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Harvey A. Moore

*Trial Practices, Inc.*

Jennifer Friedman

*University of South Florida*

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# **Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making**

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*Harvey A. Moore*  
*Trial Practices, Inc.*

*Jennifer Friedman*  
*University of South Florida*

## **ABSTRACT**

Quantitative research has dominated applied litigation research, but it seems to lack the flexibility needed to link pretrial research to ongoing courtroom events. Participant observation is a methodology which seems more suitable for studying the dynamic environment of a trial. A 6-day civil trial is used to evaluate participant observation reports against pretrial survey analysis and trial simulations. The objective is to show how different methodological approaches converge in the frame of reference which reflects the actual verdict reached in trial.

Litigation research is a relatively new field of social science application. The most useful methodological approaches to study ongoing litigation are still under development. Quantitative designs have dominated this field to date and typically are used for jury selection (Frederick, 1984; Penrod & Linz, 1986). Quantitative techniques, such as secondary analysis of survey data, have been employed to help create checklist scales to evaluate potential jurors for prejudicial tendencies during voir dire (Abbott, 1987). Another purpose of quantitative techniques, which is used less often, is to focus strategic themes and arguments for trial. Nonetheless, quantitative designs have been strongly criticized (Saks, 1976), in large part

because they tend to fall short when used as the principle methodology to anticipate the essentially dynamic character of a trial.

The tactical environment of an ongoing trial is fluid. Quantitative methodologies appear to lack the requisite flexibility to grasp the changed meaning of issues as they emerge in the courtroom. In short, once a trial begins, pretrial quantitative research may be overtaken by unanticipated events. The utility of strategic themes, the integration of developing arguments vis-à-vis an opponent's claims, and revision of potential cross-examination scripts must be evaluated continually in light of daily trial experience.

Consequently, a major task for an applied research team is to link pretrial efforts with techniques that can incorporate dynamic developments in the conflict. Participant observation is one of the few approaches which can assimilate holistic knowledge and diverse data for application to emerging situations in an applied or clinical role. The potential of this method for application in legal conflict would seem promising.

Participant observation has long been employed in the anthropology of law (see Llewelyn & Hoebel, 1941). There are numerous references to its use in criminology and the sociology of law (McCall, 1976; Skolnick, 1966; Ziesel & Diamond, 1976a; Ziesel, *et al.*, 1959), but there are relatively few reports from any applied setting where research plays an instrumental role in the actual conduct of trial. This method is also the least well-defined methodological component of the social sciences (Bernard, 1988). Its applications tend to be confined to concrete situations and always must be adapted to different contexts. Participant observation's focus is on process rather than outcome, on context rather than specific variables, on discovery rather than confirmation. The nature of participant observation tends to lend itself to exploratory research as opposed to outcome prediction. Yet, participant observation actually may be a very useful tool in litigation research. Participant observation techniques permit us to grasp the dynamic environment of the trial and link pretrial analysis with ongoing courtroom events. Participant observers may be able to examine the interpretation of interaction during the trial and use these ideas as a guide for continued strategy development. Consequently, sociologists should find a multifaceted methodological approach very useful in applied litigation research.

This paper examines the utility of a combined methodological strategy applied in support of a multimillion dollar contract dispute. A case history of this 6-day civil trial is presented to evaluate the reports from participant observers against the results of pretrial research and trial simulation conducted prior to and independent

of the observational data reported below. The main objective is to begin exploration of how diverse methodological approaches converge in the actual verdict reached in trial.

This report is an example of the benefit of sociological methodologies and critical perspectives in the field of law. Through an analysis of key patterns during multiple stages of data collection, sociologists can provide lawyers with an understanding of human behavior which then aids in the development of strategic themes for and during trial.

### **Issues in Courtroom Observation**

Observational techniques used to support a plaintiff or defendant in a trial present a unique challenge to qualitative methodologies, both ethically and procedurally. To a great extent, these concerns are interrelated. Ethical questions are often raised in the social sciences regarding the issue of whose side practitioners are on (Becker, 1962). Since the U.S. court system is based upon an adversarial model, the only choice is whether to be involved or not, for there is no way to avoid taking sides (Thornton & Voight, 1988). When researchers choose to be involved in a trial, they are also choosing a particular side and perspective. Thus, it is quite clear whose side the researcher represents. If services formally have been engaged, it is also quite clear that the implications of research will be to help a particular antagonist. Ethical concerns are not obfuscated, but are dealt with immediately upon deciding to do this type of research.

