

Jury Research



“Never forget, almost every case has been won or lost when the jury is sworn.”

Clarence Darrow

Howard T. Markey
Intellectual Property Inn of Court

Pupilage Group No. 5

June 2, 2015

Experience with mock juries and focus groups challenges conventional wisdom about how jurors react to evidence in general, expert testimony in particular, attorney preparedness and performance, and other parts of the trial process. A jury consultant and a trial lawyer explain.

By Sara Parikh and Terrence Lavin

Lessons from Jury Research



With the incredible stakes in major litigation, most trial lawyers leave no stone unturned in their preparation for the battle to come. As the parties get closer to trial, lawyers prepare deposition abstracts, witness examination outlines, opening statements and countless motions in limine. But while lawyers would like to think they can shape the decisionmaking process through careful planning, they must first know what evidence will be most persuasive to the decisionmakers.

In many major trials, the decisionmakers are jurors, ordinary citizens who fulfill their civic duty by responding to a jury summons and reporting to the courthouse. Most of them, of course, are ambivalent about jury service. On the one hand, they are interested in what happens in the courtroom and feel a sense of civic duty. On the other, they have lives to lead and often dread the thought of being taken away from those lives for a paltry sum (\$17.50 per day in Cook County).

These lay people come into the courtroom with a range of varied attitudes about lawsuits, corporations, lawyers, judges, and even juries. These attitudes provide the lens through which they evaluate a particular case and its parties. When jurors are deciding cases involving millions of dollars, it is wise for trial lawyers to consider using the services of a jury research firm that can help them to understand how the decisionmakers are likely to view their case.

In this article, we will briefly trace the evolution of jury research in this country. We then discuss some basic methods of jury research and – most interestingly – what that research has taught us about jury behavior. These lessons are useful to every litigator, even when thousands, not millions, are at stake and mock juries and focus groups won't play a role in trial preparation.

A brief history of jury research

As long as there have been juries there has been some form of jury research. Diligent lawyers informally interviewed their secretaries, their neighbors, even their cab drivers to try to understand how lay people might view their case. The more industrious lawyers put on abbreviated presentations in front of friends and family in their law offices.

Things got serious, however, when the field of professional market research began to mature in the second half of the Twentieth Century. Market researchers draw upon social science research methods to study human behavior and help commercial clients better understand their market and how to reach their customers.

Lawyers began to understand that their friends and family might not be truly representative of the venire and, because they were friends and family, might hold a bias that would influence their view of the case. Thus, the field of professional jury research emerged in the 1970s¹ when lawyers began working with social scientists to study jury behavior in a more systematic way.

While the field of jury research and consulting has matured since those early days, many of the social science techniques remain the same. Jury consultants use telephone

interviews, focus groups, and mock trials to help their clients refine their case strategy, evaluate witnesses and demonstratives, value their case, select a jury and debrief a jury after trial.

Basic jury research methods

Two common jury research techniques are focus groups and mock trials.

Focus groups. Because jury deliberation is a small-group process, focus group methodology is particularly suited to studying jury behavior. In traditional market research, a focus group involves an in-depth discussion with a small group of relevant consumers on a particular topic led by an experienced moderator.

The advantage of focus groups is that they encourage participant dialogue and interaction which researchers use to explore consumer reaction to concepts, products, advertising, and a range of other issues. Though they are generally considered to be qualitative exercises (rather than large-scale projectable surveys), focus groups are very helpful in identifying not just what consumers think and do, but also *why* and *how* they think and do what they do.

Jury researchers use this same moderator-led-discussion process to understand jury behavior. They work with counsel to put together a script that outlines the key arguments and evidence in the case. A professional, unbiased moderator then leads the participants through a group discussion, getting their reaction as they go through the story.

This is a particularly useful technique for identifying the strengths and weaknesses in a case. It is also helpful in the early stages of a case, because participants often raise questions that can guide discovery efforts and theory development.

