

Utilizing Behavior Research for Successful Attorneys

By Dr. Jeffery R. Boyll

There appears to be an emerging trend in modern litigation toward utilizing behavioral trial consultants in very high risk cases. This practice originated in the late 1960s when social scientists began applying complex statistical models to survey data to develop "ideal juror profiles." This technique became widely recognized due to the successful outcomes for those who utilized it.

Most attorneys believe they have not had a case that warranted the use of a social science consultant. Since consulting techniques grew out of highly publicized trials, the common belief is that only extremely high profile cases justify the use of a trial consultant. To some extent, this is true. In order to obtain the highly touted "scientific jury profiles," a large (500-800) telephone sample is necessary, requiring interviewers, data entry personnel and complex analysis. It is a time-consuming and expensive proposition, if done correctly.

Interviews with practicing trial consultants, however, indicate that "scientific jury selection" is becoming one of the lesser-used techniques in their repertoire of skills. Without debating the efficacy of the practice, this method is not necessarily the most powerful technique a trial consultant can offer in a particular case. This may come as a surprise to many attorneys who equate behavioral trial consulting with assistance in "picking juries."

Unquestionably, voir dire is of critical importance. Because jurors bring with them preconceived attitudes, values, and opinions, it has been said that the people who constitute the jury can have as much to do with the outcome as the evidence itself. However, there are behavioral pretrial research procedures available to attorneys that have demonstrable effectiveness at a much lower cost than "scientific jury selection." These procedures are also adapted from the social sciences and employ the same research methodology that goes into scientific experimental designs. Through a combination of these research methods and the attorney's expertise, a considerable edge at

trial can be obtained. Consequently, litigators can more routinely benefit from behavioral research—not just in extremely high risk cases.

Why Pretrial Research Can Be Effective

Negotiations

Since only a small minority of cases ever actually go to trial, a significant aspect of a litigator's task is to negotiate settlements. For counsel representing either plaintiff or defendant, this is rarely done without contemplating the hypothetical question, "If this goes to trial...?" Consequently, attempting to predict how a jury will react to a case becomes paramount. 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? Or for all their efforts, only one dollar to the United States Football League? The sometimes idiosyncratic nature of civil damage awards suggests that psychological and other non-evidentiary factors come into play.

Due to the unpredictability of trials, much of the purpose of pretrial behavioral research is "uncertainty reduction," i.e., to predict how jurors will react to evidence, witnesses, or arguments. Oftentimes, pretrial research can provide reliable estimates of what the actual jury's damage award will be should the case go to trial.

Opening Statements

Studies consistently indicate that jurors formulate a verdict early on, sometimes by the conclusion of opening statements. Additionally, those jurors tend to maintain their initial opinions despite subsequent conflicting evidence. As a result, opening statements are believed to be of immense importance in relation to other aspects of the trial. Pretrial assessment of the effectiveness of opening statements, including factors of

Oftentimes, pretrial research can provide reliable estimates of what the actual jury's damage award will be should the case go to trial.

comprehension, persuasiveness and impact, is more accurate when pretested with surrogate jurors.

Issue Analysis and Comprehension

Juror comprehension and memory retention, particularly in complex cases, is often remarkably poor. On the average, jurors remember only 50 to 60 percent of the trial. Post-trial interviews indicate jurors may even associate certain witnesses or demonstrative evidence with the wrong side! Further, in lengthy trials involving a multitude of issues, jurors often "anchor" on only four or five critical themes or issues. Pretrial research can identify the poorly comprehended issues and help determine the best methods of enhancing recall of key points. Of particular importance, the four or five key issues can be identified so the case presentation can be built strategically to emphasize and enhance these themes.

Demonstrative Evidence

Modern trials are becoming increasingly visually oriented. This is not surprising in light of research which documents the superior learning and retention curve when information is presented visually rather than verbally. Litigators are often faced with a choice between various types of demonstrative exhibits, e.g., films, models, photographs or computer simulations. Testing the comprehensibility and persuasive impact of demonstrative evidence prior to trial can be critically important in certain cases.

How Pretrial Research Is Conducted

Assume you have a child who has been hyperactive and irritable of late. You hypothesize that he has been over-indulging in Sugar Buff-Puffs for breakfast. You eliminate the cereal and his behavior improves. Thus, you conclude that Sugar Buff-Puffs cause irritability, at least in your child. What you have done is conduct a study, albeit somewhat unscientifically. Specifically, you began with a hypothesis: Buff-Puffs are causing irritability in your child. You manipulated the independent variable (cereal injection) and observed the effects in the dependent variable (degree

of irritability). You have proven Buff-Puffs cause irritability.

Simple, except for the fact that your sample size was only one (it doesn't happen with other children) and the child's behavior actually changed because he started getting more sleep and he thought his better behavior would help get his Buff-Puffs back! This study failed to control for what are called "threats to the validity" of a research design. In fact, it was this type of flawed research methodology, with the help of the media, that led millions to conclude that sugar caused hyperactive behavior in children. This finding has been soundly refuted in more recent and better controlled studies. In the same vein, jury research must be conducted utilizing strict research methodology to assure that results are valid and reliable.

Research methodology and statistics are complex fields and, for most people, avoided like the plague. The basic procedures are relatively simple, however, and can be utilized effectively in litigation.