More practically, it is difficult for sociologists to violate research ethics because participant observation techniques are highly constrained by the courtroom setting. The main research role available in a courtroom to participant observers seems to be merely as audience. Unlike some traditional participant observers, courtroom observers do not communicate with those whom they observe. While observations of a courtroom may be conducted covertly, the behavior is public and occurs within open court. Checks on intrusive behavior by a paid participant observer do not rely solely on one's internal ethical principles.

Judges prohibit any form of verbal or gestural communication from spectators. Consequently, it is unlikely that the courtroom behavior of participant observers during a trial will influence its outcome. Although jurors may look to the audience for cues or effective attorneys may play to the audience as a means of gauging

effective communication, the observer plays a passive role in court interaction (see Sternberg, 1972). Both the judge and opposing counsel are responsible for stifling remonstrances from the gallery. If offensive behavior is observable to opposing counsel or the judge in open court, such behavior may be fatally self-defeating.

Perhaps a greater potential ethical concern regarding courtroom observation is that sociological methods are used to shape rather than document reality construction (Holstein, 1985). The applied social scientist does not have a traditional "What is going on here?" orientation toward research. A courtroom participant retained by one side or the other observes for a purpose, whereas a traditional ethnographer is there to become "immersed" in the field, becoming part of a group, organization, or community, examining those features of activity which presumably have greatest significance for the event or participants. Conversely, applied observers have a direct interest in the success or failure of the client's case. The purpose is to influence the outcome of trial—something attorneys are ethically bound to do. Although traditional ethnographers and sociologists attempt to remain impartial, typically the outcome of their work does have political implications. Yet, many times the implications of sociological work tend to be hidden because of such an attempt at impartiality. In applied research, however, political agendas are apparent and brought to the forefront. In such situations, applied researchers can make clear decisions about their involvement in this type of work.

Serious methodological problems may emerge. In particular, how should the attention of the observer be directed? In a traditional approach to participant observation, the observer should be open to the broadest array of phenomena. Yet, a courtroom is a busy place and it is difficult to analyze everything. One approach to deal with this issue is to direct attention to specific events and not to all observations. Some raise concerns, however, that if an observer's attention is aimed at specific issues by virtue of a specific theory of the case, there is risk that often "important" or emergent developments could be missed. Some suggest that observers ought never to know by which side they are employed (Vinson, 1982), yet this solution makes it difficult to direct observation toward any specific evaluative purpose. If pretrial research is effective, there should be a reduced risk that unanticipated observations may emerge to shape the outcome of trial. Pretrial research should help focus participant observers. Trained observers also will be aware of other emergent patterns that may have not been anticipated. Typically, participant observers learn to find important patterns among complicated environmental and interactive stimuli. Patterns that emerge repeatedly are deemed important, and trained observers will not miss such information.

There has been limited research on the applied use of participant observation in courtroom settings. Procedural aspects of this approach have received little scrutiny. Ethnographic techniques for standard research purposes, however, have been widely reported, with little critical discussion of the method (see, e.g., Conley & O'Barr, 1988).

The few discussions of observational techniques in the courtroom tend to primarily focus on "shadow" or "mirror" juries (Covington, 1985; McCabe & Purves, 1974; Vinson, 1982). Such procedural strategies attempt to replicate the trial jury with *untrained* observers seated in the courtroom; the assumption is that these members will observe and react to activities similar to actual jurors. Shadow jurors typically are debriefed on a daily basis by a "neutral" observer at a site removed from the courtroom. Tactical strategies derived from these interviews are provided to the client's attorney. While the approach has intuitive value, there are as yet no evaluations of its effectiveness. Presumably, if all pertinent characteristics of the sitting jury are matched in the parallel panel, then extraneous effects might be minimized. Very little has been said about this matching process or how it is accomplished within the time constraints present in court. In fact, Vinson (1982) reports his study even without matching on gender in one instance. On the other hand, little is known about the effectiveness of a more traditional participant observational approach during an actual trial. This research is an attempt to examine its utility.

