Using Early Jury Focus Research

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In earlier articles in *For The Defense*, the authors discussed the use of jury consultants at various stages in a lawsuit. See Boyll, "Identifying Key Juror Attitudes," February 1993, and Parshall, "Jury Consultants in Complex Litigation," May 1997. In this article, we focus on using jury consultants and case deliberation panels early in the lawsuit to help guide counsel in structuring case themes and in making early, realistic settlement evaluations. Early jury research can also help reduce overall litigation costs.

THE VALUE OF EARLY RESEARCH

We begin with what happens all too often: corporate counsel or a claims supervisor receives a frantic call on the eve of trial from trial counsel. She advises that the plaintiffs are only willing to budge slightly from their initial settlement demand and appear quite confident about their prospects with the jury. "It's going to take $1.5 million to make this go away," the client is told. Previously, both client and defense counsel had evaluated the case as winnable 60-70% of the time and the last settlement offer of $750,000 from the defense seemed more than reasonable.

Now, however, faced with the reality of the trial, and the prospect of a larger adverse verdict than previously thought possible, maybe settlement isn't such a bad idea. The jury's acceptance of the defendant's theory of causation and several key liability issues remain uncertain. Reluctantly, the decision is made to increase the settlement offer, settling the case for an amount that very likely would have resolved the matter long before most of the litigation expenses were incurred.

Could this scenario have been avoided? In certain types of cases, pre-trial jury research or deliberation panels would have reduced much of the uncertainty regarding the potential jury verdict by "pretesting" the trial and evaluating the range of verdicts arrived at by several deliberation panels or mock juries, set up by the defense. This analysis can often be conducted well in advance of trial, potentially eliminating hundreds of thousands of dollars in litigation expenses by educating client and counsel as to the real risks and value of the lawsuit, thus facilitating an early settlement.

In the above example, learning early on that four of five mock juries from the venue in question have returned verdicts in excess of $1.5 million might have resulted in an earlier and less expensive resolution. In some instances, substantial litigation expenses can be spared while saving trial counsel the aggravation of unnecessary (or misdirected) pre-trial preparation. Conversely, had pre-trial jury research revealed consistently, even when testing the worst case scenarios, that a defense verdict was highly probable, this could have supported an unyielding settlement posture which, by itself, may ultimately have caused plaintiffs to settle for the value placed on the case by the defense.

Not uncommonly, corporate clients and defense lawyers view jury research as useful only during the final trial preparation phase to test overall themes and assist with jury selection. Jury research may be perceived by corporate counsel as simply another aggravating, and possibly unnecessary, expense of going to trial. A common misperception is that discovery must be completed and the case virtually set for trial before jury analysis is productive, viewing such research as a "trial tool" in the event settlement opportunities have been exhausted. Jury research conducted shortly before trial does help reveal whether defense strategies and expert opinions are likely to succeed with the jury. Unfortunately, these benefits to the defense are often wasted: expert opinion testimony may be "locked in" via deposition or otherwise, and the defense may lack the time and flexibility to pursue strategies found by the research to be more palatable to a jury. In addition, the benefit of saving substantial litigation expenses no longer exists.

Can jury research effectively be conducted much earlier in the process, i.e., prior to the completion of discovery, with motions pending, depositions uncompleted, and numerous questions left unanswered? Can jury research, the cost of which may run upwards of thirty thousand dollars for a sufficient number of testi

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panels, actually serve to *reduce* litigation costs? The answer is generally "yes," but two major factors must be considered. First, the likelihood that the lawsuit will be dismissed entirely through summary judgment or other means must be evaluated. Obviously, under such a scenario, as little as possible should be spent on litigation until the answer to this crucial question can be ascertained.

The second factor to consider is of central importance: how much is known about the plaintiffs' allegations and their anticipated lines of attack? In some product liability actions, for instance, the plaintiffs' theory of defect may not be known until plaintiffs' expert has either submitted a report or been deposed. In many others, plaintiff's theory evolves as the case progresses. Any meaningful jury research would need to await the development of such critical information. Another example: in an allegation of excessive force/wrongful shooting by a police officer, the mass of recorded or written eyewitness statements, taped interviews and immediate memorialization of witnesses' and parties' versions of events may allow for early jury assessment.

