

Doing Your Homework: How Advance Jury Research is Putting a Smile on a Few Faces

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Despite twenty-five years of changes brought about by tort reform, jury verdicts in medical malpractice cases continue to increase. To the people who manage and defend such cases, it often seems to be a losing battle. They feel that even with the help of conservative politicians and judges, plaintiff lawyers always seem to find a way to get around the rules.

They feel overwhelmed by bad news. For example, *Lawyers Weekly*¹ reported that three of the top ten jury verdicts for the year 2001 were received in healthcare malpractice cases. The largest malpractice verdict was for \$313 million against a nursing home, suggesting a trend against certain care providers. An award of \$115 million was entered against a hospital and a resident for the care of an 8-month pregnant woman who had smoked crack cocaine and developed breathing problems. Another verdict for \$108 was entered against a hospital and medical staff on behalf of a child with cerebral palsy.

Amidst this onslaught of dreadful news, a few adventurous souls in the healthcare defense business pioneered new pathways to success by doing business the old-fashioned way—they did their homework. They learned that the best way to compete in a lawsuit is to know more about how a judge, jury, or professional panel will view a

case than the opposition and they found ways to use that information to their advantage.

As a result of this additional effort, healthcare providers and defense attorneys who do their homework have increased their success rate across the board. According to statistics furnished by the National Association of State Jury Verdict Publishers² and the National Law Journal,³ the average success rate in trial of healthcare providers in general has risen a whopping 5-8% since 1995, although not all providers shared evenly in these added victories. This brings the overall defense success rate in healthcare malpractice cases to almost 68%, compared to 62% in product liability cases.

Some people might attribute this increased success rate to better patient record keeping or improved healthcare professional education. However, healthcare providers have been improving record keeping and education for more than thirty years. So what has changed over the past five years?

In a word—everything. These recently successful healthcare providers and defense attorneys took a more aggressive stance in managing their cases with the help of scientifically conducted focus groups and mock trial jury research. Although some industries have been slow to adopt new methods of developing cases using scientifically based information, the healthcare industry has been at the forefront.

Instead of being defensive about coming face to face with juries, many healthcare litigation case managers and defense attorneys

now take the time to study likely jurors in advance of trial and to make important decisions about settlement and trial long before the trial date. Those cases that should be settled because of clear liability are settled early, leaving those cases where liability is really doubtful for trial.

In developing their trial and settlement strategy, these professional people use information about how judges, juries, or professional panels are likely to mentally process the case. For instance, there are a number of prominent research studies jointly conducted by healthcare companies and academic jury researchers comparing the decisions of medical panels and juries in the same cases.⁴ Although the general findings in this research indicate that doctors are more likely than jurors to be critical of other doctors, comparisons of the rationales offered by reviewing doctors and jurors provide many insights that are helpful to case managers and defense attorneys.

To better understand how these case managers and defense counsel have benefited from their research homework, let's examine why conducting scientific jury research can be helpful, how much you can rely on it, the kinds of research that are available, and how much they cost.

I. Why Research is Helpful

An example of the importance of advance jury research can be found in the case of a lawyer patient in Florida who had undergone a surgical repair of a sports hernia with

the installation of a plug and mesh. After the surgery, he experienced continual problems with internal infections. Despite the patient's frequent complaints about pain and secretions, it was not until several contacts with the surgeon that the surgeon conducted a close inspection and performed a second surgery in which he tried to remove the original mesh that had become irreversibly infected and replace it with new material. However, the patient continued to suffer. After consulting a second doctor, a third operation was conducted and it was discovered that that some of the infected mesh from the first operation had not been removed, leading to further infection. The patient sued the first surgeon as well as the hospital alleging negligence, and requested damages for loss of wages, pain and suffering, mental anguish, loss of consortium, physical disfigurement, and loss of enjoyment of life. During mediation the patient would not accept less than \$1,000,000 to settle the case.

In this typical medical malpractice case, an experienced case manager and trial lawyer will likely spot many potential issues that might affect how a jury would decide the outcome. Would a jury decide that a lawyer has so much power and money that he should be denied relief? Why would the hospital be liable if the problem seems to center on the doctor's care? If the doctor is clearly liable, should the hospital point its finger at him in order to escape exposure? Would some sort of joint defense be possible that would help both the doctor and hospital escape liability?



In this case, advance jury research indicated that a jury would likely find that the hospital staff was competent and concerned about the patient, and, therefore not liable. At the same time, research suggested they would likely find that the doctor was not so competent or concerned about his patient and should be found liable. The amount of damages seemed to turn on how much the jury would like or dislike the doctor, but in any event would not likely exceed \$1,000,000 unless the jury became enraged against the doctor. The jury seemed unconcerned that the patient was a lawyer, since even lawyers can be injured.