## **Approach**

Applied research for the development of strategy in this trial consisted of three interdependent stages. In the first stage, demographic information was obtained from secondary analysis of social survey data collected by the National Opinion Research Center (NORC) to determine what kinds of people might be expected to support the defense (see Davis & Smith, 1988) as structured by its attorneys. Data for the analysis was taken from the General Social Surveys conducted each year since 1972 by the National Opinion Research Center. It is comprised of a yearly national probability sample of approximately 1,500 Americans. The survey covers a wide range of topics but uses standardized question formats where possible to facilitate trend analysis and pooling. One question concerning peoples' confidence in business leaders was selected as a criterion variable for estimating favorability of juror predispositions to the case:

I am going to name some institutions in this country. As far as the *people* running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them? [Business leaders]

This variable was cross-tabulated with various demographic and attitudinal items using the Statistical Package for the Social Sciences (SPSS). The best method of determining the characteristics of favorably oriented jurors is to correlate attitudinal and demographic characteristics with a *direct*, local measure of case perceptions. These data consist of general attitudes of people in the Southeastern United States and are not case specific. While a local survey would be preferable, the case budget did not permit such an exercise.

In the second stage, an abbreviated mock trial was held before two separate juries to estimate how jurors might assimilate and process information about the case. The jurors were selected from a pool of respondents to a newspaper advertisement on the basis of characteristics that presumably were related to potential biases for or against the defense, as determined from the secondary analysis survey data. Two juries were formed on the basis of this model of potentially favorable and unfavorable jurors' responses to the case. Both juries reported verdicts *against* the defense, with awards of \$2.5 million and \$175,000, respectively, after hearing both a surrogate plaintiff's presentation and the planned defense by the actual case lawyers.

The last stage of the research consisted of two professional observers who provided feedback to the trial team and client. Both professional observers have a PhD in sociology. One person was closely acquainted with the trial and had read all depositions, interviewed defense witnesses, and observed several trial simulations. In addition, this person systematically participated with trial attorneys in the daily presentation and evaluation of the case, and in the development of tactical responses and initiatives for the next day. The second observer has had extensive experience with qualitative methodological approaches across various settings, but became acquainted with the case only as it unfolded. In some ways, it may be advantageous that the observer lacked background in the case as such observations would be more similar to those of jurors who were initially unfamiliar with the issue. This observer submitted written field notes and summaries of the proceedings, but did not participate in the defense.

Notes were kept electronically on laptop computers. Typically, technical information (business contracts and transaction) were gathered from trial exhibits. In particular, observers would write down the “story” being presented to jurors and the themes that the lawyers used to communicate their sides of the dispute. Furthermore, notes on jurors’ reactions, interactions with each other, and judge’s and lawyers’ mannerisms, for example, were included. Primarily, as is typical of most qualitative researchers, as much information as possible was gathered. As the trial proceeded, patterns became evident. More attention was devoted to examining such patterns as the trial continued. These types of patterns and themes form the framework by which jurors understood the specific business issue presented in this trial. The results of this particular case analysis are not generalizable to other trials (or at least no such claim is proffered here). Law has developed on the basis of *stare decisis* or precedent. Yet case studies typically represent the least sophisticated, most disparaged form of scientific explanation in sociology, notwithstanding important classics such as *Street Corner Society* or *The Jackroller*. The development of the trial is reported below in the form of a descriptive case history of major events and themes in the trial because jurors finally are only exposed to two “stories,” both of which represent attempts by one side or the other to justify a verdict against their opponent. Participant observation, as opposed to other methods of pretrial research, both qualitative and quantitative, is the only method by which parties may develop an alternative understanding of the actual story which observers may hear—as opposed to what lawyers think they said. This is not a new methodology, nor is our intent to evaluate participant observation as a separate and distinct method of trial intervention. Each case in every trial may call for a unique mix of applied research strategies. We report here one such example to serve the heuristic purpose of illustrating how sociologists from both academic and applied backgrounds may introduce sociological method to a traditional profession.

