

# Understanding Jury Research

by Cynthia R. Cohen, Ph.D.  
Jury research is science, not magic.

**A** young mechanic has been burned beyond recognition. A child has lost an eye. Or an attractive, young woman is confined to her home. What do you do when you have sympathy factors that strongly affect jurors' perceptions and the client is unwilling to settle the case? How can you successfully try this case? Are you going to hire a jury consultant? If you do, can you evaluate what type of services the consultant offers or if you will be able to practically apply the consultant's report? Do you want to have someone advise you whom to select or strike during voir dire? Are you curious about what appeals to jurors? Do you want help with case presentation?

Frequently, trial lawyers do not know what to look for when they seek a jury consultant. Some attorneys approach jury research with little or no idea of how social science can enhance trial preparation. There is a vast array of services available, not all of them useful. Some consultants will claim, without empirically researching your case, that they can spot the potential juror who will zap you for millions of dollars. This is not jury research; it is psychic prediction.

## CHOOSING THE CONSULTANT

Jury consulting is not in its infancy. The proliferation of marketing jury studies has led some trial attorneys into buying a product unfamiliar to them. As more discover that they can gain an extra edge in the courtroom, they also may discover that their consultants giving them a look into the



deliberation process of jurors may be giving them erroneous results if incorrectly applying social science tools. Whatever type of service you decide to use, you will have to take steps to find it. The first step is to establish your objectives. The second step is to educate yourself in evaluating research methods. The third step is to practically apply social science results to win your case.

## Defining Research Strategies

Before spending thousands of dollars on jury research, you should explain to your client just what you expect and how you are going to apply the findings. The study needs to be more than just interesting—it needs to be practical. If you have planned the study well with the consultant, interpreting the results is not a difficult procedure. Once the empirical results are in, the creativity begins. Jury research is an art as well as a science. Here are some questions you should ask in defining a successful research strategy:

- How much time and involvement will be needed from the trial team to

work with the consultant and to observe the study?

- What are the social scientist's qualifications?
- What types of methods does the researcher use?
- What are the connected costs and benefits?
- What kind of report should I expect?
- Will jury research give reliable and valid predictors for jury selection?
- How can I use the results for other applications (e.g., witness preparation, graphics, opening statement)?

Jury research has applications beyond obvious matters like jury profiles, voir dire questions, community attitudes, and venue choices. Jury research can also help to develop the best possible case strategy and presentation by providing insight into areas including:

- Settlement;
- Themes and communication solutions for a favorable verdict;
- Identifying obstacles to juror comprehension;

- Teaching concepts (via analogies, spiral steps, and graphics);
- Opening statement development and closing argument suggestions;
- Refinement of courtroom delivery;
- Witness presentation;
- Detecting deception in witnesses; and
- Reducing ambiguity in jury instructions.

### **Testing Voir Dire Approaches**

An example of how jury research can help you is its usefulness as a voir dire test. Relying on favorite voir dire questions without having empirically tested answers to go along with the questions can be a problem. For example, “Do you watch *LA Law*?” or “Have you ever worked for a large corporation?” are questions repeated time and time again during voir dire, even when responses to these particular questions do not separate plaintiff-oriented jurors (“POJs”) and defense-oriented jurors (“DOJs”). It is a mistake not to be concerned about the *response* to the question and whether it will differentiate between POJs and DOJs. Trying to adapt a questionnaire from a previous case without trained assistance on the methods may jeopardize the trial outcome.

Another problem is undue reliance on stereotypes. Most trial attorneys have standard rules about selecting jurors by occupation, race, or sex. Most cases have budget constraints and consequently, stereotype rules may give the trial attorney comfort in having some criteria for selection. But do the stereotypes or standard rules produce a false comfort? Probably. No two cases are identical. A general profile may emerge, but there are always individual case differences. Patterns that turn out to be predictors for one case do not necessarily have predic-

tive value for a different case, even if that case is in the same venue.

### **Example**

To illustrate how useful it is to know what the question really asks, take the following case example. In one study, developers were suing the building contractors. The developers were trying to avoid payment on a \$5 million note arguing that the project was not completed on time. The defense attorneys wanted to test the voir dire question, “Have you ever had any difficulty with building contractors?” Intuitively, they thought that anyone who had had difficulty with building contractors would be against their building contractor clients. The findings proved otherwise. Those who had had difficulty with contractors before were in favor of the contractors. This finding related to the facts of the case – the builders finished only two weeks past the deadline. Jurors in the study commented, “A two-week delay? You want to hear about difficulty with contractors? Let me tell you about difficulty with contractors!...”