As a practical matter, the hospital and the doctor were stuck in the lawsuit together. The research indicated that if the hospital held the course and presented its case well, it would likely escape liability unless the jury became angered enough to charge everyone with negligence. If the hospital attacked the doctor along with the plaintiff, the momentum of the attack could enrage the jury against the doctor and then boomerang back to the hospital for not exercising better control over the situation.

After analysis of the jury research data and recommendations of the trial consultant, the parties resolved to engage in a somewhat sophisticated defense. The hospital decided to defend itself by demonstrating the excellent quality of care delivered by its staff, by gingerly indicating that its staff had had no opportunity and had not been requested to offer continuing care to the patient, by

agreeing that infections are a natural phenomenon, and by stating that the surgeon had a sterling reputation. The doctor defended himself by strongly stating his commitment to the patient's health with some regret that he had not been able to eradicate the infection.

Although not an admission, the surgeon's statement did indicate some remorse and likely avoided enraging the jury.

The trial lasted almost two weeks. At the end of the deliberations, the jury returned a verdict against the doctor for about \$550,000 and exonerated the hospital.

In this instance, the case manager and defense trial teams benefited from advance jury research in a number of ways. First, the research helped them to sort out the important issues and better understand how a jury would view them. Second, the information from the study helped them to fashion a strong and coordinated defense. Third, the research helped them to gauge the true settlement value of the case so that settlement decisions could be made with more confidence.

Whether we like to admit it or not, we all have blind spots. No matter how experienced or smart we are, we all have biases about our positions in litigation. Furthermore, when it comes to predicting decisions of judges, juries, and professional panels, one can only guess what will happen without some help. While it may be true that the defense will statistically have a 50-50 chance of winning without the benefit of decision maker research, would you want to be the person to stand in front of

the board of directors and explain why you decided to just roll the dice in an important trial that you lost?

In addition, until recently, a wide gulf in understanding has sometimes existed between litigation case managers and defense attorneys. Case managers are generally trained in risk analysis and case management while, on the other hand, defense attorneys are trained in trial advocacy. There has been no common body of information that was useful and made sense to both groups.

Scientific decision maker research has changed all that. As a result of recent developments in social psychology and scientific research methods, we can now produce reliable information that reveals how a judge, jury, or professional panel is likely to respond to a case. More importantly, we can translate this information in ways that help both case managers and defense attorneys in doing their jobs more effectively.

For example, in typical jury focus groups and mock trial research studies we can uncover the issues that are likely to be most important at trial, identify the strengths and weaknesses of our case, and test ideas for successfully persuading people in the courtroom. With a large enough sample of research participants, we can even make some judgments about the likely range of damages upon a finding of liability.

Armed with this information, case managers and defense attorneys have a more substantial basis for making important decisions about the case. Case

managers can make more informed decisions about settlement strategy and can work with defense attorneys to develop an effective trial strategy. Defense attorneys can use this information to develop persuasive trial strategies for voir dire, jury selection, opening statement, witness testimony, and closing argument in those cases that will not settle. They know that in order to be successful in the courtroom, they have to present a case from the decision maker's point of view.

Courtroom decision maker research provides us with two advantages. First, it gives us unique and valuable information that applies to a specific case. Second, it helps us to organize our thinking about the case so that our work is more effective and produces better results.

II. How Much Can You Rely On Research?

Whether courtroom decision maker research can be relied upon involves three considerations. The first is whether the research study was conducted scientifically (i.e., whether truly scientific methods were used with all the safeguards built in). The second is whether the interpretation of the information received in the study and recommendations that are made based upon the data are made by someone with experience, skill, and objectivity. The third consideration is the application of commonsense.

Another way of stating the point is that gathering and using information, whether it be jury research or legal research, is a matter of using dependable

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methods in gathering information and using good judgment and commonsense in utilizing it. Because we have great responsibilities, we are obligated to surround ourselves with reliable information and reliable people to assist us.

III. Which Method of Research Is Best?

When thinking about decision maker research, it is helpful to remember that scientific research is simply a tool for obtaining answers to difficult questions. As a case proceeds over time, the questions change.

For example, at the outset of a case, we may want to know which issues will be most important to a likely jury so that we can focus our resources and money on those issues. As we proceed toward settlement discussions, it is helpful to know more specifics about a likely jury's reactions and the likely range of a verdict. To answer these general questions about the case, we often rely upon focus groups. Scientists refer to this type of research as "descriptive research." In other words, we are simply trying to describe or understand the parameters of a likely jury's response.

