

DECISION ANALYSIS

Trial Consultants

Defining the Case:

Making the Most of Focus Group and Mock Trial Research

by

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"In preparing for battle I have always found that plans are useless, but planning is indispensable." – Dwight D. Eisenhower

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"Remember the carpenter's rule: Measure twice, cut once." - Anonymous

Introduction

While millions of us sat down to watch the Super Bowl a few years ago, little did we know that in a research lab at UCLA, Fred Kipperman, a 26-year-old attorney from Santa Monica, was telling Toyota, Bud Light, and other major advertisers how well they spent their millions during one of the biggest sporting events of the year. Mr. Kipperman was not counsel for these companies. He was hooked up to an MRI machine at the Ahmanson-Lovelace Brain Mapping Center, which registered the brain activity related to his emotional responses to the commercials.

Brain mapping has been used to tell advertisers and merchandisers how consumers respond to commercials and product designs and how the public responds to the faces of celebrities and politicians. And while jury decision making, like consumer behavior, is hard to predict, there are ways to improve the specificity and accuracy of our results from jury research and their translation into effective case management and trial presentation strategy.

Trial consulting, like many of the social sciences, has evolved considerably in the 30 plus years since it has been a recognized profession. In the early days, much of the research was focused on the simple recognition that there was a difference between how the courts and the legal profession instructed jurors on their decision making and how jurors actually engaged in the process of arriving at a verdict. Later, much of jury research was focused on juror *reactions* to legal cases, specifically what they thought of evidence, witnesses, and arguments. More recently we have grown much more sophisticated in studying the dynamic process of juror and judicial decision-making. The most current advances in research methodologies tell us specifically how jurors (and Judges) arrive at their ultimate verdict by constructing a cohesive case story and decision-making role out of each side's presented evidence, the legal instructions, and their own personal experience, beliefs, and world view. This allows trial counsel and clients alike to more accurately evaluate the risks and advantages of going to trial, to better prepare for hearings, mediations, arbitrations and bench trials, and to more effectively prepare their trial presentation strategy. These days, with tight litigation budgets and less tolerance for the uncertainty of outcomes in trial, the ability to get targeted information about cases is even more important. Although numerous, the factors affecting juror decision-making can be defined.

For example, some of the factors we most commonly weigh in jury research are:



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| <ul style="list-style-type: none">• Case Facts and Evidence• Legal Precedent and Rulings• Verdict Questions/Jury Instructions• Public or Community Opinion• Current or Local Events• Pretrial Publicity• Cultural Interpretations• Individual Life Experiences• Unspoken Standards, Rules or Expectations | <ul style="list-style-type: none">• Emotional Issues• Case Complexity or Confusion• Preconceptions or Misconceptions about Case Issues• Attitudes/Beliefs toward Case Issues• Communication Preferences• Graphic & Demonstrative Evidence• Case Story Formation• Group Dynamic• Individual Personalities |
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These factors can be mapped, studied and weighed to come up with a strategic research and communication design plan.

This article is the first of three articles geared toward outlining research methodologies to gain the most specific and accurate results from jury projects, specifically focus group and mock trial research. Although some of the planning and analysis concepts also apply to community attitude research, arbitration and other types of judicial research such as Markman hearings, we will focus this article on research projects oriented mainly toward jury decision making. To better explain this process, I have divided jury research into three steps:

- **Step #1: Planning Effective Research**
- Step #2: Conducting Effective Research
- Step #3: Strategic Analysis and Application of Research

If we think of jury decision making as an expedition, we need to plan carefully to make sure that the jury arrives at the exact destination where we want them, no matter how many detours or distractions they run into on their trip. To do this we, need to create a clear map to outline a travel path to the jury's ultimate destination: the verdict.

*"There is in the act of preparing, the moment you start caring."
- Winston Churchill*



Planning Effective Jury Research - *What do we want? What do we need?*

While time and budget constraints put limits on *how* the research is conducted, the planning and goals of the research should never be compromised. In the past, we have engaged in discussions about research goals along the lines of, *"We want to know how a jury reacts to the evidence X or witness B."* Now, we can accomplish much greater precision to our goal setting and research planning. The way we define these goals is essential in determining the type of research we conduct, the questions we ask, the information we obtain, how that data is analyzed and, most importantly, how we formulate strategic case recommendations from our results.

We have all sat in darkened rooms eating M&M's watching focus groups and mock trials. And when we are not shaking our fists at two-way mirrors or the TV monitors exclaiming, *"I can't believe they focused on that insignificant piece of evidence! It's not even evidence! I can't believe these people!"* we usually are looking at four distinctive types of information we get from jury research.

