

Gaining The Edge In Court With Pretrial Behavioral Research

By Dr. Jeffrey R. Boyll

Settlement offers are rarely increased or decisions to proceed to trial made without contemplating the hazards of permitting a jury to decide the case. Ultimately, success at predicting how juries will perceive and react to insurance cases, will be translated into losses incurred.

It is virtually impossible, however, to foretell with certainty what the outcome of the trial will be. For example, could counsel for Texaco have predicted the jury would award over \$10 billion to Pennzoil? Nearly every experienced claims executive has been "burned" at one time or another by a ridiculous jury award, and even the most successful litigators can recall the nightmarish experience of a sure winner case gone bad.

The sometimes idiosyncratic nature of civil damage awards suggests that psychological and other non-evidentiary factors can enter into play. Additionally, even the perception of basic facts and evidence may not occur as anticipated.

This article examines the emerging role of behavioral scientists in litigation and how pretrial surrogate jury research methods can help insurance claims professionals and litigators with difficult or high exposure cases.

Objectives Of Jury Studies

Due to the unpredictability of trials, a primary purpose of pretrial behavioral research is uncertainty reduction, e.g., to predict how jurors will react to evidence, witnesses, strategies, parties, and events. Oftentimes, pretrial jury studies can provide reliable estimates of what the actual jury's damage award will be should the case go to trial. This information can provide a significant edge during negotiations.

Additionally, a thorough analysis of the case through the juror's eyes can reveal enlightening information regarding critical case themes, the persuasiveness of various strategies and the effects of sympathy or other psychological factors. This information can help give the insurance professional responsible for the case a better focus on the issues and exposure involved.

What Is Jury Behavioral Research?

In carefully controlled scientific studies, researchers attempt to explain the various

phenomenon of the world with ultimate precision and reliability. In advertising and marketing research, perceptual and psychological reactions to advertisements and products are ascertained by studying groups of potential consumers.

Pharmaceuticals are not permitted on the market until they have been systematically tested for safety, and a major soft drink company would not dream of investing millions on an untested ad campaign.

Behavioral jury research combines the methods of these two fields in order to empirically determine the effects of the various components and issues under litigation on potential jurors. These techniques range from relatively simple debriefing interviews of jurors to complex experimental designs requiring the use of advanced research methodology and statistical analysis. A brief synopsis of the primary jury research procedures are provided in Table

1. The primary focus of this article will be on how mock trials and pretrial behavioral research can assist in case evaluation and strategy development.

How Pretrial Research Is Conducted

Jury research must be conducted utilizing strict research methodology to assure that the results are valid and reliable. All research begins with a hypothesis or research question. For example: will the case theme result in persuasive impact

upon jurors? The second step in research is to identify the variables to be evaluated. Nearly any "variables" involved in the case can be included for study evaluation.

Next, the researcher must determine if the study will be qualitative or quantitative. An example of qualitative research in

litigation is a "focus group," where the impact of, for example, the issues and evidence would be discussed among group participants and the persuasive impact assessed in a qualitative manner.

Another common qualitative method is the "mock" trial which is essentially a dress rehearsal performed for a small group of surrogate jurors. "Mock" trials are primarily designed to improve the presentational style and persuasiveness of attorneys and key witnesses, although the insights gained from the surrogate jurors are valuable as well.

In quantitative research, the dependent variable (juror reactions) are "scaled" in such a

manner that the response becomes numerical data. In some cases, "inferential" statistics can be applied to this data in order to test a number of hypotheses.

For example, the correlation between juror age and damage award can be statistically determined. When the findings are statistically "significant," this indicates that the jury sample characteristics can be generalized to the population of interest (actual jury) with a specified degree of confidence.

Jury Research Methods

- **Scientific jury selection:** Community surveys are utilized to assess demographic and attitudinal information, resulting in statistical profiles of most and least desirable juror types.

- **Mock trials:** Also called trial simulations. Essentially a dry run of dress rehearsal prior to trial. The idea is to give attorneys and witnesses practice as well as to assess mock juror's reactions.

- **Pretrial research:** A condensed version of the trial or portions thereof are put on videotape and shown to surrogate jurors. The strength of issues and impact of counsel and witnesses can be tested and a prediction of the verdict and award determined.

- **Shadow jury:** Surrogate jurors who match the actual jurors selected to view the trial as it takes place. Nightly reports assessing reactions, comprehension of issues, and so forth are conveyed to counsel each night.

- **Post-trial interviews:** Used to assess why and how jurors reached their verdict. The information can be utilized for similar or serial trials, decisions to appeal, and so forth. ■

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Thus, the difference between qualitative vs quantitative research to some extent can be distinguished as informational vs predictive. Since it can be extremely valuable to predict through pretrial research what effects the case will have on the actual jury, quantitative research is often preferable. Consequently, most aspects of jury

behavior, as with other forms of human and animal responding, can be scientifically and empirically measured. These specific procedural rules must be adhered to, however, to assure that the outcome is truly the result of the variables in question, as opposed to chance or irrelevant factors.

In a quantitative pretrial research project, the variables under study are typically combined into a stimulus videotape that stimulates an abbreviated version of the trial. The dependent variables (juror reactions), are measured using carefully constructed ques-

tionnaires that quantify strength and direction of attitudinal response. The ultimate dependent variable is often juror verdict and damage award. This tape is then shown to a sufficient number of "surrogate" jurors who are representative of the potential jury. The experimental jurors are carefully selected and screened from the venue population to accurately match the potential jury panel.

