

Mock Juries

By Jerry W. Thomas

The term “mock jury” refers to a type of group research that allows lawyers to evaluate the potential reactions of jurors to their evidence and arguments before a case goes to trial.

Typically, a mock jury consists of eight to 12 “jurors” who are assembled to hear a summary presentation of both sides of a case. Once the case is presented, participants then discuss the evidence and the arguments. Generally, lawyers observe the group discussion from behind a one-way mirror or via remote video transmission. A typical mock jury discussion lasts one to two hours.

The mock jury traces its origins to focus groups used in marketing research and to the even earlier use of group therapy in clinical psychology. The so-called focus group came into general use in the business community after World War II, with very rapid growth in popularity during the 1970s and 1980s. During this same era, the focus group technique was adapted to the legal profession as a way to simulate a jury, and the term “mock jury” gradually gained currency as its name.

Trial lawyer Bill Sims (Vinson & Elkins, Dallas), a pioneer in the use of the technique in the Southwest, said, “I have been a big believer in mock juries and focus groups for over 10 years. I like to use mock juries twice during a case—once early on to get a feel for people’s visceral reactions to the themes I anticipate

each side stressing, and then again near trial when I can weave in the facts that have come to light during discovery.”

Mock juries are not appropriate for every case, or even most cases. Since the price of professionally conducted mock juries runs from \$3,500 to \$5,000 per group, they should only be used when a lot is at stake (i.e., potential damage awards of several hundred thousand dollars or more). Also, the more complicated and involved the case is, the greater the potential benefit from mock juries. The mock jury helps the attorney simplify and focus his case. Ergo, the greater the complexity, the greater the benefit of simplification and focusing.

The mock jury is a rough predictor of the likely outcome, should a case go to trial. If the attorney finds his case is weak and hopeless, he can follow the admonition of Shakespeare’s Falstaff that “the better part of valor is discretion” and settle the case out of court. On the other hand, if the attorney’s case is solid and strong, he can confidently move forward (and move his client forward) toward trial. But prediction is not the greatest benefit of mock juries.

Trial attorney Paul Watler (Jenkins & Gilchrist, Dallas), another leader in the use of mock juries, said, “I try not to look at the results of mock juries as absolute predictors of actual trial outcomes, but rather as windows into the jurors’ decision process—to identify the stronger and weaker parts of my case.”

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The mock jury also can be an effective tool to help the attorney manage his client. If the client is overconfident, in a state of denial, or refusing to face up to the risks of the case, sometimes the videotapes of mock jury deliberations can be a powerful influence upon the client's attitudes and behavior.

The mock jury is especially valuable in answering seven kinds of questions:

1. What is the relative value of the different facts and evidence? What evidence or facts do "jurors" place the most importance upon?
2. What evidence do jurors accept easily or accept at face value, and what evidence is inherently weak (i.e., has to be fully substantiated or proved)?
3. What is the relative value of different witnesses or testimony, and what determines the credibility of the witness or his/her testimony?
4. What is the web of logic that jurors weave? How do jurors fit the evidence and arguments together? What are the linkages and relationships among evidence and arguments? If the attorney really understands the jurors' web of logic, then he has a much better chance of preparing a winning case.
5. What words, terms, and phrases do jurors understand, and what words, terms, and phrases should be avoided? In essence, what language should the lawyer use to best communicate with the jury?
6. What emotions, feelings, and possibly hidden motives are influencing the jurors? How do these emotions and motives shape the issues and the debate within the jury?
7. What types of jurors are most likely to be favorable to your client's case? What opinions are correlated with a favorable attitude towards your client's case? This information can help in questioning and selecting the final jury.

Let's assume an attorney has decided to use mock juries to help prepare his case. What are some guidelines, or rules of thumb, to help ensure a successful outcome?

Here are several suggestions, based upon our 25 years of experience with focus groups and mock juries:

Sampling

The mock jurors must be representative of the types of jurors likely to be on the actual jury. The mock jury should be conducted in the city the case will be tried in, or at least nearby in a similar city. The jurors should be registered voters or have a valid driver's license. Be sure to screen out anyone associated with the judicial system, law enforcement, the legal profession, or news media. Set quotas for men, women, and minorities so that the jurors are representative of the people likely to appear on the actual jury.

The attorney should resist the temptation to "preselect" the jurors, based upon common sense assumptions about who will be most favorable, or least favorable, to his case, or who is likely to be "struck" by the opposing counsel. A mock jury chosen without any bias or preselection criteria (other than those noted to ensure representativeness) is ideal, because part of the learning is to find out how different types of people respond to the case, to help in the final jury selection process.

Presenting the Case

The case must be condensed into a 20- to 30-minute presentation for each side, and both sides of the case should receive equal effort and equal treatment. It is best to have two different attorneys argue the plaintiff's and the defendant's cases. Insofar as possible, these two attorneys should be evenly matched in experience and quality of presentation.

"To ensure that both presentations are balanced and equally hard hitting, you need to have an attorney not working on the case read both scripts to verify that the presentations are, in fact, balanced," said Sims of Vinson & Elkins.

