

Jury Research: Can You Afford Not To Do It?

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Introduction

You think you have a great case. Your client is convinced. Your staff, your friends, and sometimes even your spouse nod their heads when you talk about the case. What more information could a trial attorney want before gambling hundreds of thousands of dollars or many millions on how a jury will decide the case? The answer: a lot more information. It does not make sense to bring a large case to trial without conducting some jury research. As attorneys, we are very good at predicting what arguments will be made and what evidence will be presented at trial, but we have no special training in—and often no special insight into—how a jury will perceive the arguments and evidence. In fact, our intimate involvement in the facts and details of the case, along with our client relationship, can cloud our perceptions.

Jury research provides critical insight into how a jury will react to the key facts of the case, and guidance on how to most persuasively and clearly present your evidence. It may also provide valuable data for jury selection. In addition, a jury study—which the client should always attend—often sends a loud message to a recalcitrant client. This article will provide an overview of the types of jury research available and the benefits and costs of jury research.

Types of Jury Research Available

Trial attorneys have a multitude of choices when it comes to jury research. The research project that is ultimately selected will depend on the needs of the case and on what the budget allows. The two most common types of projects are mock trials and focus groups. Both of these projects allow trial teams to test the key issues and facts of their case before a group of mock jurors, and obtain reactions to those issues and facts. Other, more specialized studies can be designed so trial counsel can see how mock jurors respond to certain witness' and the experts' testimony, to damage presentations, or to the overall case (opening statements, key witnesses, and summations). Studies can also be designed to compare and contrast two or more distinct strategic approaches to liability or damages and to develop a quantitatively based set of juror profiles. Additionally, telephone attitude surveys can be designed so trial counsel can find out how mock jurors in one or more venues view key issues, which is useful in assessing whether a change of venue motion is appropriate. Moreover, change of venue surveys can be

constructed to provide evidence of the need for a change of venue.

Although these research projects are all conducted before trial begins, there are also studies and services available after trial starts. For example, in some very complex, bet-the-company types of cases, shadow juries (who observe the real-life trial) are used. Also available are studies that gather mock juror reactions to only portions of the trial, such as opening statements or key witness testimony. In serial litigation, it is often beneficial to interview jurors after a trial to better understand how they perceived the parties, witnesses, key issues, and lawyers. This article focuses on two common forms of jury research: mock trials and focus groups.

Mock Trials

In the broadest sense, a mock trial is intended to assess how a jury in the trial venue would understand and evaluate key issues in the case. It is striking how often trial attorneys think an issue is crystal clear, while mock jurors find it as clear as mud. In addition, the mock trial should determine the strengths and vulnerabilities of the case, and provide information to develop strategies to capitalize on the strengths of the case, minimize vulnerabilities, and develop trial themes that will serve as the foundation for the case story. Here is how a mock trial generally works.

Select a Trial Consultant

Although it is theoretically possible to conduct a mock trial without a trial consultant, it would be a little like a layperson conducting his or her own trial. A trial consultant should provide advice on how and what to present, make arrangements to obtain mock jurors that represent the profiles of the jury pool for the county in which the case is venued, arrange for the physical facilities for the mock trial, moderate the mock trial, analyze the results of the exercise, and develop more effective trial strategies and themes based on the results. The trial consultant may also help edit or write presentations, develop graphics for presentations, and provide statistical data regarding the outcome of the jury study, including demographic information from the jurors and the persuasive effects of the various arguments. The scope of services provided will, of course, affect the cost.

The trial consultant should be considered an integral part of the team for purposes of preparing for, running, and reporting the research. Trial consultants should help ensure that the attorney and witness presentations are balanced, that the mock jurors reflect what the trial team will see in the venire, and that reliable data is collected, analyzed, and summarized. Most important, and sometimes most painful, the trial consultant should provide objective, data-based advice to the trial team.

Recruit Mock Jurors

This task involves inviting, screening, and selecting people from the trial venue to participate in the mock trial. It is important not only to recruit representative mock jurors, but also to screen out mock jurors who pose a risk to the confidentiality of the exercise. The last thing trial counsel and the client need is to read about their mock trial in the newspapers. Procedures that both identify representative mock jurors and safeguard the confidentiality of the study should be used. For these reasons, the recruitment process is generally managed by the trial consultant. The recruitment process can take between 1 and 4 weeks, depending on the venue and nature of the recruiting.

