

Why Do I Need A Venue Analysis?

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When a trial team prepares for a case in an unfamiliar venue, they need to know enough about the venue to help them shape their trial themes, refine technical and expert explanations, and prepare for jury selection. This kind of familiarity may begin with learning about the basic demographic profile of the venue, along with previous verdicts in the region. To be effective and beneficial, it must move beyond the basics to cover the beliefs, customs, and history of the community, and integrate that information with the particular case. A thorough venue analysis can benefit the trial team in a number of ways:

- A familiarity with the venue affords more comfort to the attorneys as they talk to jurors in voir dire, and makes the chance of a gaffe less likely.
- Familiarity gives attorneys a context for interpreting jurors' responses in voir dire.
- It helps attorneys identify and appreciate the factors that may drive jurors' underlying attitudes and beliefs during the trial and deliberation.
- It offers the trial team the opportunity to align case themes with mores that are viscerally accepted within a community and tend to drive behaviors in that particular region.

A venue analysis can also be helpful in a situation in which venue has not yet been determined, such as choosing an MDL venue. An analysis comparing several possible venues allows attorneys to consider and weigh a wide variety of factors, such as attitudes or experiences specific to various communities, current economic hardships in those communities, and the influence of history, institutions, and organizations in each venue. In an MDL, where multiple trials are anticipated, a venue analysis also considers the level of media saturation that the trials and verdicts will produce as well as the ability to pull open-minded jurors for successive trials.

Venue analyses are also done to assist with change of venue motions. In this circumstance—when the trial team is concerned about widespread bias in the community against one party in a high-profile controversial case—a Community Attitude Survey is conducted to determine familiarity with the specific issues of the case. This situation is less common and as such, not the focus of this paper. Instead, we focus on the more common uses and benefits of venue analyses: as a description that provides a trial team comfort and context as they prepare for trial (Example 1 below) and as a tool to help in the evaluation of MDL venues (Example 2 below). Both examples are hypothetical.

Example 1: Walter White and Albuquerque, NM

The case: Walter White is a middle-aged Caucasian high school chemistry teacher, married, with a teenage son who has cerebral palsy, with a second child on the way. To augment his income, he worked part-time for several years in a local car wash. Although his job was to run the cash register, the owner often asked him to do other jobs, such as clean tires using a chemical solvent, or to clean the water filtration system, exposing him to a number of hazardous and/or carcinogenic chemicals, all without protective gear. Mr. White was recently diagnosed with lung cancer, and he claims the car wash owner, as well as the makers of the chemicals, are to blame. The car wash company claims that, if there is any cause for Mr. White's cancer, it's to be found in his exposure to chemicals, both

in his classroom and in prior employment in a lab. He is suing for \$50 million, and, frankly, if he doesn't win this case, he isn't sure what he will do next to provide for his family after his death.

What might be helpful for both sides to know about Albuquerque as a place before going to trial? We'd begin by answering these questions:

1. What makes Albuquerque special? Albuquerque is both urban and remote. Albuquerque is located in Bernalillo County, one of the smaller counties in New Mexico in terms of size, but its population of 662,564 makes it the most populous county in the state, with one-third of the state's population concentrated there. Nearly all of the county's population (545,852 persons) live in an urban area, making it the most urbanized county in the state. Density is one measure of urbanity, and the population density in Bernalillo is 570 persons/square mile compared to 17 persons/square mile in New Mexico as a whole. (By comparison, Eastern cities are much denser: the density for Philadelphia County, for example, is 11,581 persons/square mile.)

Albuquerque is also remote—cities of comparable size are hundreds of miles away: El Paso, Texas (649,121) is 269 miles, Denver, Colorado (600,158) is 445 miles, and Phoenix, Arizona (1,445,632) is 332 miles.

Remote doesn't mean insular, however. If we look at the "place of birth" measurement, we can get an idea of how closed the venue is to newcomers, which gives us some notion of a venue's insularity. In Bernalillo, half of the population was born in New Mexico, 38% in a different state, and 11% are foreign-born. For New Mexico as a whole, 90% of the state's population was born in New Mexico. Therefore, Bernalillo County is more open to newcomers—who bring differing beliefs and values—than many of the surrounding communities.

Bernalillo County is also distinctive in its three major population groups. Native Americans have lived in this area longer than any other ethnic group. Although they constitute just 4% of the population, their reservations and pueblos surround Albuquerque, signs of this heritage and influence are easily visible, and their presence cannot be discounted. Hispanics have the second-longest tenure in the area: 2006 marked 300 years of Hispanic habitation, they constitute 48% of the population, and are growing in political power. Anglos are fairly recent additions to the residential population, dating from the 19th century, and constitute 42% of the population. Members of each group may view the facts of the case through a different cultural or historical prism.

2. Will many members of the potential jury pool be able to understand complex arguments about causation? It's likely. The jury pool in Bernalillo County is well-educated, and is even better-educated than the New Mexico population as a whole. In Bernalillo County, 87% of those aged 25 and older graduated high school, and 32% hold a BA or higher; for New Mexico, those figures are 83% and 26%, respectively. Beyond the statistics, this part of New Mexico has some high-powered institutions and organizations: Albuquerque is home to the University of New Mexico and Sandia National Laboratories, and Los Alamos Laboratory is in the adjacent county.

