

Do I Need Jury Research?

Dorothy K. Kagehiro, Ph.D.
FTI/Consulting, Washington, D.C.
Dale S. Frediani
RMG Consulting

When Is Jury Research Needed?: The Issue of Sensitivity of Detection

Jury research may be warranted if risk managers conclude that the seriousness of a case goes beyond what they have encountered in past potential litigation. Consider the analogy of a decision to consult a medical professional. How accurate and how detailed an assessment of your health do you want? Usually, a self-evaluation and a glance in the mirror are sufficient for most of us (e.g., “I’m okay” versus “I think I’m coming down with a cold”). There are instances, however, when you are concerned enough – when you want a more sensitive detection of a suspected problem and a detailed assessment – that you consult a medical expert. The medical expert may in turn recommend a more sensitive means of accurately detecting different degrees of health (e.g., X-ray versus stethoscope evaluation of the condition of your lungs). There are cost considerations associated with degrees of sensitivity of detection. It costs you nothing to look in the mirror to assess your health; it costs more to visit your physician, and even more if laboratory tests are deemed necessary. The decision about how much you are willing to pay is a combination of your concern about your health (the consequences of a failure to detect a suspected chest cold versus pneumonia versus lung cancer) in consultation with the medical expert’s assessment of the required sensitivity of detection of the suspected problem.

Now return to the situation of a jury trial. In most instances, risk managers may feel comfortable relying on their past experience to assess their likelihood of success at trial in a given case. Occasionally, however, they may face a jury trial situation in which the nature and complexity of the case presented to the jury -- or the financial risks at stake -- are such that they feel the need to consult experts on jury research. In other words, the risk managers need a more sensitive detection of small differences among the jurors that affect verdict or damages orientation. Here, as in our medical analogy, budget considerations are a combination of the degree of concern about the jury trial (“How likely is it that damages will be awarded? What amount of damages is likely to be awarded? Can we afford this outcome?”) and the desired degree of sensitivity of detection (“Are older, blue-collar males, in this venue and in this case, likely to be high-damages jurors?”).

The Issue of Sample Size

Having concluded that a case warrants jury research, the risk manager is next faced with the issue of deciding what specific type of jury research is needed. Jury research offerings vary widely in their costs and benefits, much as legal service offerings vary in costs and benefits. As consumers of jury research services, risk managers face a bewildering array of research projects of different scope, brands, and price tags (looks-like-research versus real research). What is needed to make a selection is a common dimension on which to compare different proposed research, keeping in mind their specific need for sensitivity of detection – or how much error in the research findings they are willing to tolerate. The single best basis of comparison is the sample size involved in the proposed research design.

How accurate should the results of jury research be?: The margin of error. The margin of error, or the sampling error, is the difference between the results obtained from the sample (the number of participants in the jury research exercise) and results that would be obtained from the population of interest (the venire). Two points should be noted. First, there is a principle of diminishing returns with increases in the absolute sample size. Reductions in the margin of error decrease as absolute sample size increases past a certain size (see Table). It is not worth spending more money for the smaller and smaller increase in accuracy of the research results. Second, if the research focus is on subgroups within the trial jury (e.g., age or occupational categories), the margin of error for these subgroups depends on the absolute size of those subgroups – the more detailed the assessment of jury subgroups the trial team is interested in (e.g., older, blue-collar males), the larger the absolute size of the overall sample that is needed to keep the margin of error within acceptable limits. In other words,

for certain trial needs, it is worth spending money to conduct a larger-size jury research project.

