



## **An Evolving Frontier: The Use of Jury Research in Litigation**

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Years of work by your attorneys – research, analysis, document review and production, depositions, motions and painstaking preparation – ultimately can come down to this: a trial by jury, made up of a seemingly randomly-selected group of people, who know absolutely nothing about your case.

All of them, wild cards. All of them coming into the courtroom with their own experiences and perspectives on life, their own viewpoints and values. Professionals, blue-collar workers, teachers, self-employed entrepreneurs, and the unemployed are all called to the courtroom to take a juror's oath and resolve business and other types of disputes.

Will the jury have the sophistication to understand the complexities of your case? Will they have the maturity, attention-span, or intestinal fortitude to stay tuned in and listen to days of tedious testimony? What biases will they have that may make them predisposed to lean for or against you? Will they be able to set aside their sympathies and follow the rule of law? After all, it was a jury that acquitted O.J., and yet now, the vast majority of Americans think the jury got it wrong.

Perhaps more than anything, it is the desire to control – insofar as possible – these unknown variables that has led attorneys and their clients to increasingly utilize the skills of experts in jury research and human behavior. The use of mock trials and jury research is nothing new. But the field is changing with the times.

Jury research is no longer reserved for “bet the company” cases. Indeed, Sue Jones, Ph.D., founder of Jury Research Institute and an expert on jury behavior, finds that demand for jury research is increasing in all types of cases, and that jury research tools are being used in new and inventive ways. And whereas once, Dr. Jones was called in near the end of the case and just before trial, she is now regularly involved at a much earlier stage in the litigation as part of the trial team, and is called on to help clients make critical decisions about discovery, mediation, settlement, and general trial strategy.

For example, in recent years, Dr. Jones has utilized focus-group, roundtable discussions that she leads in the very beginning of a case—before the evidence is in and before the case themes are fully developed—to help guide the discovery process. Most useful for fact-intensive cases like employment disputes, she has found that sometimes jurors want to know something specific—the contents of a conversation, what happened before or after a key date, whether there were security cameras that might provide video footage of an incident, or how another employee was treated, for example—that neither the attorney nor her client ever thought to investigate. “If a fact doesn't come out at trial that the jury is interested in knowing, jurors may feel that the party who should have that information is trying to hide something. Worse yet, the jury may speculate about what that fact is—and get it wrong. These open-ended, pre-discovery discussions help the attorneys at the outset of the case refine their discovery strategy,” says Dr. Jones.

Cynthia Cohen, Ph.D., founder of Verdict Success, and an expert in jury research and research design with more than thirty years of experience, has seen the most change in her business through the use of new technologies. Now, her mock jurors use personalized iPads to complete the various questionnaires she has designed for a particular case before, during, and after a mock case

presentation. “It really allows me to get the information back more expeditiously and in a clear format, so that I can turn it around to the client as quickly as possible,” Dr. Cohen explained.

She also now regularly performs online jury studies using a web-based platform she developed in lieu of face-to-face mock trials. “With the online research, I can get a sample of 400 mock jurors in the representative community to listen to the case presentation and provide feedback, and that larger sample size of mock jurors is crucial to drawing conclusions about the data and to developing meaningful juror profiles. You just can’t get that in the typical mock trial scenario where your number of participants will be more limited. Technology has allowed us to reach more people, and in turn, get more reliable and valuable information.”

“Technology also plays a much bigger role in trial than it once did,” added Dr. Cohen, a sentiment echoed by Dr. Jones. “Testing technology presentations—whether it’s a PowerPoint presentation, a demonstrative exhibit, or a virtual diagram—can be critical. Essentially, you’re doing a trial run to see how a jury might perceive and interpret the tools you plan to use to present your case,” said Dr. Jones. It could be devastating to have a costly presentation backfire at trial because people with less exposure to the case view it differently.

While jury research is changing in many ways, a number of things remain the same. Jury research is still both an art and a science, helping attorneys and clients assess how their side of the case might be perceived and what pitfalls might be out there. They want to know how a jury might look at “bad facts.” They want to know how best to present complex information so that it can be readily understood by the widest cross-section of people. They want to have the most information they can so that they can weigh the pros and cons of forging ahead or throwing in the towel. And, they want any information that will help them select the types of jurors most likely to understand their case and control a wild-card juror who simply doesn’t get it.

While jury research exercises are illuminative, they are not predictive of the ultimate outcome and there are, obviously, no guarantees. Jury research is, however, another data point. And, all avenues of jury research—from surveys and smaller, more informal focus groups, to limited case presentations, to full-blown mock trials and online jury studies—add to the arsenal of information that helps inform trial strategy and guides clients and their counsel to make educated decisions about their case.

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