



The “Do-It-Yourself” Mock Jury: Effective Use of Mock Jury Exercises That Don’t Blow Your Litigation Budget

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Most litigators and trial lawyers agree that a well-orchestrated mock jury exercise yields invaluable insights on case strengths, weaknesses, and the impact and perception of key evidence. But many of those same attorneys, and their clients, often view mock jury exercises as a cost-prohibitive luxury justified only in high-stakes litigation. Balderdash. Alternative, fee-sensitive options exist that do not require retention of jury consultants or multi-day mock trials, which often come with six-figure price tags, but nevertheless generate many of the same valuable insights into the case as would be provided by a much more expensive, multi-day mock trial. As described below, based on a process we have employed and refined over the years, an effective and economical mock jury requires attention to the juror selection process, a condensed mode of presenting the case, and techniques for eliciting the most insight in the shortest amount of time.

Selecting the “Jury”

A mock jury should be representative of the types of jurors an attorney expects to encounter at trial. In larger cases, we might work with jury consultants to identify appropriate candidates in a statistically rigorous way – looking to sample size, demographic variables, and potential jurisdictions similar to the one where our case will be tried. But where the budget is smaller, there are other options. One very effective possibility is to obtain past jury lists from the court. Generally, courts will have lists of jurors who have served or have been called to jury duty and then dismissed. Counsel can select participants from these lists without tainting the jury pool, since these jurors will not be called again in the near future, and with confidence that they are both randomized and representative of the jurisdiction.

Here’s how it works. Once you have the mailing addresses, send a mass mailing. The size of the mass mailing is dependent on the number of participants desired. A positive response rate of at least twenty-five percent (25%) can be expected if moderate compensation (as described below) is offered. The letter to the jurors should clearly state the date and time of the exercise (we recommend an early evening session), but it should *not* identify the exercise as a mock jury exercise. Rather, reference an “opinion research project,” or similar vague term. You should send the letters on plain paper rather than firm letterhead as well, simply using the address and having responses go to a legal assistant or paralegal. We’ve found that offering \$100 to \$150 per person plus a meal is sufficient to entice a solid range of participants. Mention that the time commitment will be modest – two to three hours, including a meal. Conclude the letter by inviting candidates to call a number to discuss the matter further.

When the candidates call, ask appropriate screening questions to assure your prospective jury pool will be balanced (name, address, age, education, employment, are examples). Publicly available data for your county (on age, gender, and race) also will be of assistance. Once you have evaluated your entire list of respondents and reviewed their respective demographic information, call to confirm those participants who will provide you the most balanced jury. Assemble enough commitments so that any no-shows or last-minute cancellations will not prevent a full set of ten to twelve participants for each mock jury.

In terms of logistics, we recommend that the exercise be scheduled in the evening or on a weekend when participants are not feeling pressed for time. If possible, try to set up two different mock juries so that you can (1) get different opinions on your case, (2) find out what themes are consistently good or bad, and (3) test out different arguments. While you may want to restrict your pool of mock jurors to twelve per session, we recommend hosting as many people as want to attend and as are consistent with your budget.

The Presentation to the Jury

To maximize the benefits of the exercise, make advance preparations to identify key facts, documents, issues, themes, and arguments to be tested. Make condensed presentations that fairly advocate each side's respective positions. Since this exercise does not include witness testimony or excerpts as are customary in a full-blown mock trial, these presentations are hybrids of the opening and closing, and include a review of the key facts as well as an argument for the desired outcome. This is also a good time to test demonstrative exhibits and the presentation of key evidence.

Be judicious with the presentations. Focus on facts that are in dispute, and recognize that you likely will not have time in one session to vet every legal issue or claim in the case. Identify those facts, documents, and issues that are most important. A period of thirty to forty-five minutes for each argument is the maximum, so as to allow appropriate time for jury deliberations, feedback, and follow-up questions.

We also recommend having another attorney act as the "judge" for the mock jury exercise. The judge should welcome the participants, explain how the exercise will proceed, and introduce stipulated facts and contested issues in the case along with any short preliminary instructions concerning the law in the case.

Remember that one of the principal goals of the exercise is to learn more about your case and avoid potential pitfalls at the actual trial, not to "win" the mock jury exercise. Accordingly, if you are particularly worried about a given fact or argument that you expect opposing counsel to raise at trial, make sure your "opposing counsel" presents those facts and arguments to the mock jurors. Failure to make the best and/or anticipated arguments available to the opposing party is a fool's errand. By addressing these challenges head-on, the mock jury exercise should provide valuable insight on how best to counter those facts and arguments when it matters most at trial.