Typically, two or three groups of 10 to 14 mock jurors are recruited for a mock trial. The number of mock jurors and groups will depend on the complexity of the case. More groups may be used if the team wants to test issues with different types of jury compositions. For example, in a case involving racial issues, such as an employment discrimination case, the team may want to test two demographically representative groups, and one or two groups with specific racial compositions, to allow those mock jurors to express their unedited reactions to the issues. In some very complex cases, four to six groups can be used to capture a wider range of reactions to the liability and damage aspects of the case.

Of course, a greater number of mock jurors provides a better sample of the jury pool, but mock jurors are paid for their time and the facility for its space and equipment, so a greater number of jurors will increase the cost.

It is of critical importance that the mock jurors be from the trial venue (or a matched venue if there are problems with running the study in the trial venue). A juror from Fresno may react dramatically differently than a juror from San Francisco.

Select a Facility

This is also something that the trial consultant typically handles. If possible, the study should be conducted in a facility with one-way mirrors, so the trial team and client can directly observe the attorney arguments and jury deliberations. If such a facility is unavailable, the groups should be video recorded with a live feed to an observation room so the team can watch via closed circuit television.

Present "Clopenings"

In a mock trial, the trial attorneys typically present for each side a "clopening," an opening statement that emphasizes the facts, but also includes some of the major arguments. The clopening is designed to lay out the key test themes and argue the evidence supporting those themes. Documentary and demonstrative evidence is displayed on a screen for the mock jurors to examine during the presentations. The more evidence that can be tested, the better. If a protective order is in effect, the mock jurors can sign

the protective order to allow the team to test as much of the key evidence as possible.

One key to the success of this exercise is the ability to predict and present the arguments and evidence against your client. The mock trial becomes nearly meaningless if you cannot competently present your opponent's case—and preferably present it better than your opponent. One ancillary benefit of the mock trial is the thorough understanding of the opponent's case that comes from developing the other side's arguments and graphics.

Typically, mock trials focus heavily on the liability aspects of the case, with less emphasis on damages, although the clopenings should present at least a summary of the damages.

Decide Whether to Test Witnesses

It is simpler, easier, and less expensive to limit the mock trial to clopenings, but sometimes one of the major questions is how a jury will perceive a particular witness. In fact, there are cases in which the key determining factor will be which witness wins the credibility battle.

Trial Counsel's View: Many years ago, I defended a large corporation against a race discrimination claim. My client had a very positive view of the case and of the manager who fired a minority salesperson, but I saw nothing but problems with the case. I convinced the client to conduct a mock jury with live testimony by the manager and by an actor playing the plaintiff. After my partner, playing the plaintiff's attorney, cross-examined the manager, the mock jurors applauded my partner and proceeded to award several million dollars in punitive damages. I then readily convinced our client to pay \$75,000 to settle the case.

There are two options to test witnesses: live or video-recorded presentation. Live testimony is more interesting, but also more difficult. When testing witnesses, it is important to present balanced testimony so as not to bias the mock jurors' reactions, so both direct and cross-examination should be tested. If a deposition is used, positive and negative clips should be mined from the deposition to make a balanced presentation. Ideally, to remain balanced, a witness for each side should be presented. Of course, it is generally not feasible to borrow the other side's key witness, so an actor or someone playing the role with similar characteristics could play the opposition witness if there is no video deposition available. In a 1-day exercise, the trial team is not testing the impact of the witnesses' testimony; rather, the team is testing the credibility of the witness. Thus, the clips or testimony tested are generally short (5 to 30 minutes per witness). Although it can be painful for counsel to edit a key witness down to 10 minutes, it is important to remember that mock jurors have generally made up their minds about a witness's credibility within 3 to 5 minutes.

Questionnaires

Although not all trial consultants use questionnaires to gather the individual reactions of mock jurors, questionnaires are highly recommended not only to obtain a better understanding of the mock jurors' reactions but also to obtain data to assist in jury selection. Before the clopenings, the trial consultant generally presents the mock jurors with a questionnaire that examines their relevant attitudes and experiences before hearing about the case. After the plaintiff's clopening, a second questionnaire is generally presented to measure the jurors' reactions. After the defendant's clopening, and before deliberations, each juror completes a third questionnaire.