Mock trials. The most common technique for studying jury behavior is the mock trial.² Like the focus group, mock trial participants are usually lay residents recruited to match the demographics of the jurisdiction. Mock trials often take place in established research facilities equipped

1. Neil J. Kressel and Dorit F. Kressel, *Stack and Sway: The New Science of Jury Consulting* (Boulder, Colo: Westview Press 2004).

2. Lawyers and jury researchers often use the terms mock trial and focus group interchangeably. For discussion purposes, a focus group is a moderator-led session; a mock trial is a session in which attorneys present the arguments and then the mock jurors deliberate.

Sara Parikh <sarap@ljs.com> is in charge of jury research at Leo J. Shapiro & Associates, a Chicago-based behavior and opinion research firm. Terrence J. Lavin is a Chicago trial lawyer and a past president of the ISBA.

with a one-way mirror for viewing.

The mock trial differs from the focus group, however, in a few important ways. In the mock trial, attorneys present an abbreviated version of the case before the participants. This generally consists of a brief presentation

Using mock trials, focus groups, surveys and other social scientific research methods, these studies have examined a wide variety of aspects of jury decision-making and behavior.

Below we discuss a few things we have learned from academic research on jury behavior and through our direct experiences in the cases we have worked on over the years. We also discuss their implications both in terms of trial strategy and conducting jury research.

The strength of the evidence. Legal and social science scholars who study jury behavior have found the strength of the evidence to be *the* most important factor in jury decisionmaking.⁴ To some

attorneys this will sound obvious; to others it will sound unbelievable. Either way, it cannot be emphasized enough. In every focus group and mock trial we have conducted, jurors spend most of their time focusing on the evidence.

Scientific studies of jury behavior support this finding. While pre-existing beliefs and extraneous issues might come into play during deliberations, jurors always come back to the evidence in front of them. We often hear mock jurors complain that one lawyer or another did not present enough evidence and instead just spent the allotted time arguing general principles or making ungrounded assertions.

Mock trial participants, like actual jurors, need to have specific evidence and facts to consider and react to in order to sort out potential liability. This means that showing demonstrative exhibits, including medical charts, police reports, accident reconstruction videos, timelines, etc., is critically important. How focus group participants and mock jurors read and interpret these exhibits can be especially illuminating and often surprising.

Further, jurors usually take a systematic approach in their discussion on damages. As such, damage suggestions should be anchored and explained so that the mock jury has a basis for evaluating and assessing damages as they would at trial.

Finally, the goal of jury research should not be to win the mock trial. Instead, it should be to learn and un-

derstand the strengths, and, more importantly, the weaknesses of your case. To identify and understand your own case's weaknesses, therefore, it is just as important to prepare and properly build the other side's case as it is to prepare your own.

The story model of jury decision-making. In trying to reach consensus, juries spend most of their time working with the evidence to fit the disparate pieces into a single, cohesive story.⁵ Evidence that does not fit the story either tends to get dismissed or serves to reframe the story.

Focus groups and mock trials are particularly helpful in identifying the confirming evidence, the disconfirming evidence, and the holes in a story. These exercises will also help the trial lawyer better understand the emergent story in her case. Thus, focus groups used early on in a case can help guide discovery and shape the theory of the case. Additionally, as the case progresses and the theory or theories evolve, focus groups and mock trials provide safe venues in which to test theories and see how they fit the evidence and how they resonate with potential jurors.

This opportunity to test a theory does not necessarily mean that you have to know what the story is before conducting a focus group or mock trial. Jurors don't necessarily need or want to be spoon-fed the full story.⁶ In fact, many jurors distrust lawyers and react with suspicion if the lawyer says "I am going to tell you a story."

While jurors (real and mock) need enough pieces to formulate a cohesive story, they like the discovery of figuring things out for themselves. Further, if you spell everything out for the mock trial participants, it will be more difficult to determine exactly what the jurors themselves bring to the table.

