How Jury Simulations Can Trim Litigation Costs

By Jeffery R. Boyll, Ph.D.

The rising cost of litigation has become an issue among defense attorneys and their clients.

Insurance and corporate defendants are finding that pre-trial jury simulations and mini-trials are an invaluable source of information to maximize settlements, reduce litigation costs and promote alternative dispute resolution.

Pretesting case exposure and potential jury reactions with trial simulations is not a new concept, and, in fact, has become a routine procedure in major litigation. Noted trial attorney Donald Zoeller, referring to the use of jury researchers, states: "It's gotten to the point where if the case is large enough, it's almost malpractice not to use them." (Wall Street Journal, October 1989).

If trial simulations have been little publicized, it may be because the results (and the costs) are often kept hush-hush, with consultants working behind the scenes and their clients perhaps a bit embarrassed to acknowledge that they have resorted to what some see as "social science trickery."

Traditionally used to obtain an inside edge at trial, jury trial simulations have begun to find their way into the insurance and corporate executive's arsenal of legal weapons to reduce losses and trim litigation costs. They can be conducted relatively inexpensively—often for less than $10,000.

Simulations go far to improve evaluations of potential liability and damages by previewing the anticipated outcomes of cases in three ways:

- By facilitating an early settlement before costly litigation is undertaken.
- By increasing negotiating power when the results clearly reveal that the plaintiff's demands are excessive.
- By testing the advisability of Alternative Dispute Resolution (ADR).

Facilitating Early Settlement

A growing area of concern for insurance and corporate clients is the skyrocketing cost of going to trial.

Frequently, thousands of dollars are spent on attorneys' fees, expert witnesses and other litigation costs only to reach a settlement at some point before the actual trial. With that in mind, most companies evaluate their cases to determine the cost-effectiveness of settlement vs. jury award plus litigation costs.

Jeffery R. Boyll

Interestingly, decisions regarding anticipated jury awards almost always take into account a subjective evaluation of intangible variables, such as sympathy, how witnesses will be perceived, bias against defendants and perception of liability and damages. However, the fact that defendants are sometimes shocked by adverse awards is testimony to the fact that this is an inexact science.

Logically, much of the guesswork can be taken out of this process by conducting systematic and carefully controlled assessments of actual juror reactions.

Those experienced in the game know all too well the difficulty in predicting jury awards. For example, in a recent wrongful death suit, a mediation panel recommended a $700,000 settlement. The plaintiff was willing to accept, but the defense chose to proceed to trial.

Defense attorneys had expected a verdict no higher than $2.5 million. The jury returned a $10 million verdict. The decision to proceed to trial cost the company $9 million.

Juries, sometimes swayed by emotions, sympathy and other non-evidential aspects of the trial, may award huge sums of money to injured plaintiffs. Facing the possibility of disastrous consequences, insurers, corporations and other parties named as defendants often feel pressured to increase settlement offers.

Clearly, how jurors arrive at decisions regarding liability is a complex process and attempting to predict jury damage awards solely from prior precedence or actuarial data overlooks the dynamic realities of the human decision-making process.

Improved Negotiating Power

In negotiating, a familiar maxim is that "information is power." Plaintiff attorneys attempt to capitalize on the idea that the jury will sympathize with the "poor little plaintiff" and be adverse to the "big bad corporation or insurance company."

Using actual jurors to test the effects of pain and suffering and punitive-damage claims reduces the plaintiff's ability to substantiate exaggerated damages. When the jury research is conducted by an independent firm, it may be revealed to the plaintiff that, in the interest of a fair and equitable settlement, the company invested in objective independent case research. The results may not substantiate the requested damages.

To be effective however, the company must be prepared to provide the plaintiff with the research results so that objectivity is not in doubt.

In some cases, the plaintiff attorney's realization that a hard-line bargaining position has been based on more substantive data will soften settlement negotiations. In other instances, plaintiff attorneys may welcome this data to convince an unrealistic client to consider a lower settlement figure.

Alternative Dispute Resolution

Essentially, the limits of ADR are restricted only by the creativity of the parties. However, traditional forms are often rejected by plaintiffs who feel that a jury will be more sympathetic than, for example, an arbitration panel.

Many courts are experimenting with the Summary Jury Trial, in which both attorneys present their cases in a highly condensed and summarized fashion. In the same manner, a trial simulation, conducted outside of the court and early in the negotiations, may provide an expedient and cost-effective resolution to certain cases.

If all parties agree that the results of such a trial are binding, minimum and maximum award limits are typically agreed upon ahead of time. This reduces the risk for both sides and promotes a win-win solution. Plaintiffs may accept this option because they feel they had their day in court and didn't have to wait years for a trial date.

When Jury Research Won't Work

Trial simulations are not for every case. A key determination must be made regarding completeness of case information available and the potential for surprises at trial.

From a prediction standpoint, this type of research will only be effective if the majority of the key issues and anticipated testimony can be ascertained. ◊

Jeffery Boyll is a consulting psychologist and president of Litigation Research Technologies of Phoenix, Ariz.

Garamendi Makes Changes In Ins. Dept. Management

California Insurance Commissioner John Garamendi has appointed veteran Department of Insurance analyst Norris Clark to the DOI's newly created chief of financial surveillance position.

In his new post, Mr. Clark, who has been a DOI employee since 1973, will head the departments Financial Analysis, Financial Examination and Actuarial divisions. He will report directly to the commissioner.

In other personnel developments, Commissioner Garamendi recently promoted Ramon Calderon to chief examiner of the Field Examination Division. A 14-year veteran of the DOI, Mr. Calderon replaces Jerry Reiley, who recently left the Department to take a job in the private sector.

As chief examiner of field operations, Mr. Calderon will be responsible for comprehensive on-site financial, rating and market-conduct examinations.

Mr. Garamendi also has appointed Schuyler "Sky" Johnson to head the Department's Consumer Services Division. The post has been vacant since the commissioner took office last January.

"These changes reflect our continuing effort to better monitor the financial stability of insurance companies and deliver the highest level of assistance and responsiveness to consumers," the commissioner said. "I am delighted to both reward outstanding insiders with deserved promotions and bring superlative new talent to the organization." ◊

EVENTS

Golden Gate CPCU To Hold 'I' Day

The Golden Gate Chapter of the Chartered Property and Casualty Underwriters will hold its 43rd annual Insurance Industry Day Nov. 1 at the San Francisco Hilton.

The event will run from 7:30 a.m. to 2:30 p.m. Keynote speaker is Dr. Thomas Tutko, a psychology professor at San Jose State University. Dr. Tutko's address is entitled "Winning is Everything and Other American Myths."

For more information contact Arlene Halligan at Cambridge General Agency, San Francisco. ◊