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OCTOBER 15, 2008

RISK REPORT: PUSHING THE LIMITS
page 66

Mission: Risk Ready

The U.S. Navy sets itself apart from other military branches by its risk management focus on individual risk.

page 26

U.S. NAVY Commander Allen McCoy pauses in front of the Naval Safety Center at Naval Station Norfolk, Norfolk, Va., where the U.S. Navy trains young aviators and officers in the basics of operational risk management.

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SPECIAL REPORT: ALTERNATIVE RISK
page 58

IN-DEPTH SERIES: CHRONIC PAIN
page 52

The Mock Shop

In some cases, mock jury trials can accurately forecast the amount of money actually awarded in a dispute, which can help carriers decide how much to settle for.

	Jury 1	Jury 2	Jury3	Jury 4	Average	Actually Awarded
Exxon-Valdez	$2 B	$3 B	$4 B	$12 B	$5.2 B	$5B
Heavy Equipment Burn Case	$25 M	$37 M	$112 M		$58 M	$55 M
AHDC vs. City of Fresno	$1,000	$1	$10,000		$3,667	$1

MEMBERS OF the jury in the fraud and conspiracy trial of former Enron executive Ken Lay and Jeff Skilling in Houston are shown in this courtroom sketch Thursday, May 25, 2006. Many companies resort to mock juries to get an estimate of the potential damages in a case. AP PHOTO/PAT LOPEZ

Trial by Science

A scientific perspective on predicting jury behavior and hopefully cutting costs at a time when verdicts can mean the difference between tens of thousands of dollars or millions of dollars. **BY GEORGE SPECKART, PH.D.**

The intervention by psychological research into assessing litigation exposure is generally considered to have begun in the late 1970's, although the study of jury psychology dates back to the 1950's with Hans Zeisel's seminal work in the criminal field.

The study of jury psychology was generally dominated by the focus on criminal juries until the last few decades, when damages awards in civil cases began to reach staggering levels. With the amount of money at stake reaching into the billions since the 1990's, more sophisticated means of estimating and forecasting exposure have become utilized in civil cases by trial teams and their consultants.

Over this time, jury consultants have been increasingly sought by trial teams and their clients to assist with the design and implementation of trial simulation, or "mock trial" research, focus groups, and other forms of pretrial research to determine which relevant themes, issues, and arguments

Summary

- Many practitioners calling themselves jury consultants have no formal legal or psychological training
- Engagement of a qualified jury consultant and engaging in mock trials can be a cost-effective way of arriving at settlement.
- Claims adjustors sometimes settle on hunches rather than science in deciding how much to settle for.

would be effective, and ultimately, to assess the probable verdict and damages dispositions of jurors.

Notwithstanding the popularized methods depicted in the film Runaway Jury, the methodologies utilized have adopted various approaches, with varying degrees of legitimacy, as far as scientific rigor is concerned. The types and backgrounds of jury consultants varies widely, but among those with a bent for scientific rigor, post-trial interviews of jurors from the actual trials were used as a benchmark to test the accuracy of pretrial research activities with mock jurors.

Over the years, data obtained from real jurors and actual trials became a basis for inferring the extent to which pretrial research with mock jurors was accurate, or "hitting the mark." This accumulation of knowledge led to more awareness of how jurors actually make verdict-related decisions in civil cases and the manners in which mock trial research could fail, resulting in significant refinements to mock trial research methodology for ensuring accuracy of the results.

As a result of what has now been a thirty-year period of testing and refinement, mock trial research has evolved to the point at which considerable accuracy is attainable, when the trial teams are willing to expend the time and resources to conduct scientifically valid research.

But Does It Work?

In research language, the term "validity" refers to the extent to which research results can truly be used to infer real-world outcomes; in other words, are the results of a mock trial actually predictive of deliberation outcomes in a real trial? The table in the illustration above shows results of mock trial research that accurately forecasted verdict and damages from real trials. These results have been selected from hundreds of potential results in our existing database.

I have seen, for example, spreadsheets for jury verdicts on asbestos cases in New York, and the results ranged from about $500,000 to $115 million.