This case history summarizes how the opposing lawyers attempted to create their own versions of reality concerning transactions between two businesses involved in a lawsuit. The lawyers for the plaintiff and defense each used different strategies reflecting their own theories about how to influence juror behavior. Lawyers wanted to set their own versions of what happened in order to sway jurors to accept one particular version of reality. Jurors, nonetheless, must come to a consensus regarding the story which organizes the case or else the defense prevails. Eventually, if there is a verdict for the plaintiff, only one view of reality will be accepted by the jury (see Bennett & Feldman, 1981; Goffman, 1974).

Data gathered during the actual trial quite clearly shows the different strategies set by both the plaintiff and defense attorneys. In addition, the field notes abstracted in this paper tend to highlight how particular strategies might be observed or interpreted by jurors. The information provided in the case history delineates such strategies and shows how participant observation data can be used by the research team to help attorneys create new tactics and themes and deal with unanticipated courtroom events.<sup>1</sup>

## The Case

The lawsuit involved a breach of contract action brought by Jones Tugboat and Towing Company (*Jones*) against Consolidated Barge Transport, Inc. (*Consolidated*). Jones was going out of business and sold its major asset, a contract to haul commodities to Mississippi from Florida by seagoing barge, to Consolidated, located in Florida. Consolidated was principally interested in the value of the return barge trips for their business of hauling coal. Jones's commodities contract was up for renegotiation and renewal and so its future value was uncertain. Consolidated agreed to pay a contingent price if it was able to achieve a satisfactory hauling rate for these commodities. Otherwise, the contract would have less value to them and they would therefore pay Jones less in the future. Consolidated claimed that it did not satisfactorily renegotiate that commodities contract, and subsequently refused to pay Jones. Jones sued in a trial that lasted 6 days. Summarized field notes by the naive observer were as follows:

### The First Day

On the first day of trial, the plaintiffs' attorney's opening argument set the mood for the case. He drew the jurors into the life of the plaintiff by discussing his family history. The lawyer emphasized how Jones was a family business and owned the company for many years. In addition, he presented the themes for the case by contrasting this family business with the other major corporation, Consolidated. He emphasized the differences between big and little corporations and alluded to their power differentials. The lawyer presented the story of the dispute. The larger business, Consolidated, purchased a section of the smaller business, Jones, which entailed a relationship and business contract with a third corporation. Consolidated would continue to owe Jones a share of the profits as long as the contract's

requirements were upheld. Consolidated discontinued paying Jones because market conditions had changed and this nullified the contract. In addition, Consolidated did not include Jones in contract negotiations with the third corporation.

The specific details of the case were complicated. The strategy of the plaintiff attorneys was to present simple themes that jurors had opinions about and could understand. Family business may imply characteristics such as honesty, or that products are not sold for huge profits but for survival of the company. Family business also implies that larger corporations are more powerful, profit-oriented, possibly corrupted by greed and not to be trusted. In contrast, the defense attorneys had not addressed or discredited all the themes presented by the plaintiff attorney. They had not countered the claim by the plaintiff that Jones was not included in business negotiations with the third corporation. Instead, defense presented a complicated version of what happened during the business negotiations between the two companies as their strategy was to confuse jurors. The jurors received technical information about the case rather than simple themes.

Objections by opposing counsel also became an issue, initially, because they broke the monotony of the case. The defense attorney discontinued the presentation of the objected information in both situations. One objection occurred about the base rate and the other was about Jones throwing away critical documents concerning the sale. Since the defense attorney did not continue discussion after the objections, it appeared to the observer, and may have appeared to the jurors, that he misrepresented information. Although the jurors were quite attentive, as this was the opening day, with time they seemed increasingly disinterested in the defense attorney's statements.

