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# Common Mistakes in Interpreting Jury Research

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The past several years have brought an explosion in the use of pretrial jury research. Enormous amounts of data are being compiled and are sliced and diced in an attempt to divine some meaning that will shed light on trial strategy and tactics. With no professional qualifications, anyone can call himself or herself a jury researcher. In fact, there are lawyers conducting jury research who have no social science training. As a result, a great deal of bad research is conducted and much good data is misinterpreted. Below, we teach you to identify common mistakes.

## Failure to Examine All the Data

While conducting jury research in recent years, we have noted the same potentially dangerous mistake made over and over again. While we watch with a lawyer as a

mock jury deliberates, a juror will make a comment that becomes overwhelmingly important to the lawyer. The lawyer will not bother to watch all the mock jury deliberations we conduct, but instead focuses on one idiosyncratic and unrepresentative comment.

Selective attention by an advocate (who is biased by definition) impairs his or her ability to make objective empirical observations. What one juror says once should be given the weight it deserves and no more. Individual remarks that are highly favorable or unfavorable are disproportionately salient to lawyers because they tend to press “hot buttons,” but they do not lend themselves to reliable generalizations. Useful generalizations can only be gleaned from an in-depth review of the data as a whole.

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## Improper Generalization

Small-group research is rarely a valid or reliable method for determining what types of jurors are likely to find in favor of your side. Rather than focusing on who said what, we should look at what is said. In small-group research, the process by which jurors make decisions is far more important than what jurors make what decisions. The reason for this is simply that the scope of the research allows only the grossest generalizations about juror type. Still, we find clients focusing improperly on juror types after watching 12 mock jurors deliberate to verdict: "Older people are bad for us," they might say, or "We don't want young mothers with children." Because race and gender are easy to identify, they receive inordinate attention: "No women"; "White jurors are good for us."

Attorneys make the same mistake in actual trials. How many times have we heard an experienced trial attorney say that he or she will never take a particular kind of person on the jury? This mindset can often be traced to a single bad experience that may have resulted from a visceral misread of a juror's body language. Perhaps the juror had an itch or squinted because of the lighting, and in fact received the information favorably. Such a mistake is compounded by attorneys' tendency to remember a bad experience far better than a good one (as if the lawyer suffered trauma at the hands of a specific juror).

It is not useful to consider a particular type of juror as wholly undesirable. A juror type that previously warranted rejection may be well-suited to a different case scenario; a juror type that was desirable for one case may be a prime candidate for deselection in another. Small-group research can suggest types of jurors to seek or avoid, though validation of such hypotheses requires rigorous investigation. Research can also give us insight into what might motivate a juror to render a particular decision.

## Seduction by Percentage

It may seem impressive and important that 70% of a sample of mock jurors accept an argument while only 30% reject it; however, these results are meaningless without the numbers that make up those percentages. If only 10 jurors were included, such statistics are useless. Another group of 10 might give a very different response. Differences based on the few individuals observed become inflated and cannot be relied upon to represent generalities.

This problem becomes most manifest when telephone surveys are used improperly to collect data. If a too-small sample size is used to save money, the data collected are easy to misinterpret. For example: A 100-person tele-

phone survey is accurate to +/- 10%. If you want to find out how many people believe a particular substance causes cancer, survey 100 people. If 60 say they believe the substance causes cancer, anywhere from 50 to 70 percent of the general population hold this belief (a range containing quite different implications). It is much more desirable for a survey to have at least 400 respondents, which will provide an error rate of +/- 4.9% (the ".95 confidence level"). You would achieve a result within this range 95 times out of 100 – a standard that is used in survey research.

## Overreliance on Outcome

One of the least reliable pieces of data that emerges from jury research is the outcome (who wins, who loses, and what damages are awarded). Far more important is the process by which jurors come to their decision (which arguments were convincing, which fail, how well the evidence is understood, how jurors persuade each other, etc.). However, our clients often overreact to the outcome (for instance, by using the damages awarded by a single mock jury as the basis for a settlement). As with actual juries, awarding damages is one of the most random activities a mock jury engages in. It is susceptible to the influence of a single juror, attempts to compromise, and misinformed mathematics ("A big company like that can afford it"; "Let's split the difference – I want to go home tonight"; "\$20 million is chump change"). We have developed techniques for using mock juries to evaluate a case, but they are very different from typical mock jury research approaches.

