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# Jury Research for Settlement: The Price Is Right?

Research focused on damage assessments sheds new light on settlement negotiations.

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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 jury research is only relevant right before trial and then only for the purpose of developing themes and arguments to present to a jury. In reality, the benefits of jury research are vastly greater, and this preparation tool may be used much earlier in the litigation process, whether the trial team is intending to bring the case to trial or not.

Specifically, research for the purpose of assessing damages (also called valuation studies) arms litigators with information to guide settlement negotiations. Often litigators may use 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.

## 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, the 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 if they proceeded to 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, based partially on the damages information provided by the research.

It is not uncommon that clients, especially successful professionals and tough negotiators not accustomed to

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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 what the real exposure is on their case in a context in which the final jury decisions are not binding, 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 in which the plaintiff, an elderly woman, lost her husband and sustained multiple injuries, the plaintiff went through several months of very painful physical therapy while simultaneously dealing with the death of her husband. Plaintiff’s counsel thought this case was worth tens of millions of dollars, and the defendant, the transportation company involved in the accident, just couldn’t settle for that much as there were other plaintiffs from the same accident waiting in the wings.

Research showed mock jurors wanted to give the plaintiff whatever she asked for. It turned out that, although the defense believed that her age could be a mitigating factor to damage awards, jurors saw the plaintiffs as “everyone’s grandma.” She was very likeable and sympathetic, and her story packed a strong emotional punch. For the defendant, the case was very dangerous to take to trial, but notwithstanding what it had learned in the research, the defendant could not settle the case for an amount amenable to the plaintiff (who wanted at least double-digit millions). So both sides decided to roll the dice, and the case went all the way 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.

Most everyone has heard of the 1984 case in which Texaco bought Getty Oil days after the Getty board made a deal with Pennzoil to sell a large portion of its assets for a lower price. In that case, Pennzoil v. Texaco, the jury gave an astounding \$11 billion verdict in favor of Pennzoil.

In these cases, especially when punitive damages are in play, the sky can be the limit. 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 such as those involving medical malpractice or wrongful death. 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 of discrimination, and the powerful emotional aspect of the plaintiffs’ argument, the trial team wanted to settle the case and needed information to aid their settlement negotiations. Another option was to try and settle with the lead plaintiff, as his evidence was obviously the most dangerous of the group. 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. In this case, 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 defendants 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 actually chose to reveal what they had found. To prove that both cases had been fairly presented, the team permitted opposing counsel to watch the videotape of the plaintiffs’ presentation from the research effort (of course, this was subsequent to opposing counsel signing a contract indicating that they could not use what they saw against the

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defendant at trial). Faced with this objective information about the manner in which the plaintiffs were portrayed and the general reluctance of the mock jurors to award substantial damages, if any, 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 your negotiations. Data on damages provides a context for battle in the settlement arena, and provides a foundation upon which you can make informed decisions for your client.

## **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 one of the company's gas trucks that had just 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 that the entire 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 successfully 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 where potential jurors fall in assessing damages as a nonbinding exercise to inform settlement negotiations.

## **And the bonus gift**

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 the best informed decisions on advocating for our clients.