

## **Development of Themes in Trial, Use of Mock Trials, and Other Trial Tactics & Techniques**

**David B. Graeven, PhD, President of Trial Behavior Consulting  
San Francisco, Los Angeles, Dallas, Denver**

As every panelist will tell you, mold is in the news. This is of concern to those involved in settling and litigating those cases because the media usually sensationalizes the issue and offers a very selective presentation of facts and scientific and medical controversies around the issue of toxic molds. Mold is still a new issue, unlike asbestos claims, for example, so most jurors have had little opportunity to be educated about mold through vehicles other than the sensationalizing mass media.

What do jurors currently think about mold? In this paper, I will present some recent survey data that takes jurors' temperatures nationally about mold. I will also discuss the emotional charge that mold cases can carry. I will then discuss how to use jury research effectively to test your specific case and develop persuasive case themes.

### **What Do Jurors Think about Mold?**

Our survey research from various venues around the country (n=500), demonstrates that a significant percentage of the jury pool believes that mold is very dangerous and that it is dangerous to their health to work in a building containing mold. Almost half surveyed (forty-six percent) felt that if mold grows in a building, this proves the construction was shoddy and improper.

About one-fifth of these respondents felt builders and developers should take full responsibility for mold that grows in their buildings. About one fourth of jury eligible respondents in Florida said they know someone who has breathing problems due to exposure from mold.

In our survey, we wanted to explore the native ideas that jurors hold in mind when they hear stories about toxic mold in homes. We believed that many would associate "sick building syndrome" with toxic mold, so we asked jurors to tell us what their understanding of this concept was. Half of our national group of respondents had heard of "sick building syndrome." Some jurors had an accurate idea of what "sick building

syndrome” is. A number specifically mentioned mold contamination as one cause of sick building syndrome. However, a number were confused and associated it with asbestos contamination, a failure to meet safety standards, or structural defects in a building. Of those who had heard of it, regardless of whether their understanding was accurate, forty percent felt that “sick building syndrome” was very serious.

### **Oddities about Mold Cases**

#### ***Mold Cases Never Seem To End***

For most property damage claims, there is a time at which the damage is over. When facing trial, particularly one involving a bad faith claim, time has passed and a repair of the damage may have occurred. With the mold claims that we have seen, it seems that the damage continues because the mold issue has not been resolved. The property still contains mold, the remediation was not satisfactory and the plaintiff cannot return to live in the property. The never-ending nature of the damage fuels resentment towards claims handling practices. The decision on coverage and delays in fully resolving the claims are seen as supporting a bad faith claim. Whether the insurance company is obligated or not, jurors want the problem fixed. In mold cases, that closure seems more difficult to achieve, and jurors find this lack of closure irritating.

#### ***Damage Claims in Mold Cases Escalate over Time***

In a motor vehicle case, a car can be damaged to such an extent that the car is totaled. In mold cases, the clean-up/remediation costs for contents and dwelling repair often appear to exceed the value of dwelling by some multiple. It often appears the best solution from a damages standpoint is for the insurance company to take over the property. There may be legal arguments against such a move, but from a practical standpoint and resolution of continuing claims issues, it sometimes seems the best solution.

However, people have very strong emotional attachments both to their own homes and to the *idea* of home. What seems like a logical solution may not satisfy some jurors, who may find the prospect of a plaintiff losing his or her home because of someone else’s negligence to be very upsetting. Just as all jurors in employment cases bring a long

history of personal work experience to bear on a case, all jurors in mold litigation bring a lifetime of emotional associations with “home” to bear on evaluating liability and damages in these cases. We think that survey research should be conducted to see how jurors respond to the solution of buying a plaintiff’s home to resolve a mold claim.

### **Juror Concerns about Airborne Diseases**

There have been several significant airborne diseases or trends in respiratory health that in the recent past have captured public attention. These include:

- Legionnaire’s Disease
- Anthrax Contamination
- Increase in child and adult asthma

Consistent with concern about these problems, our jury research demonstrates greater concerns about the dangers of airborne contaminants as compared to water borne contaminants. The critical difference seems to be that jurors feel they have no way to protect against unseen airborne risks. When people feel out of control, they feel anxious. They are also more likely to sympathize with the plaintiffs if they believe the plaintiffs have little ability to control a toxic exposure.

### **Juror Anxiety and Mold Litigation**

In general, juror anxiety about case issues presents a significant problem for the defendant. If jurors are anxious about case issues, research has shown that they are less able to follow or track a logical argument. While inability to follow a logical argument does not always hurt the defense, our research in a variety of types of cases demonstrates that anxious jurors most often hurt the defense. When people are anxious, they are more inclined to fall back into old, emotional patterns of reaction that ignore external stimuli. And it is usually the defense that must present a complex, technical argument that relies on jurors to set aside their emotional reactions to focus on evidence and the law.

