natural father. Shortly thereafter, the juvenile and his gang brutally beat his father, causing permanent brain damage. All of the boys confess and are convicted. The step-mother sues the involved governmental agency, alleging the juvenile should never have been released and was not routinely visited by the probation officer, among other allegations. Again, policies were not strictly followed. However, would a jury force the government to pay for damages inflicted by a boy against his own father?

In a case such as this, the traditional approach would be to hire defense counsel, retain experts, take depositions and proceed aggressively towards trial. Shortly before trial, after perhaps $100,000 or more in legal bills, the case is settled. However, the case is settled without ever really knowing whether the jury would force the governmental defendant to pay under these circumstances.

However, what if an alternate approach were taken to first get a grasp on this key jury question? In cases such as this, the evidence and case facts are well-known from inception. The perpetrators' confessions have been memorialized, the department's records and the juvenile case file, including the glaring omissions and violations of policy, are obviously unchangeable. The plaintiffs' demand letter spells out their allegations and trial strategy. Virtually everyone involved has given a statement which, presumably, will be consistent with their trial testimony. Simply put, this type of case needs little additional discovery to obtain an accurate assessment of the jury's response to the case.

Many cases involving municipalities tend to be well-suited to earlier focus jury research because incidences involving police, prisons, child protective services, parole and probation departments immediately result in extensive paper trails — incident reports, witness statements, file notes and so on. The results of early jury research can promote earlier settlements and consequently reduce litigation expenses. In the event the outlook for victory is poor, plaintiffs may be persuaded to accept a reasonable offer early to avoid the time and expense litigating the case. Conversely, the anticipation of a defense verdict, as supported by several jury deliberation panels, bolsters support for an aggressive defensive position.

Jury research conducted early in the litigation process can also reduce costs by focusing the discovery process. What will the jury need to decide the case? Will a certain type of expert help? What is the jury having difficulty understanding? Will a computer animation pay off? These are just a few of the many questions that can be answered by jury research that ultimately may prevent unnecessary case expenditures.

Planning effective strategies

While some cases appear set in stone, other cases present unique strategy questions that can make or break the case. Making the wrong choice, or simply allowing defense counsel to operate by instinct, can be costly.

Say, for instance, a major snowstorm causes a multi-car and truck pile-up in the early morning hours. The events of the chain reaction occurred slowly enough that one of the first motorists to crash got to the side of the road and succeeded in videotaping cars and trucks cresting the hill and sliding on the ice

into the pile. Multiple deaths and severe injuries resulted. Numerous lawsuits were filed against the transportation authorities for alleged failure to properly maintain the road (via clearing of the snow and ice), close the road or otherwise warn motorists of the hazardous condition. In total, the claims exceeded $10 million.

Jury focus research, conducted approximately six months before trial, revealed a slim likelihood the transportation department would escape liability, receiving, on average, 40 percent of the comparative fault. The defense strategy focused on the culpability of the drivers, the numerous advance warning signs of possible icy conditions, excessive speed under the conditions and the limitations of snowplow crews and transportation officials. Despite this, the test jurors consistently expressed an expectation that the transportation authorities, as those "in charge of the roads," had a duty to eliminate or warn of the icy hazard. The defense strategy was revised and subsequent panels were somewhat more favorable but still refused to exonerate the transportation department.

Then something happened. Several test jurors were noted to have commented on the dense fog in the background of the video. Indeed, the statements of virtually every witness noted that they "came out of the fog" and were suddenly right on top of the pile-up. The defense strategy was re-vamped. The case was no longer about ice and why the transportation department had failed to clear it. The case was about an uncontrollable "act of God" — a fog bank, which workers could not control, move, clean or predict. The next set of test jurors were also provided a jury instruction regarding "acts of God" and were instructed that the defendant cannot be held liable under such circumstances. Under this refocused strategy, subsequent test panels resulted in defense verdicts. Proceeding to trial with this theme resulted in a defense verdict for the transportation department.

While the above provides an example of how jury research may provide a sudden "a-ha!" insight into the best strategy, most often the situation involves a decision among one or more developed strategies. Sometimes these decisions must be made quite early before testimony is set in stone and expert opinions become solidified. At perhaps the greatest extreme may be the strategic decision as to whether liability should even be contested.

