

Jury Research and Trial Outcome Prediction

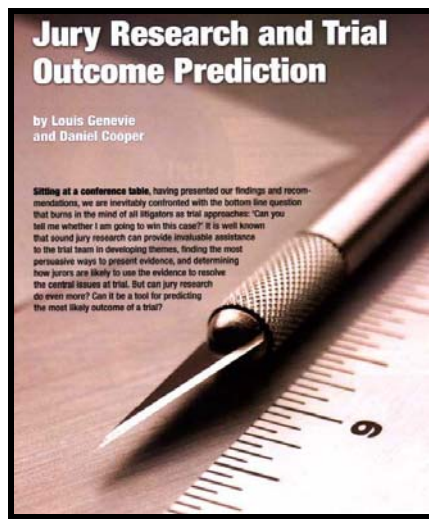
By Louis Genevie, Ph.D. and Daniel Cooper, Esq.

Sitting at a conference table, having presented our findings and recommendations, we are inevitably confronted with the bottom line question that burns in the mind of all litigators as trial approaches: ‘Can you tell me whether or not I am going to win this case?’ It is well known that sound jury research can provide invaluable assistance to the trial team in developing themes, finding the most persuasive ways to present evidence, and determining how jurors are likely to use the evidence to resolve the central issues at trial. But can jury research do even more? Can it be a tool for predicting the most likely outcome of a trial?

The short answer is that jury research can be predictive within the limits of any science, if certain conditions are met. Of course, most jury research is not designed to be predictive. Most jury research is aimed at understanding jurors’ hierarchy of facts and issues in the case, critical for theme development and strategic focus. In highly technical or complex litigation, for example, early phases of research may focus on specific issues or isolated topics, such as medical causation in a products liability case or the technology that forms the foundation of a patent infringement case. It would be ill-advised for counsel to consider the outcome of this type of early testing to be indicative of the likely outcome of the case at trial. Issues interact with one another, and there are a host of intervening variables that negate the predictive value of such preliminary endeavors.

Our experience has shown, however, that jury research can be predictive if three essential elements are present: 1) accurate anticipation of the central themes both sides will present to the jury at trial, 2) probable juries that accurately represent the jury that will hear the case at trial; and 3) replication of the findings to insure their validity and reliability. (Litigation Strategies, Ltd.’s *Mock Voir Dire Program*, designed to create the *Probable Juries* noted in this article is protected under U.S. Patent 6,607,389 “Systems and Methods for Making Jury Selection Determinations” issued to Louis Genevie, Ph.D., August 19, 2003).

It is possible for jury research that does not meet these criteria to be predictive, but to be so requires estimation and interpolation of the actual bottom line findings in a way that takes these criteria into account.



ACCURATELY ANTICIPATING THE CASE THAT WILL BE TRIED

Accurate anticipation of the case, while important for any jury research, is indispensable for research that is intended to be predictive. A failure or serious flaw in anticipation will severely handicap the research effort’s predictive value. Trial lawyers readily accept the concept of anticipation and its importance to trial preparation. However, the ease with which the concept is accepted belies the difficulties of doing it, and doing it well. Time is often perceived as one of the key obstacles. The value of building the opposition’s case is difficult to perceive in the same way as building your client’s case and typically gets much less attention, despite the fact that everyone agrees that it is essential.

Anticipation requires the thorough assessment and identification of the key facts, issues, arguments and themes on both sides of the case, with special attention focused on the opposition’s strengths. While this is a process that trial counsel has typically been engaged in on some level from day one of the litigation, we find that it often needs considerable refinement before the case can be presented to mock jurors.

Beyond a commitment of time and effort to develop a complete understanding of both sides of the case, is the trial team’s willingness to confront the strongest, realistic case the opposition can put together. No one likes to deal with the most

difficult problems in a case, even though everyone would agree that it is healthy and constructive to do so. The psychological barriers to accurate anticipation of the opposition are often difficult to recognize in ourselves. It is human nature to try to avoid confronting the worst case in any situation, even when the need is clearly recognized. How often have we heard trial counsel say, 'I'm going to stay away from that issue, it can't help us', only to have us point out that the opposition is not likely to stand by and let that happen. For jury research to gain predictive validity, the adversary's case in its most difficult, yet realistic configuration must first be anticipated, written in summary form, and delivered to several panels of mock jurors, whose responses are then analyzed in detail.

The creative analysis and application of research findings to inform and improve anticipation is also indispensable to prediction. Anticipation is, at its core, a continual process of re-examination and re-formulation of both side of the case. For research to serve a useful strategic and ultimately a predictive function, the analysis and interpretation of the findings must elevate the data from the informational level to the point where information is transformed into knowledge and, ultimately, into trial strategy and tactics.

