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Selecting the Best Form of Jury Research for Your Case & Budget

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Jury research, if conducted properly, is an extremely effective tool that can be utilized by trial teams when assessing the wide spectrum of reactions that are possible to the particular facts of a case. There are a variety of ways that research can be conducted, some more effective than others. This article will cover various types of jury research, the pros and cons of each, and pitfalls to avoid when conducting jury research.

COST BENEFIT ANALYSIS

I am routinely asked by my clients, “Is my case large enough to justify the costs of jury research?” The answer to this question is simple -- if there is significant risk and/or exposure to your client, some form of jury research is warranted. Does this mean that every case requires jury research? Certainly not.

However, in cases where exposure is great, monetarily or otherwise, pre-trial research can help you make strategic decisions that will affect the course of the litigation.

WHY PERFORM JURY RESEARCH?

There are numerous reasons to perform jury research but the most compelling reasons to conduct jury research include:

- Testing the attitudes and perceptions of demographically similar jurors to the facts of your case.
- Identifying strengths and weaknesses in your case.
- Testing and developing case themes.
- Assessing the difference between individual juror analyses versus the group deliberation process. This is known in the industry as testing the “sway factor.”
- Evaluating key witnesses and the impression they make upon jurors. Are they likable? Are they perceived as credible? Was their testimony persuasive?
- Testing the range of possible juror verdicts.
- Assessing your case for settlement purposes.
- Determining what jurors want by way of persuasive evidence. During jury research, jurors have the opportunity to provide feedback about what was persuasive versus non-persuasive to them.

TYPES OF JURY RESEARCH

There are several ways to conduct pre-trial jury research. Some of them are very costly, upwards of \$50,000.00. Others are less expensive and can be conducted even in cases where budget is an issue. We routinely conduct reliable and useful jury research in cases where the budget is as small as \$10,000.00 - \$15,000.00. The types of research I will focus on, for purposes of this article, include:

- Mock Trials
- Jury Focus Groups
- Internet Research
- Discussion Groups

Mock trials are obviously the most expensive and time consuming to put on whereas discussion groups are the least expensive and least intrusive of the trial team's time and resources. As with any research project, the more you invest in the research project, the more likely you are going to simulate accurate results.

MOCK TRIALS

Mock trials, or trial simulations as they are sometimes called, are typically done over a 2-3 day period. The format in which the evidence is presented to the jury panel is very similar to that of an actual trial. Evidence is presented to the jury panel through opening and closing statements, witness testimony, and actual and demonstrative evidence. Testimony is shown either through videos of

witnesses' deposition testimony and/or through actors who portray the witness. Demonstratives which have been developed by the trial team and their consultants are shown and tested before the mock jury.

Mock trials are expensive to put on and time consuming in terms of preparation. Mock jurors are typically paid in the range of \$150.00 - \$300.00/day (depending on the location of the research). In a mock trial, 25-35 jurors are recruited. The goal is to have 3 deliberating panels. The cost to pay jurors alone can be upwards of \$10,000.00 for a 2-day mock trial. Preparing for a mock trial can take the attorneys and consultants several months. There is significant time that must be spent to develop attorney presentation scripts, video testimony, the visual presentation of evidence, and to develop and review the questionnaires that will be given to jurors during the research process. The biggest mistake attorneys make when electing to conduct a mock trial is not allowing for the proper amount of time and/or budget to adequately prepare.

○ ADVANTAGES OF A MOCK TRIAL

- It is the most effective and comprehensive way to test evidence and jurors' perceptions of the facts of the case.
- The most effective way to obtain feedback on witnesses.
- Most similar to an actual trial setting in terms of "GroupThink" dynamics (i.e. assessing the sway factor between individual case analysis and the group deliberation process).