### The Second Day

On the second day of the trial, the plaintiff attorney continued to emphasize story themes set on the first day. The theme of strong family roots of Jones was further emphasized. Jones was dependent upon the whims of big corporations such as Consolidated and the third corporation. In addition, Consolidated had made a huge profit from this business transaction with Jones and would continue to do so in the future. The specific factual details of the case were secondary to the simple familiaristic themes. Although the owner of Jones had not remembered many facts about his business transactions, the plaintiff lawyer eased this anticipated problem by asking the witness for his recollections about events. The term "recollections" seemed to emphasize random forgetfulness and not calculated avoidance of

important details. In addition, the plaintiff emphasized the theme about Consolidated's powerfulness and corruptness by raising the issue about a confidentiality agreement. For example, Consolidated did not want Jones to show the business contract to anyone, even their lawyers. One of the jurors, a 24-year-old manager of leasing at a major bank with a graduate degree in finance, smiled repeatedly during his testimony, which seemed to suggest that she followed the point presented by the plaintiff (she later was elected foreperson of the jury). That is, Consolidated preferred that Jones not use experts to examine the contract as it was negotiated. The implication was Consolidated had sinister purposes.

Tactics during cross-examination by the defense still dealt mostly with details and facts about the case rather than themes. Instead of presenting their own themes, the defense lawyers tried to discredit themes supplied by the plaintiff's witnesses. They used a chart to show all the corporate subsidiaries of Jones in an attempt to suggest that Consolidated was not dealing with a little corporation but that both companies were of equal size. The president of Jones, however, discredited such information by saying that the smaller subsidiaries were bankrupt. The defense lawyer tried to get the witness to state that Consolidated could lose money in this deal, but Jones's president emphasized emphatically that no one ever would get him to say Consolidated would lose money, "Consolidated would lose nothing." The jurors laughed at this response. Thus, the witness for Jones was able to manipulate the defense attorneys' questions to emphasize themes of the plaintiff's case. Although testimony of the witness missed or ignored key pieces of evidence already substantiated, and he appeared to have a highly selective memory, he was still supportive of the plaintiff's case.

Objections still seemed to be exciting to jurors. The plaintiff argued also the relevancy of the defense attorney's questioning when he requested information about the time it took for barges to return coal. One of the jurors laughed during such interaction, which to observers, at least, seemed like pointless bickering.

### The Third Day

By the third day of the trial, the jurors seemed very familiar with each other. They talked during trial breaks and became obviously less attentive to the witnesses. The plaintiff called a lawyer from his own firm to testify. Although such a strategy could present credibility problems, the witness used humor which eased the jurors. They laughed at his jokes. This witness joked when a letter was found

in his files and he had not known about it. He stated that his computer files were like a “vacuum receptacle and ended up with everything in it.”

The theme about the size of Consolidated continued to be emphasized. The witness discussed the main corporation and the other corporations it owned, such as grain transport. Due to Consolidated’s size, it could purchase insurance, electricity, and other resources at low prices. The witness discussed the quickness with which Consolidated wanted to close the deal, which highlighted the amount of profits anticipated.

Consolidated refused to provide information about their estimated benefits under the contract. The “one-way” confidentiality agreement also was reemphasized. Such themes reinforced the image that Consolidated was a large corporation, solely interested in profits. Consolidated controlled the amount and nature of information it shared with Jones, which suggested that it acted in bad faith.

The defense strategy again focused on discrediting information provided by the plaintiff or discrediting their witnesses. For example, the defense attorney emphasized the lack of clarity in responses of defense witness testimony.

The one theme that the defense tried to raise was to frame the story within the nature of “business risks.” Both sides, they argued, entered negotiations recognizing that there were risks involved in any business acquisition. The defense attorney expressed concerns about market conditions that could affect the amount of strategic materials Consolidated would move in the future.

Furthermore, the defense expressed concern that the third commodities corporation could go bankrupt. This tactic inadvertently emphasized the importance of short-term profits, which supported themes presented by the plaintiff’s case. Nonetheless, the information was discredited by the plaintiff’s witness. Assets would be high enough that Consolidated’s profits would not be affected by market conditions nor would the third corporation become bankrupt. Concern over business risks, however, seemed secondary to other details of the case and the attempts to discredit the witness testimony. At this point in the trial the jurors were clearly less interested in objections and used this time to talk with each other.