The first one shown, from the litigation surrounding the Exxon Valdez oil spill of June, 1989, was focused exclusively on punitive damages, since that was the sole area of the trial team's interest. Four mock juries awarded an average of $5.2 billion, and subsequently the real jury awarded $5 billion. It should be noted that Exxon's stock went up immediately after the jury verdict, as Wall Street had expected a potential punitive award of $10 billion to $15 billion, and that Exxon ended up agreeing to pay less than $500 million in the second half of 2008.

The second project involved one of the world's largest heavy equipment manufacturers, in which an operator received third degree burns after leaking brake fluid ignited. The client settled out after the mock trial, while the remaining defendants (who

Some attorneys say that they do in fact conduct "research" by conducting archival searches of verdict records on similar cases.

did not conduct mock trial research) received a $55 million judgement against them delivered by a Los Angeles County jury.

In the third case, a discrimination suit was brought by a housing developer against the City of Fresno. While the jurors agreed on liability, they did not think damages were warranted to any significant extent and the results were consistent throughout the research and real trial.

Of course there are situations in which predictions can go wrong, particularly with unfortunate rulings by the court or unexpected performance by key witnesses. But, overall, barring unusual circumstances, the science works – as one might expect, if one obtains a representative sample of test respondents, and provides the input that the real jury would receive at trial, it is a simple proposition that the sample will do more or less what the real jury does in response to the same stimuli.

Don't Try This At Home

In practice, however, trial teams are all over the map as far as their assessments of the true utility of using a jury consultant. The reasons for this difference in opinion are rather straightforward, however, from a scientific point of view: Mock jury research is psychological research, which is well-known in academic circles as having serious pitfalls in terms of methodology. In actual practice, however, the reality of the jury consulting field presents something far different than the rigors of academia.

In the litigation world, there are no barriers to entry in the jury consulting field, and the only requirement for becoming a jury consultant is to assert that you are one. As a result, the field is full of practitioners that come from all over the place, from cooks to bottle washers, amateurs in terms of their training, who are designing "psychological research" or mock jury research for corporate clients in multimillion dollar cases.

Since litigators typically make choices on jury consultants based on whom they like instead of whom the jury consultants are (in terms of background and credentials), the result is a great deal of poorly designed research, leading to the perception that mock trial research is inherently unreliable.

As a result, those who make settlement decisions are apt to doubt the reliability of the research when coming up with a dollar figure for dispensing with a case, and end up instead making such decisions based on hunches. Losses connected with these hunches are generally more expensive than the costs of scientific jury research.

Alternatively, cases are settled on the basis of "nuisance factors" and a myriad number of corporate or management decisions that are far afield from

the central question of what a jury would actually do with the case, and what the true exposure is in dollar figures from the standpoint of the courtroom floor.

In a legal malpractice case involving potential damages of nearly $100 million, I was discussing the possibility of conducting a mock trial with lead counsel. She told me, "If the client can settle it for under $10 million, they are going to do that." I asked her, "What if a jury would only award $5 million? What if a jury would only award $2 million? What if the jury would give a defense verdict?" Her reply shocked me: "They don't care," she said. I sat back in my chair and tried to absorb the implications of this position.

The first factor that came to mind was an ethical one: Is it acceptable to spend someone else's money unnecessarily? If you can take a case to court and win, or get out with a $5 million verdict, is it ethical to pay $10 million to "make it go away"? Moreover, is it ethical to pass on the opportunity to find out what the jury outcome options are? Ultimately this case did settle for an amount that "seemed reasonable" and no one actually determined what a jury would have done with the case.

Some attorneys say that they do in fact conduct "research" by conducting archival searches of verdict records in the venue on similar cases. I have seen, for example, spreadsheets for jury verdicts on asbestos cases in New York, and the results ranged from about $500,000 to $115 million.

Obviously, the results' key variables are not the facts that asbestos caused the injury and New York City is the venue, since all of those verdicts had those facts in common. This example is not extreme, yet lawyers and claims personnel in the insurance industry commonly use these spreadsheets to attempt to put a value on their cases.

When the diversity of the numbers is too great to arrive at a point estimate, the preferred methodology is then to resort to the "hunch." Those in the field will use different terms ("intuition based on experience") but the end product is still the same.

