Jury Research for Settlement: The Price Is Right?

By Melissa M. Gomez

Knowledge is power.
Sir Francis Bacon (1561 - 1626)

Debunking the myth

It has been said that a case that goes to trial is the failure of negotiation. Why not help the negotiation along with the most powerful tool available - information? Trial attorneys have increasingly employed jury research to inform theme development and strategy for going to trial. However, there is a misconception among many litigators that such exercises are only relevant right before trial and only for the purpose of developing themes and arguments for trial. In reality, the benefits of jury research are vastly greater, and may be used much earlier in the litigation process, whether the trial team is intending to bring the case to trial or not.

Specifically, jury research designed to assess damages (also called valuation studies) arms litigators with information to guide settlement negotiations. Litigators have used it to convince a stubborn client that settling is in his best interest; assess how high damages can really go; provide a bargaining tool in negotiations with opposing counsel; or even to allow an alternative way to resolve the dispute when done collaboratively with opposing counsel. In any scenario, information gleaned from these research endeavors has proven quite helpful.

The reality check

In a contract dispute case involving a large franchised restaurant chain as the defendant, the trial team struggled with its client. The client, CEO and founder of the restaurant chain, was a strong, stubborn and brilliant professional who had built an empire on his tough negotiating skills and unwillingness to yield when he believed he was "right." This client was so steadfast in his belief that he was "right" in this case that he refused to settle with the plaintiffs, despite some very damaging evidence. The trial team, knowing that there was a danger of losing the case, put on a full mock trial with in-depth damage assessments to provide the client with hard evidence of the danger that could lie ahead at trial. The research uncovered that most jurors, while agreeing that the defendant was not entirely at fault, did apportion it some blame - to a tune upwards of $1 million. With data in hand and videotape of all presentations and proceedings, the client could no longer deny that there was a chance that he could lose big. Several weeks after the results were delivered; a settlement was reached.

It is not uncommon that clients, especially successful professionals and tough negotiators who are not accustomed to losing, become so entrenched in their own convictions that they are hesitant to settle a case. Whether they enjoy the thrill of the fight, feel as though settling is admitting wrongdoing, or are so angry at the plaintiff that the thought of voluntarily offering money seems completely out of the question, these clients put themselves at risk of losing big - cutting off their noses to spite their faces. In these kinds of scenarios, research may be used as an investment in "reality," so that clients can experience first hand their real exposure in a non-binding context, and action can be taken to come to a more favorable resolution. While the client may suffer a blow to the ego, the potential blow to the bank account (in terms of damages and the cost of going to trial) may be softened.

The lotto

In a case involving a tragic accident, an elderly couple was severely injured. The husband did not survive and the wife sustained multiple serious injuries. Plaintiff's counsel thought this case was worth tens of millions of dollars considering that the elderly woman went through several months of very painful physical therapy, while dealing emotionally with the death of her husband. The defendant, a transportation company involved in the accident, would not settle for such a high demand knowing there were other plaintiffs from the same accident waiting in the wings.

Research showed mock jurors wanted to give the plaintiff whatever she requested. It turned out that, although the defense believed that her age could be a mitigating factor to damage awards, jurors saw her as "everyone's grandma." She was very likable, and her story

packed a strong emotional punch. For the defendant, the case was very dangerous to take to trial. Notwithstanding what it had learned in the research, it would not settle for an amount amenable to the plaintiff. As a result, both sides decided to roll the dice, and the case went to verdict. Jurors in the real trial had the same reactions as those in the research, and the plaintiff walked away with the largest jury award to an individual plaintiff in the venue's history.

Especially when punitive damages are in play, the sky can be the limit. Because of frightening case examples like the one above, it is natural for the trial team and its clients to react strongly to the fear of the unknown, especially in cases that have a high emotional impact. Research to assess damages in these cases helps combat the possibility of clients throwing too much money at a scary problem just to make it go away. Jury research designed to assess damages can provide the trial team with an understanding of how high the sky can really be in a particular case, so that informed decisions may be made regarding whether to proceed with trial, and how far to go to try and settle. For many nervous clients, the best way to alleviate fear of the unknown verdict is to replace the unknown with information elicited from potential jurors.

The ace

A large corporation was being sued by a group of minority plaintiffs for discrimination in one of its production facilities. One plaintiff claimed he had experienced severe racial slurs, racist graffiti and other traumatizing discriminatory events at the facility. While the other members of the group admitted that they had not directly experienced events of racism or discrimination, they stated that the knowledge that these events occurred in their place of employment was emotionally damaging. The plaintiffs were suing the corporation for upwards of $15 million.

