

# Reduce Uncertainty by Taking your Trial Venue's Temperature: The Role of a Community Attitude Survey

By Ken Broda-Bahm



One reason trial by jury is falling out of favor in civil disputes is that parties and counsel treat it like the ultimate mystery, and this uncertainty makes the alternate ways to resolve the dispute look a lot safer. The jury is sometimes considered a “black box,” and the phrase “A jury can do anything,” is often on counsel’s lips as expectations with clients are being set. That can be a little off-putting, and of course, that is often the point: The client who sees a big verdict in their favor as a sure thing, probably does need that reality adjustment. At the same time, treating a jury trial as if it is casting a pair of dice into the unknown is probably overselling the uncertainty.

Ultimately, jurors are not really that unpredictable. After all, a jury doesn’t just come out of nowhere. They come from the community. Understanding that community -- the local attitudes and experiences *as they relate to the issues at play in your particular case* -- is an important uncertainty reduction strategy. Client, counsel, and consultants are better armed with the aid of a relatively simple and low-cost tool: a community attitude survey conducted prior to jury selection.

Conducting a community attitude survey means using telephonic or online polling within the juror-eligible population in your trial venue to discover and use the particular attitudes and beliefs that characterize your venue. Unlike the special purpose surveys associated with a change of venue motion, community attitude surveys are conducted with an eye toward remaining protected work product which is used to inform the attorney's strategy for trial. Many of the barriers that can pull

attorneys away from other consulting services aren't present with the survey: They're not typically high dollar, usually don't involve long-term planning and advance notice, and rarely take much if any time from the attorneys. But they can be enormously useful in choosing your trial venue, assessing knowledge or attitudes regarding your case, providing a baseline for focus group or mock trial research, and in developing questioning strategy for voir dire.

## Conducting a Community Attitude Survey: Four Steps

Actually conducting the survey takes four steps, each one of them aided by the involvement of a social science researcher.

### One, Know What You're Researching

That means developing research questions in advance. The point isn't to just broadly know the community — chances are good that an experienced local counsel already knows their community. Rather, the goal is to look at the specific case issues and decide what uncertainties attach to this particular scenario. For example, in a construction case, you might want to survey on questions like these:

*How common are positive and negative experiences with contractors?*

*Who is generally seen as having more control over a project: the general contractor or the subcontractors?*

*How much awareness is there over the project at issue, and have people formed opinions?*

### Two, Develop Fair and Effective Questions

I might be unusual in one way: Whenever I'm at home and I get a call asking if I want to take a survey, I always say “Yes,” because I

want to hear how they frame the questions. And increasingly, I've noticed questions structured like this: *"If you learned that Senator Schlum had sacrificed his own illegitimate children in a Satanic ritual, how would that influence your support for Senator Schlum?"* That's an exaggeration, but the use of questionnaires to *influence* rather than just *measure* public opinion, the so called "push poll," has become a lot more common. Litigators, who are used to influencing and often adapt a more subtle version of that approach in their oral voir dire, can drift into that approach. That is another reason why questions should be drafted by an experienced public opinion researcher, and should be fair with no "push" one way or the other. Ultimately, you want questions that are neutral enough that they could be included in a draft supplemental juror questionnaire submitted to the court for use in voir dire.

### Three, Sample the Venue

The next step is to work with a market research company to run your survey on a sample drawn from the community. How big a sample? Generally not as much as we would use if we were trying to predict the next presidential election, but it should be large enough to draw some statistically significant and meaningful associations. Around 300 respondents is typical for our group. There are two other additional considerations. One is that it matters how the sample is selected. An "opt-in" sample is not going to be representative: You want people who are contacted and agree rather than people who contact your recruiter and volunteer. A sample randomly drawn from the population (that is, not part of a pool that gets paid to take surveys) is vastly superior, and probably a precondition to being able to make reliable generalizations from the sample. The second consideration is that you don't want to risk tainting the eventual jury pool: If the summons have already gone out, screen potential respondents to exclude those who have received a summons for jury duty. If they have not,

then make clear at the end of the survey that if they are called for jury duty and if they are questioned on issues having to do with the survey questions, they should share their experience as a part of the survey during voir dire.

### Four, Understand and Apply the Results

When you get the results back, it is going to be a lot of tables and charts. It is purely descriptive and will be purely useless unless it is analyzed and applied. Remember at this stage that your goal is not to just understand the playing field. Rather your goal is to reduce uncertainty as you prepare for trial. If you have designed the survey well, you should be able to treat some answers as indicating a person who would be higher or lower risk for you at trial. With those questions treated as "dependent variables," you can next ask which "independent variables" work best in identifying the favorable or unfavorable potential jurors. In other words, if respondents reacted to a short thumbnail of your case scenario, you can analyze the data to look at the experiences or attitudes that are statistically associated with that response, and you can use that in voir dire.

When preparing your case, knowledge is power. A community attitude survey is a good way to get that power, and ultimately to make your eventual jury much more knowable. Of course, it will never be perfectly predictable, but then again, neither are any of the alternatives to a jury. When it is accompanied by a thorough and honest attempt to understand and adapt to the community, persuading a jury becomes a lot more controlled than a roll of the dice.

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