- The easiest way to “test drive” your case.
- The most effective way to test the persuasive value of counsel.
- **DISADVANTAGES**
 - Expense: By far the most cost intensive form of research
 - Time consuming in terms of preparation

JURY FOCUS GROUPS

There are a variety of ways to conduct jury focus groups. At Opveon, we often use a hybrid approach. We perform a scaled down version of the mock trial that includes only attorney presentations that summarize the evidence and limited video testimony. At the conclusion of the presentations, we have two deliberating groups and one “round table” discussion group. This allows us to test the evidence in a couple of different scenarios. We have the benefit of brainstorming ideas, concepts, attitudes and bias with the jury in an interactive setting (the round table discussion), but it also allows us to test group think dynamics in the deliberation process.

Depending on the scope of the research, the timing of the research (is it being used for early case assessment or settlement purposes, etc.), and the budget of the case, a varying number of focus group participants are recruited. In a typical focus group, we will recruit anywhere from 20-35 participants. The cost to recruit focus group participants is usually less expensive because the time requirements are less intrusive. Focus group participants can be paid as little as

\$100.00 - \$250.00/per session, depending on the location of the research. Unlike mock trials that can take 2-3 days, focus groups can be conducted in as little as 5-6 hours.

- **ADVANTAGES OF JURY FOCUS GROUPS**

- As with any small group research project, focus groups cannot be used to predict actual jury results. However, the same hot button issues and sensibilities generally arise given the trial team the opportunity to fine-tune their presentations before trial.
- More economical than a full-blown mock trial.
- An effective way to test themes, storylines, and juror reactions to important pieces of evidence.
- An effective way to assess attitudes and perceptions on damages.
- Extremely useful for early case assessment.
- Can be conducted at any stage of the litigation process.

- **DISADVANTAGES**

- Not as effective as a mock trial in terms of testing the full range of reactions to witnesses, opening/closing arguments, etc.
- Not as effective at testing the persuasive value of counsel

- Shorter time frame means more summaries, less actual evidence.

INTERNET RESEARCH

Conducting internet research is the latest phenomenon to hit the trial consulting industry. Although it hasn't completely replaced telephone surveys and other forms of community attitude surveys in the jury research process, it certainly has become a popular way of testing case issues to a larger number of people than you are able to assemble in the small group research process (mock trials, jury focus groups).

As with small group research, when conducting online research, you can select the exact demographics of the jury panel. Everything from age, gender, income, education, religion, and other characteristics of each juror.

The format of the presentation is an online based review where jurors watch video footage of the presentation of evidence by both parties, which can include everything from opening/closing statements, video testimony, documents/demonstrative evidence, etc.

After reviewing the presentations, jurors are given a series of questionnaires, very similar to those given during mock trials and jury focus groups. The questionnaires are submitted electronically and received by the consulting team who then, in turn, prepares a written report of the research to the trial team.

○ **ADVANTAGES**

- Research participants are easier and cheaper to recruit.
- You have the ability to recruit 100+ participants vs. 25-35.
- Cutting edge technology: High degree of flexibility and control over the presentation information.
- A very cost-effective way to test a wider range of reactions

○ **DISADVANTAGES**

- Less quality control over the research panel. There is little assurance that Jimmy, who is the 18 year old white male that we recruited, will be the actual one participating. He might have his 65 year old disabled mother do the work for him.
- No personal interaction with jurors.
- Limited ability to follow up with jurors for questions in response to their feedback.

DISCUSSION GROUPS

Discussion groups are a very cost effective way to obtain non-biased input and feedback. For this type of research, a group of demographically similar jurors sit down with a trial consultant and members of the trial team and are given an overview of one aspect of the case or the case in general and then guided through a discussion to gather feedback. These are brainstorming sessions of sorts. They

are not designed to assist the attorney/consultant in putting together ideal/non-ideal juror profiles, but rather are useful when testing themes, attitudes, or particular elements of a case that are concerning and/or problematic.

○ **ADVANTAGES**

- Extremely cost effective
- Lots of interaction between counsel/consulting team and the jurors
- Limited preparation time

○ **DISADVANTAGES**

- The least effective method of jury research with respect to assessing the probable range of a jury verdict
- No ability to test reaction to witnesses and limited ability to test the reaction to graphics/demonstratives, trial exhibits, etc.
- Limited ability to assess the effectiveness of counsel.