For example, in a recent case, our client and his co-defendants left their employer to form a competing business, after planning a substantial part of the competing business on a company computer. Before leaving, he removed those business plans and "defragged" his computer, effectively wiping that material and making it impossible to retrieve. His justification was that he did not want his former employer to see his future business plans. We were very concerned at how these facts might play out at trial, particularly because of applicable jury instructions that where a party deletes evidence, a jury can assume the evidence was unfavorable. Hence, we made sure to include in opposing counsel's presentation to the mock jury a pointed argument as to why our client could not be trusted. The "judge" then instructed the mock jury on this. Surprisingly, in the context of this particular case, neither of the two mock juries awarded any damages based on these facts. Nor were they concerned; during their deliberations we heard comments like "Well, I would have done the same thing," or "Who wouldn't do that?" Therefore, we decided to not worry too much about the spoliation issue and to focus on other issues, freeing up valuable time during trial preparation and the actual trial (which also resolved very favorably for our clients). Without a mock jury, we would not have had this insight.

When possible, you should test different arguments to different juries. For example, in one case, the first mock jury held that our clients were not liable for trade secret misappropriation. The client representatives who were present at the first session felt strongly that we should add several new "key" defense positions that we, the lawyers, did not believe helped and quite possibly could backfire. Although we explained why the arguments were not effective, watching deliberations made the point more compellingly. When we incorporated these new positions (without changing any other aspects of the presentations), the second mock jury awarded \$3 million against three of our clients. Not only was this sobering to our clients, it showed what arguments did not work.

Finally, make every effort to control for potential bias. For example, even where multiple attorneys are working on

the case, consider having the same attorney present both sides of the argument. This has been shown to limit false inferences based on juror feedback that may be influenced more by whether one attorney is more likeable than the other. While such juror bias will be part of any trial, the particular characteristics that may impact the likability of the opposing party's counsel and witnesses cannot be controlled for in a mock jury exercise. Furthermore, the participants should not know which side of the case your firm represents.

Deliberations

If possible, the attorneys and their clients should observe ongoing deliberations. We typically conduct the presentation in a large room with a projector so that PowerPoints can be used. Then, we send the mock jurors to a conference room to fill out surveys testing their initial, pre-deliberation perceptions – we want to check these conclusions and see how and where they change as a result of deliberations. Then we ask the jurors to begin deliberations and discuss the matters in dispute until they reach a unanimous decision. A video camera transmits a live feed of the jurors' deliberations back to the large room; the audio-visual equipment including cabling will be ready at hand in most offices but can be rented for a nominal cost. Watching these deliberations gives counsel the opportunity to see what did and did not persuade the jury, what arguments need to be refined, and what arguments need to be ignored. Video permits later review and analysis as necessary.

A question and answer session is critical. Following the actual deliberation, we typically invite jurors back into the original conference room and ask them for their comments. Great questions include how their initial perceptions changed; what facts they found most important; what they thought of certain documents; and always, what other information they did not hear that they would liked to have heard. Sometimes we use these sessions to include certain facts that we did not include during presentations: "Would it change your opinion if you knew..." These variations on the facts and reactions to additional facts can be incredibly instructive. Importantly, the most useful information is not the ultimate result (for example, the amount of damages awarded, or even the verdict) but the way in which jurors deliberate, think and reason about the case, including the questions they ask.

Amazingly, we have found that, even when we tell participants the exercise is over and they can leave at any time, most mock jurors want to give additional input and are willing to stay late. Recently, we scheduled the exercise from 6 p.m. to 8:30 p.m. The jurors deliberated until almost 9 p.m. and stayed until 10:30 p.m. giving us their comments! This input was invaluable. Simply put, the mock jurors will, in all likelihood, want to be helpful and want to give you their opinions. In this regard, the more, the better.

A Low Cost Alternative

At \$100 for each juror, plus buying a light dinner and accounting for incidental expenses, total costs for two full sessions of fourteen jurors each typically range from \$5,000-\$7,500 – dramatically less than a typical mock jury exercise outsourced to a consultant. If you are in a larger office and have sufficient staff available, to take costs lower you might even consider assembling a smaller group of co-workers for a focus group over lunch, recognizing the limits in terms of demographics and representativeness this option allows. The presentations are shorter and the overall time more constrained, but it is still vastly superior to proceeding without any road-testing of your case presentation. In either case, hourly rates of the attorneys involved in the case, as well as the "judge," also need to be factored into the budget. In our experience, that is a small price to pay for the valuable insights that mock jurors can provide.

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