Fearful of the impact of disturbing evidence in the case, the trial team wanted to settle and needed information to aid their negotiations. To that end, the trial team conducted focus group research to determine how jurors would assess the damages in the case. As it turned out, while the case for the primary class member (who claimed to have experienced the events directly) was quite strong, jurors were suspicious of the intentions of the other members of the class. As a result, jurors became suspicious of the validity of the case in its entirety. Instead of increasing the damage award, as may be expected, the inclusion of the other class members actually diluted the damages. While jurors did feel that the plaintiffs were damaged, they valued the case at a minimal sum.

Armed with the results of the research, the trial team attended mediation with the other side and chose to reveal what they had found. To prove that both sides had been fairly presented at the research, the team permitted opposing counsel to watch the videotape of the plaintiffs' presentation. Faced with this objective information, the plaintiffs accepted a settlement well below their original damage claim.

Whether or not you plan to show your hand to the other side, research to assess damages may provide a bargaining chip in negotiations. Data on damages provides a context for battle in the settlement arena, and a foundation upon which informed decisions are made.

The collaboration

A wrongful death case in the Midwest was filed against an oil company as a result of the death of a 74-year-old man who was struck and killed by a gas truck that had run a red light. The deceased was an active, well-loved and highly recognized member of the community. The case was set for jury trial, but both sides agreed that they wanted to settle. The problem was that the plaintiff's and defendant's damages estimates were so far apart, that the possibility of reaching settlement looked grim. The defense focused on the deceased's age and retirement status, while the plaintiffs were sure a jury would be willing to award high damages because of his status in the neighborhood and the loss the community felt upon his passing. As an alternative dispute resolution, the two sides agreed to engage in a collaborative effort to research the case, assess damages and use the results to

mediate to a settlement. With the mediator present at the research, both sides presented their cases, damages were assessed, and based on the mock juror feedback and general outcome of the research, the case was settled the next day.

Considering the substantial costs of actually taking a case to trial, alternative dispute resolutions have become increasingly popular. Having both sides engage in a collaborative effort and splitting costs, both plaintiff and defense can present their arguments and gauge how potential jurors evaluate damages. This has proven helpful as a nonbinding exercise to inform settlement negotiations.

The bonus

No matter what the initial purpose of a damages assessment exercise, jury research still provides a comprehensive assessment of the juror perspective to inform key case themes and strategies. It also proves to be a useful tool in the event that negotiations do fail, or in the event that the research results indicate that taking the case to trial may be a worthy endeavor. Regardless of the eventual mode used to resolve the dispute, jury research provides the power of information and insight into the way jurors think, speak and make decisions about a case, so that we can make informed decisions to advocate for our clients.

A jury consultant and owner of MMG Jury Consulting, LLC, Dr. Melissa Gomez (melissa@mmgjury.com) holds a Ph.D. and M.S.Ed. from the University of Pennsylvania. Her expertise is in the psychology of learning, behavior and decision-making. She has more than a decade of expertise in research design and methodology, as well as in behavioral and communication skills training. You can review more information about Dr. Gomez and her practice at www.mmgjury.com.

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Editor's Note

This is a very cool issue of The Jury Expert. We have an array of articles we think you'll find interesting, thought-provoking and fun to read. First, we have a look at gender and race in the courtroom over time and recommendations for how litigators might use this information with reactions from two trial consultants. Then a look at how the internet has been intruding into the courtroom (it isn't just with jurors) and recommendations on how litigators and judges can minimize the impact through clear and specific education and instruction. Third, we have an article on how research into damage assessments can inform settlement negotiations. Following that, we have a introductory bibliography on the GBMI/NGRI verdicts with thoughts from three trial consultants on learning about this specialty niche, educating jurors, and voir dire. We all pay attention when jurors nod. But what does it mean and when should you really pay attention? Read our fifth article and find out. Our sixth article takes lessons an experienced trial consultant has learned over three decades about communication in the courtroom (and more decades on the stage). Learn about common mistakes and best practices as well as the identity of Konstantin Stanislavski. Most of us already know who Antonin Scalia is but did you know it's not a good idea to 'poke Scalia'? What can litigators learn from observing our Supreme Court in action?

November's issue of *The Jury Expert* also features advertising for the very first time. Publishing this journal has been a very exciting undertaking for the American Society of Trial Consultants (ASTC) but not one that has been without cost. We are grateful to our growing readership base and we are especially grateful to those advertisers who believe in us and show their support by advertising on our website and in the downloadable pdf version of *The Jury Expert*.

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