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# **Mock Trials, Past And Present**

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### **Evolution of the Use of Mock Trials**

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

Today corporate clients are frequently the ones initiating the use of trial consultants. Sophisticated corporate 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 Coverage Litigation**

In insurance coverage litigation, the stakes are often extremely high and both sides probably have conducted one or more mock trials. Mock trials in coverage disputes are used to develop persuasive themes, to make sure jurors understand the case and to anticipate questions that jurors want answered. Whether jurors simply accept an argument or whether certain jurors are able and willing to convince other jurors about the merits of their position, can be determined through mock jury deliberations.

Another important issue examined in a typical coverage mock trial, is the impact of bias toward the parties involved. Often the policyholder is seeking coverage for a product that



caused injury or actions that caused harm to the environment. Similarly, the defendant insurance company is also not generally regarded positively by jurors. Mock trials are used to detect how juror perceptions of the parties affect juror reactions to the claims and the evidence. For a proper sample size, jury selection research involves multiple juries.

## **Focus Groups v. 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.

*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 Mock Trials**

### ***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.

## **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

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### ***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.***

ATTORNEY PRESENTATION FORMAT		
	SAME PERSON PRESENTS BOTH SIDES	DIFFERENT PERSON PRESENTS EACH SIDE
VIDEO	Artificial; Less Engaging; Removes Attorney Impact	Less Involvement; More Control Over Content; Scheduling Flexibility
LIVE	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.