The process of integrating initial research findings into overall case strategy and tactics forces the trial team to work through each issue in the case through the eyes of jurors on *both* sides. As a result, by the time the actual trial commences, counsel has gained insights that normally are only apparent at the end of trial. After a defeat, what losing trial counsel has not thought: "If I had only done this or that differently, would the outcome have been different?" Knowledge gained from hindsight is good, but often gained at great cost. Foresight derived from knowledge gained through repeated, and ever more refined research, has greater value, and is essential in predicting the outcome of the case. This is because

the knowledge gained from each phase of research, appropriately applied, brings us one step closer to the best possible case for each side. By integrating the learning from each phase of work into the next, and then retesting, awareness of how the case will actually be tried is sharpened, assuming both sides have done the research necessary to become aware of the way jurors see the issues, and apply that knowledge at trial.

The development of accurate anticipation need not stop with the creative application of research findings, but should reach even higher to the level of trial wisdom. At this level, the knowledge derived from the research is integrated with other knowledge that the trial team has at its disposal: knowledge of the judge and the witnesses, knowledge of the law, knowledge from past experience on related cases, knowledge of the client and the opposing counsel. Such knowledge gained from other research and direct trial experience helps to create the most persuasive case, again bolstering anticipation of what will actually occur at trial and with it, the predictive value of the research.

If each side works to develop its best case and presents it at trial, and if we have worked through the issues on both sides beforehand so that we have tested both sides' *best case*, we will have accurately anticipated the opposition and by doing so, we will have increased the predictive validity of the research. And if the opposition does not find or present its best case, the chances of winning increase substantially anyway, and the prediction -- presumably a positive one if the decision has been made to try the case -- would be accurate then as well.

CREATING PROBABLE JURIES

Sound scientific research begins with an appropriate research design and analytic methodology. There are a plethora of design issues that have a substantial impact on the validity and reliability of any research. From the size of the sample to the length of the

case summaries, every detail is important, and most of these issues have been dealt with elsewhere.

Among the most significant and rarely addressed design issues is the creation of the mock juries that will hear the case during the research exercise. To create the most predictive panels, a mock voir dire conducted prior to the trial simulation is essential. Going through the voir dire process allows for the creation of panels that more closely resemble the actual jury that will hear the case. This is because actual cases are not tried to randomly selected juries, but rather to a group of jurors remaining after the voir dire process has been completed.

Even in Federal Court, with its typically limited, judge directed voir dire, the jury selection process, a missing element in almost all jury research, has an impact on who actually sits on the jury. In many State courts, the difference between random samples of jurors and actual juries can be even greater. This is especially true in States as New York, Florida and Texas where there is substantial opportunity for attorneys to directly or indirectly place their case themes before the venire, gather detailed information about prospective jurors and build credibility during a more open, lawyer directed jury selection process. As a result, juries that actually hear cases are often highly filtered, and at times substantially influenced by the voir dire process. Their decision making process is not likely to be reflected in a random sample of the venire, and jury research that uses the random selection of individuals to create mock panels will often fall short when it comes to making accurate outcome predictions. The opportunity to take advantage of counsel's initial encounter with the jurors is missing, and the mock panels will probably not reflect the important characteristics of jurors who are likely to actually hear the case. Research juries that result from a mock voir dire are much more likely to reflect the jury that will actually hear the case, and are therefore far more predictive of the actual verdict at trial than

randomly selected panels. In addition, probable juries provide a more accurate identification of jurors' hierarchy of case issues, critical in formulating the best strategy and tactics for the case. Stricken juries are also important as they provide invaluable thematic guidance as they go head to head during their deliberations on the key issues in the case.

Whatever process is utilized to create probable juries, it is important to include voir dire planning and training as part of building the predictive model. Besides identifying jurors closer to those who will actually decide the case, the process of voir dire itself can have an impact on the outcome of a trial. The attitudes that jurors bring to the trial and the first impressions they form about the case and about counsel often have a lasting impact on how they hear and use the evidence presented. It is not an easy task to communicate trial themes effectively, while being truly bias seeking during voir dire and a mock voir dire provides counsel with an opportunity to practice a trial skill that even experienced attorneys rarely get to use. Such practice is particularly important when trial counsel travels to a venue in which he or she is an 'outsider', unfamiliar with the local rules, traditions, and general character of the local population. This lack of familiarity can place even the veteran trial lawyer at a disadvantage, when confronting experienced local counsel. Improving the quality of jury selection, especially in venues that permit extensive lawyer conducted voir dire, is another important aspect of insuring reliable prediction because without the anticipated audience, the chances of accurate prediction are reduced dramatically.