How many jury research subjects are enough? There are some general rules of thumb for determining *a priori* adequate sample size for jury research. Sample sizes smaller than ten are flatly not recommended – the results obtained from such a small sample are so inaccurate (not predictive of trial outcome) they are a waste of money. Generally speaking, adequate jury research involves sample sizes of 36 (e.g., interactive focus groups or mock summary trials) to 500 (telephone surveys). Smaller samples can be considered depending on the research questions of primary interest. If the primary interest is juror comprehension of the case as a whole (but not specific issues, evidence, or witnesses), then sample sizes as low as 20-24 can be utilized at lower cost. If the focus of interest is assessment of likely verdict or damage award outcomes when jurors are presented with detailed summaries of the case presentations, then sample sizes of at least 36 can be considered minimally adequate. If the primary concern is detailed profiles of plaintiff-oriented versus defense-oriented jurors, or low-damages versus high-damages jurors, then sample sizes of 100 (jury research exercises) to 300 or more (telephone surveys) are desirable. In all instances, it is assumed that the sample of surrogate jurors used in the study is demographically representative of the trial venue.

What Is the Risk Exposure?

A common reason that jury research might be conducted is concern about the degree of financial risk in a jury trial. Oftentimes, trial presentation or settlement negotiations require specific dollar predictions of the most likely damage award outcome. Here, we describe a Risk Analysis mock summary trial that provides an in-depth assessment of juror perceptions of each side's damage theories and their impact on verdict preferences and damage awards.

The basic research procedure for the Risk Analysis Study does not differ from the typical mock summary trial format. What differs is the statistical analyses conducted on the questionnaire information, which includes jurors' damage awards before they begin to deliberate. The research procedure must adhere to principles of accurate and reliable (real) research: (a) representative sampling; (b) balanced and comprehensive case presentations; and (c) individual juror assessment. Representative sampling is achieved by recruiting residents of the trial venue who are demographically similar to the jury pool. The surrogate jurors hear and make their decisions on the basis of attorney presentations that reflect as closely as possible the strengths of each side's expected case. Representative sampling and realistic attorney presentations are essential factors in achieving the best possible predictive accuracy in research results. The third factor in predictive accuracy is individual juror assessment, i.e., sample size.

The risk analysis can be calculated for the summed total of compensatory damages across all categories and punitive damages by jurors, or separately by category of damages. Since damage awards by deliberation groups provide information based only on those particular combinations of jurors, it is important to use individual jurors' damage decisions as the basis for the analysis for optimum reliability. The best predictor of the likely range of actual jury damage awards is how individual jurors awarded damages **before** deliberations. Group deliberations are useful for a number of reasons. For instance, certain case factors create group dynamics that inflate or moderate the level of damage awards (i.e., the group polarization phenomenon). We take into account the likely impact of group dynamics, based on our observation of the deliberation groups. Group factors such as proportional composition of plaintiff- and defense-oriented jurors, the effect of leadership characteristics among the jurors, and the degree of commitment of jurors to their decisions will have a modifying effect on individual jurors' pre-deliberation damage preferences.

The risk analysis calculation provides probability estimates of likely total damage awards associated with various jury compositions (the proportion of plaintiff-oriented versus defense-oriented members of the jury). Such information can be especially useful should settlement negotiations continue after the jury has been empanelled. The trial team can reassess its risk level after voir dire has been completed and it knows what type of jury it faces.

The risk analysis can be done for any jury size. Here, we use a six-member jury as an example. Assume that the jury research exercise was conducted with an adequate sample size (at least 36) and results revealed that 77% of the jurors favored the plaintiff after hearing the case presentations (an actual outcome in the first round of research for a professional malpractice case involving an accounting firm). The expected probability of a particular plaintiff/defense juror composition in a six-member jury drawn from a pool with an expected composition of 77% of prospective jurors predisposed in favor of the plaintiff are:

6 plaintiff jurors/ 0 defense jurors	20%
5 plaintiff jurors/ 1 defense juror	38%
4 plaintiff jurors/ 2 defense jurors	28%
3 plaintiff jurors/ 3 defense jurors	11%
2 plaintiff jurors/ 4 defense jurors	2%
1 plaintiff juror/ 5 defense jurors	< 1%
0 plaintiff jurors/ 6 defense jurors	< 1%

Note that, in this example, the chances of ending up with a jury that would award some amount of damages is 97% (i.e., the chances of ending up with a jury composed of at least three plaintiff-oriented jurors).