### **EVALUATING CONSULTANT COMPETENCE & QUALIFICATIONS**

Ultimately, you are responsible for hiring a competent consultant. From a practical point of view, what do you look for in a consultant’s background? Besides looking for a person you can trust and a personality you can work well with, you should seek out consultants with educational credentials and social science training grounded in research. “Ph.D.” behind a jury consultant’s name does not indicate discipline, field of training, or that the consultant was trained in research methods. And not all those who claim to have a Ph.D. or to be an accredited psychologist are so credentialed – some borrow their titles.

### **Psychologists**

Even if your consultant is a psychologist, there is a great variety in psychology graduate training programs. Developmental psychology, clinical psychology, social psychology, cognitive psychology, educational psychology or measurement all involve individual studies and unique research for a specific area. In dealing with expert witnesses, attorneys soon learn that they cannot have a social psychologist qualify as an expert on Delayed Stress Syndrome unless that social psychologist has had clinical training as well.

### **Other Social Scientists**

Not all jury researchers are psychologists. Other social science areas – sociology, anthropology, political science, and communication – have produced fine researchers. There are also consultants who do not have educational credentials, but do have a research support network behind them. If you plan to employ a consultant to conduct a study based on statistical analyses, it is important to evaluate whether the person is a qualified researcher. Does this person know basic research concepts? If the person is not a qualified researcher, is there a research director behind the design and the analyses?

### **COMMITMENT TO THE PROJECT**

Once you have the results, what have you learned? Were the facts that you presumed to be damaging not as detrimental as first believed? What if the research illustrates that you have an uphill battle? Will you settle the case? How committed are you to using the findings? When the research seems contradictory to your beliefs or the findings are not in your favor, do you ignore the findings? Do you question the consultant’s methods and abilities? You might know something about the same

venue that the consultant does not (for example that a particular minority is notorious for awarding damages). How will you share your knowledge with the consultant?

You must decide what kind of commitment you will make to the project. It is impossible (or at least inadvisable) for a jury consultant to design the research scenarios and materials without input from the trial team. Besides testing psychological theories, competent jury consultants incorporate and empirically test the attorney's proposed voir dire questions and theories. Just as it is inadvisable for jury psychologists to work without attorney input, it is inadvisable for the trial team to conduct jury research without an objective consultant. No matter what methods are used, it is important for the trial team and consultant to work together in designing the research. Lawyers are trained to be advocates, psychologists are trained to be objective. It is important for you to test the case and the questions you want tested. It is also important that you do not hold back damaging facts. Without objective scrutiny the research may be heavily lopsided and thus useless. A consultant's job is to keep balance in the research materials. The goal in designing jury research is to understand the battle and use that information to win the war.

## **EVALUATING RESEARCH METHODS**

It is important for a jury consultant to know enough about research methods to design a study that fits the needs of the case. You don't need to know the intricacies of sampling procedures, measurement, or statistics, but your jury consultant does. In any event, you need to know how to evaluate your consultant's abilities, so you should familiarize yourself with a few basic research terms.

## **Empirical v. Clinical Approaches**

Empirical research gives you an opportunity to test your theories. Although it is not feasible for most cases to use empirical research, most cases could benefit from it. Once you have empirically tested your theories, you may want to add a clinical opinion. An empirical approach would say, "Let's test it."; a clinical approach would say, "Let me judge the situation." A clinical approach relies on the clinician's observations and judgments. Asking a consultant to help pick a jury or give you feedback about a witness may be all that you want (or can afford). This adds an expert's intuition to yours. If the clinical opinion is developed in conjunction with the research findings, you have a more solid strategy; the data will refine your intuition. But without empirical data, a clinical approach might not help your case.

## ***Causation and Correlation***

Science is ultimately concerned with identifying cause-and-effect relationships. Two variables can be related, but have nothing to do with each other. Correlation means the changes in one variable are accompanied by equivalent changes in another variable. Since cause-and-effect relationships are always correlated, there is a strong tendency to reverse the process and infer a cause-and-effect relationship from mere correlation.