Anxiety affects jurors’ ability to think logically, as well as their inclination to make sense of the case before them. For example, attorneys specializing in civil litigation involving dramatic events and traumatic injury, such as aviation crashes, are no doubt aware of the need to identify jurors who have a fear of flying. This is a particular

concern to the defense attorney, who must make jurors understand events from the airline's point of view. Just as someone who has test anxiety may fail to perform well on an exam, a juror suffering anxiety over the subject matter of the litigation is less able to comprehend logically the evidence presented at trial.

For litigation involving property damages related to mold and possible claims of personal injury, fifteen to twenty-five percent of the jury pool will experience anxiety about the case issues. This percentage is substantial enough to raise concern for attorneys who have to select a jury in a mold case.

### **Two Challenges to Communicating Your Themes: Sympathy and Anger**

In order to prevail in a mold case on damages and liability there are two common juror reactions to a case that need to be examined: sympathy for the plaintiff who has lost their dwelling and/or may have been injured or unable to work, and anger toward the defendant insurance company for the way the claim was handled. In cases with loss of a family member, crippling injuries or financial ruin, it is natural for jurors to feel sympathy for the injured party. It is the defendant's challenge to acknowledge the sympathy and give jurors permission to feel it—and, at the same time, to instruct them that they need to set aside their sympathy in order to render a just decision.

It is wise to begin discussing setting sympathy aside in voir dire and then to repeat this in opening statement and closing argument. Post-trial interviews with jurors in successfully defended cases often show that jurors wrestled with the issue of sympathy but were able to set it aside. Juror comments from a case involving major personal injury demonstrate this effect:

“We all felt sympathy for the plaintiff, she lost her husband. Sympathy came up in deliberations, but we discussed how that was not the issue.”

“The defense attorney mentioned about ruling out sympathy, and the judge kept reminding us of our duty.”

There is no doubt that anger towards the defendant fuels damage awards. Whereas defense attorneys have some good, simple techniques for getting jurors to

disregard sympathy in their verdict, there is no easy way to block or redirect feelings of anger that might emerge in a trial. We are all familiar with the inflammatory arguments that plaintiff attorneys can make in response to allegations of insurance company misconduct in handling a claim. In terms of mitigating jurors' anger towards a company, it is important that insurance company witnesses do well on the stand and also that the defense have themes that will allow it to explain what happened. In other words, you must ensure that jurors do not find a ready target that can then justify their anger and give a forum in the jury room for those who want to place anger onto the insurance company.

Anger flows from beliefs about responsibility and blame for a problem. According to the "just world theory,"<sup>1</sup> people have difficulty accepting the injustices of life and have a strong need to believe that the world is just. If the world is just, it means that our own outcomes are controllable. In other words, people who do good deeds can expect rewards or profits. Jurors, therefore, will have a tendency to want to even out inequities and seek justice. They wish to assign responsibility for injustice and bring about restitution to injured parties. It is therefore incumbent on the defense to persuade the jury that justice sometimes means that the plaintiff (typically considered the underdog) goes home without money.

## **Case Themes**

### ***What are case themes and why are they important?***

Research in a variety of applied fields has demonstrated the significance of themes for organizing information and making decisions. Every experienced trial attorney understands that jurors need to be able to have some way of organizing all the information they are exposed to during a trial. To persuade a jury, an attorney needs to develop case themes that help organize the diverse case facts and convey the case theory. Case themes can provide a bridge and a way for jurors to understand what they are learning during a trial. For many cases, themes are as important for damages decisions as they are for liability. To affect damages awards, attorneys need to influence jurors on the issues of responsibility, blame, and justice.

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<sup>1</sup> Lerner, M.J. & Meindl, J. R. "Justice and Altruism." In J.P. Rushton and R. M. Sorrento (eds.) Altruism and Helping Behavior, Hillsdale, N.J.: Erlbaum: 213-32 (1981)

### **Three Approaches to Theme Development**

There are techniques, which can be used to develop case themes for mold litigation. While these approaches may be used intuitively by attorneys, there is a research tradition that supports and explains why these approaches work.

#### ***Attribution Theory/Choice Theme***

When judgments of responsibility and blame are being made, it is important to know whether or not there was any choice involved. Attribution theory looks at the choice factor and supports the notion that when someone chooses to do something, that person is then seen as responsible for the consequences of the choice. To the extent that the plaintiff and the defendant are seen as having a choice in their conduct, then jurors will feel they are responsible for the consequences of the choices that they made.