The probability distribution of damage awards from possible compositions of a six-member jury drawn from a 77% pro-plaintiff pool is:

Number of Plaintiff Jurors	Probability	Likely Damages
5-6	58%	Median award by all plaintiff jurors
3-4	39%	Average of median awards by plaintiff jurors and by all jurors
2	2%	Median award by all jurors
0-1	1%	No damages

We assess the damages awarded by the deliberation groups to get a sense of the impact of group discussion (do discussions have a moderating or escalating effect on damage awards?). To determine whether to use the damage award distribution of all jurors or the damage award distribution of the plaintiff-oriented jurors for our estimates, we take into account the likelihood of a win on the liability issue. If it is obvious that the verdict will be overwhelmingly in favor of the plaintiff, we would use the

damage award distribution of the plaintiff jurors. If our results indicate there is a likelihood of a compromise (e.g., trading liability votes for lower damages, as often happens), we would use the damage award distribution for all jurors (plaintiff- and defense-oriented) to capture the compromise effect. By understanding the damage award patterns of individual jurors, risk managers can use this methodology to establish settlement parameters and consider it a “win” if they can beat the calculated odds or if the opposing side’s settlement demand is below cost (based on the client’s calculations of expenses and risks of proceeding to trial).

Important caveats are reiterated for the risk analysis. To accurately reflect trial outcome, damage award estimates must be based on attorney presentations that accurately reflect the relative strengths of the plaintiff and defense cases at trial. In other words, the estimates of damage awards are only as accurate as the estimates of each side’s actual case arguments, themes, and damage theory. Determining how best to present the case dispute as a research stimulus requires careful consideration. In this regard, the assistance of an experienced jury researcher is most helpful. Moreover, damage award estimates must be based on an adequate sample of research participants who match demographically the jury pool in the trial venue.

What determines “adequacy” of sample size? Obviously, it should be based on risk managers’ assessment of the risk they face and the margin of error they are willing to pay for – and live with – for the research prediction of their outcome at trial. The accompanying table presents the margin of error associated with different sample sizes. A quick perusal of the table demonstrates why we do not recommend sample sizes of 24 or less – given the associated margins of error, the research estimates of damage awards are practically a 50-50 coin flip. In other words, no matter how adequately the research is done otherwise, the result could be off base simply because of the small sample size. A minimum sample of 36 surrogate jurors, with its margin of error of 17%, will result in two-thirds of individual juror damage awards that will fall within the range likely to occur at trial. While sample size is a major component in the overall cost of the research, increasing sample size does not proportionately increase the overall cost of the research. Increasing the number of surrogate jurors from 24 to 36, for example, does not increase the total cost by 50%. As a rough rule of thumb, it costs \$200-\$250 per additional research participant if the margin of error is reduced further.

Conclusion

Case evaluation. If the client is an insurance company defending a first party policyholder’s lawsuit, hopefully the company’s position has some credibility or it would not be defending the suit or have initiated a declaratory action. The insured’s case will probably have jury appeal on its merits and also have bad faith and punitive damage potential. The relationship of case value to policy limits impacts the practical decision of whether the case should be tried or settled before trial, keeping in mind the potential for punitive damages, prejudgment interest and an award of attorneys’ fees.

In a third party liability insurance matter, the relationship of case value and policy limits affects the insurance company’s obligation to discuss the potential of an excess verdict with its insured or to notify excess carriers. If the case evaluation in the jury research results was well within policy limits, but a judgment comes in exceeding them, the research results may be used as evidence of the client’s thorough and good faith evaluation of the claim. Using this information has important discovery considerations in the subsequent bad faith litigation, in that the entire jury research exercise and its impact on claims decisions made might be open to scrutiny.

This case evaluation can be used by the insurance company to establish a realistic reserve, which may trigger reporting requirements to excess carriers in a layered insurance program. It may also bring into play reporting requirements to reinsurers or demonstrate that no such reporting is prompted, if that is the circumstance.

