APPLIED SOCIOLOGY AND CORPORATE LEGAL PRACTICE

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Social science research techniques have emerged as pivotal courtroom advantages over the past 10 years. Sociologists and psychologists market their services directly to attorneys and clients or may be employed by litigation consulting firms. The approaches used include a broad array of concepts and theories, such as case positioning, ethnomethodological analysis, surrogate juries, survey research and transactional analysis. This variety produces confusing and sometimes conflicting interpretations of how success can be achieved. Nevertheless, the results of this innovation command attention.

Plaintiffs' attorneys have been the primary users of these services. The pressure for predictability in jury work is sharpened by the need for all members of a panel to agree if a high award is to be realized.[1] Research has provided plaintiffs a competitive edge. Consequently, utilization is spreading to corporate and banking practices.

Unfortunately, these sometimes expensive approaches are frequently purchased in desperation shortly before trial. Many practitioners have only a vague understanding of the techniques which rarely are taught in law school.

While social science research may seem alien to legal practice, it is commonplace in the research and marketing strategies of corporate clients. In fact, many businesses possess hidden pretrial strengths in this area. Advertising and market research is used in everything from production planning for toothpaste manufacturing to the selection of branch banking sites. If counsel can link the data collection and analysis techniques used by clients in their business activity with the issues at trial, significant advantages may accrue. But what are the most fundamental and important features of social science consultation?

This article seeks to provide an orientation to common litigation research methods in applied sociology. Despite the variety of approaches used in proprietary literature, two applications are central to both business and courtroom operations. These include collection of baseline data on juror attitudes and values and the use of simple ethnographic techniques

[1] *See* Kalven and Zeisel, *The American Jury*, 2d Ed., 1986.

before and during trial.

Survey Research and Case Development

Information on the attitudes and beliefs of potential jurors is the cornerstone of all social science applications to trial planning. Just as a market survey is a prerequisite to a client's sales campaign, pre-voir dire determination of juror characteristics is essential to positioning of the case, selection of themes, order of proof, selection of jurors, and opening and closing statements of counsel. Use of these surveys is unfortunately infrequent.

Even such disparate techniques as witness training and surrogate juries depend upon informed knowledge of juror characteristics. Nevertheless, attorneys often make general "seat of the pants" type judgments about jurors in million dollar cases merely on the basis of having lived in the community for a number of years. No bank would take such a risk in investment decisions of equal magnitude.

Defense attorneys, for example, typically avoid black jurors in voir dire because of a widely perceived pro-plaintiff anti-institutional attitude in this population. An analysis of regional survey data conducted by Trial Practices, Inc., recently confirmed the presence of this general predisposition. However, when specific elements of a case involving moral behavior were introduced in a survey questionnaire designed for a specific case, the observed attitudes of black respondents shifted dramatically to a pro-defense position. In this instance, religiosity and the salience of several social problems in the black community became much more effective predictors of the behavior of black jurors than the more stereotypical proclivity toward the underdog.

Staff subsequently tested this finding in a pretrial focus group evaluation of the case. A focus group is a technique for studying ideas in a group context, and differs significantly from a mock trial in that an interviewer may present facts, evidence and testimony in an interactive setting.[2] The purpose is to discover or verify patterns useful in development of the case. A pro-defense, institutional bias was observed in this case for black participants at the point in which the moral elements of the case emerged. Despite the prevalent generalizations, black participants took leadership positions in later jury simulations, against liability for the defendant.

Pretrial assessment and preparation of witnesses are also popular means of enhancing communication with jurors. This training usually focuses on the appearance and demeanor of the witness, rather than on the relationship between the witness and jurors. In practice, this is like listening to only one half of a conversation. Survey data analysis provides the most

[2] *See* Morgan. *Focus Groups as Qualitative Research*. Qualitative Research Methods, vol. 16, 1988.

predictable basis for identifying and then introducing juror attitudes and values to the communication awareness of the witness. Attention directed to the capabilities and predispositions of potential jurors is as important as fine tuning the physical appearance of a witness. Similarly, a surrogate jury employed in a courtroom during an actual trial is most effective if the observers are matched on criteria developed in a local survey rather than just on surface characteristics such as sex or race.

On balance, the primary reason for the utility of survey approaches is that attitudes and associated demographic characteristics are not uniform across jurisdictions. More importantly, case specific attitudes typically involve sentiments which are not obvious, even to sophisticated observers.

Unfortunately, survey research always has been suspect in court and rarely is accorded "scientific" status in testimony. Interview costs may run as high as $50 per respondent. Moreover, since consultants often are hired after basic trial strategy has been developed, surveys are not often used appropriately to maximum impact.