Research begins with a hypothesis or research question. For example, will my case theme persuade jurors? The second step in research is to identify the variables to be evaluated. Variables are classified as independent (if) and dependent (then). Nearly all "variables" involved in the trial process can be identified as shown in Table 1, below.

Next, we have to determine if our research will be qualitative or quantitative. An example of qualitative research in litigation is a "focus group," where the impact of, for example, the case theme would be discussed among group participants and the "persuasive impact" assessed in a qualitative manner. Some basic "descriptive" statistics may be generated to help describe the results. For example, the frequency of positive response or the average damage award can be tabulated.

Pretrial research can identify the poorly comprehended issues and help determine the best methods of enhancing recall of key points.

Table 1	
IF (Independent Variables)	THEN (Dependent Variables)
Opening statements	Persuasiveness
Key issues	Comprehensibility
Demonstrative evidence	Believability
Witnesses	Credibility

Most aspects of jury behavior, as with other forms of human and animal response, can be scientifically and empirically measured.

In quantitative research, the dependent variable is "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 the ability to generalize. Given statistical "significance," we assure ourselves that the sample characteristics can be generalized to the population of interest with a reasonable degree of confidence. Thus, to some extent, the difference between qualitative and quantitative research can be identified as informational versus 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. Most aspects of jury behavior, as with other forms of human and animal response, can be scientifically and empirically measured. 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 factors.

In a typical beginning jury research project, the variables under study are combined into a stimulus videotape representing an abbreviated version of the trial. This tape is then shown to a sufficient number of "surrogate" jurors to be representative of the potential jury. The dependent variables, typically aspects of juror reaction, are measured using carefully constructed questionnaires that quantify strength and direction of attitudinal response. The ultimate dependent variable is often the juror verdict and damage award.

At this point, jury researchers evaluate and control for "threats" to the validity of the design. Keep in mind, the goal of all research is to assure that all responses and changes in the dependent variables (juror reactions) are due to the independent variables and not to extraneous or chance factors.

Threats to Internal Validity

"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," i.e., the surrogate jurors, must be evaluated under the following conditions:

Sample Representativeness. The sample must be representative of the actual jury. If all policemen, mothers with young children, and professionals will likely be excused from the actual jury, they will contaminate the findings if included in the research study. Further, if only \$5.00 is paid to participants, the sample will likely over-represent lower income levels.

Random Sample. While maintaining representativeness, the sample must be random, e.g., all participants have an equal chance of being selected to participate. For example, handpicking members from the law firm as surrogate jurors would result in a non-representative sample.

Sample Size. Of essential importance for prediction purposes is the necessity of having a minimum of 30 to 50 surrogate jurors. The greater the sample size, the greater the degree of confidence in the findings.

Threats to External Validity

"External validity" refers to the generalizability of the research study, i.e., the extent to which the results can be generalized to other methods, other times, other settings, 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 as those 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 differently than the actual jury. They may be aware of, and tainted by, experimenter expectancies.

In sum, obtaining information regarding the outcome of the trial through pretrial research and having a significantly different result in the actual trial can happen *only* if threats to either internal and/or external validity were not controlled. Due to the nature of jury trials, it is impossible to absolutely control for all of these factors. Consequently, pretrial jury research is not infallible.

Conclusions

In modern litigation, preparation for a single case is often a lengthy and arduous process. With discovery, pretrial motions,

depositions, settlement conferences, and other related proceedings, years of preparation can sometimes go into a single case. Superb litigators leave no stone unturned. Somewhat surprising, however, is the neglect shown to basic pretrial behavioral research, designed to pretest juror reactions.

Pretrial social science research utilizes the same empirical procedures that establish causality in the scientific world. Applied

to litigation, attorneys now have the resources to critically evaluate the effectiveness and impact of various aspects of their case. The trial outcome becomes far more certain and the odds for success improve.

This article was originally published in the Trial Diplomacy Journal and is republished with the express permission of the author and that publication.

Dr. Jeffrey Boyll is a psychologist and president of Litigation Research Technologies, a Phoenix based jury research and consulting firm that assists attorneys with the behavioral aspects of litigation. He is actively involved in research, has written numerous articles on litigation strategy, and speaks at educational programs conducted by legal organizations.

WHY LITIGATION RESEARCH

Have you ever been surprised by a jury verdict or damage award?

In pre-trial preparation, have you sometimes wondered how the jury will react to a particular theme, issue, or method of dealing with damaging evidence?

In post-trial discussions with jurors, have you found that key evidence/issues/witnesses were misunderstood, downplayed or ignored?

Has your case been hurt by psychological/perceptual features, sympathy, or other non-evidentiary factors?

Have you ever been faced with a biased jury panel?

Are your pre-trial negotiations or settlement decisions affected by uncertainty regarding the outcome should the case proceed to trial?

Litigation Research Technologies helps take the guesswork out of jury behavior by scientifically pre-testing issues, evidence, witnesses and events.

DR. JEFFERY R. BOYLL
PRESIDENT

TELEPHONE
(602) 997-6669
DIGITAL PAGER
259-4346
888 E. CLINTON #2026
PHOENIX, ARIZONA 85020