#### The Fourth Day

On the fourth day of the trial, the plaintiff called a key defense witnesses to testify, the president of Consolidated, who was seated at the table as corporate representative to the trial. This surprised the defense attorneys and the witness seemed unprepared to testify. The witness was unable to remember facts about

business transactions. Specifically, he forgot about a letter which stated that Consolidated and Jones should meet, and he appeared dishonest rather than forgetful. The specific details of the case at this point, however, were less important than the theme that Consolidated had not included Jones in business negotiations with the third corporation. Once again, this was an indicator of Consolidated's bad faith. In addition, the profit motive of Consolidated was highlighted again by presenting the notion that Consolidated wanted profits without sharing them with Jones.

The defense attorney was not able to counteract information presented by this witness (the defendant president). His strategy was to further emphasize business risks such as the volatility of the market, which inadvertently reinforced the plaintiff's theme of the importance of profits for Consolidated.

### The Fifth Day

The fifth day began with an acquaintance of the president of Consolidated. He had dined with the president of Consolidated prior to closing the deal with Jones. His testimony emphasized that Consolidated withheld information from Jones. The jurors received testimony that the president of Consolidated said that "Jones's money was safe."

Following this testimony and immediately before presenting their expert witness, the plaintiff attorneys read a deposition. The expert witness had an MBA from Harvard and the plaintiff emphasized the witnesses' expert status. The witness, once again, highlighted the theme of profit motive.

During cross-examination, the defense attorney emphasized details about the case. He continued to try to discredit information presented by the expert witness as well as the status of the expert witness. The lawyer emphasized that he made a career change due to fluctuations in the market. The witness, however, rebutted that he never testified about anything in which he was not qualified. The defense attorney also emphasized that it was not unusual not to discuss business at a social dinner and thus the president of Consolidated was not withholding information. Furthermore, the defense reemphasized the risk associated with the market which would diminish Consolidated's profits.

After 4½ days of grueling testimony about business transactions, the defense case began on late Friday afternoon. The defense started with a taped video deposition by one of their witnesses. The jurors were not as attentive to the video compared to live testimony, and certainly everyone was tired at the end of the week.

The defense had not anticipated its case would begin on a Friday afternoon and most would agree that Friday afternoon was not advantageous to the defense; nonetheless, their strategy to confuse the jury and discredit the plaintiff reinforced the monotony of the trial.

### The Sixth Day

The defense continued their case on Monday morning. The defense attorney strategy was unclear. Rather than using his own themes, he rehashed information already presented by the plaintiff. Consequently, the struggle that ensued was clearly a reinterpretation of old facts rather than a presentation of new ideas. The defense attorney questioned the president of Consolidated about if he ever had said “Jones’s money was safe,” as a way to counteract the testimony presented by the plaintiff. In addition, concern about the third corporation’s bankruptcy was reemphasized. The defense further emphasized the risks entailed with Consolidated’s purchase of a portion of Jones, but such information had not seemed to offset their anticipated huge profits. The president of Consolidated had acknowledged that they expected to make profits or else they would not have entered this business deal, but he emphasized that they could lose money too.

It appeared that the defense’s attempt to discredit the themes set by the plaintiff’s case reemphasized the strategies of the plaintiff’s attorneys. The few times the defense tried to present their own themes about business risks they were unable to override the themes the plaintiff had presented. In addition, these themes reinforced the perspective that Consolidated was a large corporation preying on a small family owned corporation for large profits.

During cross-examination, the plaintiff questioned the credibility of the president of Consolidated by reemphasizing that information was withheld from Jones about negotiations with the third company. Specifically, the president had not told Jones that if the third corporation went bankrupt they would not get paid. The plaintiff raised the issue of the confidentiality agreement and that the current witness had recommended that Consolidated not use it. Once again, the plaintiff emphasized the huge profits Consolidated would make and that there was no risk to them.

The jurors seemed initially to be interested when witnesses first took the stand, since this was the beginning of the defense case. As the defense attorney asked questions, the jurors became less alert. They were less attentive to objections and talked with each other during such times as well as during actual testimony.

The trial finally ended. Both sides offered closing statements which summarized their respective themes: David versus Goliath for the plaintiff as opposed to a complicated business dispute for the defense.