- **Confirming information:** *"Well, I already knew that! See, I told you this was how it was going to go."*
- **Modifying information:** *"They understood the expert's testimony but it wasn't strong enough to make them vote for us on the verdict questions. We need to give that testimony more teeth."*
- **Clarifying information:** *"They got completely lost during the expert's testimony. We need to create a 101 primer for them on this issue."*
- **Surprising information:** *"I never thought the jury was going to base their decision on THAT! We need to rethink our approach."*

The question is: what does jury research really tell us? Does it accurately reflect how a jury will decide on the issues in the case? Does it accurately tell us how to present the case in order to influence the outcome? For us, accuracy is defined as the ability to anticipate the number of variables that might affect the outcome of the case and the translation of research findings into usable trial strategies.

As many attorneys have heard from trial consultants or experts, clearly the best way to increase accuracy is to be involved from an early stage in the litigation. However, no matter when you start, there are a series of questions that should be answered to define the way the attorneys are approaching the case and what information they most need from the research.



Start with the End

“Setting a goal is not the main thing. It is deciding how you will go about achieving it and staying with that plan.” – Tom Landry

One of the best ways to plan the research is to start at the end and work your way backward. We start this process do this by asking a few simple questions:

1. *What is the desired verdict or settlement outcome?*
2. *What are the obstacles to that desired outcome?*
3. *What is the decision path that the jury needs to follow to overcome those obstacles and reach that desired verdict or settlement?*
4. *What is the evidence, testimony, or themes that comprise the story thread that the jurors will use to navigate the decision path?*
5. *What are the standards that you want the jurors to use to judge the evidence, testimony or issues?*
6. *What is the attitude or state of mind that you want the jury to have as they make their decisions? (Outrage, skepticism, significance, curiosity).*

Note: For a more comprehensive set of preparation questions, refer to the *Case Issues Questions Checklist*.

1. What is the desired verdict or settlement outcome?

For example, in a patent case, if we were defending the infringement and prosecuting the invalidity claim, we might ask the following initial case specific questions:

- **Question A:** First, we want to decide on what we feel will be our primary decision-driving question. Although we may be tempted to target our research based on how we can best defend the infringement claim, this may not play to the evidentiary strengths of the case. So for our purposes, we may want to lead with the question: “What does the jury need to *decisively* invalidate the patent?”. Remember, *questioning* how the patent was obtained is different than *decisively finding* that the patent is invalid. This question tells us that we are searching not just for reactions but a decision goal with a desired state of mind. Additionally, in focusing on information to invalidate the patent, we are hoping to minimize the infringement claim.
- **Question B:** What does the jury need to conclude that the patent was *extremely obvious* to someone of ordinary skill in the art? More specifically, what do jurors need to know about patents and the related industry to conclude that this patent should never have been granted?



- **Question C:** What does the jury need to know about availability and awareness of the prior art to the plaintiff to find that their research was *insufficient* or *willfully ignorant*?
- **Question D:** What does the jury need to hear to conclude that the plaintiff's representations to the examiner were *false* or *incomplete* and that the acquisition of the patent was obtained negligently or fraudulently?
- **Question E:** What does the jury need to hear to conclude that our client's product or process is *much different* from the patented product or process?
- **Question F:** How do we empower the jury to overturn a patent that has been granted by the Patent office?

Notice that many of these questions contain characterizations that are italicized. We often put these enhancers into our research questions to create a higher standard of proof for ourselves in the research. The reasoning is that if we can create a great degree of certainty in the jury's decision process, even if there are weaknesses or challenges during the trial, jurors will still have enough evidence to get to the requisite verdict.

These questions are important in research because they specifically explore what jurors (or Judges) need to arrive at a specific conclusion. Most importantly, these questions explore what fact finders may be missing in order to come to the desired conclusion. One of the most valuable exercises in verdict research is mining from jurors or judges what information they want or need to supply a cohesive story to get to the desired outcome. For example, research jurors often tell us they want more information on the industries involved to put into context what the inventor would have, should have, or could have known about prior art at the time of the patent application.

2. What are the obstacles to that desired outcome?

This is one of the most important questions in research. This question drives the case preparation for research. We always ask counsel to put together the strongest possible opposing case, even reaching beyond what they anticipate the other side will present. And although we do not want to present evidence that would not be allowed in trial, it allows us to test not only the arguments that the other side will surely use but also the arguments that skeptical jurors will use to argue against your case in the deliberation room. The thinking here is if we can effectively answer the toughest possible challenges put to us by the other side *and* our most cynical jurors (or judges), we stand a better chance of prevailing.