For example, attorneys in mock trials often purposely provoke discussion among the jurors by directly raising red flag issues such as lawsuit abuse and the so-called malpractice crisis. If

Jurors can be forgiving and are able to separate the lawyer from the case. But what they will not forgive is disorganization and lack of preparedness.

of evidence and a combined opening and closing argument. Demonstrative evidence is almost always used. Participants are instructed on the law and then deliberate on the case to reach a consensus.

While a moderator may be available to answer questions or probe certain issues, the mock jury, like the real jury, appoints a foreperson and leads its own discussion. Mock trials can vary in length and scope depending on the complexity of the case and the objectives of the mock trial. Some are held on a single evening. Others take place over a number of days.

The mock trial provides invaluable insight into case strengths and weaknesses, case themes, and damage demands. It also affords the opportunity to gauge lay reaction to physical evidence, demonstrative exhibits, counsel presentations, the plaintiff and defendant, and key witnesses (through recorded or live testimony).

What jury research teaches us about jury behavior (and vice versa)

Academic interest in jury behavior has matured over the past few decades. In the 1950s, Harry Kalven and Hans Zeisel, of the University of Chicago Law School, undertook the first large-scale study of the American jury system.³ Since then, countless studies of jury behavior have been conducted by legal scholars and social scientists.

3. See Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Boston: Little, Brown 1966).

4. See, for example, Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DePaul L Rev 327 (Winter 1998).

5. Reid Hastie, ed, *Inside the Juror: The Psychology of Juror Decision Making* (Cambridge Univ Press 1994); and Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Cambridge: Harvard Univ Press 1983).

6. James W. McElhaney, *People Like Their Own Ideas*, 93 ABA J 24 (Oct 2007).

you discuss such red flag issues in your remarks, you can count on the mock jury discussing the issues, but you will never know if it was important enough for the jurors to spontaneously discuss the issue on their own.

Expert witnesses. Research on jury reaction to expert witnesses has found that juries tend to be somewhat cynical about expert witnesses and will evaluate them through the same critical

This is seen as a sign of incompetence and disrespect for the jurors' time. It also makes it more difficult for the jury to sort out the case when the attorney is fumbling around with words or exhibits.

Finally, in post-trial interviews, one of the things that actual jurors express great frustration with is the amount of repetition at trial. Today, more than ever, jurors have busy, demanding lives.

Jurors understand the importance of jury duty but also expect the court and the attorneys to respect their time and commitments.

While it is appropriate for lawyers to emphasize and perhaps even repeat important concepts, too much repetition can backfire. Jurors appreciate lawyers who respect them enough to make a point

once or twice and then move on.

Jury instructions. Jury research has found that jurors often struggle with basic legal terms and at times disregard or even misinterpret complex instructions.⁹ If the actual jury is likely to be given complex instructions or interrogatories, it is helpful to test these during the focus group or mock trial. This will provide the participants with the context for decisionmaking, enable you to learn how your case fares when it is applied to the specific legal concepts in the case, and identify any potential problems that the instructions are likely to present during deliberations.

Jury selection. Jury research is often equated with jury selection. Yet jury research has found that only small percentages of Americans fall consistently at the pro-plaintiff or the pro-business end. Studies have found that few, if any, demographic or attitudinal characteristics are strong predictors of a particular juror's verdict in a particular case.¹⁰

Indeed, a 2006 study conducted by coauthor Parikh's firm on perceptions of the justice system,¹¹ found that most people hold complex and, at times, even contradictory views. For example, the research indicated that a majority of Americans believe that malpractice disputes make it difficult for doctors to

practice medicine. Yet, they also said that such lawsuits are needed to prevent mistakes. Similarly, a majority of Americans believe that there are too many frivolous lawsuits and at the same time that they believe that more laws are needed to regulate corporate behavior.

In short, the study found that we are less a nation divided than a nation conflicted. Contrary to the popular notion that the world can be divided into plaintiff and defense jurors, the study instead found a normal bell-shaped distribution of attitudes, with the majority of Americans falling somewhere in the middle.