## **Results**

The plaintiff's case presentation lasted for 4½ days, while the defendant's presentation lasted only 1 day. During this time, the plaintiff attorneys were able to get their story across for a longer duration of time. They began the case, set the stage for what happened, and created the themes. The defendants did little to present their own themes. By the fourth day the themes were already set and solidified in the jurors' minds.

The defense was unable to discredit the themes and present their own ideas. The strategy that the defendants selected was to inundate the jurors with details about the complexities of business transactions. Since the jurors appeared to be confused by some of this testimony, they may have held in mind the simple themes they did understand as presented by the plaintiff's attorney (big corporation vs. little corporation, powerful vs. powerless, huge profits vs. bankruptcy, corruption, and acting in bad faith).

After deliberating approximately 1 hour, the jury awarded Jones \$2.5 million.

## **Discussion**

A multifaceted methodological approach seems beneficial in the application of litigation research. The generation of pretrial data in conjunction with participant observation data during the actual trial can enable the trial team to not only determine critical aspects of strategy development, but also to analyze the implications of tactics during the trial, if the approach to litigation remains flexible.

In this case, courtroom observation provides more depth as well as a qualitative verification of other pretrial research techniques. The major dimensions of discussion and action were anticipated for the client. Yet while the research team may advise lawyers based on their research of possible strategies and associated implications, they also must convince lawyers that their research is reliable. Although participant observers tend to trust and find valid information gathered with this technique, that is not necessarily the case with attorneys. As a result, recommendations may be

rejected on the basis of the attorney's independent judgment of the significance of events.

In the present case, the pretrial secondary analysis of survey data drawn from the General Social Science Survey (GSS) identified several background correlates which suggested hostility to Consolidated. The attorneys were advised to avoid in voir dire potential jurors who were (a) males above 50, (b) females below 25, (c) anyone with an occupational title as "manager"; and (d) anyone with an analytic occupation. The foreperson elected by the mock jury was a 52-year-old male who was manager of a stock brokerage firm. The foreperson of the actual jury was a 24-year-old female (MBA), who was manager of leasing for a local bank. The attorney overrode a recommendation to strike this juror on the basis of the profile of hostile jurors, in large part because she seemed "attractive" and interested in the case when he addressed her during voir dire. In short, the GSS data presented a model jury which was not duplicated at trial, so the utility of this data source is untested. "Seat of the pants" judgments by attorney, while perhaps mistaken, represent an element of judgment and experience which no methodology can encompass or replace. Jury selection is a fast-paced, dynamic event which provides few opportunities in civil court for lengthy debate over the merits of various candidate panel members. This is, after all, the practice of law before it is the practice of sociology. The judge in this case permitted only a 5-minute emergency restroom break with only furtive opportunities for private conversation.

More importantly, the plaintiff's attorneys were able to maintain their strategy and emphasize consistent themes. This happened because the defense approach was to discredit the plaintiff's themes rather than change or push an alternative framework of explanation from the defense perspective. Since the defense attorneys held rigidly to the strategy of confusing the jury, they disregarded observational data made during the trial as extraneous. For example, during the trial, the court bailiff frequently fell asleep. The court reporter had to stop and adjust tapes or switch shifts with a second reporter. Both activities elicited the attention of one or more jurors during defense presentations. Jurors seemed bored by the defense. Yet, because these types of events were assumed to have little relevance to what the lead attorney desired to know, which was "Are we going to win?" such observations were deemed "unimportant." Since the strategy was to confuse the jury, no one was disturbed by such reports that the naive observer also was confused. The defense attorneys anticipated losing and were mostly concerned about the size of the award. Thus, they selected and stayed with a strategy which ensured defeat despite independent field reports which suggested the need for a change in strategy.

Decisions about tactics also needed to take into account procedural variables. The plaintiff's presentation ended on Friday afternoon. The defense had to decide how to proceed given such a short amount of time to present the beginning of their case. They elected to open their case with a video deposition so as to begin distancing the jury from understanding the plaintiff's presentation of the case. Whatever anticipation existed in the minds of jurors as they waited to hear the affirmative side of the defense was lost when the television deposition was turned on. The senior defense representative, an elderly man with over 30 years of experience who had been listening to attacks on him and his company's character all week was not called to answer the charges until Monday morning. While the tactic was debatable, the decision rested with the senior attorney and the style with which he felt most comfortable.