The exercise of shooting holes in your own case then becomes one of the most useful endeavors in preparing your case for research and trial. This exercise also serves to help



position your case for evaluation and can inform you where you might need additional expert or lay witness testimony.

For example, most jurors try to give a doctor the benefit of the doubt in a “failure to diagnose” case. For a plaintiff conducting jury research, this might be the first obstacle: to get past the presumption that most doctors are diligent (and even fearful of litigation) in thoroughly examining a patient and taking a history.

Great care should be taken to define as many of the case vulnerabilities, whether it be evidence, witness inconsistencies or demeanor, expert’s relevant background, case complexity, or legal authority in order to identify what the jurors need to hear to overcome these weaknesses.

3. What is the decision path that the jury needs to follow to overcome those obstacles and reach that desired verdict or settlement?

Much of jury research over the years has concluded that jurors formulate their decision-making by building the case into a personal story of “what happened.” The case story that is constructed by jurors should be designed to navigate them along this decision path toward your desired verdict.

Juror stories are informed by the case facts they hear, their own personal experience and beliefs, and their expectations that have been conditioned by popular culture. Classically, stories are formulated into action, character and environment and are bound together by the theme or message in the story. As we are studying story construction through research, we are looking not only looking at what evidence and issues jurors use to make their decisions, but how they sequence, organize and prioritize the information.

For example, if you are conducting research on a product liability case, you may be tempted to start the plaintiff’s research presentation by focusing on the plaintiff and how the product harmed them. If you do this, you may run the risk of jurors believing that the most important issue in the case is whether the product caused the injury (traditionally a weaker position for the plaintiff) rather than the alleged defect. In this example, the research should tell us whether the plaintiffs get a stronger reaction by focusing the jury’s attention initially on the defendant’s actions in the design and manufacture of the product rather than the causation.

In studying how jurors put together an optimal story sequence of the case, it is important to note that they rarely use a straight chronology. This is where case presentation may differ from case organization. While we may legally organize a case in a straight chronology, it may not tell the best story. With the proliferation of crime shows such as CSI and Law & Order, jurors have gotten used to hearing cases hop-scotching out of order from present to past and back again.



4. *What is the evidence, testimony or theme that comprises the story “map” that the jurors will use to navigate the decision path?*

Once the decision path is defined, the themes, evidence and testimony are assembled to support this optimal jury version of the case. Some of the best uses of jury research are to refine the overall themes and presentation order of the case. Additionally, if there is a particular vulnerability in the case, this research may be able to tell us how to turn the weakness into a strength, or how to embed or bookend the evidence at a particular point in the case to minimize the damage.

5. *What are the standards that you want the jurors to use to judge the evidence, testimony or issues?*

Since jurors have their own way of interpreting legal instructions and industry standards, one of the most fruitful exercises in focus group research is to understand how jurors re-define the key jury instructions or industry terms in the case. Having a discussion with representative jurors helps to define, in their *own* words, key terms like “standard of care”, “prior art”, or “design defect”.

Jurors struggle in complex cases to understand a patent process, medical terminology, definitions of securities, or the industries that spawned the dispute. Using jury research to have the jurors describe where they get lost or how they would want the experts and lawyers to clarify these complexities helps to ensure that they will retain a greater portion of the case.

6. *What is the attitude or state of mind that you want the jury to have as they make their decisions? (e.g., outrage, skepticism, curiosity).*

Jurors want to be told what is important in the case. But, especially in complex cases, they also want cues as to how they should feel about the case. Since jurors always ascribe motive and intent to the parties, it is natural for them to attach a psychological or emotional state to the actions of the parties. In an employment case, is the employee a high achieving employee struggling with new performance criteria in a difficult economy or a controlling supervisor having difficulty adjusting to a new reporting structure?

Analyzing these issues helps to prepare the human story behind the technical and legal complexities of a case. If you are representing a large pharmaceutical company and you are concerned about a jury condemning your client’s profit motive, jury research can help to define whether you should even be concerned about the issue or whether you can embrace the business motive wholeheartedly. If it is a concern for the jurors, research can also tell you how to tell the story of the company, to personalize the plaintiff without making them liable.



Finally, understanding the psychological or emotional needs of jurors in these cases tells trial counsel how to approach the presentation of the case. Does the case fare better with a scholarly, professorial approach or an indignant, combative approach? Do you want jurors to become angry at the outset of the case or to gradually become more and more outraged as the case progresses? Do you want them to merely shrug and conclude, “What’s the big deal? Business is business. No harm, no foul.”