Closing thoughts

Some lawyers tend to be dismissive of mock jurors who do not understand an issue or who might not share their view. It is not uncommon for a lawyer watching a mock trial to say "he would never get on the jury."

Yet, people of all kinds can *and do* get on juries. The outliers actually teach us the most about our case, if we are willing to really listen. This is why we do the exercise: to see what is relevant, what is confusing, what is convincing, and what is unpersuasive.

Whether or not you "win" the mock trial or focus group, you can learn much from the exercise about your evidence, your theory, your witnesses, your expectations, etc. Be willing to listen and learn, and, if necessary, restructure your arguments, let go of a pet theory, drop a defendant, accept the settlement offer, or perhaps roll the dice at trial – knowing that you have made an informed decision. ■

7. Scott E. Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va L Rev 1109 (Sept 1997).

8. Valerie P. Hans and Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 Ind L J 1297 (1993).

9. Phoebe Ellsworth and Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 Psychol Pub Pol'y & L 788 (2000).

10. M. Juliet Bonazzoli, *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, 18 QLR 247 (1998). Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?* 6 S Cal Interdisc L J 1 (1997).

11. *Public Perceptions of the Justice System* (October 2006), commissioned by Robert A. Clifford, Clifford Law Offices, available at <http://www.cliffordlaw.com/abaillinoisstatedelegate/public-perceptions-of-justice-11-17-06-final.pdf/view>.

Jurors place much greater weight on actual evidence and will ignore expert testimony if it does not add anything to the evidence, or if it contradicts the evidence.

eye they would evaluate any witness.⁷ In focus group and mock trials, we have found that jurors will place much greater weight on actual evidence and will ignore expert testimony if it does not add anything to the evidence, or if it contradicts the evidence.

For example, jurors will place much greater weight on their own interpretation of actual written policies or standard practices than they will place on an expert's opinion about standard practices. We have found that the most effective role of an expert is to explain or expand upon actual evidence or complex concepts. Mock trials and focus groups can be effective venues for testing an expert witness's credibility (through live or recorded testimony) but this testimony should be presented in the context of the evidence in the case.

Attorney style. Jurors respond best to counsel that are "middle-of-the-road" – those that display the appropriate amount of emotion for the case at hand. Jurors react negatively to attorneys whose presentations are too dry and detached, or too emotional.⁸ However, jurors can be forgiving and are able to separate the lawyer from the case.

But what they will not forgive is disorganization and lack of preparedness.

Reprinted from the *Illinois Bar Journal*,
Vol. 96 #4, April 2008.

Copyright by the Illinois State Bar Association.
www.isba.org

Services And Cost Estimate From ZMF Jury Research Company

ZMF No Longer Conducts Business

Cost Estimate Is From 2013 And Is For
Informational Purposes Only

Recommended Services

Trial Preparation Focus Group

This research format, often referred to as a “Mock Trial,” involves attorney presentations that summarize the case and issues to be tested, questionnaires designed to measure individual responses, and group discussions to simulate jury deliberations. The attorney presentations are a combination of opening statements and closing arguments and will include graphics and videotaped witness testimony. We provide you with analysis of both written and verbal responses, as well as strategies and recommendations for increasing the effectiveness of your case presentation to the jury at trial.