The presence of so many well-educated people in this part of the state, not just in this county but in the neighboring counties of Los Alamos and Santa Fe, has consequences for the kinds of cultural, social, and civic institutions that receive support and influence the lives of everyone in the region. It affects the kinds of concerns that get raised publicly, and the kind of public discourse found in the media. And as a practical matter, it's pretty likely that many of those well-educated persons in

Bernalillo County will show up for jury selection, something the trial team should take into consideration as they frame explanations of causation.

3. Will many members of the potential jury pool have special concerns about car wash chemicals, hazardous waste, and pollution? It's likely. Pollution is a major concern for many citizens, because this region is not a pure desert wilderness, but instead has toxic waste from uranium mines and the development of the bomb in the Cold War era and the presence of Kirkland Air Force Base. Citizen groups have organized and protested against such waste, with some success. What's noteworthy is not the existence of pollution concerns, but the accepted notion that polluters can and should be held accountable, even if every contest doesn't end in victory for the environmentalists—this is not a despairing community.

In addition, the Native American population has a concern about a different kind of pollution, encroachment on their sacred mountain, Mount Taylor. Within the last ten years, there's been controversy over uranium mining and ranching on Mount Taylor, which ended in 2009, when Mount Taylor was granted the status of Traditional Cultural Property, with 89,000 acres of private land exempted.

Lastly, water is an environmental concern. This region has experienced drought for a number of years, and residents have reduced their water usage to conserve water. We would expect that allegations that the car wash was wasteful with water will have more impact in this venue than a venue in which water is more plentiful.

Example 2: The Equussude MDL

Case: The Pegasus Pharmaceutical Company developed an antidepressant using the sweat from Suffolk Punch horses, a breed known for longevity, ability to handle heavy work, and stable disposition. Premarket testing of the drug, known as Equussude, showed remarkable effectiveness with depression; side effects were few and mild. Once it was on the market and in use for several years, users began to report a serious problem with profuse sweating and dehydration, resulting in a number of deaths. Users sued over injuries and death.

Complicating the issue were two findings from an early investigation: (1) an animal rights issue, since the process by which sweat was derived from the animals involved pain for the animals, and (2) a manufacturing/adulteration issue, since the manufacturer was now using broken-down race horses to procure sweat, having run out of Suffolk Punch pure-breds (fewer than 1,500 in the U.S.).

At this point, the cases have been consolidated in a federal MDL, but venue has not been selected. Plaintiff's counsel has suggested these venues: the Eastern District of Kentucky, Lexington Division; the Eastern District of Missouri, Eastern Division; or the Billings Division of Montana. Assuming that there are reasonable legal arguments for the appropriateness of these three venues, and that neither side has reservations about judges in the three venues, how can the defense respond to the plaintiff's counsel venue suggestions?

Identify and understand the reasons for the plaintiff's preferences. It looks like the plaintiff's counsel is weighing the "horse factor" heavily.

- Lexington, in the Eastern District of Kentucky, is also known as “the Horse Capital of the World,” and the plaintiffs’ attorneys may believe many jurors will have some familiarity with horses, and will be concerned not just about the possible abuse of horses, but about the allegations of abusing the horse-breeding industry.
- The preference for the Eastern District of Missouri, Eastern Division, which includes the City of St. Louis may rest upon the presence of the Budweiser Clydesdales, another breed of heavy draft horse.
- Billings, Montana is two counties away from one of the few breeders of Suffolk Punch horses, in Park County, and also boasts of a local figure who uses three Suffolk Punch horses for logging, and publicly drives them around town.

Consider some basic factors in comparing venue: isolation and size. These factors touch on practical as well as strategic considerations.

- **Isolation of venue.** How easy is it to reach court in each town or city? Venues that are difficult for outsiders to reach (due to limited airlines or flights in and out) are typically fairly small and relatively isolated. Such venues often do not have a lot of variation in population characteristics and qualities—an important consideration for a client facing multiple trials in that venue. St. Louis is the most accessible venue, Lexington is next, with Billings last.
- **Size of the venue.** In a venue with a small population, a big defense win, or a big plaintiff win, will have a big impact in the community, and the chances of the losing side finding an impartial jury for succeeding trials is small. The St. Louis venue is largest, having nearly 2 million residents in the city of St. Louis and the immediately surrounding counties.* Next comes the Lexington Division, with about 260,000 persons in Lexington and the immediately surrounding counties. Last comes the Billings Division, with about 186,000 persons in Billings and the surrounding counties.

At this point in the comparison, it looks like the St. Louis venue has advantages over the other two. However, we would still investigate all three venues in greater depth and detail, as we did with the Albuquerque venue. In our experience, once we do an in-depth comparison of venues for an MDL, we sometimes find that we favor a community that would not have seemed to be the appealing choice at first glance.

In any venue, a Supplemental Juror Questionnaire will help. We would underscore a related point, that no matter where the venue ends up, the Juror Questionnaire and/or the voir dire should explore jurors’ attitudes and experience with horses, animal testing, and animal rights, in addition to attitudes toward depression and pharmaceutical companies. The need for this questionnaire becomes more urgent if the defense ends up with a less favorable venue.

In conclusion, by fully and properly utilizing venue analyses, clients are able to develop a thorough understanding of the issues jurors are facing in a specific venue, to be aware of jurors who are likely skeptical of them, and to develop and emphasize trial themes that are in accordance with the values and beliefs of the jurors. Also, in MDL cases, a multi-district venue analysis can prevent the choice of an MDL venue that appears beneficial on the surface, but which actually has hidden problems that will plague long-term litigation.

* For our discussion here, we estimated the size of these venues based on the home county plus the immediately surrounding counties. District courts can draw from distant counties, but the majority of jurors come from closer counties, in our experience.