REPETITION AND REPLICATION: ONCE IS NOT ENOUGH

When the research design is well planned and executed and the analysis elevates the resulting data from information to knowledge to trial wisdom, jury research can be predictive. The *reliability* of the

prediction, however, comes from following the basic scientific method: theory formation, testing, reformulation and re-testing until the case is fully developed and the results are replicated. This is essential because any research process can be flawed, if not by a lack of experience or effort, then by chance factors as sampling variability, which is always present, although limited when a mock voir dire is conducted before a trial simulation. Replication of the findings limits the potential effects of chance variation in the outcome and is a vital element in the prediction equation. But remember, science yields probabilities, not absolutes. No trial is without some risk of an adverse verdict. By using the procedures outlined above, that risk can be minimized.

Repetition is one of the keys to increasing the accuracy of prediction and thereby reducing risk. The process of repeating and improving research on the case one step at a time allows the trial team to accomplish a number of objectives. First, repetition creates the opportunity to improve anticipation. With each phase of research, anticipation of the case that each side will present at trial becomes more refined and more accurate. Repetition also allows for the consideration of additional or different variables. For example, different evidence can be introduced to fill gaps or misunderstandings that jurors expressed in prior exercises, the effectiveness of graphics can be tested, witnesses examined and assessed, and the tone of the presentation and impact of trial counsel can be tested. The process of replicating research permits the trial team to analyze all of the many variables that they may confront at trial. Most important, it reveals how consistent the mock panels' verdicts are when tested over a period of time, and it is the consistency of the outcome that ultimately provides an empirical basis for assuring accurate prediction.

CONCLUSION

Jury research can never be a guarantee that there will not be an adverse verdict at trial. Nor is it a guarantee that a predicted outcome will actually occur. However, well designed research, strategically applied, can both *reduce* and *predict* the probability of an adverse outcome. The impact on both the result and the predictability of the result start from the earliest phases of the research planning process. While a multi-phased research design yields much greater reliability, the predictability of a case is enhanced each step along the research path. Research, even predictive research, should not be avoided because of a fear that there is not enough time, money or inclination to reach an ideal level of confidence. There is much to be gained from the first step of a well conceived research program, even if it were to go no further. However, predictability is a difficult goal to achieve and predictions based on one phase of research should be given, and heard, with a great degree of caution. Even when the research has been well designed, the positions of the parties accurately anticipated, and the results creatively analyzed, applied and replicated, there will always be some margin of error. For example, in one case we worked on that met our prediction criteria, we ran twelve additional focus groups for jury profiling purposes after the case was fully developed. All the groups saw the same videotaped presentations of the fully developed case. Deliberations among nine of the groups resulted in defense verdicts, as we predicted. Two of the groups were hung and one found for the plaintiff. This case had less than a 10% chance of resulting in a plaintiff's verdict, and by making sure during jury selection that a stealth plaintiff leader did not get on the panel, we were able to accurately predict victory in the case.

Where a specific case falls in the range of unavoidable risk depends on the company being sued and the nature of the claims against it, the judge, the venue, the lawyers

involved, and the extent to which local rules permit substantial, lawyer directed voir dire. Some cases are easier to predict than others, and some are completely unpredictable, as a priest sexual abuse case we worked on some years ago. The first three groups who heard the case, involving a long term sexual relationship between the priest and a teenaged female parishioner, split in three different directions: one group was literally ready to hang the priest; another group wanted to let the priest off with minimal punishment since the young woman 'consented' and they were 'in love'; and a third came to a more moderate verdict. Findings as these may not lend themselves to accurate prediction of the outcome even with additional research and the case was settled soon after we reported these findings.

The venue where the case will be tried is also particularly important in understanding how accurate your jury research is likely to be in predicting the outcome of the case. In more politically conservative venues, as in much of the mid-West, for example, with experienced trial counsel and extensive voir dire, the risk of a case we predict as a win going against us is very limited. However, change the venue to a high risk venue like Washington, D.C., for example, change the lawyers, and change the voir dire procedure, and the risk of a good case going bad can increase substantially, apart from any efforts on the part of your jury consultant.

And finally, it should be recognized that the best trial strategy can be handicapped by a number of variables completely outside the parameters of jury research. These factors include adverse evidentiary rulings just before the start of trial, or adverse jury instructions on key issues just before deliberations. Moreover, trial counsel can fail to execute properly; witnesses can collapse on the stand; exceptional opposing counsel may raise his or her case to an unanticipated level; and an emotional or highly sympathetic plaintiff or one with strong ties to the community where the case is tried can overcome even major holes in his or her case. Many of the variables noted above can and should be anticipated. In the end, however, uncertainties will always be a part of the calculus to be included in the analysis of jury research results, not a basis for arbitrarily disregarding the predictions they yield when appropriate prediction criteria are met.

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