Key Benefits:

- Tests attorney presentations as well as key case arguments and themes
- Gain insight into effectiveness of cases themes
- Assess lawyer persuasiveness
- Identifies problem jurors which improves jury profile
- Measure witness credibility and demonstratives
- Gauge juror deliberations, verdict and propensity to award damages
- Part of our **Tablet-Based Research Suite**

Deliverables:

- Tabulated questionnaires
- Qualitative and quantitative analysis
- Jury profile recommendations
- Recommendations for *voir dire*
- Outline of case strengths and weaknesses
- Deliberation results
- Recommendations to guide trial strategy
- One DVD recording of presentations and jury deliberations

Cost Estimate: (One Day in the Central District of California)

2 Cell (24-30 Jurors) - **\$40,000** (labor)*

3 Cell (30-36 Jurors) - **\$48,000** (labor)*

**Expenses (facility, recruiting, participant payment, etc.) are additional and billed as incurred.*

Experience the Industry’s Most Advance Jury Research Product

**TABLET-BASED
RESEARCH SOLUTIONS**



401 N. Michigan Ave., Ste. 1100 | Chicago, IL | 60611 | www.zmf.com | @zmf_llc | 312.494.1700

This document contains privileged, confidential and proprietary information and expires in 60 days unless otherwise noted. Absent permission, the information in this proposal may not be disclosed, copied, or delivered to others.



zOpinion Online Venue Attitude Survey

A zOpinion survey is an online/Internet based survey, which allows us to quickly and efficiently solicit information from a large, scientifically reliable sample of jury-eligible residents in the trial venue. The survey results provide feedback on potential case issues and themes which will assist you in establishing a basis for your trial strategy.

In terms of implementation, a randomized sample of jury-qualified residents are contacted by Internet and interviewed. The interviews are drafted by ZMF consultants in collaboration with the trial team and consist of questions on demographics, experiences, perceptions, attitudes and reactions to the key case issues. A comprehensive report of survey results contains tabulated questionnaire results and suggested case themes, along with a preliminary jury selection profile.

Key Benefits:

- Large number of respondents (*100-300 responses nationwide or in a specific venue*)
- Provides insight on demographics and prevailing attitudes in a specific venue
- Uncovers juror bias and on potential issues and themes
- Assists in the planning of future research and trial strategy sessions
- Quick response rate (online presence allows for faster feedback)
- Low cost (no travel, lodging, or facilitation expenses)

Deliverables:

- Qualitative and quantitative analysis
- Tabulated survey responses within 48 hours
- Recommendations for future research and/or trial strategy
- Case themes analysis and recommendations

Cost Estimate: 20 Questions / 200-300 Responses - **\$15,000**

Case and Communication Consulting

Based on the research conducted in your case, we will help the trial team refine the case story, themes, witness testimony, and demonstratives. ZMF communication experts will assist in the preparation of an opening statement based on case strategy and themes and offer advice for effective delivery and presentation.

Key Benefits:

- Identify key trial themes and strategies based on 20+ years of litigation consulting experience
- Weaves vital aspects of the case together to create a comprehensive and compelling trial strategy
- Creates a persuasive trial story
- Crafts specific language and images that resonates with the jury and judge

Cost Estimate: Alan Tuerkheimer's rate - **\$350 per hour**

Jury Selection

By partnering with ZMF during *voir dire* and jury selection, you gain the benefit of our experience in hundreds of trials involving a full spectrum of cases. ZMF consultants will attend jury selection to observe, provide juror insights, and offer recommendations on the best use of peremptory strikes.

Key Benefits:

- Identify problem jurors and hone jury profile
- Get on-site juror recommendations
- Recommendations on best use of peremptory strikes

Deliverables:

- Written Supplemental Juror Questionnaire and oral ***voir dire*** questions prepared based on our research and expertise developed over decades of jury selection work
- Post-jury selection, a detailed juror chart outlining juror demographics, attitudes, results of our online background research and our assessment of their personality

Cost Estimate: Alan Tuerkheimer's rate - **\$3,500 per day**

Note: Our cost estimates are based on our limited knowledge of the case and the specific issues that will be most challenging. We can provide more specific and reliable estimates once we are able to discuss the details of how the work will be divided between us, how much data would be gathered in any individual study, and how much time is needed to refine and/or rehearse the topics to be tested. Unless otherwise noted, cost estimates do not include consultant travel expenses. We make every effort to keep expenses to a minimum and pass them through directly to our clients without markup.

