Reducing Litigation Costs

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The rising cost of litigation has become an issue among defense attorney's 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, Oct. 1989.)

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If you haven't heard all that much about trial simulations it may be because the results (and the cost) are often kept hush-hush, with consultants working behind the scenes and their clients perhaps a bit embarrassed to acknowledge resorting to what some see as "social science trickery." Indeed, much debate has centered over the imbalance of power potentially created by this typically very expensive service.

Traditionally utilized to secretly obtain an inside edge at trial, jury trial simulations have begun to find their way into the insurance and corporate executives arsenal to reduce losses and lessen litigation costs. What? Jury research reduces the cost of litigation? Indeed, trial simulations can be conducted relatively inexpensively (5 to 10 thousand) to improve evaluations of potential liability and damages. This "preview" of the anticipated outcome, can be used in three ways:

1) To facilitate early settlement — prior to turning the case over for potentially costly litigation.

2) To increase negotiating power when the results clearly reveal that the plaintiff's demands are excessive.

3) To test the advisability of Alternative Dispute Resolution (ADR). In this case the parties may agree on an additional binding or non-binding "mini-trial."

Facilitating Early Settlement

A growing area of concern for insurance and corporate clients involved in litigation is the skyrocketing cost of taking a case to trial. Often times, tens, and perhaps hundreds of thousands of dollars will be spent on attorney's fees, experts and others, only to reach settlement at some point before the actual trial. Due to this fact, most companies evaluate their cases to determine the cost-effectiveness of settlement vs. jury award plus litigation costs.

Interestingly, decisions regarding anticipated jury award almost always take into account a subjective evaluation of "intangible variables," such as sympathy, how witnesses will be perceived, bias against the defendant, 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 assessment of actual juror reactions to obtain answers to many of these questions.

Why are such critically important and potentially costly decisions made with solid information regarding prior "similar" cases, but only sketchy, subjective estimates of the impact of that particular case? Those experienced in this game know all too well the difficulty in predicting jury awards. For example, in a recent wrongful death suit, a mediation panel of three lawyers reviewed the case and recommended settlement for $700,000.

The plaintiff was willing to accept this sum to resolve the case, however, the defense chose to proceed to trial. At the very worst, defense attorneys had expected a verdict no higher than 2.5 million. The trial proceeded and the jury returned a verdict against the defense. . . levying damages in

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the amount of $10 million! They sought unsuccessfully to overturn the verdict. In effect, the decision to proceed to trial *cost* the company over $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. In response to the potential for disastrous consequences, insurers, corporations or other parties named as defendants often feel pressured to increase settlement offers.

However, this can result in unnecessary expenditures — due to the uncertainty and fear generated by unpredictable jury awards. For example, in a recent case the judge asked the jury to proceed with deliberations, despite the fact that the defense had upped their offer and "successfully" achieved settlement at $5.5 million. The jury deliberated, unaware of the settlement amount, and awarded the plaintiff less than $3.5 million. In essence, the defense "wasted" approximately $2 million.

Clearly, how jurors individually and collectively come to decisions regarding liability and damages is a complex process. Consequently, attempting to predict jury damage awards solely from prior precedence or actuarial data represents a dangerously constricted view of the dynamic realities of human decision-making and thought processing. That is precisely why pretrial jury simulations are becoming progressively recognized as a valuable tool to assist in difficult case evaluations. Some major insurance companies have begun contracting with jury research firms or even hiring in-house personnel in order to provide jury research on a more routine basis.

Improved Negotiating Power

In negotiating, it is well known 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 plaintiffs 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/unbiased independent case research. The results do not substantiate the requested damages. To be effective, however, the company must be prepared to provide the plaintiff with the research results including the stimulus presented to the surrogate jurors, so that objectivity is not in doubt.

In some cases the plaintiff attorneys' simple realization that a hard line bargaining position has now been based on more substantive data will soften in their negotiations. In some instances, plaintiff attorneys may welcome this data to convince an unrealistic client that they would be wise to consider a lower settlement figure.

Alternative Dispute Resolution

Due to the cost and time involved in modern litigation, various forms of ADR are becoming increasingly popular. Essentially, the limits of ADR are constricted 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" as a means of ADR. With this method, 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 the case. If it is agreed among the parties that the results are binding, a "floor" (minimum) and "ceiling" (maximum) award is typically agreed upon ahead of time. This lessens the gamble for both sides and promotes a win-win solution. Plaintiff's 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. In some cases, jury research cannot be conducted until shortly before trial. Unfortunately, under these circumstances the advantages of reduced litigation costs and promotion of ADR are significantly reduced. However, avoiding a lengthy trial may still be beneficial.

Summary

Jury research methods employ the same strict methodology used to determine facts in the scientific world. Through the use of case specific research designs and, in some cases, computerized statistical analysis, this research can provide reliable estimates of actual trial outcomes. Consequently, this information is useful in negotiations and settlement decisions. Since most cases are settled prior to trial, this information provides a vital edge that improves accuracy, promotes settlement and reduces losses to the company. Additionally, trial simulations may promote ADR and more expedient resolution of the case, thus reducing litigation costs.

"L.R.T. jury research results have been consistant with the outcome in over 96% of cases that have gone to trial."

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