On balance, participant observation complemented other litigation support efforts. We reported two unfolding stories—one of which proved superior for the plaintiff's case in organizing juror observations as reflected in the verdict. The themes and story line of the plaintiff's case were easy to follow. Nothing in our observations provided a basis for alternative ideas that the defense could use to undermine the opponent. The defense lawyer used the reports to provide tactical ideas for minimizing losses as opposed to prevailing in the case in chief. The observations reported faithfully tracked the actual dynamics of the case, but it was difficult to persuade the legal team to abandon preplanned legal tactics in the face of an overwhelming emotional attack. Defense lawyers consciously chose this path as it represented a good "business decision" in the mind of the client corporation. In this case, the defense was prepared to lose; the case was viewed as a lost cause and portrayed to the jury as merely a complicated business dispute in the face of such personal and visceral charges as "bad faith." Nevertheless, the defense did not lose \$6 or \$7 million, a sum which represented its potential financial exposure from a legal and economic perspective and which also was the amount demanded by the plaintiff. The defense strategy of keeping the issue complicated in hopes of lowering the overall award against the firm seems to have paid off.

The purpose of this report differs significantly from typical trial reports involving participant observation.<sup>2</sup> Principally, these include ethical and procedural considerations that usually do not arise in traditional academic research. Whose side we are on and how the information is to be used must be answered before the research begins. While there are strong ethical considerations shielding attorneys, such that there is nothing disreputable about defending an obviously guilty mass

murderer, social scientists have no traditional courtroom role to guide activity. The ultimate challenge of this work, however, lies in the credibility of the social sciences themselves. Experienced litigators have a panoply of prejudices and preferences developed over years of experience which arise from an understanding of trial as a legal rather than social contest. The results of litigation research may challenge legal or trial maxims and principles with blunt but probabilistic statements.

This, in itself, is a problem of communication with two related points. First, is the problem of language. Even outside the pressured environment of court, the logic of case analysis in law and the generalizing strategies of sociology would clash. Jargon may further complicate matters. But, ultimately lawyers want and need to know *what to do*. Sociologists want to know *what is going on*. The attorney asks, Do I want this juror? Predictive methods involving quantitative methodologies seem to fit that need, although not perhaps as effectively as desired (although in this case, the outcome predicted was ultimately obtained). Qualitative methods provide greater insight into what is happening and why. The challenge for the applied sociologist is to rectify these divergent aims. This requires observers who do what sociologists long have preached—taking “the role of the other.” We are not lawyers, but we must think and act in two different worlds. This is, after all, the historical challenge facing all involved in field work.

Second, these problems finally are conditioned by questions of finance. Qualitative sociologists usually beg off on addressing the adequacy of participant observation in assessing complex environments and organizations, for the cost of comprehensive observation of even single agencies can be astronomical. A court of law consists of two realities which are emerging simultaneously at least from opposing sides. One side or the other will prevail. Quantitative techniques oriented toward prediction then may enter the applied arena with a 50% handicap. Qualitative techniques, though, require us to observe at least these two perspectives.

Participant observation shows promise in providing a means by which sociologists may explicate the unfolding story jurors perceive in court. Unfortunately, it costs money to pay observers. Further, clients and attorneys may find it difficult to accept advice and implicit criticism from those who would only watch the fight. Convincing attorneys to pay for such services is a challenge the social science discipline historically has failed to accomplish. In short, only by extending the application methods to a broader variety of settings and professional domains will sociologists develop the skills needed to introduce sociology to a larger audience.

## NOTES

1. Readers should note, however, that the defense did not alter its strategy for presenting the case after reviewing the pretrial research.

2. Such reports virtually always arise from courtroom *victories* (McConahay, Mullin, & Fredericks, 1977; Zeisel & Diamond, 1976; 1976b). Applied social scientists seem always to be "selling" these techniques, perhaps in response to the problematic limits of methodologies used for framing such research. This in itself raises serious ethical problems (see Kleinig, *et al.* 1989).

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