Improving the case. Reliable research can be used to improve jury selection by identifying those juror characteristics and attributes that lend themselves to a finding in favor of the client’s position. Long before it comes to that, however, if the research is conducted at an appropriate time in the process, what is learned can be used to improve the presentation of the case. For example, if there are evidence gaps in the case or if certain facts were unclear to the surrogate jurors, additional investigation or discovery can be conducted. Excerpts from expert testimony, videotapes of the

experts, or live presentations can show how the jurors perceive the experts' theories and, if they need to be bolstered, how best to do that. Photographs, video-graphics, charts, blow-ups of correspondence, or notes can be shown to the surrogate jurors and their reactions gauged. Anything poorly received can be improved upon or eliminated in favor of a more effective way of presenting the information. Well-received demonstrations can be further enhanced and given a more prominent role in the case presentation.

Risk managers should be present during jury research to observe firsthand how the information and its presentation are received, for it is ultimately the client's decision whether and how to proceed. Improving the negotiation position. If the case evaluation indicates that negotiation or an alternate dispute resolution process should settle the litigation, information learned from the jury research process can be useful in improving the client's position. While not divulging the existence of the research exercise, the strengths of the client's position can be emphasized in negotiations and the weaknesses more effectively dealt with. The discussions during jury deliberations bring out all the points and counterpoints in detail from the lay jurors' perspective. Often these points may have been overlooked or forgotten by those who have been working in-depth on the case for years.

Mediators will sometimes avail themselves of information on a confidential basis, recognizing sensitive discovery issues. Sharing some results on this basis can give the mediator practical arguments for deflating the demands of the other side. It also demonstrates to mediators, and indirectly to the other side, the thoroughness and resourcefulness with which the case is being prepared.

Timing. Ideally, jury research is conducted at a point in time when much of the details and merits of each side have been recognized, but early enough before a trial date so that what is learned can be used either in trial preparation or settlement negotiation. For cases with substantial exposure, the attorneys and risk managers should consider this tool early on so the timing can be effective. Ultimately, timing is the clients' call since they will have to pay for the jury research, including attorney preparation and presentation of both sides of the case. Sometimes, if there are multiple plaintiffs or defendants with substantially similar cases, expenses can be equitably apportioned.

If the discovery period is still open, additional testimony can be taken to clarify questionable details or fill in blanks. Care must be taken, however, if a principal of the client has been noticed for a deposition, but not yet deposed. While jury research is protected by the attorney-client relationship, any deponent should be shielded from potentially testifying about it. If a principal is subject to being deposed after a research project, counsel and the client carefully need to consider who has firsthand access to the exercise and results, to protect the client from possibly divulging the research's existence and results.

The important thing from a timing standpoint is to conduct the research early enough so that whatever additional testimony or investigation needs to be done can be accomplished in the remaining time before trial. This also pertains to creating or changing visual aids or computer graphics; modifying the case story; or giving expert witnesses tips on presentation style or format to practice (follow-up focus group research may be useful for this last purpose). Given enough time before trial, counsel and risk managers can evaluate the exposure and if, settlement is advisable, devise an effective strategy for negotiations or an ADR process.

Table.
Margin of Error Associated with Sample Size

Sample Size	Deliberation Groups	Margin of Error
10	1	$\pm 32\%$
20	2	$\pm 22\%$
30	3	$\pm 18\%$
40	3	$\pm 16\%$
50	3	$\pm 14\%$
60	3	$\pm 13\%$
70	3	$\pm 12\%$
80	3	$\pm 11\%$
90	3	$\pm 11\%$
100	3	$\pm 10\%$

Example: A research outcome showing a likely verdict split of 70% in favor of the plaintiff and 30% in favor of the defendant will accurately predict a plaintiff majority with reasonable confidence using a sample of 48 or more, but not using a sample of 24.

Note. Margin of error = Estimate of standard error.
Standard error = Measure of variability around the population of interest, based on repeated samples (i.e., estimated sampling error).