Jury Instructions and Deliberations

The clopenings are typically completed before the lunch break. Once all presentations are made to the mock jurors, they are divided into two or more deliberation groups, and are instructed on the law. Given the abbreviated nature of the test, the instructions should be boiled down to the essential elements of proof for each claim tested. Additionally, verdict forms may also be incorporated into the test, but like the jury instructions, the verdict forms are often abbreviated. After the instructions, the mock jurors are broken into groups of 10 to 12 and asked to deliberate.

You and your client will be able to watch and listen to the deliberations, either through a closed-circuit video system or through a one-way mirror. The deliberations are often also video recorded to allow each client representative and member of the litigation team to later view all the mock jury groups.

At the conclusion of the jury deliberations, the trial consultant typically rejoins the deliberation group and asks follow-up questions in a focus session. During this focus session, new evidence and arguments may be tested. These focus sessions provide a unique opportunity to test evidence that may be excluded from the actual trial. For example, suppose a plaintiff has been involved in prior litigation, but the team is uncertain whether this evidence will be admitted at trial. The attorney presentations should not mention this evidence. Instead, the trial consultant can introduce it during the debriefing session. Thus, the trial team can ascertain the mock jurors' reactions to this evidence without biasing their reactions to the case or their deliberations. At the end of the debriefing session, the mock jurors are usually asked to complete a final exit questionnaire to assess the impact of deliberations on the individual thinking of each mock juror.

The Results

The deliberations are always fascinating and always helpful. First, you will learn the verdicts. Sometimes, the verdicts tell you most of what you want to know, particularly if the verdicts are overwhelming for one side. But

more important than the "bottom line" are the reasoning, arguments, analogies, and evidence the mock jurors used to reach their conclusions.

Trial Counsel's View: In representing one severely injured child, we learned that the jurors in a conservative mountain county had absolutely no inclination to find liability. We negotiated the best deal we could and settled, knowing that trial was not an option. On the defense side, we have brought several complicated cases to trial in which mock juries rendered strong defense verdicts and we have, fortunately, obtained the same results at trial. In other cases, the results of the mock trial were less clear, providing our clients with a valuable device to assess the risk and evaluate settlement options.

Following the research, the trial consultant may report the findings and conclusions of the study to the trial team. There is a great deal of variance concerning the style and content of this report, depending on the particular trial consultant's style and practice.

The mock trial results should provide the trial team with a tremendous amount of information about the overall case strengths and weaknesses, areas of confusion, how to teach difficult concepts to the jury, and how key testimony and documents impact case outcome. The research should help to provide a roadmap for case strategies and an effective set of trial themes. Witness credibility assessments can be ascertained as well as qualitative juror profiles. With regard to juror profiles, trial attorneys should be mindful that the sample size in a mock trial is relatively small. Thus, the profiles ascertained from mock trials have no statistical validity. Rather, the profiles should be used as a framework to help understand which questions will be critical to ask during voir dire, assess whether a written juror questionnaire will be helpful, and give qualitative guidance about what to look for in jurors.

The key strength of a mock trial is the insight gained into how jurors respond to both case issues and the case as a whole. A common myth about mock trials is that they predict trial outcome. Mock trials may, but are not designed to, accurately predict trial outcome. They predict how jurors respond to issues.

Armed with this knowledge, the trial team can use the results and recommendations to modify their case presentations.

Trial Counsel's View: Listening to mock jurors deliberate provides insight into what evidence and themes are effective. I have successfully tried several cases in which I pounded away at the evidence and themes that worked in the mock trial. Absent the mock trial, I could not have focused my trial strategy as effectively.

Often, mock jurors may be split about case outcome, whereas the case is won at trial after new strategies and themes are implemented. There are times, however, when the trial outcome is more negative than the research

outcome. This can be due to several factors: rulings on motions in limine, failing to test key opposition points and documents, or other factors that can bias the research. One important function of the trial consultant is to help the team make balanced case presentations and avoid or minimize factors that can bias the research. The trial consultant should be fully involved in preparing for the mock trial.