Ultimately, jurors need to feel satisfied that they have come to a meaningful and correct decision. While you are not directly telling them how they should feel about the evidence in the case, jury research can tell you what your witnesses and you, as trial counsel, need to convey on a psychological level to help jurors feel more content with their decisions.

For my part, whatever anguish of spirit it may cost, I am willing to know the whole truth; to know the worst and provide for it. – Patrick Henry



Form A: Planning Questions to Define Research Goals

1. What is the desired verdict or settlement outcome? _____

2. Given the way the case is positioned right now, what do you think is the likely outcome?

3. What are the obstacles to that desired verdict or settlement outcome? _____

4. What is the current theme of your case? _____

5. What is the decision path that the jury needs to follow to overcome those obstacles and reach that desired verdict or settlement? This can also be thought of as the story thread.

6. What are the evidence, testimony or themes that comprise the story thread that the jurors will use to navigate the decision path? _____

7. What are the legal or industry standards that you want the jurors to use to judge the evidence, testimony or issues? _____

8. What, if any, are the compromises, the resistance or doubts that the jurors are likely to attribute to your case?

9. What is the attitude or state of mind that you want the jury to have as they make their decisions? (e.g., outrage, skepticism, curiosity).



Case Issues Questions: Checklist

- ✓ What are the three most important issues in the case?
- ✓ What are our five best pieces of evidence in the case? How can I strengthen them?
- ✓ What are our five worst pieces of evidence in the case? Are they too damaging? How do I eliminate or minimize their damage?
- ✓ What is my one to two sentence theme that pertains to all aspects of the case? How do I best position or frame the case using my best and worst evidence?
- ✓ What is the essential worldview that I want the Judge and jury to use to view this case?
- ✓ What evidence should I put on first? What evidence should go in the middle of the case? What evidence should be last?
- ✓ What is the best story of the case?
- ✓ What (if any) are my case concessions that I can use for jury deliberation negotiations?
- ✓ How can I use the opposing case to best present my case? How do I use their witnesses and evidence to best tell our story of the case?
- ✓ How do my witnesses support or contradict each other?
- ✓ How do I help my witnesses be clearer and more confident?
- ✓ How do I define the jury instructions and verdict questions to optimize getting a favorable outcome? How do I raise the burden of proof for the other side and lower the burden for myself?
- ✓ What are the industry or objective third party standards and equations that I can use to show that the opposing side has failed or we have succeeded?
- ✓ What is a jury likely to award in my best case, worst case and moderate case scenarios? What are the issues and evidence that upwardly or downwardly affect those awards?
- ✓ What are the community, cultural or personal values, beliefs, experiences and biases of the jury pool that will affect how they view the case? How will pre-trial publicity or local events affect the jury view of the case?
- ✓ What are the most confusing or complicated issues in the case? How can I, my experts and lay witnesses help to clarify these issues? What are the organizational and teaching tools that I need to help the jury or judge understand these issues?
- ✓ What is the visual story of the case? If I had to tell this story just in pictures, what would it look like?
- ✓ What is the historical background or context of the case that will help the jurors understand the decisions of my client?
- ✓ What are the characteristics of jurors that will be most problematic for my case? What are the characteristics of jurors who will be most receptive? What are jurors' likely initial inclinations toward the case issues?
- ✓ Do I want jurors to work with or against each other?
- ✓ What are the deliberation questions that jurors are likely to ask each other to decide the case and how will they answer those questions? How do I want these jurors to deliberate on the case?
- ✓ How do I think jury sentiment and verdict preferences will swing over the course of the trial? How do I want it to swing?
- ✓ What am I still missing from the case that will help the jury and Judge decide in my favor?
- ✓ What are my Judge's style and decision preferences? What are the themes, issues, story and precedents that will help them understand the case and decide in my favor? How can I help them administer the case?



Selecting the Right Research Project

Once you have defined and refined our research goals, you then need to select the most appropriate type of research project to get at this needed information. Below you will find a number of different types of projects. Some of the focus group concepts listed below also may be used in a mock trial setting. At times, two of the components listed below are incorporated into a single focus group. Depending on the information needs of the case, all of these research projects should be custom designed to ultimately pull from jurors (or judges) the responses that will help you position your case for litigation.

A. Focus Groups

While a mock trial is designed to study the changing decision making process of jurors based on a proscribed set of facts that are known with a reasonable amount of certainty to come into a trial, a focus group is designed to delve into the thought process of jurors: their initial misconceptions, beliefs, and biases that affect how they filter and interpret the facts in the case to conform to those beliefs as well as the process they use to construct the story of the case. These groups are also designed to look at more discreet, rather than global, issues in the litigation as well as take snapshots of the critical points that drive juror decision-making. Overall, focus groups are designed to provide not only insight into the various forces that drive a jury toward a particular finding but to provide specific recommendations to enhance the strength of the case.