A favorite example comes from a study in a town near London. Investigators measuring the number of babies and the number of storks in surrounding communities found a high positive correlation – towns that had lots of storks had lots of babies. Towns that had few storks had few babies. The study's conclusion? Storks bring babies. Answers to questions in telephone surveys

often lack the same causal validity that this investigation did.

## **Methods and Methodology**

People often incorrectly use the terms "methods" and "methodology" interchangeably. "Methods" describes the set of procedures used to conduct the study. For example, writing the case scenarios, developing a questionnaire based on the scenarios, recruiting a random sample in the venue, conducting the study with directed discussions, entering the raw data from the questionnaires into a data file, writing a computer program to analyze the data, debugging the program, analyzing the data, running ad hoc analyses, synthesizing the data, writing a report, and assisting the trial team in understanding what all of this means for the case. "Methodology" is the study of methods. Methodology is an area of study that graduate students geared toward research undertake. Research psychologists often devote years of their training in different types of research methods to understand the advantages and disadvantages of particular methods.

## ***Different Types of Methods***

The best way to design a research study depends on your objectives and questions. Research design refers to the methods of arranging observations so that principles and relationships can be identified. What follows are basic descriptions of the advantages and disadvantages of frequently used methods.

- *Mock Trial.* Group size varies from six to 50. It is difficult to give a pinpoint definition of a mock trial since the term is used in many different ways. The term usually indicates a practice (of sorts) for the trial team. A mock trial may or may not use a research component. The advantages

include practice for attorneys and witnesses and an opportunity to test graphics. Disadvantages include replication difficulty and controlling time limits. Generalizability to the real jury pool is questionable, if the recruiting for simulated jurors was biased.

- *Panel Surveys.* Group size varies from 25 to 50 or more. Computer diaries can be used to record data with immediate results. The television and movie industries have used this method to preview shows for decades. Generally, the advantage is that this is an economical way to gather survey data. The disadvantage is that group discussions are inhibited.

- *Case Scenario Research.* Group discussion size is 15 to 22. (Generally two or three groups are used.) Development of case themes is by presenting both sides of the case through scripts and selected evidence. This is a blended quantitative and qualitative design with an extensive questionnaire component, observation behind a surveillance mirror, and directed discussion with the facilitator. Case Scenario Research can be built to include empirical and clinical evaluations of witnesses' testimony and presentation. The product includes a written report and videotape of the voir dire and discussion components. Its major advantage is that it is a great tool to develop case strategy – case issues are sliced, analyzed, and rated, no juror dominates the discussion, and it is cost effective. By adding more groups to the research design, you can compare trial strategies. Voir dire questions and case presentation themes are included in the written report. The main disadvantage of this method is that the facilitator must constantly limit domi-

nant personalities during discussion.

- *Focus and Deliberation Groups.* The average group size is 12. (Generally two groups are used.) Focus groups are a form of marketing research, utilizing participant discussion, observation behind a surveillance mirror, and sometimes a questionnaire. Videotaped or live case presentations are used. The advantage to this method is that one can see what issues emerge from a leaderless discussion. Like Case Scenario Research, with additional groups the researcher can compare different trial strategies. The disadvantage is that you cannot replicate the group dynamics of the actual jury that will try the case. Group dynamics depend heavily on personality characteristics and related prior experiences. With nonintervention, time may be wasted by strong personalities dominating and focusing on their personal philosophies. Equally valid opinions of less controlling personalities may not be heard. With two deliberation groups, voting may end in opposite directions, 12 to zero and zero to 12, making interpretation difficult for the observers.

- *Telephone Surveys.* Telephone surveys have few advantages besides speed and low cost. Typically, respondents are reluctant to answer more than simple, superficial questions. A telephone survey's principal defect – the inability to obtain detailed information – does not lend itself to gathering reliable information about a person's view of the case. You might, for example, find a relationship between females with children and females' views of hospitals, but without the case scenario revealing the facts (doctors involved, procedures taken and so on), it is difficult at best to determine a causal relationship between females' general view of hos-

pitals and a verdict favoring a particular hospital in a malpractice case. Telephone surveys are also prone to have sampling errors.

