

## Getting the Most from the Mock Trial

By Nancy J. Geenen – August 27, 2015

Some successful trial lawyers are born with storytelling skills that are compelling and persuasive, but most are made through years of practice, using tools and resources that increase the odds of winning at trial. A mock trial, backed by solid social science and the experience of jury consultants who understand group dynamics and behavior, is one of those important tools to prepare for trial.

### What Is a Mock Trial?

A mock trial is an adversarial, evidentiary presentation of the dispute to a large group of people representative of the jury pool to whom the case will be tried. Just as if both sides of the dispute were represented, mock-trial presentations include a combination opening statement and closing argument; key documents, timelines, tutorials, and thematic graphics; and key witness testimony. The mock jurors are surveyed for their individual reactions to the presentations. Afterward, they receive jury instructions and retire to deliberate with those instructions and a verdict form. Clients, attorneys, and consultants view the group deliberations through two-way mirrors or closed-circuit monitors. The entire exercise is recorded digitally.

At the end of the deliberations, the trial consultants facilitate discussions with each group to explore the process, identify points of conversion, and respond to observers' questions. The jury consultant then interprets the results of the individual questionnaires and the group decision-making process in a report that provides feedback for witness preparation, demonstratives, exhibits, and the graphics used to tell the story. That report recommends revisions to the trial strategy and presentation and identifies problematic jurors who should be struck during jury selection.

In a mock trial, your goal isn't to win the mock case, or to predict which side will win at trial. Rather, a successful mock trial tests juror reactions to the trial story, to fact and expert witnesses, to demonstrative evidence, and to attorney storytelling skills. Mock trials uncover the attitudes and experiences that influence the group decision-making process for arriving at a verdict. A mock trial uncovers (1) how jurors understand complex problems and concepts, (2) how those same jurors use the arguments and evidence presented to persuade the group to a majority or unanimous verdict, and (3) how attorneys should adjust the trial strategy and trial presentation to be memorable and persuasive. In a mock trial, I want a close loss or even a draw that tests our side's worst facts and witnesses against the opponent's best.

### Logistics and Practical Considerations

As a trial consultant, I like to conduct mock-trial exercises after a ruling on the summary judgment motion and at least 90 days before trial. Rarely, however, am I afforded that luxury. Once the decision is made to conduct a mock trial, it takes three to four weeks to recruit jurors, prepare materials, and practice the presentations.

Mock jurors are carefully screened to weed out conflicts, professional jurors, and those who would not qualify to serve on a jury. I prefer to recruit 36–40 jurors for three separate deliberation groups.

The duration of a mock trial varies, depending on the goals of the trial team and the amount of material to be tested. A one-day exercise, with a morning of presentations and an afternoon of group deliberations, ranges in cost from \$35,000 to \$50,000, depending on the venue. But much can be gained by going beyond a one-day exercise. Even a three-day mock trial may not be enough to test the majority of witnesses and the key themes for a three-week courtroom trial.

I often recommend that the lead trial counsel or the second chair prepare and present *the other side's* case in a mock trial. That forces the most senior attorneys to take a broader view of the themes and evidence that have guided the trial strategy to this point.

To select a jury consultant, consider four factors: (1) experience in jury trials in the venue (e.g., SDNY, NDIL, CDCA); (2) experience in the subject matter or industry (e.g., pharma, employment, financial); (3) chemistry with the trial team; and (4) past results. Often the prospective jury consultant has a sample report and recommendations for review by the trial team. Make sure that the sample report fits your style of learning, so that you are not “fighting the form.” And look for a jury consultant with lots of successful jury verdicts under his or her belt, who has watched his or her teams during trial in addition to directing voir dire and jury selection.

To prepare for the mock trial, the jury consultant works with the trial team to identify the themes, facts, witnesses, and demonstrative ideas worth testing. He or she then prepares the questionnaires that will be used to measure individual juror reactions at the conclusion of each presentation and witness testimony. The jury consultant also works with the trial team to prepare and simplify the jury instructions and verdict forms for the group deliberations.

Clients evaluate every aspect of the mock trial to determine the risk of loss, the odds of winning, the value of settlement, and the quality of attorney preparation and presentation. Managing client expectations, from the budget to the expected results of a mock trial, is an important task that should not be relegated to a junior associate. Partner the client with a senior associate who knows the case well and has experience with mock exercises.

For the client, this is the last dress rehearsal before opening night at the theater. The mock trial is not a time to choreograph the dance routines or learn the script. Every person involved—from the presenting attorneys to the graphics consultant to the presentation technician to the lead jury consultant—should be an experienced professional dressed for court.

Invite the client to the rehearsal of the presentations just before the mock trial. That way, you can obtain the client's reactions and feedback before you test your presentation and witnesses with the mock jurors. The value of the exercise diminishes when a client sees the presentations for the first time at the mock trial. There is nothing worse than losing valuable client feedback—and client confidence—because the client is reacting to his or her own video deposition testimony instead of observing whether the mock jurors understand the case overall.

At the mock trial, I ask the client to watch one of the deliberation groups from start to finish to determine which facts of the storyline the jurors are missing, especially if there is a complex timeline of events or difficult technical aspects to the case. I also recommend having one trial team member observe each deliberation group from start to finish, to keep the client informed of the progress and focus of the deliberations.

At the conclusion of the mock exercise, the trial consultants, and sometimes the trial team, walk away with recordings of the attorney presentations and the group deliberations. I do not recommend that trial teams provide clients with a copy of the recordings. This is attorney work product. The trial consultants use the statistical data from the questionnaires and the qualitative data from the group deliberations to prepare a report with recommendations for strategy or tactical adjustments during the next phase of trial preparation, including witness preparation, graphics development, and trial strategy. Invite the client to attend the follow-up meeting to discuss the report and recommendations of the trial-consultant team.

### **Trial Readiness**

Within two weeks of the mock exercise, the trial team and client meet with the trial consultants to discuss the report and recommendations. Members of the teams may not have thoroughly read the report or recommendations, so treat

these meetings as a learning opportunity. I guide the discussion to address both the quantitative and qualitative findings in the report, and to understand the trial team's blind spots about the themes and strategies of the case:

- How did the jurors use the verdict form? What was unclear?
- How did the jurors evaluate the damages request?
- How did the jurors use the jury instructions, especially the burdens of proof?
- How much do the jurors think the case is worth?
- What stories did the jurors use to explain the case to each other?
- How did the jurors rate the witnesses from a qualitative approach?
- What questions did the jurors ask each other?
- What questions were unanswered by the presentations?
- What arguments did the jurors use during deliberations to persuade others, whether effective or not?
- What documents were reviewed and how were those documents used?
- What graphics were reviewed and how were those graphics used?
- What facts, documents, or witnesses were missing from the presentation?

The trial team then develops an after-action plan that focuses on improvements for the trial strategy and theme, storyline, witness preparation, and the attorneys' presentation mechanics. As the trial date draws near, the jury consultant and the trial team use the learning from the mock exercise and after-action plan to work on jury instructions, voir dire (if permitted), and identification of the most dangerous jurors to sit on the panel.

Finally, the recordings of the attorney presentations at the mock trial are a hidden gem. To be persuasive, every trial attorney must be aware of the real-time dynamics of the trial, appear natural and relaxed in the courtroom, build rapport with individual jurors, and speak with conviction on the correctness of the client's case. Watching the presentations recorded during mock exercises is an opportunity to improve each of these persuasive communication skills. Trial attorneys who demonstrate command of the courtroom, of the evidence, and of the witnesses rarely lose—and sometimes even win the loser case.

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