While these groups can be done at any stage of the litigation, much of focus group research is best done earlier in the process – some are done pre-litigation to discern the risk of particular scenarios, during discovery to help counsel understand how to prepare witnesses and what to ask from the opposing side, and pre-trial to develop the optimal story of the case.

1. Comprehension Research

No juror will be able to walk into a trial with an understanding of complex case issues or laws. Yet, juries are asked to understand and make decisions about multifarious business laws that they likely have never heard of before. In fact, jurors come into a case with their own definitions of even seemingly simple issues, which can hinder their understanding of how *you* want to define an issue. Jurors need to hear clear and detailed explanations about complex laws while at the same time they demand efficiency and intellectual respect.

A *Comprehension Focus Group* aims to assess jurors' *a priori* definitions and comprehension of complex case issues or laws to discover the best way to describe the case, the issues, and the law in a way that jurors will understand and embrace. The focus groups begin by gathering jurors' basic opinions and definitions on key issues. Next, the discussion develops into more



complex and targeted case information, delving into the jurors' biases against your case and assessing the best route to defining terms and issues that will be most persuasive to jurors.

In order to increase the retention of your key case issues, a moderator specifically looks for where jurors get stuck on the complex issues. As they are introducing these issues, the research team looks for glazed expressions or outright confusion. They then probe into exactly what jurors find difficult about the concept and then ask the group to brainstorm ideas to help clarify the issue, including recommendations for demonstrative graphics.

2. *Opposing Case Definition*

Understanding the opposition's case strengths through the eyes of the jury can point out your case weaknesses and offer insight on the areas of your case that need the most augmentation or redirection. An *Opposing Case Definition* group poses case issues, laws, and arguments from the opposition's point of view to gauge juror definitions and reactions. Then, respondents are asked what they find particularly strong or weak about that case and what they would need to hear from your side in order to minimize or eliminate those allegations. These groups are especially effective early in litigation as these groups sometimes identify issues that can be developed in discovery.

Then, attorneys can strengthen their own case using the words, phrases, and definitions of the jurors themselves. This increases rapport, understanding, and influence with jurors. By knowing the opponents' case strengths by through an understanding of how jurors identify with opponents' definitions, counsel can inoculate jurors against the opposition's tactics while increasing their own persuasiveness.

3. *Values Research*

Often used as a starting point or in conjunction with other types of research groups, a *Values Research* group can assess community opinion and sentiment about basic issues in the case. Gauging juror reactions to general case-related issues provides rich information about what is important to jurors in their every day lives and insight about the lens with which they will view the facts of your case. These general juror worldviews are crucial in assessing jurors' baseline attitudes that can impact the way they interpret your case. Early in the group, the most general and basic issues are discussed. The content and direction flows according to what respondents find important or compelling. As the group progresses, more detailed issues are presented and discussed in context of the facts of the case. This process assesses how resistant general juror attitudes are to persuasion and the individual facts of the case. Areas of resistance are identified and arguments to breach that resistance are tested. Counsel can use these juror beliefs as a guideline for creating strong, persuasive case themes and framing the case in the most appealing way for jurors.



Values Research is specifically used to identify the core beliefs and what jurors hold dear (e.g. innovation, independence, integrity). This helps to identify themes for the case and to develop language and witness testimony to ensure that the evidence you introduce is consistent with those values.

4. Advocacy Research

In an *Advocacy Research* group, the jurors themselves play the role of the attorney for your case. Depending on whether you are representing plaintiffs or defendants, they are given a brief neutral overview of the matter and then walked through the strong opposition case points. They are then charged with creating the strongest counterarguments possible while in their role as an attorney for your side. Jurors are presented with written sheets summarizing and outlining all of the possible arguments in support of your case, which they then rank according to the strength and impact of each argument. Then, either in groups or individually, they create the best arguments, sequencing, and presentation possible in their own words. This allows us to determine what is important to jurors, which issues are undeniably critical to address, and any additional obstacles to overcome. The results offer a clear, quantitative picture of how jurors categorize and weigh evidence and arguments in your case, and provide clarity on the best sequencing of those arguments.

Although placed in the role of lawyers, *Advocacy Research* groups often create arguments that you hope jurors will use to argue your case in deliberations.