Cost

The cost of a mock trial depends on the nature of the case, where the research is conducted, how many mock jurors and groups are used, and what type of equipment is needed. Most trial consultants' fees for mock trials are comprised of two components: a professional fee and out-of-pocket expenses. Professional fees for a 1-day, two-group mock trial can range between \$15,000 and \$40,000, and out-of-pocket expenses can range between \$13,000 and \$25,000. Expenses will generally be higher in venues where the cost of living is higher. The consultant's fees should cover time spent learning the case, designing the research, assisting the trial team with their presentations, writing a questionnaire, analyzing the results, and reporting the results and recommendations to the trial team. The out-of-pocket expenses cover the cost of getting and paying mock jurors, renting a facility and equipment, and any travel or miscellaneous items. Thus, the total cost may range from about \$28,000 to \$65,000, excluding the attorneys' fees.

Trial Counsel's View: In general, because of the cost, we do not recommend a mock trial unless the case has a potential verdict of over \$750,000. In large cases, we routinely recommend a mock trial because the cost is relatively small in light of the total attorney fees and the verdict potential, and the information gained is always extremely valuable.

Trial Consultant's View: There are times when a defendant will choose to conduct a mock trial when the stakes are less than \$750,000. These situations usually involve the potential for repeat or serial litigation if the opposing party prevails.

Focus Group Research

The goals of a focus group are to understand how mock jurors react to specific case issues, assess which approaches to the issues work best, and develop strategies for best handling those issues. Only specific issue areas are assessed, not the entire case. For example, a litigator may have an employment case with several claims, e.g., discrimination, wrongful termination, and retaliation. The facts may be strong on issues concerning discrimination and wrongful termination, but uncertain on retaliation. A focus group can be designed to closely examine key issues, testimony, and documents that relate only to the retaliation claim. Usually, each side of various issues is presented in piecemeal format. In other words,

in the retaliation example, the mock jurors may hear the plaintiff's spin on some evidence, then the defense spin on the same evidence. Once the arguments and evidence are discussed, the moderator moves on to a different subject matter concerning retaliation.

Setting Up Focus Group Research

To conduct focus group research, several groups of mock jurors are recruited from the trial venue (or a matched venue if there are problems with running the study in the trial venue). The recruitment process, selection of a facility, and other set up is similar to a mock trial.

Questionnaires

At the outset of the exercise, the mock jurors may answer a brief questionnaire about their relevant attitudes and experiences before hearing about the case. This questionnaire allows the trial team to assess the mock jurors' baseline attitudes, and is often very helpful in revising strategic approaches to critical issues. For example, the trial team may want to argue that a company took certain measures to benefit consumers. The questionnaire may reveal, however, that mock jurors believe corporations are only motivated by profit and do not act out of altruism. The consumer benefit argument would thus have little-to-no credibility with mock jurors. The trial team may modify its approach, arguing that the corporation took certain actions because those actions benefited both the company and consumers. Measuring the mock jurors' predispositions can be tremendously helpful. Understanding their reactions to issues allows counsel to modify the approach at trial so it is consistent with what the actual jurors believe.

Depending on the needs of the case, some questionnaires may be used after key issues are tested, but the majority of data collected comes from the comments, observations, and reactions of the mock jurors during the group discussions after each issue is presented.

The Process

After the initial survey is completed, a trained, neutral moderator (trial consultant) sits with each group and provides a case overview, then reviews each side of the key test issues. At various stages, the moderator asks for reactions and feedback. For example, the moderator may ask how the group reacts after just hearing the allegations, after hearing the plaintiff's side of an issue, then after hearing the defense side of an issue. The trial team is thus able to obtain feedback on discrete aspects of an issue. This helps the team understand which points and counterpoints are understandable, credible, and persuasive. In the retaliation example mentioned above, the moderator may present facts that the plaintiff made a complaint 1 year before he was demoted. When the group is asked for feedback, some mock jurors may voice the view that this time lapse indicates there was no retaliation, while

others may think it is irrelevant, reasoning that the retaliator did not have a chance to take adverse action until 1 year after the complaint was filed. Isolating the temporal issue allows mock juror reactions, both pro and con, to be identified and better understood. The moderator may also ask what questions the mock jurors have, or what information they would need to hear to be persuaded one way or the other. This allows the mock jurors to provide their own unique perspectives.

