Uses of Jury Research in Alternative Dispute Resolution

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The instruments of jury research mock trials, focus groups, and other devices are well known to most seasoned players in the litigation scene. They are usually thought of as valuable tools in trial preparation, serving as vehicles for attorneys to test out their case themes, measure the impact of witnesses, identify and handle weaknesses in their case presentation, etc. These same research tools are not as frequently considered as aids in the preparation of cases which are likely to be resolved through ADR. For example, there are a number of applications of jury research in mediation. Let's focus on this interesting and effective dispute resolution device.

Mediation

Mediation involves the use of a third party neutral in a facilitated settlement negotiation. It is characterized by a focus on the mutual interest of the parties in avoiding trial and its attendant risks. It, by definition, does not oblige the mediator to take a position on the merits of either party's case. It does, though, demand that the sides operate as though each has a legitimate position, without excessively focusing on the arguments concerning that legitimacy. Mediators are usually but not always attorneys who are trained in the special facilitative skills required. Mediators usually charge fees on an hourly or daily rate, with numerous exceptions to this rule. Mediation services are almost always much less expensive than trials.

One of the most common applications of social science research in mediation comes as a direct consequence of the key dynamic of litigation: adversarial viewpoints. Holding opposing positions on a subject frequently limits the ability of the adversaries to see one another's strong points very clearly. The lawyers will say that, because of their closeness to the case, sometimes they just can't tell if a jury will respond favorably to the testimony of a particular witness. Alternatively, and for the same reason, the lawyers may be absolutely convinced that a certain witness or component of evidence will be the key to a case. The other side, unfortunately, frequently holds a different and opposite opinion. A useful solution is the performance of a mock trial of the main issues in the case, using videos of the key witnesses.

Mock Trials And Focus Groups

A mock trial of the type noted above does not require the cooperation of both sides in order to be highly useful. Usually, people know the key evidence in one another's case. Also, most litigators appreciate the value of the videotaped deposition and usually tape important testimony. The ready availability of such tapes means that a study of the impact of the witnesses for both sides can easily be created. In personal injury cases, it is likely that the typical explanation for a big gap between demand and offer is that one side thinks the jury will love the claimant and the other thinks the opposite. If that is the case, a test (using tapes) of the claimant's impact on a simulated jury would give the party who sponsored the test invaluable information for the selection of a settlement position. Such a test might best be run as a focus group,

"focusing" on the impression a particular witness makes upon a panel of jury eligible people.

About Mediators

In a recent letter to a lawyer, I wrote:

"The thing we try to remember at DecisionQuest is that the mediator's understanding and attitude is of immense importance in the outcome of the settlement conference. He is rarely a benign, facilitative presence, but rather is an active opinion-forming creature agent of his own views and prejudices. He is judge, jury, and counselor. As such he should be skillfully pleaded with, persuaded, and relied upon for intercession.

As I told you, several of our clients have used our analyses of mock trials, focus groups, or other studies as tools to inform and persuade a mediator. Our third party viewpoint seems particularly compelling to people in the role of neutral facilitator, perhaps because it is more like their own. This is particularly helpful when the sides are far apart in their prediction of what a jury will do with their case. The research results arm the mediator with the same knowledge which has presumably persuaded you to take whatever your position is. He then understands your commitment to your case, and your confidence in your assessment."

There are several points made in the letter which are worth elaborating. The most important is that mediators are almost never a "neutral party." They are human beings who will begin forming an opinion about the case and the parties involved very quickly. This opinion will shape the work they do. It is obviously very important to present yourself to them in a way which engenders the most positive response. Having commissioned third party assistance in the evaluation of your case will add greatly to the impression made. It helps a lot to be able to say, "We did not take this position arbitrarily. We did some serious jury research before we evaluated the case at 'X'. Let us show you what we found."

Should You Let The Other Side In On It?

One of the issues which comes up is whether or not to let the other side at a mediation see the results of jury research. In the several examples known to me, this has worked well for the party who performed the research. The attorneys and clients on the other side were appropriately skeptical at the outset. After examining the studies they always revised their numbers as a response. There is frequently this initial tendency by adverse parties to suggest that the research commissioned by one side only is somehow insufficient or invalid. The reputation of the jury research company usually makes the difference here – no legitimate consulting group would let you design a test of your case which did not fully address the arguments and interests of your adversary in the action. In terms of our firm, putting our name on the report means we believe it to be a good test of selected issues in the case, period. We do not design jury studies solely as aids to argument, we also design them as aids to evaluation.

The choices, then, involve whether or not to show the results of a jury study to the mediator, as well as whether or not to let the other side see them. There seems little argument against informing the mediator about information you have which substantiates your position vis a vis settlement. Mediators are informed and persuaded by such material. Sometimes, you may wish to show only some parts of the jury study to the mediator or opposing party those results which go to damages as opposed to witness effectiveness, for example. You can usually get a jury researcher to create an excerpted study report for you, and, when appropriate, include a statement which asserts that, although abbreviated, the report is not substantively altered.