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In general, "document intensive" cases tend to be well suited for early focus research. Another suitable category is cases where much is known early on, e.g., where the parties have dealt with each other in a business relationship and the substance of the dispute has been the subject of pre-suit negotiation. Typically, the key factor in determining the suitability for early jury focus research is the extent to which the defense knows the plaintiffs' case and the ability to anticipate their issues, arguments, and focus of attack.

It is not necessary and, in fact, may even be counterproductive, to have formalized all defense themes. Early focus research can be used to test possible themes. It can also be used to assess the clarity and impact of anticipated defense expert witnesses and their opinions; this may be of importance if there is a need to "lock in" a key expert or other witness early in the lawsuit. The following example illustrates this point.

An electric utility is sued for improper maintenance of power lines. Allegedly, it allowed tree limbs to make contact with its lines, causing sparks and a destructive wildfire. Because origin and cause of fires is difficult to establish conclusively, there are several plausible explanations of the cause, such as a lightening strike, arson, a careless match, etc. Assume the defense expert postulates that a likely cause was a spontaneous chemical reaction from an old pile of debris and fertilizer. Will the jury accept this theory? Will jurors accept the defendant's chemical reaction/spontaneous combustion theory over the plaintiffs' power lines "sparking" causation theory?

Early focus research, conducted *prior* to defense experts' deposition, revealed that the defense's chemical reaction theory, in light of the overall facts and evidence, would not be accepted by the jury; the defense was virtually certain to lose if it limited itself to this theory. However, the mock jury panel was willing to consider other sources of causation. The research also suggested that a strong defense would be a "shotgun" approach, with subsequent emphasis on plaintiff's burden of proof. The defense could effectively demonstrate that the fire reasonably could have been caused by any one of several possibilities (including spontaneous combustion). The defense could present a plausible explanation for each possible causation, and argue that it is impossible for plaintiffs to meet their legal burden of establishing what happened. When subsequent jury research panels adopted this approach to find for the defendant, the work with the panels greatly improved the defense's chance of success. *Had this information* not been learned until a few weeks prior to trial, following depositions that would essentially have committed defendants to the spontaneous combustion theory to the exclusion of all other causes, it would have been too late to adopt the more "jury acceptable" approach.

USE OF EXPERTS

Conducting jury research early in the litigation process can have an effect on the credibility of experts and their opinions. If the research indicates that the expert's opinion would be more effective if its emphasis was changed slightly, the shift in emphasis will have a less negative impact on the expert's credibility if it is done early in the litigation process.

Early jury research may help in making strategic decisions regarding the use of experts. Not uncommonly, the defense will retain an expert whose opinions are quite different than plaintiffs' retained expert. For example: plaintiffs hire a neuropsychology expert, defendants hire their own neuropsychology expert; plaintiffs retain a cost of care expert, defendants do likewise; and so it goes. However, the questions need to be asked: Is this expert and his or her opinion truly necessary? Does the jury need to hear from this expert? Is this issue seriously going to be contested? Will the jury even get to the issue of damages? If it does, will cross-examination of the plaintiffs' expert on his or her methodology for computing damages be more effective in countering the expert's opinion than a competing defense expert? Will presenting a defense expert actually lend more credibility to the issue and make the plaintiff's expert seem more credible?

Post-trial interviews reveal that jurors (particularly in long trials) often believe that much of the expert information presented to them was irrelevant to their decision, and that many of the experts were unnecessary and redundant. They often fail to understand even the basic essence of some experts' testimony, and sometimes are unable to recall which side retained the expert. In addition to the unnecessary expense, such ineffective and unneeded testimony may have diffused the impact of other, more critical exhibits and testimony.