#### ***Counterfactual Thinking***

An additional approach to theme development is to use what is described as counterfactual thinking. Counterfactual thinking occurs when a person evaluates an event by how easily it could have been undone to create a different outcome, usually a more positive outcome. The ease with which a juror can undo the negative event with a counterfactual affects the amount of blame he/she attributes to a party. In a mold case, the question raised is what could either side have done to prevent this problem from occurring. If it is hard for jurors to develop reasonable counterfactuals, “if only” statements, it will be harder for them to attribute responsibility, and thus blame, to the person/company. On the other hand, the more counterfactuals a juror can create to prevent the negative outcome, the stronger their opinions of blame on the party who they feel could have changed the outcome of the event.

The question answered by a counterfactual usually takes the form “if only...” or “what might have been...” An example of a counterfactual would be, “If only the plaintiff had done something about the leak, all of this damage could have been prevented.” A counterfactual creates an alternative way of looking at a situation, an alternative reality.

The way to use counterfactuals to look at case themes is to consider what “if only” arguments the plaintiff and defendant could make. It is often the case that the plaintiff will have several “if only” arguments. The response to a counterfactual argument is to argue “even if the behavior had occurred, the negative outcome still would have occurred.” Defendants often find themselves having to create several “even if” arguments. The search should be made to determine whether there are any “if only” arguments that can be made by the defense.

### ***The Story Model***

The story model assumes that jurors organize the evidence of a case into a coherent explanation or story. This narrative structure is then compared to the verdict categories to determine the best match<sup>2</sup>. Trial attorneys have used the story model for years in crafting case presentations. The point is that jurors actively engage in creating their own story about a case and that may or may not include the attorney’s version of the story. The story model, in the hands of most attorneys, is a way of presenting case themes, metaphors and analogies.

### **Hindsight Bias: An Obstacle to Theme Acceptance**

Hindsight bias is one of the psychological processes that affects jurors’ decision making when attributing cause and responsibility to an individual or company for an event. Hindsight bias is an individual’s tendency to see events as expected after they have occurred, even when they were seen as unlikely prior to their happening. This tends to increase feelings of confidence in judgment after the fact, and can lead to continued use of faulty decision strategies.<sup>3</sup> Most defense attorneys are well aware of ‘Monday Morning Quarterbacking’ and the way it can be used to second guess a decision by a defendant. A number of studies have been done which show that hindsight bias is very difficult to overcome, even among sophisticated decision makers. If hindsight bias is present in a case, one of the few things that can be done is to educate jurors about

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2 Hastie, R. (Ed.), *Inside the Juror*, New York: Cambridge University Press: 3-37 (1993)

3 Heath, L. & Tindale, S. “Heuristics and Biases in Applied Settings.” In: L. Heath, R. S. Tindale, J. Edwards, E. Posavac, F. Bryant, E. Henderson-King, Y. Suarez-Balcazar, J. Myers (Eds.), *Applications of Heuristics and Biases to Social Issues*, New York: Plenum Press: 8-10 (1994)

hindsight bias: “If something bad happens, we have a tendency to think that we should have known it would have happened.” The hope is that at least one juror understands that idea and could use it in deliberations.

### **Mock Trials and Focus Groups to Test and Develop Case Themes**

The use of mock trials has evolved considerably over the past twenty years. In the past, mock trials were primarily used for large cases, lasted more than one day and involved several juries. As trial consulting and the advantages of jury research have become more widely known, mock trials and focus groups are now routinely used in all types of litigation.

Another change in the use of mock trials is that corporate counsel and claims managers are aware of the use of mock trials as methods of case evaluation. Ten years ago, in-house counsel and claims managers were somewhat reluctant to use mock trials to evaluate cases. Outside counsel often had to work hard to convince the client that a mock trial and the use of litigation consultants were a valuable addition to their trial preparation.

Today, clients rather than the trial attorneys are frequently the ones initiating the use of trial consultants. Sophisticated clients are aware of the benefits of using a mock trial and they expect their outside counsel to be aware of these services as well. Similarly, the plaintiff’s bar is more open to obtaining mock juror feedback as part of their trial preparation and settlement strategy.

### **Use of Mock Trials in Mold Related Litigation**

In bad faith litigation involving property damage, the stakes are often extremely high and both sides probably have conducted one or more mock trials. For smaller cases dealing with new issues related to mold litigation, a focus group may be appropriate. Mock trials are used to develop persuasive themes, to make sure jurors understand the case and to anticipate questions that jurors want answered. Through mock jury deliberations, it can be determined whether jurors simply accept an argument or whether certain jurors are able and willing to convince other jurors about the merits of their position.