One type of pretrial survey work which has been ignored in practice involves the use of established data sets generated by numerous ongoing survey efforts. Secondary analysis of such questionnaire data can be used to identify issues or attitudes toward defendants in a particular venue. The North American Opinion Research Center (NORC) at the University of Chicago and the Roper Data Center in Storrs, Connecticut, for example, have ongoing surveys for time series analysis dating back over 15 years. These may be useful for a variety of clients and cases. NORC, for example, has conducted over 25,000 interviews in the Southeastern United States over the past 10 years to examine community attitudes toward and confidence in financial institutions.

Larger corporate clients, ranging from retail chains to public utilities, may also benefit from secondary analysis of data collected by their marketing departments on customer satisfaction and product acceptance. Corporate clients are acutely aware that sales depend on customer perceptions and invest substantially in market research. Yet, when the company becomes involved in litigation, these types of data typically are overlooked for it does not seem natural to contact marketing in preparation for trial. A recent institutional client of Trial Practices, Inc., for example, possessed eight years of customer reaction data which proved highly useful in constructing an inexpensive profile of hostile and favorable jurors for use in voir dire.

Good Observational Skills

Knowledge of underlying community attitudes is important but not sufficient to reduce uncertainty in trial decisions. The use of good observational skills lies at the heart of such

different approaches as ethnographic studies and surrogate juries. The shared assumption of these techniques is that the attorney is so caught up in the daily tactical environment of a developing trial that important subjective elements of juror reaction are overlooked.

Some consultants urge attorneys to scrutinize jurors for body language signs of acceptance or rejection. Unfortunately, the meaning, syntax and grammar of "body language" are not well articulated in a multi cultural society. Folded arms may mean rejection, for example, or fatigue.

The ethnomethodology of observation involves the study of everyday, taken for granted assumptions about social activity. But there is no Baedeker or rule book on what to observe, or what is important. Although there are numerous schemes for classifying seating patterns, gestural activity or conversation styles, the value of whatever usefulness they may possess lies in sensitizing attorneys to the fact that much is going on in the courtroom besides testimony and argument.

While the law and courtrooms are organized rationally, the perceptions of jurors are not usually so elegant. Lawyers organize facts and argument in terms of the logic of the case. Jurors typically reorganize their observations in terms of frames of reference or chunks of action with which they are already familiar.[3] Good background research and simple observational skills can permit attorneys to use these frames in the organization and presentation of a case

The demands of conducting or defending a lawsuit limit the ability of attorneys to be good observers. Attention to the substance of law is the traditional focus of the profession. Data analysis and observational training require a division of labor rather than intuitive skill. A surrogate jury, seated in the spectator section of court during trial and carefully matched on appropriate demographic criteria, measurably improves prediction of trial outcome even though the participants have no training whatsoever. In short, variety of perspective is an important advantage in trial.

Conclusion

The utility of these consulting techniques is limited by the guild orientation of law which doesn't easily lend itself to a division of labor. More importantly, lack of familiarity with social science applications makes it difficult to weigh the benefits of increased predictability against cost. For these reasons, litigation consulting has been restricted largely to extremely high risk cases in which almost any investment may be justified.

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[3] *See* Goffman, Frame Analysis, 1974.

A thorough mock trial requires careful replication of planned testimony, exhibits and tactics as will be encountered in actual trial. The expense can be enormous. A February front page article in the *Wall Street Journal* explained the relative failure of a federal prosecution team investigating the Texas savings and loan controversy in part on the ability of the defense to outspend the government. A Dallas developer, for example, was offered "any amount of money" to play the role of a thrift regulator in a mock trial, presumably because his experience as a borrower afforded the high level of expertise needed to simulate the actual outcome. The budget for this mock trial alone reportedly was $1,500,000. Obviously, routine cases cannot be tried several times before the actual court date. However, the routine application of traditionally "academic" techniques is at hand because the principles are well established in business practice and involve only journeyman level science.

Sociological consultation in corporate practice should, therefore, become increasingly popular for it permits the division of labor necessary to maximize prediction of jury outcome. Good observational skills can be taught, but the value of these techniques rests on good measurement of attitudes, values and beliefs which provide the continuity for juror frames of reference.

When attorneys take the current potpourri of techniques from a consultant's briefcase, without linking the art to the corresponding science, they invite failure. However, those attorneys and clients who can examine strategy, courtroom tactics, jury selection, order of proof and argument in the context of sociological data can expect greater probability of success.