On the other hand, early jury research may lead to the decision to hire an expert to counter the plaintiff's expert. If the issue and testimony is significant to the jury, failure to present an expert can be devastating. Jurors may conclude that the defendant was *unable* to find any expert to counter the testimony, thus emphasizing to the jury the importance of plaintiffs' expert. The key, as in all decisions whether to use jury research, is learning ahead of time what jurors will want and look for in deciding the case, and then providing that evidence clearly and succinctly.

APPLYING JURY RESEARCH

The following hypothetical case depicts how early jury focus research has been specifically utilized to guide strategy to help gain a more favorable trial outcome.

At a prison, a problem inmate throws a cup of his urine in the face of several correctional officers. Later, a group of five officers removes the inmate from his cell. The inmate resists vigorously, requiring physical restraint actions by the guards. The inmate sustains severe, debilitating injuries that, with complications, result in paraplegia.

Quickly, a lawsuit is filed portraying the prison guards as sadists deliberately overpowering and crippling a "helpless inmate under their care and supervision." A critical race element is added in that the officers were all white and the prisoner black.

The plaintiff retains the typical expert line-up for this type of case: a police/prison expert, who will focus on unreasonable force and breach of standards; an orthopedic expert who will describe the cause of injury; various vocational rehabilitation professionals; cost-of-care experts; and so on. Similarly, defense experts who will counter each of the above plaintiff's experts are located. Can the defense convince a jury that the restraint procedures were reasonable, and that the injuries were accidental and may occur whenever inmates resist? Further, in light of the prisoner's history, instigation of the problem, continued resistance and combativeness, will the jury place a significant amount of comparative fault on the plaintiff? Is there a valid race issue: will jurors view the guards' acts as racially motivated? Obviously, all of these factors weigh on deciding whether to settle and for what amount.

> In deciding whether the jury research approach is cost effective, the amount of potential exposure in the particular case must be considered. If the risk is high, with a substantial downside threat, jury research may be advisable.

The first step for defense counsel is to put together a package of materials, which will be studied by the jury consultant and the focus jury panels. The materials can include written documents, photographs, videotapes, exhibits, etc.

The first inclusion in the package is plaintiff's theory of the case, which is based upon court pleadings, incident reports, and so forth. Plaintiff's theory is scripted, developed, and refined. Anticipating the plaintiff's probable "spin," a skillful defense lawyer will prepare a videotape of plaintiff's anticipated opening statement; he may later also give a live presentation of the opening statement to the focus jury panels. Pre-recorded videotaped presentations may be preferable in that they may be evaluated and re-taped until sufficiently polished prior to showing them to the panels. Further, the videotaped presentation may be held constant and utilized repeatedly while testing various defense approaches.

The package then includes the anticipated theory of the defense case. Summaries of anticipated expert witness testimony, internal reports of the incident, witness statements (including from the guards), photographs of the plaintiff, relevant standards, policy statements, and other key documents and exhibits are also included. Finally, closing arguments and basic jury instructions are prepared.

Although the case is still years away from possible trial, the package is ready for examination by the initial set of focus ju panels.

A few weeks later, all of the initial jury panels have complet their study—and they have come back with huge/runaway verdic for the plaintiff, including punitive damages. What went wron In interviews and questionnaires administered by the consultan the jurors say they find the defense approach callous, uncaring, ar literally offensive. They refuse to place *any* fault on the inma and are angered that defense counsel woul even attempt to excuse "beating a prison and paralyzing him for life." The juror pa ticipants perceive plaintiff as the victim. The see no excuse—under any circumstances– for five "professional," trained correction officers to fail in subduing a prisoner witho inflicting permanent, debilitating injury. Fu ther, the record suggests that several of th involved officers lost their temper. The d fense expert's anticipated position, that th guards' actions were reasonable, is perceive to be laughable. The post-incident phot graphs of the victim's injuries are devasta ing. In light of juror reactions to liabilit even the jury instructions requiring the plai tiffs to prove gross negligence were found have been met. Many jurors found the beha ior of the guards to be "willful and wanton.

Back to the drawing board. The plaintiff demand is so aggressive and unreasonab (although lower than the jury research pane suggest is possible) that settlement is not y seriously considered. Further, having learne what won't work, what does the jury researc reveal about what will work? Herein lies th benefit of *early* focus research.