Documents and Graphics

The mock jurors should have copies of key testimony, documents, or graphics. This allows them to examine key evidence and provide specific feedback. This exercise is useful for identifying trouble spots that might not otherwise have been anticipated. It is also helpful for narrowing down which demonstratives are most effective. By focusing the mock jurors on the graphic, the trial team can pinpoint what about the graphic is confusing, and the trial consultant serving as the group monitor can ask how the graphic can be made simpler, *i.e.*, what information the mock jurors find extraneous. With documentary evidence, mock jurors often find language that is not highlighted by either side, and use this language in making their determinations. By focusing on a document, mock juror reactions to all of the language can be better understood.

Limits of Format

Focus group research yields a wealth of qualitative data concerning how mock jurors react to specific issues, and provides tremendous insights into which arguments are persuasive on those issues. This in turn tells the trial team how to best handle the test issues at trial. As with any research study, focus group research has limitations. Because the entire case is not summarized, mock jurors are not reacting to the overall case. Thus, focus group research is generally not helpful in designing overall case strategies and themes. Also, because the feedback is primarily in the form of oral responses and discussions, questionnaire data is typically not gathered. This limits the trial consultants' ability to validate the results. The third major limitation is that focus group research does not yield juror profiles, because in-depth data is not collected with regard to the mock jurors' predispositions. Lastly, the issues are read to the mock jurors by a trial consultant who is not trying to argue either side. Because the information is presented in a dry, unemotional way, this format is not predictive of jurors' possible emotional reactions to a case.

Cost

The cost of focus group research can vary widely depending on the nature of the case, where the research is conducted, how many mock jurors and groups are used, and what type of equipment is needed. As with mock trials, most trial consultants' fees are comprised of two

components: a professional fee and out-of-pocket expenses. The professional fee covers the time it takes for the trial consultant to learn the case; design, set up, run, and analyze the research; and report back to the team. Out-of-pocket expenses include the cost of recruiting mock jurors, paying mock jurors for their time, facility and equipment rental fees, and travel. Professional fees for a 1-day, two-group focus group study can range between \$10,000 and \$30,000, and out-of-pocket expenses can range between \$7,500 and \$18,000.

When to Run Jury Research

The research should be timed to meet the needs of the trial team. Mock trials are generally run at or near the close of discovery, thereby allowing the trial team to use the key documents and testimony. Yet running the mock trial before discovery closes has several advantages. First, it is not too late to depose new witnesses who are identified as important through the research process. Second, clarification on key points may be obtained during the discovery process. Third, expert testimony may be simplified to improve comprehension at trial.

In a high-stakes case, it often makes sense to run some form of jury research before discovery commences. Although the witness testimony is not nailed down, and the opposition's documents are not known, trial counsel generally have a good idea of the trial themes and critical documents in their own case. Research run before discovery allows the trial team to design its preliminary trial themes at the outset, then elicit testimony during depositions that directly supports those themes. This can be very powerful at trial, and is generally done in complex, bet-the-company types of cases.

Attorney Time and Commitment

Make no mistake, these research exercises are a great deal of work and require a time commitment from the trial team. Much of the time involves preparing for the project: drafting attorney presentations or moderator scripts, gathering documents, selecting witness clips, drafting graphics, and pulling key jury instructions.

Trial Counsel's View: The amount of time, of course, depends on the case, but on average, we have spent about 80 hours for each jury study.

Is this time well spent? Absolutely. Many of these tasks need to be done for trial anyway, and the jury research process forces the team to attend to these necessary tasks sooner. Additionally, it forces the team to carefully think through the opposition's case, a critical task from a risk-assessment standpoint. It also helps to better understand the holes in the opposition case. The bottom line is, the more time spent on preparation, the more the trial team will get out of the jury research. If the exercise is shortchanged, the results can be misleading or worthless.

Conclusion

In complex, high-stakes cases, most clients cannot afford to go into trial blind. It is highly likely that the opposition has conducted some form of jury research or consultation, thus putting your client at a disadvantage. Even in a moderate-size case, or in a smaller case with significant ramifications, the same logic applies. At the end of every trial, one side is generally very surprised by the verdict. With proper jury research, you can dramatically reduce the chances of being one of those surprised people.