5. Liability and Damages Research

Since jurors naturally look to share the blame in litigation, *Liability Research* tests which issues, facts, and evidence are most likely to increase or decrease the desire to place responsibility on the various parties in the case. At various points in the plaintiff and defense cases, jurors are asked to apportion responsibility. Then discussions are held with jurors to pinpoint exactly which issues, arguments, evidence, and testimony tend to increase the placement of fault on each of the respective parties. This response path is put into a model which tracks which variables in the case change the finding of fault and recommendations are made to upwardly adjust or eliminate this decision-making path that jurors will take on the road to assigning blame. This group also recreates the natural dynamic of jurors to negotiate fault in deliberations.

Similarly, *Damages Research* studies which of these variables increase or decrease the desire to award damages. This research especially tracks which emotional aspects of the case tends to increase or decrease the desire of the jurors to award damages. Additionally, this research



looks at anchoring points, or how jurors may use random evidence in the case to decide on non-economic damages such as emotional distress and pain and suffering.

6. Theme and Story Development Research

Lawyers present cases - jurors hear stories. Every case has a unique story. These *Theme and Story Development* groups identify the best storyline to thread through each phase of your case that will help jurors identify with your side. This research project is especially useful in developing opening statements and closing arguments.

We all receive information through a narrative, present in all our modern media – internet, books, newspapers, film, and television. Most Americans rely strongly on story-telling structure – ‘In Washington this morning...’ is another way of saying ‘Once upon a time...’. People hear information through their own filters, and without proper story structure, they fill in the elements themselves using their own experiences and biases. These research groups help define the best story by examining five elements: Character, Narrative, Point of View, Environment, and Structure. Respondents are presented with case facts from both sides, and then recreate the story line as they see fit, stopping to see what additional information they need to fill in the story they naturally want to tell. Jurors then, in their own words, help to fill in the gaps and substance of the story, providing counsel with the most resonant, believable sequencing and narrative structuring consistent with the evidence in the case.

7. Witness Reaction Research

Witnesses and experts can play a key role, and thus a great deal of juror belief or disbelief in a case hinges on their reactions to a witness. *Witness Reaction* groups test the credibility, believability, personal style, likeability, honesty, openness, and usefulness of the information that the witness presents, either live or via videotaped excerpts from a deposition. At crucial time points, the presentations are stopped in order to gauge respondents’ reactions to what they just heard. Thus, after each segment of testimony, jurors’ changing cognitive and emotional responses can be tracked and analyzed. *Witness Reaction* groups provide vital evaluative feedback on what jurors want to see and hear from a witness, as well as what truly resonated in the witness’s story. This group can also provide insight into what additional witnesses may be necessary to prove your case to a jury or to fill in informational gaps that the jury brought to light. Finally, this type of research can also gauge how jurors react to a witness’s nonverbal gestures and mannerisms which allows us to assess additional factors that may increase or decrease credibility.

8. Demonstratives/Graphics Research

People understand and interpret the world through visuals every day – through the news, television shows, the internet, and movies. The visuals tell the story with as much, or even more, of an impact as words. These focus groups gauge juror reactions to demonstrative



evidence and the graphics, testing which have the greatest impact, where confusions lie, and identifying areas of strength and weakness. After each graphic is presented, respondents discuss their reaction to it, the weight they give to the information, and any confusion that they may have. These reactions are tracked over time and analyzed for overall impact on jurors. Respondents make their own recommendations for what they would need to see to reinforce or strengthen your case, adding to the arsenal and increasing juror persuasion at trial.

9. Judges Panel/Mock Markman

A *Judges Panel* or *Mock Markman* project is designed to discover and organize the issues, evidence, and legal precedents needed for a bench trial, arbitration, or claim construction. The primary objective in this phase is to understand how judges evaluate case issues and make decisions as well as how to organize and present information to get the optimal receptivity from a fact finder.

To accomplish this phase of our research, we recruit a panel of retired judges. The trial team prepares short trial briefs that will be reviewed by the panel. Each judge provides information regarding: 1) their overall assessment of the case and their decisions regarding each of the critical issues; 2) their response concerning how the law applies to specific issues; 3) their judgment on which case facts and law would ultimately be included in their statement of decision; and 4) their observations and recommendations concerning the effectiveness of counsel's presentation of evidence.

After the judges reach decisions, we conduct a focus group to probe the underlying meaning behind the group's impressions and decisions. The attorneys can then conduct a question-and-answer session with the judges. The combined analysis of small group deliberation dynamics, individual questionnaires, and focus group discussions permits Decision Analysis to make recommendations in the following areas: 1) judicial decisions and commitment to those decisions; 2) impact of plaintiff and defense arguments; 3) defense and plaintiff vulnerabilities; and 4) requirements for legal research and arguments, expert testimony, exhibits, and evidence.