The presentations can be in person or videotaped for presentation to the mock jury. We strongly recommend videotaping the presentations. Any errors or mistakes can be edited out, and weak sections can be redone and edited in to build the final taped presentation. Also, it is sometimes possible to videotape and insert footage of

actual witnesses, actual evidence, or actual scenes into the presentation.

Another reason for videotaping is to free the attorney from the distraction of having to present in person, so that he can sit behind the one-way mirror and focus his attention on the reactions of the jurors as the presentation of the case unfolds.

The better the taped presentations, the more accurate the results from the mock juries will be. Therefore, we recommend that professional video production experts be employed to prepare the tapes.

Facilities

If the case is to be tried in a major metropolitan area (i.e., population of 500,000 or greater), marketing research focus group facilities probably will be available. These facilities will have focus group rooms and observation rooms with one-way mirrors. If this type of facility is available, it should be used. If the case is to be tried in a rural area or smaller city, then focus group facilities probably will not be available, and meeting rooms in a hotel or community center will have to suffice.

The videotaping and remote video transmission should be handled by a professional videotaping firm. It is generally a good idea to have video experts travel to the rural area or smaller city to handle the videotaping, since local video talent is often missing or inadequate.

Recruiting

he recruiting of participants is very important and should be conducted by a marketing research company with experience in recruiting. Depending upon the geographic area, you will want to overrecruit by about 40% to 50% to ensure that 8 to 12 jurors show up for the mock jury (i.e., you will want to recruit 14 or so to ensure that 8 to 12 actually show up). These jurors typically are paid \$50 to \$75 for participating.

Size of Jury

The purists would argue that 12 is the only acceptable size. Any size from 8 to 12, in our experience, works just as well. The larger the group, the more difficult it is to follow and

control, but otherwise the group dynamics are very similar within the 8 to 12 participant size range.

Number of Juries

A minimum of 3 to 4 mock juries is recommended. If the same pattern of response is repeated across 3 of 4 groups, we can be reasonably confident in the validity and reliability of the learning. Never do just one mock jury. It is simply too risky. It's always possible to encounter a fluke mock jury (or a fluke real one, too).

Moderating

Some would argue that the jurors should debate the case by themselves without a facilitator or moderator in the room, while many would argue the counterpoint. Our experience suggests that a moderator-led mock jury works best.

Without a moderator, the jurors tend to waste a lot of time choosing a leader, and then the leader tends to dominate the conversation during the early part of the session, possibly biasing the outcome. True, these uncontrollable variables are at work in real juries (and tend to inject greater variability in the outcome), but we don't need to "mess up" our mock juries for the sake of simulating reality. What is important is for the participants to get into the case quickly, to have full opportunity to interact with other participants, and to feel free to express their feelings and opinions openly and fully.

A good moderator can help achieve balanced interaction, keep more aggressive participants from dominating the discussion, and keep the discussion focused upon the key questions posed by the attorney. The moderator should be a low-key facilitator, not a "lawyer" or "judge" or legal expert. The moderator should not use "legalese" or legal terminology, if at all possible. The participants should not know which side of the case the moderator is representing. The moderator should appear as a neutral and unimportant figure to the mock jurors.

Observation

Watching jurors react to a case can be a fascinating learning experience for the attorney and/or his client. It also can be an ego-threatening nightmare. Mock juries

can turn negative at times and castigate the client, the attorney, and the cherished beliefs and assertions of client and lawyer. If the lawyer tends to be thin-skinned or very rigid in his thinking, he should perhaps avoid the use of mock juries, because they may be so threatening to him that he really won't learn much from the mock juries anyway.

Likewise, it is sometimes very dangerous to allow the client to observe the mock jury with his lawyer, unless the lawyer has a very strong relationship with the client, and the client's personality is such that he can accept the cold, hard truth that mock jurors can dish out. A safer strategy is to videotape the mock juries (again, using professional video people) and then decide if, how much, when, and where to share with the client.

It is critically important for the attorney, however, to view the mock juries in person, if at all possible. He can provide additional direction to the moderator, as the sessions proceed, but most importantly he can see and hear firsthand how jurors are reacting and thinking.

Work-Product

"The fruits of mock juries are probably protectable as lawyer work-product. To help ensure this, the research firm must be retained by and act as the agent of the

attorney (not as an agent of the client). Also, anyone not directly involved in the case should not observe the mock juries or have access to the results," said Watler of Jenkins & Gilchrist.

Analysis

The most important analysis of the results is performed by the attorney, since only he knows all the issues, the situation, the client, and the legal context. If the moderator is a marketing and/or motivational expert, then his insights into the marketing and motivational implications of the mock juries can sometimes be helpful to the attorney, since preparing a case for the jury is somewhat analogous to developing a marketing strategy.

As a final note, the single most important benefit from using mock juries may be the self-improvement of the lawyer. An attorney who understands how ordinary people behave in a jury setting, and who understands how ordinary people react to him personally and his style of presentation, will almost always outperform an attorney who is lacking this "jury" sense and experience. No lawyer ever gets to observe firsthand what actually goes on behind the closed doors in the jury room when his cases are debated, no matter how many years he has been practicing law. The only way this "jury" experience can be gained is through mock juries.

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