## Blaming the Research Process for Intrinsic Problems

After watching their arguments crumble to dust in the hands of mock jurors, our clients sometimes complain about the artificiality of the research process. While observing deliberations, lawyers often blame the jurors, saying in frustration "They don't get it." Such thinking assumes that "it" is an objective concept that can be learned rather than an argument which has not been salient or persuasive. Some common responses we hear from lawyers: "If only we could have spent more time"; "In a two-week trial it would be different"; "They didn't understand the burden of proof"; "When the judge instructs them on the law they'll understand better." In such cases, clients have usually ignored good data at their peril. Though it is artificial, the research process is extremely robust if conducted properly. It approximates the mindset and approaches of jurors in a real case, even if the real case will take weeks or months to try.

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We have observed lawyers using so-called simplified language, yet terms such as “pretrial motion,” “cross examination,” “document production,” “discovery,” “the statute of limitation tolls,” and “deposition” are often met with blank stares or furrowed brows. Similarly, mock jurors are assumed to understand how fact and expert witnesses differ, but that references to “the Court” and “the judge” mean the same thing. In contrast, jurors hold fast to what they believe they do understand: RICO means mobsters; anti-trust means monopoly; and “there is no statute of limitations, as in the case of murder.” These examples point out fundamental fallacies. Not everyone sees the world as lawyers do; those who don’t are not necessarily wrong. More significantly, lawyers often have a difficult time seeing the world as jurors do. When a mock jury does not understand presumably user-friendly Legalese, lawyers tend to reject the jurors (“Boy, that group was really dumb”) as unrepresentative of a real jury. By discounting the source (a mock jury), untrained observers drop the ball on an opportunity to fashion improvements to their presentation. When lawyers observe misconceptions, distortion, or a lack of comprehension in a mock jury, they must translate these into constructive approaches.

Like actual jurors, mock jurors proceed with gusto. They are well-equipped with misconceptions and opinions, and are undaunted by (if not entirely resistant to) instructions. The burden of proof is overly relied upon by lawyers but is rarely employed (correctly or not) to lead jurors to a decision. Furthermore, a lifetime of movie consumption makes “beyond a reasonable doubt/beyond the shadow of a doubt” indelible concepts in jurors’ minds. This is stiff competition to brief exposure to the contrary. Finally, despite attorneys’ urges to teach jurors the intricacies of complex science or technology (“If they just understood how this thing works, they’d come to the right conclusion”), this approach typically leads more to cognitive overload than to winning votes. Instead of trying to make jurors understand everything, lawyers need to answer juror questions like “Who cares?” and “Why does it matter?” Attorneys should not ask themselves “What more could I have said to make this argument work?” but rather “How could I have made this argument differently to make it more effective?”

## **Untrained Researchers Miss Valuable Data**

The techniques of jury research yield rich and valuable information. In the hands of an inexperienced and untrained researcher, however, a good deal of this information will be lost or ignored. This happens in two ways:

The first is when a researcher fails to attend to all the

information being produced. This is a particularly common mistake with mock juries, which can yield valuable data about language use, psychological motivations, body language and information processing. For effective communication and persuasion to occur, a speaker must skillfully evaluate the perspective of listeners to insure that the intended message is delivered. Typically, lawyers do not adequately consider juror comprehension, attention span, preconceptions, reasoning abilities, lexicon or psychological defenses. To analyze each of these facets requires specialized training.

The second problem with untrained researchers is that they do not know all the things that can be done with collected data. As an example: In developing a profile of jury types, the untrained researcher tends to focus on discrete juror attributes like gender, age, or income. Without understanding the implications of statistical and social-scientific theories, individual traits may be overinterpreted or may mislead the researcher. Often, little effort is made to examine how juror factors interact in a complex way. Advanced statistical techniques allow this kind of analysis.

## **Conclusion**

As with any unregulated profession, charlatans and neophytes can set themselves up as experts; however, there is an additional danger with jury research. Because it is not based on hard scientific knowledge (like medicine or engineering), it is possible for someone with the best intentions to improperly consider himself or herself an expert. Each year, we see more and more of these people in the field of jury research. They produce bad data, improperly interpret data, and fail to pay attention to the data available. Collectively, such errors can do your case more harm than good.

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