While similar in structure, a *Mock Markman* focuses on how to present a broad or narrow interpretation of the patent to our panel of Judges, including how to prepare a short, compelling visual presentation. While this research concentrates on how to present the intrinsic evidence usually favored in such hearing, we also look at the extrinsic evidence that might resolve patent language ambiguities. As with our *Judges Panel* research, we conduct focus groups with the judges to discern which evidence helps them favorably interpret the patent and what is needed to resolve confusion, ambiguities or vulnerabilities.



10. Internet Focus Groups:

This study can be conducted either as a cost effective alternative to regular focus groups or can be used to conduct larger studies with more respondents to get a larger group's view of a case to increase the reliability of the findings. This group would use recruited respondents to discern the jury pool's attitudes toward the key attitude, issue, and evidentiary questions in the case. These respondents are screened for jury qualification and direct participation or knowledge of the matter. They are then given a website code to login to the site where they will take the survey. Once they are logged into the website, they are asked a series of attitude questions on case related issues, including their exposure to the pre-trial publicity and what opinions they have formed. Next, they view condensed presentations of both the plaintiff and defense cases, including exhibits and even snippets of testimony as well as view short jury instructions. Finally they are asked to render verdict preferences on a series of case specific questions and then queried on their demographics and life experiences. These characteristics and attitudes of those who render a pro-plaintiff vs. pro-defense preference can be analyzed, defined, and rendered into a statistically reliable profile.



B. Mock Trials

Mock trials bring more structure to the research format, as the goal is to test the cumulative impact of the evidence, presentations and legal instruction on the dynamic decision making process of a jury. While focus groups delve into specific litigation issues and the qualitative aspects of a trial, mock trial jury research is designed to test jurors' probable decision-making path in a trial.

While focus groups are usually conducted with one group at a time, mock trials are typically conducted with two or more groups.

1. "Clopening"

Some cases can be presented in a mini-mock trial style, using a combination opening statement -meets-closing argument presentation (i.e., "Clopening"). While most mock trials warrant a full day presentation, some cases are simple enough that a mini-mock can be accomplished in less time. In the "Clopening" mock trial, attorneys give a plaintiff's "clopening" statement followed by the defense's "clopening" statement. Jurors provide ratings of their reactions to the presentations at each stage, so any changes in their responses can be tracked over time. After these presentations, plaintiff rebuttal and jury instructions, jurors deliberate to a verdict, providing valuable insight into how their verdict preference changed according to the presented evidence and the arguments of their fellow jurors.

2. Opening Statements/Closing Arguments

A full mock trial includes a series of presentations to best replicate the dynamic of a real trial. Typically, each side gives an opening statement and a presentation of case evidence, facts, and witness testimony. Subsequently, the plaintiff rebuttal presentation is followed by both sides' closing statements. Between each of these presentations, mock jurors provide ratings of their reactions to the presentations, the facts, and the issues. These ratings are collected at each decision juncture during the day, so that jurors' decision-making path can be analyzed and tracked to discover exactly which issues moved juror decision making at particular points. Finally, the mock jurors are given jury instructions, verdict forms and are divided into multiple deliberation groups to provide simultaneous feedback and repetition for greater research validity. The groups deliberate to a verdict on each claim and submit a damage award amount (if they choose to award damages). Finally, moderators probe into the reasoning behind their verdicts.



3. Witness Presentations (Live vs. videotaped)

In addition to the presentations described above, during the course of a mock trial, jurors can be presented with testimony from witnesses, either live or via videotaped clips. Jurors frequently want to hear directly from the parties or experts involved in a case to evaluate their testimony for themselves. They provide qualitative and quantitative evaluations of the witnesses including their credibility, likeability and informative value. Respondents offer suggestions on how to improve a witness's testimony or demeanor, and help to identify additional areas of testimony that they need to hear in order to enhance the case presentation.

4. Voir Dire

Before jurors hear any arguments of the case, a mini voir dire and jury selection session can be conducted to test voir dire issues, poll the typical community member on pre-existing attitudes, and test accuracy in predicting juror outcome through use of cause and peremptory challenges. The attorney for each side conducts a short voir dire session with all of the jurors. The jurors complete quantitative questionnaires that assess the attorney's rapport with them, what additional questions could be asked to elicit more information, and whether they felt that they were fully open with their answers. Finally, the attorneys and trial consultants meet to discuss their probable challenges and strikes (without actually dismissing the jurors). For the later juror deliberations, the jurors can be divided up into plaintiff strike, defense strike, and neutral juror groups. Or, the voir dire outcome can be used to create evenly weighted juror deliberation groups. Verdict ratings are collected from jurors after deliberations and can be compared to their baseline attitudes collected during the voir dire session to test for the predictability of the voir dire session and the attitude strength in jurors' initial responses, as well as which questions need to be included in voir dire to reveal relevant juror experiences or attitudes.