In another matter, after he was advised to try a mock trial, an attorney dismissed the idea as a "luxury." The team subsequently went to trial and was hit with a $60 million verdict. The flip side occurred when a former senior vice president of claims for a major insurance carrier, now deceased, stopped his subordinate claims handler in the midst of writing a check for $750,000.

"We're going to do mock trials," he said. When three juries came back at under $250,000, they came back to plaintiff counsel with a new position:

"We'll offer you $400,000 – take it or leave it." The plaintiff took it, and as a result the insurance carrier saved $350,000 in the process (minus the cost of the mock trial research - about $40,000). With the certainty of valid science on its side, the insurance carrier stared down his opponent during mediation and the opponent "blinked."

The obvious cost effectiveness of valid research, however, escapes most decision-makers at settlement time.

Quite often, we hear from trial teams who may be ambivalent about conducting research. Then, during mediation, numbers – frequently in the millions – are somehow "divined" with no factual basis whatsoever for inferring what a jury would actually do with the case. The typical result is settlement based on the same type of hunch that the claims adjuster in our previous example was making in writing the initial check for $750,000 in the first place.

What is noteworthy about the incident in which the claims adjuster was writing the check for $750,000, however, is that the damages were always expected to be below $1 million, yet the insurance company derived a clear benefit from conducting the research.

Most of those in a position to utilize jury research automatically assume that cases under $1 million are "not worth it" or "do not warrant this type of work," yet here is just one clear instance of a rate of return on investment of over 800 percent (a savings of $350,000 based on research costs of about $40,000). This case is one of literally hundreds from our company's archives.

Imagine how much could be saved in the type of case mentioned at the outset, in which the trial team simply decided that, if the case could be settled for under $10 million, they would take the deal. Moreover, once again, the ethical issue arises – whose money is being wasted here? How much money is being gifted to plaintiff counsel and their clients when parties resort to "instant settlement" instead of taking a tough stand based on research? Is there accountability for this? If so, where?

One insurance professional told me, "a lot of claims adjusters do not want to spend $50,000 out of a claims budget in order to save $200,000 from an indemnity budget."

What Do Clients Want?

The fate of jury consulting will ultimately hinge on what the litigators, their corporate clients, and the insurers actually want. If the focus is on saving money by the insurers and corporate clients by attempting to control monthly bills and short-term expenses, these decision-makers will be unlikely to realize the types of long-term economic benefits afforded by well-conducted scientific, jury research. While insurers and in-house counsel who manage their trial teams certainly do care about winning, they are typically evaluated based on their performance in suppressing short-term tangible costs. Minimizing settlement amounts or jury awards, based on scientific research, is not part of this calculus. When the rubber hits the road at decision time, the types of research expenses that guide mediation or settlement are frequently rejected as a "luxury" or "too expensive," even though the expense of paying higher settlement amounts down the road dwarfs the costs of the research.

One key complication is how companies budget their management of exposures. In the insurance industry, claims budgets and indemnity budgets are typically separated, and the costs of pretrial research, like legal defense costs, are drawn out of the claims budget, while jury verdict awards or settlement amounts come out of the indemnity budget.

But those who make the decisions on whether to use trial sciences are often evaluated based on how they handle their claims budgets. An insurance insider told me, "A lot of claims adjusters do not want to spend $50,000 out of a claims budget in order to save $200,000 from an indemnity budget."

So the claims adjuster will guess at a settlement amount in order to keep the claims budget low, rather than spending the amount it takes to conduct the research to scientifically ascertain the true value of the case and save money in the indemnity budget.

Scientific research can create considerable saving when settlement discussions pinpoint an actual number based on what a jury is most likely to do with a case. Obviously, the fact that settlements are arrived at based on a number of factors will continue to play a role in how they are reached in modern litigation.

But in many instances there are – or should be – clear economic factors, an impetus for cost-effectiveness, and even ethical issues that will put the decision-makers' feet to the fire with the burning question, "What would a jury actually do with the case?"

It is imperative that decision makers are aware of the fact that, when well-designed research is carried out by those with the requisite methodological training and experience, the answer is available – and ought to be utilized.

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