- *Shadow Jury.* Average group size is six. This method aims to mirror the actual jury. The group sits through trial and hears the same arguments made to the actual jury and gives the trial team feedback. A good interviewer can use the shadow jurors' impressions to estimate their comprehension of arguments and testimony. The advantage is the ongoing objective feedback for the trial attorney. The disadvantages are small group size, difficulty in matching a real jury or producing the same verdict as actual jurors, and the actual jury (and opposing counsel) may be aware of the shadow group and suspicious or uncomfortable about their presence.

- *Shadow Expert.* During the course of the trial, a trained pair of eyes and ears can be beneficial for clinically assessing jurors' reactions to opening statements, evidence, and witnesses. Detecting subtle cues from jurors can guide helpful revisions of arguments and questioning strategies. The shadow expert can conduct juror interviews after the trial. Videotape depositions are another means that shadow experts can use to clinically evaluate witnesses.

- *Juror Interviews.* One of the most economical forms of research is conducting juror interviews through an objective party who can clearly separate the emotional from the cognitive aspects of the case. It is often difficult for the trial lawyer to immediately listen to feedback from the jurors when the case ends. Juror interviews are an excellent tool for gaining knowledge about specific perceptions of witnesses, lawyers, and issues. It is

easier for jurors to be honest with an independent interviewer than with a trial attorney. After the trial, jurors often tell the attorney what they think a lawyer wants to hear.

- *Other Clinical Methods.* Besides shadow experts and juror interviews, there are numerous other clinical methods including opening statement rehearsal and witness preparation. The advantage of these methods is that clinicians may have specific skills to teach. When the client is a witness and needs to hear critical feedback about idiosyncratic behavior, it is helpful for the psychologist to blend the feedback with communication concepts and theories framed in the context of jurors' perceptions. The disadvantage of this method is that you need to be careful about witness rigidity, overpreparation, or trying to change the witness's behavior right before the trial.

### **Generalizability**

What you learn through research ought to apply to your case. "To whom can we generalize the results of the study?" is probably the most complex and difficult research question, because it touches not only on technical matters like sampling and research design, but also on greater problems of applied research. Studies that use law students, law office personnel, or family instead of randomly sampled individuals fail to give generalizability to the courtroom. They can only be generalized to a larger body of law students, law office personnel, or family. Generalizability of the results is often the most crucial practical concern.

### **Sampling Procedures**

More than likely, the jury consultant that you employ will have a field director recruit the "jurors" for the study. Sometimes you may want

to compare certain populations (mothers and childless women, for example); the jury consultant can build these samples into the research design instead. The recruiter must do an honest job (i.e., employ random sampling procedures) and the consultant must monitor the recruiter's methods. Marketing research centers often have databanks of willing participants and recruiters often advertise for participants. It is important for the field director to exclude samples of "professional respondents" or other biased groups.

### **Questionnaires**

There is no standard questionnaire for jury research. Different methods (telephone surveys, focus or deliberation groups, case scenario research, and so on) use different types of questionnaires. Subsequent questionnaires for voir dire are best developed from the research findings. (Questionnaires are products of the company that develops them, and are generally considered proprietary. Most companies keep databases on some scales and can give comparisons in relation to similar types of cases. The scales used vary with the research director's discretion and may include demographics, habits, experiences, and case ratings.) Two important concepts that dictate the utility of questionnaires are reliability and validity.

### **Reliability**

A person's score should be similar under slightly different conditions. Every time a person is measured on a scale (for example, perception of lawyers) or an item (for example, "Do you think that there are too many lawsuits in the U.S.?" or "Are you in favor of environmental clean-up?"), we expect the same answer each time. A person who says he is in favor of environmental clean-up

today should be strongly in favor of environmental clean-up at a later point in time. Current events (economic recession, for example), may cause attitudes (consumer confidence) to change quickly. Methods and statistics used to establish reliability vary with the type of research.