5. Multiple scenarios for multiple groups

Periodically, there are two (or more) themes or strategic paths that counsel wants to test. In this type of mock trial, a general presentation of the case can be delivered to give the entire groups a baseline understanding of the case. Then one or more of the groups can be broken out and given separate presentations on the various strategies. After studying how the different groups deliberate on the different presented issues, trial counsel can make a better determination of the proper strategic path.

6. Large Group Research

Large Group Research studies allow us to measure jurors' responses and characteristics that predispose them to one side or the other with greater statistical accuracy. A large group (60 - 200) of jury-qualified participants is usually gathered and given written questionnaires or



electronic response devices to answer a series of attitude, life experience and demographic questions. They are then shown or read a carefully scripted presentation of the case. Moment-to-moment measurements of their reactions to the presented material are taken or they fill out questionnaires at prescribed points to track how their verdict and case issue inclinations swing during the course of evidence and/or arguments. The groups are then broken into smaller discussion groups to deliberate or discuss the case. A verdict or issue preference is taken after these discussions to compare against the demographic, experience and initial attitude question data. With a larger sample size, greater reliability can be placed on a jury profile that measures verdict preference, apportionment of responsibility and damages amounts. Similarly, advanced text analysis can be used to detect language pattern in how jurors react and use presented key themes in the case or develop their own language to tell the story in the case. Additionally, *Large Group Research* can also be useful to break out separate groups to hear different test versions of the case in order to assess how these different versions of the case affect their verdict decision-making.

Statistical Models from Mock Trial Research

One of the goals of the research design is to obtain information about juror characteristics that may be related to their verdict preference. Specifically, are there certain characteristics that identify people who are more likely to vote for one side than the other? Or, are certain types of people more likely to vote for the plaintiff than other types of people? To this end, we develop questions that measure characteristics, attitudes, and experiences that may be predictive of juror behavior. This is done by statistical analyses of the relationship between jurors' responses to these specific questions and their verdict choice at the end of the case presentation. This analysis is included in a cumulative analysis of the focus groups and mock trial.

Once these relevant characteristics have been identified, it is important to know *how* important and predictive they are. More specifically, we need to know how to understand and organize these characteristics in terms of their utility and importance. For example, jury research may indicate that medical professionals are good for the defense in a case and that women are dangerous for the defense. What do you do, however, with the potential jurors who are both women and medical professionals? Moreover, how do you know that the relevance of one characteristic (i.e. career) is not an artifact of its relationship with another more important characteristic (i.e. education)? That is when a statistical model (an algorithm) becomes crucial.

Multiple Regression analysis provides an algorithm that weighs these characteristics and disentangles all of the relationships between them, thus producing a model that can be applied to a real jury pool. Using a juror questionnaire and voir dire questions that quantify these characteristics, the algorithm yields a rank ordered list of the most dangerous to the most favorable jurors in a particular jury pool. Additionally, these characteristics and relationships can be used to develop a predictive model (Multiple Regression analysis) for jury selection.



These characteristics along with a jury questionnaire and voir dire questions can be developed for trial.

Electronic Dial Responses

While most jury research is conducted using paper questionnaires, mock trial research can be conducted using an electronic dial response system. This is where each of the jurors has a dial that they hold during the research. They turn their dials to register responses to questions they are given before and after each of the presentations. Additionally, during the presentations they adjust their dials in moment-to-moment response to the evidence and arguments of the lawyers and the witnesses. All of these responses can be displayed for clients on monitors as they are watching the research. The display is a graphic line that rises and falls as jurors find the presentations more or less compelling. This allows the attorneys to pinpoint themes and even specific phrases which move or fail to move jurors.

Conclusion

Jury research is always interesting. A jury's insights and observations, their struggles and confusion, their disputes and conclusions are always compelling to watch. The real question is – is it useful? Does it help you as trial counsel, and your client, know where a jury is likely to go with the case? More importantly, does it tell you how to how to effectively position and present your case for the mediator, judge or jury? By precisely planning your research goals and choosing the best projects to answer your “need to know” questions, we can get a deeper understanding of jury and judicial decision-making and develop a better presentation strategy to influence the ultimate outcome of the case.