## **Focus Groups vs. Mock Trials**

### ***Focus Groups***

Focus groups are designed to be exploratory, creative sessions and are often used early in the discovery process. They usually involve a facilitator explaining the case facts, followed by a question and answer session with the participants. The number of participants for this type of research ranges from seven to ten. Since the focus group is an interactive forum, the facilitator can conduct an in-depth examination of what jurors do and do not understand about the case issues. We have noticed greater use of focus groups for smaller cases.

The session identifies:

- Initial impressions of the parties
- Reactions to the claims and defenses
- Historical perspective; (what was known when?)
- Juror assumptions about the claims
- Irrelevant issues
- Reactions to bad facts
- Metaphors and analogies

### ***Mock Trials***

The purpose of a mock trial is to determine how best to present a case. Most trial lawyers understand the value of comments obtained from jurors after the verdict. The mock trial allows the attorney to obtain some of those insights while there is still time to use them.

Some more common reasons to conduct a mock trial are:

- To evaluate jury reactions to case themes
- To evaluate alternate case strategies
- To assess the performance or credibility of key witnesses
- To determine the type of juror who is least accepting of your case strategy
- To determine how best to teach the jury, or to see if they will understand the evidence
- To evaluate demonstrative evidence

## **Elements of a Mock Trial**

### ***Size of a Case***

In a significant case, the decisions about a mock trial usually focus on when it should be held and what issues should be covered. In most large cases at least one side and often both sides are using trial consultants and have conducted a mock trial. For these big cases, mock trials are often held early in the discovery process to evaluate themes.

For smaller cases, we have found that doubt about settlement often pushes the mock trial to within weeks of the trial date. As chances for a reasonable settlement diminish, the cost benefits of a mock trial improve considerably. In serial litigation, where the same types of issues are going to be retried, we also have seen an increased use of mock trials. Although the value of one of these cases may not, by itself, justify a mock trial, the serial nature of many types of litigation justifies the value of having such a session.

### ***Presentation of the Other Side***

Of the many do's and don'ts in conducting a mock trial, the one that is most critical in developing a realistic case assessment is having a good solid presentation of the opposing position. The difficulty is ensuring that the other side is adequately represented and that the individual playing the role expresses the themes and emotional tone of the opposing argument. This is often accomplished by having the senior attorney give the presentation of opposing counsel.

### ***Evaluation of Witnesses***

With the increase in the use of video depositions, there has been a corresponding increase in the number of cases where video deposition testimony is presented to a mock jury. Although producing edited video testimony is time consuming, this testimony provides the opportunity to assess key players and adds realism to the process.

### ***Use of Written Questionnaires***

Written questionnaires provide the opportunity for feedback on key issues. Throughout different points in the mock trial, questionnaires are administered. Usually

jurors are asked which way they are leaning as well as which arguments they accepted and rejected. Rather than separating jurors at random for deliberations, by using questionnaires we can divide the groups based on their leanings.

### ***Jury Deliberations***

The most informative part of the mock trial is the opportunity to observe jury deliberations. By observing deliberations, an attorney familiar with the case can learn which issues or questions need to be addressed more thoroughly. In preparation for the actual trial, the attorney can make sure that questions that may be raised by jurors are answered in the case presentation. These questions often seem insignificant, but in answering them the attorney can lower juror anxiety about a case and help jurors focus on the key issues. Besides raising questions, jurors often come up with images, metaphors, analogies and themes that help the attorneys tell the story. These images are extremely important in helping attorneys pitch the case to the jury.

### ***Debriefing of Jurors***

After jurors have deliberated, debriefing the jury often provides helpful feedback. A consultant asks a series of systematic questions about the case. The opportunity to ask hypothetical questions also presents itself here. Questions that went unanswered during deliberations can be posed to the mock jurors at this time as well. This process often provides the forum for developing case themes.

## **Practical Considerations Affecting Cost and Quality**

### ***Length of a Mock Trial***

Mock trials are typically held either in a full-day session or a half-day session. On occasion, where a more extensive evaluation of the case is important, a mock trial can last several days. It is also common in complex cases for components of a trial to be presented in separate four-hour sessions with different juries.