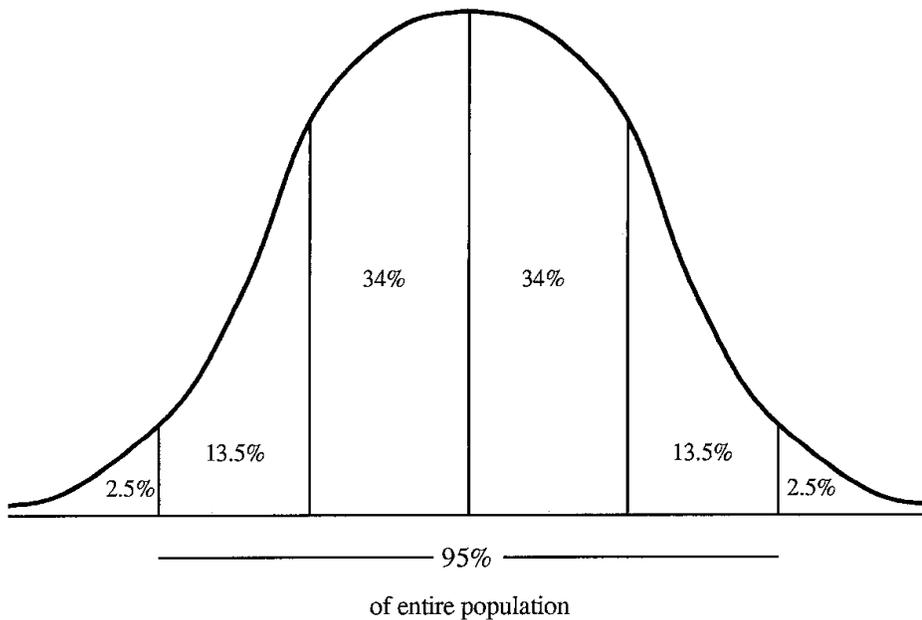
### **Validity**

You must establish reliability before validity can be established. Even if the scale is reliable, it may not be valid or really measure what you think it measures. Perhaps a scale measuring jurors' perceptions of lawyers is not truly measuring perceptions of lawyers, but instead measures television heroes or villains. Validity focuses on predictions about the individual and describing the individual. It is more difficult to establish predictive validity than content validity. Prior experiences or preexisting attitudes in jurors are used as predictors for selection during voir dire. Jury research more successfully determines which issues (content validity) influence the jurors' verdict than which individuals to select for the jury (predictive validity).

### **Statistical Significance**

A level of statistical significance is to some extent chosen arbitrarily. The .05 level that most social scientists use was first chosen by Sir Ronald Fisher in the 1920's. A result that is significant at the .05 level could occur by chance only 5 times in 100 trials. (Trials, as in rolling dice, not as in the courtroom.) A result that is significant at the .01 level could occur by chance only 1 time in 100 trials. In medical research, where life and death decisions in drug effectiveness are tested, the significance level generally reported is more conservative (.001).

BELL SHAPED CURVE  
*Distribution of Height*



**Distribution**

We expect the world to operate in a fundamental way regarding each characteristic or variable. For example, most people are "average" in height with extremes on both ends. The diagram above indicates a normal distribution. 68% of the people fall into the average range. 5% of the people fall into the extremes, the very tall and very short people that catch our attention.

If you polled enough people on the question, "I like penguins," and you had a large enough (and random) sample, their answers when plotted would resemble a bell shaped curve. If you have a highly emotional issue, ("I like insurance companies"), the curve will be skewed. When you use statistical procedures to test the differences between groups (for example POJs and DOJs) and there is a significant difference, that difference should not occur by chance. The probability should be less than .05. There are 5 chances out of 100 that you have a chance difference. With 95% confidence,

you can say that someone who likes insurance companies will be a DOJ; someone who does not like insurance companies will be a POJ.

**Statistical Procedures and Terminology**

Here are a few terms a jury consultant might use.

- *Simple correlation* measures the degree of relationship between two variables. The variables can be positively or negatively related;
- *Chi-square* involves a comparison of frequencies of two or more groups. As a basic, simple statistic, it is useful with yes/no type answers or in comparing differences between POJs and DOJs on variables that have exclusive classification (for example, gender, marital status, and so on);
- *Analysis of variance* tests differences between groups on one or more hypotheses. It is most useful in comparing differences between POJs and DOJs on attitude questions.

Statistically significant differences between POJs and DOJs may reveal differences in attitude for voir dire, as well as differences in attitude about the case issues;

- *Multiple regression* involves the relationship between a dependent variable (for example, a verdict) and two or more independent (predictor) variables (age, education, income, attitudes, habits, experience, and the like); and

- *Factor analysis* is a technique used to analyze patterns of correlation by isolating factors or dimensions to account for the patterns of correlation. It allows the scientist to make inferences about the dimensions represented. For example, in studying jurors' perceptions of a witness's verbal behaviors (accent, intonation) and nonverbal behaviors (fidgeting, covering the mouth, smiling), three dimensions (confidence, clarity, and expressiveness) were discovered. It is easier to prepare a witness when you understand how the major dimensions influence jurors' perceptions.