For example, jury research has often revealed a significant reduction in jury awards when liability is simply admitted in cases where such a finding of liability is virtually certain. This takes the sting out of plaintiffs' attempts to inflame the jury. In most aspects of life, a repentant and apologetic wrongdoer receives a more lenient punishment than a guilty party who denies culpability. However, if this decision is made shortly before trial, plaintiffs may be able to demonstrate that defendants "denied wrongdoing all along — for years, until their day of reckoning." If the jury perceives admission of liability as a ploy, a significant backlash may result. Conversely, if a defendant can argue, "we have admitted our mistake from the beginning and will suggest to you, the jury, a reasonable award be granted based upon reality," the jury may perceive that it was plaintiffs' greed that prevented the case from being resolved long before. This is just one of many key strategic decisions that often need to be made early in the process. In sum, there are few things more distressing than realizing, late in the game, when it's too late to change course without suffering a loss of credibility, that a significantly more effective strategy could have been pursued.

Obtaining a favorable jury panel

There are cases that will be lost no matter who sits on the jury and, likewise, other cases that will be won with virtually any jury. For example, if individual pre-deliberation verdicts reveal 45 out of 48 defense verdicts, it isn't possible to actually identify favorable versus unfavorable juror types — they're virtually all favorable. Consequently, the *voir dire* process will be of little importance to obtaining a defense verdict.

In other cases, however, jury selection may very well be the most important part of the case. Under the scenario whereby individual verdicts are evenly split and two test panels hang, with one panel finding for the defense and another for the plaintiff, the jury composition is the key to the case. Although this 50-50 chance of victory may be a frustrating finding from a case evaluation standpoint, the information learned regarding juror characteristics may be invaluable.

Claims managers who have gotten involved in the jury selection process likely recall how inexact the "science" is, with defense counsel and others on the team discussing which jurors they "like" and "don't like" for various reasons, many of which are supported by nothing more than hunches. Sometimes these hunches prove accurate, other times they don't. The frustrating part is that in a close case, guessing right may mean the difference between winning and losing. Even when strikes are based upon pre-conceived profiles of favorable versus unfavorable jurors, if these characteristics are based on hypothesis as opposed to empirically derived jury research profiles, you may simply be following instincts that may prove wrong.

A typical sexual harassment case is a good example of the power of jury research: The plaintiff sues her former employer for alleged sexual harassment and coercion, claiming that for years she was forced to have sexual relations with her boss or risk losing her job. The boss contends a consensual relationship occurred and the woman is simply retaliating following the breakup.

If you're defending the case, would you generally rather have men or women on the jury? If you have even ventured a guess, you have broken the first cardinal rule of jury selection — don't rely on broad-based stereotypes. Obviously, all men aren't alike and all women aren't alike. To even come close to a predictive pick, we need to add categories, e.g., older versus younger, professional versus non-professional, educated versus less educated, working versus unemployed and so on.

For the above example, quantitative jury

Common Primary Jury Research Procedures

There are a variety of different methods that jury consultants use for research. The following are the most widely utilized:

Focus groups: With this procedure, the consultant typically provides surrogate jurors with case facts and scenarios and may obtain feedback along the way or in a question-and-answer session. This procedure tends to be fluid and rather loosely conducted. While the information is valuable, the "predictive accuracy" is suspect.

Deliberation panels: With this procedure, the goal is to actually have jury panels deliberate to verdicts, following as accurate a trial presentation as possible. This usually involves either extensive scripted presentation or, most commonly, individuals (usually lawyers) presenting the case's opening statements and arguments to the panels of surrogate jurors. These presentations may be presented on videotapes ahead of time for accuracy and to assure a more polished presentation. In addition to the presentations, the jurors should be presented with witness statements and any exhibits that exist, such as photos or other documents. It may be helpful to script summaries of anticipated expert testimony to fill in the picture. Following jury instructions, the panels deliberate and reach verdicts. When done repeatedly, with differing trial scenarios and a diversity of jury panels, a consistent result is usually quite predictive of ultimate trial outcomes. As the case progresses, the "package" may be revised as needed to assess added information and differing strategies.