COMMON MISTAKES IN JURY RESEARCH

There are several pitfalls to avoid when conducting jury research. They include the following:

- **Failure to recruit a demographically similar jury pool.** You must ensure that your mock jury pool will be similar to that of the jury pool in the jurisdiction you are trying the case.

Conducting jury research in Tulsa for a case that is going to be tried in the Southern District of New York will produce unreliable results. Working with your consultant and recruiters ahead of time to put together a demographically sound panel is essential for successful research results, even for focus groups that are conducted in the same jurisdiction the case will be tried in.

- **Giving uneven/biased presentations.** This happens when you fail to adequately portray the strengths of the opposing party's case and/or when you show bias towards your own client during the presentation. Jurors are people and people are generally pleasers. If they think you represent one party over the other that is likely to sway their opinion towards your client and in turn, produce unreliable results.
- **Expecting predictive values.** This happens when the trial team assumes that because the mock jury panel awarded \$1M in damages, an actual jury will do the same thing. Regardless of the type of jury research, there are no guarantees. Rather, research should be used to assess the *possible* range of jury verdicts.
- **Underestimating preparation time.** Preparing for and conducting jury research is a time consuming process. Failing

to adequately prepare for the research will cause skewed results.

- **Failing to ask targeted questions in the juror questionnaire process.**
- **Failure to test the sway factor.** It is critical in jury research that individual versus group-think dynamics are tested.

THE TAKE AWAY

What should you expect to receive at the end of the jury research process? That will depend largely on your case budget and the type of research you are conducting. Most consultants provide some form of a written report summarizing the research findings or at a minimum, facilitate a post-research debriefing with counsel. If a written report is provided, the scope and format of the report may vary from consultant to consultant. However, most all reports will serve as a summary of the information obtained during the jury research process and be in a format that can be easily utilized during trial preparation. A typical Jury Research Report will:

- Summarize the research process and the goals of the research.
- Summarize the results obtained from the research.
- Identify problem areas in your case.
- Identify and help develop themes that resonate with jurors.

- Identify demographic information for ideal/non-ideal juror profiles. For example, the research may show that hourly wage earners are more receptive to certain evidence than business owners or that females, on average, awarded higher damages than males.

SUMMARY

Jury research is no longer reserved for only those cases with big budgets. It is becoming a standard trial preparation practice for those cases that have any significant form of risk or exposure. They are ideal for helping develop case strategy, helping prepare witnesses for trial testimony, and assessing the case for settlement. Arm yourself with every bit of knowledge and information that you can to help win your case.

ABOUT THE AUTHOR:

April J. Ferguson is the Chief Executive Officer of Opveon Litigation Services, a litigation support and trial consulting firm based in Tulsa, Oklahoma.

For her clients, April is a trusted partner, a team player, and an invaluable asset to their litigation teams. She works tirelessly with trial teams to tell their client's story in a way that resonates with jurors and creates in them a desire to be an advocate for that client in the jury deliberation room.

Having worked on large pieces of complex litigation throughout the country, April's expertise in the trial consulting arena has brought her an international client base, including top tier law firms and celebrities. The trial teams she has had the privilege of working with have been responsible for securing multi-million-dollar verdicts for their clients as well as helping large corporations obtain defense verdicts.

April focuses her practice on theme development, mock trials, jury focus groups, and the use of technology in a litigation environment. Her case experience includes complex commercial litigation, personal injury, medical malpractice, products liability, energy law, employment law cases, criminal defense, eminent domain, construction disputes, Qui Tam actions, major environmental cases, insurance bad faith, family law, trucking litigation, among others.

April has been involved in hundreds of jury trials throughout the course of her career. Her experience in the courtroom, combined with her jury research practice, gives April a unique perspective into the trial process, which clients find invaluable.