### ***Sample Half Day Mock Trial Agenda***

<u>Time</u>	<u>Activity</u>	<u>Time Duration</u>
1:00-1:15	Jurors Arrive/Snacks/Initial Survey	15 minutes
1:15-1:35	Introduction/Voir Dire/Case Summary	20 minutes
1:35-2:10	Plaintiffs' Presentation	35 minutes
2:10-2:30	Questionnaire 1 & Break	20 minutes
2:30-3:05	Defendant's Presentation	35 minutes
3:05-3:20	Plaintiffs' Rebuttal	15 minutes
3:20-3:30	Questionnaire 2	10 minutes
3:30-3:40	Jury Instructions & Division Into 2 Juries	10 minutes
3:40-4:30	Jury Deliberations	50 minutes
4:30-5:00	Consultant Debriefing of Jurors	30 minutes

### ***Live or Videotaped Attorney Presentations***

One debated issue among trial consultants is whether to have the attorney presentations live or on tape. Some trial consultants favor the use of attorney videos to present the case. The argument in support of the video approach is that video presentations are more controlled regarding length, tone and content. Video displays also provide flexibility as to when to conduct the mock trial, since the attorney need not be present. If there is a mistake, a video presentation can be redone.

While some mock trials are done with video attorney presentations, most involve live presentations. The reason for a live presentation is that jurors get more involved during this type of presentation. We have noticed that they take very few notes during a video attorney presentation. Live presentations produce greater ego involvement from jurors and provide a good opportunity for the attorney to rehearse the presentation. (See Table 1.)

**Table 1: Comparison of Mock Trial Formats**

	<b>SAME PERSON PRESENTS BOTH SIDES</b>	<b>DIFFERENT PERSON PRESENTS EACH SIDE</b>
<b>VIDEO</b>	Artificial; Less Engaging; Removes Attorney Impact	Less Involvement; More Control Over Content; Scheduling Flexibility
<b>LIVE</b>	Lacks Reality; Removes Attorney Impact; Statements Usually Read	Most Common; Greatest Involvement; Most Approximates Actual Trial

***One Jury, Two Juries or More***

In major cases, three to six juries may be used in a mock trial. For most cases where a mock trial is conducted, using one or two juries is typical. Since a particularly aberrant, strong juror could influence a jury, it is more common to use two juries. Cost considerations require a cost-benefit evaluation. Expenses for one jury can be \$2,500 to \$3,000, depending on the amount of the stipend paid to the jurors and recruitment costs. A second jury could double those expenses. Additional expenses include videotaping, space rental and refreshments.

***A Representative Jury***

Trial consulting firms provide a representative jury for a mock trial from the venue in which the case is being tried. In small venues or in high visibility cases, a different venue that is demographically similar to the trial venue may be used. Jurors are usually recruited to represent the age, education, gender, ethnicity and occupation of the actual jury pool. The methods to recruit jurors vary.

Some consultants recruit mock jurors through classified advertisements. This technique opens the risks of discovery by interested parties, and is biased by having only individuals who are looking for work. The best method is phone recruiting from existing databases. This ensures that jurors will be screened for possible conflict and allows for the most accuracy in matching the venire.

The process of recruiting mock jurors needs to be carefully monitored, so that every effort is made to avoid skewing the results of the mock trial. Certain criteria are developed to exclude individuals who would normally be stricken from the jury and those who may potentially leak information. One criterion for exclusion is employment in any form of media. Other exclusion criteria include, relationship/employment of self or family members with any of the parties and difficulty understanding or speaking English.

### ***Where to Hold a Mock Trial***

For realism, the best location to hold a mock trial is a courtroom. However, courtrooms are extremely hard to come by, and very few firms have their own state-of-the-art trial facility. For the most part, commercial focus group facilities or hotels are used to conduct mock trial, the former being the preference. Focus group facilities are convenient because they are wired for sound and offer two-way mirrors and viewing rooms. Hotels sometimes present logistical problems, but in smaller communities they are often the only site available.

### **Predicting Trial Outcomes**

At the end of a mock trial, attorneys usually feel more confident about the way they will present the case at trial. Most often they discover that the troublesome facts they have been worrying about can be handled. Nevertheless, one question may remain in their minds, “Is the result of the mock trial a good indication of the actual trial outcome?” Most experienced trial attorneys and most trial consultants would probably say a mock trial cannot predict the outcome of the trial.

In the actual trial, a dynamic can develop that can be significantly different from the mock trial. A witness can do a poor job, the evidence can be allowed in or not, or there may be an errant juror during deliberations. These uncontrollable factors do produce an element of unpredictability. The same facts can say different things to different jurors. Yet, using a well-designed, properly run mock trial, an attorney can evaluate the impact of the good and bad facts and discover the most persuasive way to present the arguments.