Nowadays there are literally hundreds of different types of focus group study methods that can be conducted to answer general and specific questions about a likely jury's reactions to the case. Focus groups can be used to study the general direction that a case is likely to take in trial or to study a jury's reactions to specific witnesses, specific issues, or even specific demonstrative aids.

As we get nearer to a trial setting, it is helpful to know how a jury is going to react to the themes, case story, evidence, witnesses, and demonstrative aids as if the case were going to trial immediately. To obtain this information, we often use mock trial research studies. In this kind of research we are testing or experimenting with the key elements of the case and refer to this type of research as "experimental research."

The point here is that there is a specific research tool that can be helpful to case managers and defense attorneys at every stage of case development.⁵ If the appropriate research tool is chosen and used wisely, it can make an important difference in the direction that a case takes and, therefore, the results.

IV. Using Trial Consultants

Trial consultants can be an important addition to a trial team if they have the appropriate background, experience, talent, and skill. Like any profession, trial consultants can most easily be classified by their academic training, their professional experience, their ability, and their reputation. Those trained in psychology or a social science will likely have more expertise in conducting scientific research and using scientific information. Those trained in trial advocacy will know more about courtroom technique. Those trained in theater will know more about performance behavior.

There is no particular standard or regulatory group that governs the training and competency of trial consultants. However, we are fortunate that the

American Society of Trial Consultants,⁶ the nation's only professional society for trial consultants, offers continuing education and sharing of expertise that benefit its members and their clients.

As with any decision regarding hiring a professional person to assist the client and the trial team, it is helpful to consider one's personality, commitment to the case, resourcefulness, and insight. Although a trial consultant's reputation and skill are important, a good interpersonal relationship with all members of the trial team is essential.

V. How Much Does Research Cost?

Twenty years ago, the science of social research like that used in studying judges, juries, and professional panels was somewhat new and undeveloped. Scientists had developed only a few research models that could be utilized in conducting focus groups and mock trial studies. They were usually expensive.

However, these days there are research tools available to case managers and defense attorneys in all price ranges. The conduct of scientific research is time-consuming and labor-intensive just like the practice of law. Basically you get what you pay for. However, most professional trial consultants will work with you to keep the cost down and to provide you with a written estimate of the cost prior to commencing any research project.

VI. Final Thoughts

There really is science behind the "science" in conducting courtroom decision maker

research. Even though you may not be trained as a scientist, you have commonsense and the ability to ask questions. There are no dumb questions.

If you have never used scientific decision maker research to help you in with a case, you owe it to yourself to investigate it or try it out. If you have used such research, there are probably ways to make better use of it. Your success and your enjoyment of life can depend on it.

About the Author

Richard Waites is a board-certified civil trial attorney and trial psychologist with 21 years experience in the courtroom. He is the founder and chief executive officer of Advocacy Sciences, Inc., and The Advocates, one of the nation's most respected trial consulting firms.

He holds a doctorate of jurisprudence in law and a doctorate in psychology. His clients consist primarily of successful trial lawyers and large corporations, including major healthcare organizations. They rely upon his unique experience in trial advocacy and scientific psychology to assist them in developing their most successful courtroom presentations.

Dr. Waites is the author of *Courtroom Psychology and Trial Advocacy*, a new book published by American Lawyer Media. He can be reached by email at rwaites@theadvocates.com.

Endnotes

¹ *Lawyers Weekly, Inc.* is a national newspaper company with eight state-specific weekly publications and a bi-weekly national newspaper, *Lawyers Weekly USA*, the only national publication committed to serving solo practitioners and lawyers who practice in small firms. *Lawyers Weekly* is found on the Internet at www.lawyersweekly.com.

² The National Association of State Jury Verdict Publishers (NASJVP) is an organization of publishers of *Jury Verdict Summaries* from throughout the United States. These Publishers collect detailed civil litigation information directly from the attorneys who tried the cases, then write concise summaries, which are used by attorneys and insurers for case evaluation. The Association is found on the Internet at www.juryverdicts.com.

³ The National Law Journal is a weekly newspaper that is part of the American Lawyer Media family of companies. It provides comprehensive coverage of verdicts, appeals, new filings, expert analysis and a wide range of award-winning litigation-related coverage. The Journal is found on the Internet at www.nlj.com.

⁴ Hans. *Business on Trial*, New Haven, CT: Yale University Press (2000); Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*, Ann Arbor, MI: The University of Michigan Press (1997).

⁵ Abbott and Batt, *A Handbook of Jury Research*, Philadelphia, PA: American Law Institute - American Bar Association (1999).

⁶ The American Society of Trial Consultants can be found on the Internet at www.astcweb.org.

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