I have attended mediations on several occasions with the specific assignment of explaining complex jury research to mediators and or opposing parties. In all instances, my mandate has been to "talk straight" with the mediator about the strengths and weaknesses of the research.

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Using A Mock Trial As A Component Of Mediation

It is not unreasonable to consider inviting the other side to participate in a jury test, performing it as part of the mediation process and thus rendering its results confidential. Incidentally, it is not necessary to worry about "giving away the case" the only material presented is in summary form. The goal is simple, get feedback about the jury issues which keep the parties apart in their assessments. Performing a study concurrent with mediation may help protect mediators from being compelled to "split the difference" in a case where such a division is clearly unfair, yet one or the other of the litigants just can't see how weak his position is. As one attorney put it, "It's a great way to sober up the clients" (Theirs AND yours!).

Evaluating Exhibits And Experts, Too

One of the advantages of performing jury research (not involving the other side, as mentioned above) is that it is possible to get a good measure of the

impact of exhibits, both evidentiary and demonstrative, and the credibility of experts. This information is helpful in preparation for mediation since it can be included in the information materials provided in advance to the mediator – as well as presented in your short presentation about the case at the actual mediation.

Advance packets and presentations for mediators should be planned out with all the care of a motion argument to a judge or an opening statement to a jury. Research clearly demonstrates that judges are as affected by powerful visual aids as jurors are; there is no reason to believe that mediators are any different. What makes visual aids compelling is that they meet human beings at the level of their perceptual needs: most humans need to SEE whatever it is they are contemplating in order to understand it fully. A terrific tactical advantage is attained by the side which presents a package of information and exhibits to the mediator which has already proven to be effective and persuasive in a jury study.

Another interesting option at mediations is the invited participation of expert accountants, for example. The jury research will reveal the strengths and weaknesses of such experts (and their exhibits) as witnesses on your behalf. A compelling presentation by an expert can be extremely effective in persuading a mediator of the validity of a viewpoint. It also impacts the lawyers and clients on the other side, particularly if they are not as well prepared. Often, there are videotapes available of the other side's experts in deposition which can be similarly tested and reported on as to their credibility and impact. Using videotapes at mediations is as effective as using them anywhere else – very effective. This is just one of a number of powerful ways to apply video technology to educate the mediator and the adverse party about your perspective on the case.

The Role Of The Client

One of the unique things about mediation is that the client usually is asked to play a much larger role in representing his own interests than he would in a trial or a conventional settlement conference. The valuable feedback the client gets from jury research generates a level of comfort and confidence which is obvious to all. It is important to note that we are not talking necessarily about confidence in a victory at trial. What the client will be confident about is the reality base of his position on the case. He may have learned from a mock trial that he stands little likelihood of prevailing before a jury. The approach to mediation will thus be cognizant of that; the client being more confident that he is doing the right thing if he has to settle at less favorable terms than he originally hoped for. He can then negotiate aggressively towards the best outcome possible, given those considerations.

In terms of the client's role, we have noticed that the idea of initiating jury research on cases identified early as being unlikely to go to trial is almost always that of the client's. Trial attorneys (at least, until recently) have typically thought of jury research as tactical in nature, applying it to matters such as jury selection, witness preparation, trial theme development, etc. They tend to suggest a test when the trial itself is imminent. Litigation and claims managers often have a more broadly strategic sense of its applicability in evaluating cases, scheduling a study early, and using the results as part of overall risk assessment, the development of a discovery plan (and budget!), an aid in the selection of experts, and – as discussed here – as a tool for improving results in mediation.

Time To Rethink The Purpose Of Mock Trials?

Since trial attorneys tend to think of jury studies as devices used in preparation for courtroom action and litigation managers tend to think of them as planning aids, does this mean one of them is wrong? Actually, both perspectives are entirely legitimate, since both purposes clearly need serving. A trial consultant would simply utilize somewhat different design and analysis parameters on tests conceived solely for evaluative rather than tactical purposes. The problem, if there is one, is that there are still too many litigation managers who only understand jury research from the perspective of their outside counsel that is, as a trial preparation tool. They miss its applicability in overall risk assessment, cost containment, and ADR.

The Future Link Between Jury Research And ADR

If ADR's weakness is that the neutrals have no better idea of the jury verdict value of a claim than the lawyers do, and are thus compelled to facilitate sessions which are often little more than mediated bargaining, then jury research may be the key. Imagine a scenario in which the sides are too far apart to accomplish a mediation of the "split the difference" variety, but neither wishes to face a trial. One or both can commission jury studies to get the answer they need. If they do the study together, the risk to either can be moderated substantially through the use of a high/low agreement. A one- or two-day mock trial utilizing several juries, with a mediator present to facilitate settlement talks as soon as the jury feedback is received, would dramatically reduce costs and risk for both parties. Perhaps this is the way many cases will be resolved in the future.