Can this type of research predict the future outcome of a case? The answer depends on the jury researcher's ability to

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control for "threats" to the validity and reliability of the research procedure.

Internal validity refers to errors that may occur within the design of the study. For example, does the videotape adequately reflect the stimulus (trial) that the real jurors will hear? Are the questionnaires designed without bias and will they accurately measure the attitudes in question? Of critical importance, the "sample," e.g. the surrogate jurors, must be selected to closely match the characteristics of the anticipated jury panel.

Of essential importance for prediction purposes, a minimum of 30-50 surrogate jurors is necessary. The greater the sample size, the greater the degree of confidence in the findings. While a single jury sample (eight to twelve) often does accurately predict the outcome, larger samples provide a much higher degree of confidence and allow for the use of inferential statistical techniques.

External validity refers to the generalizability of the research to other methods, times, setting, and other subjects.

With jury research, this applies specifically to the actual trial, courtroom, participants and jury members. External validity threats in jury research are commonly the same criticisms aimed at the literature on jury behavior. For example, the "surrogate" jurors, aware that this is not a real trial with real outcomes, may behave dif-

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ferently than the actual jury. They may be aware of experimenter expectancies and so forth.

Jury researchers must be aware of and strive to reduce or eliminate these experimental "threats." At the very least, these factors must be explained thoroughly to avoid blindly following the recommenda-

tions of flawed research.

In sum, to obtain information regarding the outcome of the trial through pretrial research, and have a significantly different result in the actual trial can happen *only* if threats to either internal and/or external validity were not controlled for.

Due to the nature of jury trials, it is impossible to absolutely control for all of these factors. For example, it sometimes occurs that the seated jurors simply do not match the sample jury characteristics or a "surprise" occurs during the trial which produces a different outcome. Consequently, pretrial jury research is not infallible. However, when included in the claims professionals' arsenal of facts and information regarding a case, this data can provide another means of evaluating exposure otherwise unobtainable.

Jury Research Benefits Claims Professionals

Insurance claims professionals face the difficult task of predicting juror response. The potential for runaway damage awards and bad faith claims complicate the picture. Plaintiffs and over-zealous attorneys do not always accept fair and reasonable offers. Pretrial behavioral research can

assist in assessing the potential for excessive damage awards as well as reducing unnecessary expenditures generated by the uncertainty factor.

For example, jury research was utilized in a recent case involving a neck injury presumably resulting from the collapse of an awning. Although there were no witnesses and the validity of the plaintiff's claims were questionable, defense counsel felt the jury would accept the story because surgery had been performed for a ruptured disc. There were three defendants, the owners of the awning, the distributor, and manufacturer. There was plausible evidence that each was partially negligent and could have prevented the awning failure. Each of their defense strategies was to point the finger at one another to absolve themselves of the "negligence" which "caused" the accident. They all felt portraying the plaintiff as a malingerer would anger the jury, resulting in a larger damage award. The plaintiff was requesting over \$600,000. A six-figure settlement offer was being considered by the defense.

Pretrial research was conducted testing the relative merits of the plaintiff's case as well as the impact of each of the defendants strategies aimed at implicating the others. A large sample of surrogate jurors revealed that the jury would indeed award a large sum of money to the plaintiff, with liability attributed to two of three defendants. However, when the additional theme and evidence regarding highly questionable validity of the plaintiff's claims was included, the surrogate jurors found this to be the key *focal point*, and all five juries found for the defense instead.

It was recommended that the defense focus *intensely* on the "validity" theme. Two of the three defendants (distributor and manufacturers) did not support this idea and proceeded as a defense strategy to blame the others for "negligence." They allowed the sole defendant to be the "bad guy," accusing the plaintiff of presenting false claims.

The result: the risky move paid off with a defense verdict absolving all three! The jury simply did not believe the plaintiff's claims. Even more shocked than plaintiff counsel were the other two defendants, though understandably appreciative. Following the case, the defense counsel agreed: failure to follow the study recommendations would likely have resulted in the "anticipated" award of approximately \$200,000.

While the results of the aforementioned study and success of the recommended strategy may be painfully obvious to readers of this article, it should be noted

that the various defense counsel in this case were highly experienced, successful litigators. The fact is, the themes and strategies of any case as well as decisions to increase settlement offers are typically based on educated estimates, past cases, and experience.

Our experience at Litigation Research Technologies indicates that claims professionals with greater experience are more likely to acknowledge the need to reduce the dangerous unpredictability of jury awards. Since no two cases are identical with regards to facts, parties and events,

behavioral research provides added information derived from case specific juror reactions.

Conclusion

In modern litigation, evaluation and preparation for a single case is often a lengthy and arduous process. With discovery, pretrial motions, depositions, settlement conferences, and so on, sometimes years of preparation can go into a single case. Superb litigators leave no stone unturned. Somewhat surprisingly, how

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ever, is that basic pretrial behavioral research, designed to evaluate and pretest how jurors will likely react to the case is typically not conducted.

Pretrial jury behavioral research utilizes the same empirical procedures that establish causality in the scientific world. Applied to litigation, insurance claims professionals and their attorneys now have the resources to pretest the effectiveness and impact of various aspects of their case. While no method can predict a jury verdict with 100 percent certainty or guarantee a triumphant outcome, pretrial behavioral research offers a valuable tool to increase the odds for success. ■

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