Can the offending correctional officers carry the day with th jury? Will the jurors perceive them as regular, hard-working a erage people straining under difficult circumstances? A secon session of jury research, to include videotaped mock direct ar cross-examination of these witnesses, is planned. (To protect th work product from discovery by plaintiff, these tapes should a ways be completed by counsel and designated "for the purpos of witness preparation and strategy planning.") By simply "plu ging in" the witnesses' testimony, a controlled assessment of ea witness and his or her impact on verdicts can be made. Howeve it soon becomes apparent these witnesses and their testimony a not going to overcome the devastating liability issues, the dama photographs, and the extent of the plaintiff's injuries. Jurors w not buy the argument that the injuries were accidental, and w not accept the defense contention that standard procedures we followed. In fact, they continue to be inflamed and angered defense attempts to justify what happened.

Ultimately, there comes a point in some lawsuits where adm ting fault may be the best approach; such admission can oft mitigate damages substantially. If the jury is not going to belie or accept any defense position supported by the facts and la pushing such a position may only irritate it. However, m people naturally forgive (at least to some extent) the remorsef and those who admit their mistakes. Thus, in the hypothetic

case, the defense position was revised, to state to the *next* mock jury panel:

- There is no excuse for what happened. We admit liability.
- The correctional officers are only human, and under trying circumstances they made a mistake.
- The only issue to decide is the appropriate amount of reasonable compensation, and to reject an excessive award.

Defense counsel's opening statements to the panel set the tone of forgiveness and reason. Knowing that a defense verdict was unobtainable, the goal was simply to admit fault, diffuse anger, and focus the jurors on reasonable (i.e., as low as possible) compensation. This approach completely softened the jurors' punitive nature and even led them to accept the same cost-of-care numbers suggested previously by the defense expert and rejected as an insult by the earlier mock juries. Some jurors even empathized with the plight of the correctional officers, working for low pay under stressful conditions. While not condoning or forgiving them, they no longer saw a reason to "throw the book at them."

At the real trial, this last defense strategy and approach was followed, resulting in an award consistent with the amount awarded by the final mock panel. The amount was well below the plaintiff's last demand; under the circumstances, it could be considered a "win" for the defense. In fact, the plaintiff inadvertently played into the defense theory (that plaintiff was asking for excessive compensation) by adding several family members to the claim (who had not even seen or spoken to plaintiff in years) for loss of consortium. The actual jury ultimately concluded that, while the plaintiff deserved reasonable compensation for basic needs, the plaintiff was attempting to hit the "lawsuit lottery" through an excessive demand; the latter had not been perceived by the earlier test juries, when the defense was pursuing the wrong strategy, to be unreasonable.

The cost of the jury research described in the above example, with two or three sets of jury panels, may range from $20,000 to $30,000. In deciding whether this approach is cost effective, the amount of potential exposure in the particular case must be considered. If the risk is high, with a substantial downside threat, jury research may be advisable. Consider also the expense of retaining certain expert witnesses, a cost which might be avoided if the mock jury indicates that they are unnecessary and ineffectual.

CONCLUSION

Clearly, early focus research is not for all cases. Making settlement decisions based upon early research runs the risk that significant developments or unanticipated testimony may evolve during the course of discovery. Obviously, these events can affect the value of the lawsuit. It may be advisable not to begin the mock jury process until the issues in the case have been clarified. Perhaps this step should be put off until discovery begins. Jury research may be helpful in the early stages of serial or national litigation, by assisting the defense in identifying which cases and in what venues a more favorable outcome will result.

From the filing of the complaint, and as discovery progresses, defense counsel is commonly called upon to provide clients with predictions on such questions as the likelihood or odds of success and the anticipated range of damages. The lawyer who makes use of jury focus research at various stages of the litigation may be able to answer such questions well in advance of trial. The research can assist in the initial case assessment and in guiding and testing important strategy decisions by the defense. In defending lawsuits with large exposure, an overall cost savings can be realized. ■