Community attitude surveys: Conducted via telephone, limited case outcome information can be obtained because telephone respondents will simply not tolerate lengthy interviews or case descriptions. However, for simple "one issue" cases, key community attitudes may be obtained.

research found, through a statistical analysis of individual verdicts, that six of eight females aged 18 to 45, who were homemakers or employed in lower-skilled occupations with limited education, found for the plaintiff. However, seven of seven females aged 24 to 55, with college degrees and full-time, professional jobs, found for the defendant. Analysis of each juror's questionnaire responses and comments in deliberations revealed that the "professional women" felt more empowered and had taken control of their lives and their success. They were unwilling to believe or accept that a woman would tolerate harassment for years and years. In fact, the likelihood of a "professional woman" finding in favor of the defendant was even greater than the likelihood of males of all ages and types in this particular case.

The analysis of juror types through jury research can test hypotheses about juror types at three levels: demographic characteristics, general attitudes and experiences, and case-specific attitudes and experiences. The extent to which the data is helpful at trial will depend on how "open" the *voir dire* is, which varies widely from state to state, judge to judge.

While demographic characteristics (age, sex, occupation, etc.) will always be known about a prospective juror, this data is, quite simply, the least predictive. Cases such as O.J. Simpson's criminal trial, in which a single demographic variable (race) provided such a high degree of predictive accuracy, are rare. Particularly in more complex civil trials, demographic information alone may fail to consistently differentiate plaintiff versus defense jurors.

General attitudes and experiences can provide a higher level of predictive accuracy. For example, in civil cases involving municipalities' liability, it has often been found that "entitlement" attitudes are predictive of a juror's propensity to find against the government and to award higher damages.

These and other "general" attitudes regarding social issues, governments, authority and so forth may provide very predictive information regarding the propensity to be pro-plaintiff versus pro-defendant in many cases. However, the most predictive data may be derived from case-specific attitudes and experiences. Questions that assess a juror's "authoritarian" attitude, or support for police and government, may be highly predictive of verdict preference.

In the earlier case of the juvenile offender's assault on his father, juror attitudes regarding parenting, the role of schools and government versus parents, and similar highly case-specific questions were found to be highly predictive. Overall, this type of analysis is the best means to test "hunches, guesses and hypotheses" regarding juror types prior to trial.

Whether the goal is to gain an early case assessment, gauge juror sentiment on difficult issues or to build winning case strategies, jury research warrants a place in claims managers' arsenal of tools. In cases where potential exposure is great, incorporating these procedures at various stages of litigation can offer a multitude of benefits and may provide a higher degree of accuracy in answering important case decisions. ▲

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How Juror Perceptions of Liability Affect Damage Awards

In the past, claims managers could sometimes be heard asking "what's a leg off worth in that county for a 20-year-old male with no earnings history?" assuming that it could be ascertained what a jury would award in an upcoming trial. An attempt may even be made, utilizing verdicts in that particular area over the past several years, to get a range of expected damages. Finding $500,000 is the average, and "guesstimating" that the plaintiff had 50 percent comparative fault, the case is worth $250,000, right? Not necessarily.

The problem is that, among other variables, a jury's perception of liability and negligence is intertwined with their damage awards. A jury that is angry with the conduct of a defendant and sees the plaintiff as a "victim" could award $10 million for the loss of a leg. Conversely, if the jury finds the plaintiff to be the primary party to blame, don't be surprised if the jury only awards enough for medical bills, or less, if they believe insurance has already covered.

Particularly in relation to non-quantifiable and noneconomic damages, such as loss of consortium, the "value" of the loss of a spouse, for example, may range from $250,000 to $15 million, depending upon the circumstances under which the event occurred. Jury research panels must, therefore, receive a full and complete picture of the liability facts before an accurate assessment of their damage awards can be obtained.

Another problem is the propensity for juries to intentionally "jury-rig" their awards, rather than view liability and damages separately. Consequently, despite finding a plaintiff 50 percent at fault, they may actually double their award, knowing the amount will be reduced by one-half, so that plaintiff receives a predetermined amount. ▲

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