**DEMONSTRATION CASE**

To demonstrate the benefits of Case Scenario Research, we will illustrate the research conducted in conjunction with a hypothetical case, *Fineberg v. American National Insurance Company*. Mr. Fineberg, the plaintiff in his early 60s, was a vice president for Southern Agency Operations. At the same time, Arthur Ashley was vice president for Northern Agency Operations, but was ten years younger than Fineberg. The company president, Mr. Stevens, was in the process of restructuring the company, eliminating most of the small separate agency operation offices. As a result, he didn't need two vice presidents for Agency Operations. Hence, he had to choose

between Fineberg and Ashley. He chose the relatively younger Mr. Ashley, and transferred Mr. Fineberg to another vice presidency job. Mr. Fineberg asserted that Mr. Stevens was "age conscious" as evidenced by his successorship planning documents which referred to younger ages for potential successors, by Mr. Stevens' comment that at age 65, Mr. Stevens himself would want to retire (this comment supposedly occurred after Mr. Stevens inquired about Mr. Fineberg's retirement plans); and the existence of age data on salary planning documents. After Mr. Fineberg filed his lawsuit, he gathered some of his evidence out of Mr. Stevens' files. When this was discovered, Mr. Fineberg was fired for taking the documents. Mr. Fineberg then amended his pleadings to assert retaliatory discharge. He said the documents were in files open to him and that he copied them on his own time.

### **Conducting the Research**

Given the above hypothetical case, we were retained by American National. For our research, we used 30 volunteers from Chicago and a nearby suburb – a diverse group, but not a random sample. (This research was conducted for illustration purposes and not for an actual trial. The recommendations for voir dire are limited by not using a random sample.) The volunteers filled out the questionnaires, listened to the case scenarios, examined documents, and were videotaped during discussion in one of two sites. Based on our sample, 73% were POJ, 27% were DOJ. After we conducted the study, the results were given to the defense counsel for preparation of her opening statement in a live demonstration to six jurors.

### **Case Strategies**

Case strategies evolve from inte-

grating communication theories with the empirical results. In our demonstration case, the summaries focused on age-related issues, retirement, employee qualifications, mistreatment, prestige, freedom of choice, zest for life, and perceptions about lawyers. The pre-attitude questions are a basis for understanding community attitudes. This general information gives ideas about addressing the jurors and can help expert witnesses with assessing the jurors' knowledge level about specific topics. Methods used in Case Scenario Research can help to define the obstacles and develop themes and solutions to overcome the obstacles. In conclusion, here are some examples of the obstacles, themes, and voir dire questions from the demonstration case.

#### *Obstacles*

- The Monday morning executive meetings stopped in order to exclude Mr. Fineberg.
- Moving Mr. Fineberg to a new office indicates that Mr. Fineberg was being demoted.
- The meeting Mr. Stevens had with Mr. Fineberg before the job change was a set up for things to come.
- Mr. Fineberg was mistreated when the northern and southern regions were consolidated.
- Copying the private documents was necessary to keep them from being destroyed.

#### *Themes and Opening Statement Suggestions for American National*

- This is a case about ethics, trust, and company spirit.
- Copying the private documents was a clear violation of ethics and trust.
- Mr. Fineberg was given an opportunity to help the company in making changes and he refused.
- Mr. Fineberg stole the documents

from Mr. Steven's personal locked drawer.

- When it was discovered that Mr. Fineberg had copied the documents, American National had no choice but to fire him.

#### *Voir Dire Questions*

- Do you think people in similar age groups have similar values? Those who disagree most strongly are DOJ.
- Have you ever worked for a large company or corporation? Those who answer yes are more likely to be POJ.

### **CONCLUSION**

Jury research is neither new nor unusual. Every day litigators across the country call on the reliable methods of social science research to gain enhanced insight on the best ways to prepare cases for trial. But you need to understand how jury research works to select the right services and researchers for your case. Fortunately, a basic acquaintance with a few simple concepts can help you do just that.

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