

Mocking Juries

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Some attorneys these days swear by mock juries, finding them sources of information essential to a successful jury trial practice. Others are more likely to swear at mock juries, finding them unreliable and expensive. The verdict on mock juries thus might just depend on who you ask. Likewise, the reliability of a mock jury rests largely on who is asked to be on the mock jury. Even with a good selection process, other problems can arise.

Mock juries are sampling devices, and such devices are found to be helpful throughout our modern culture, thirsty for information. Nielson does its sampling, and the result is *Desperate Housewives*. Pols paid pollster Zogby good money for bad information on the recent presidential election. Exit polls on election day proved to be particularly inaccurate, making many red voters blue in the 2004 election. And those remembering that earlier presidential elections also had bad polls deserve a Dewey Button. Sampling can be helpful, but only when done correctly.

So, in this *Information Age* — with some of it good, and some bad — what's the scoop on mock juries?

—The Budget—

The expense of a mock jury is an important issue. In a seven figure case, it probably makes sense to include a mock jury in the litigation budget. Depending on the budget, a few thousand dollars could be spent on statistical information and jury consultation, or around \$50,000 could be spent for a complete mock trial. Even if the stakes are not so high, the mock jury process includes options that can fit into many litigation budgets. Qualified consultants offer a variety of services including everything from telephonic polling of key demographic areas to the full-blown mock trial lasting a day or two with several panels of mock jurors. Litigants with an unlimited war chest may opt for a combination of methods to obtain potential juror information, including mock juries, surveys, psychological and statistical reviews of potentially favorable jurors, and a jury consultant to assist with jury selection at trial.

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Expensive mock juries raise the question of fairness, since they may be available only to wealthier litigants. Poorer litigants may find comfort in a recent reported case where plaintiff’s counsel used a contingency fee arrangement to obtain a mock jury otherwise unaffordable. *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.* (D. Or., 2003) 2003 U.S. Dist. LEXIS 25830. This opinion noted that the normal fee for the mock jury was \$60,000, but the contingency agreement was to pay six times that if plaintiff won, and only out-of-pocket expenses if plaintiff lost.

Poorer litigants should also note that the plaintiff in the *Confederated Tribes* case, as the prevailing party, recovered mock trial expenses, though only the smaller \$60,000 amount was awarded. The other side of this coin is that a poorer plaintiff who does not prevail faces the chilling prospect of paying the opposition’s mock trial expenses. After citing numerous cases dealing with the recoverability of mock trial expenses, the court stated at page 27:

“I do not suggest that mock trials and jury consultants are necessary expenditures in routine litigation. Far from it. However, this was a complex case with many millions of dollars at stake. Plaintiff’s experienced counsel reasonably concluded that Defendants would likely employ these services itself, and that Plaintiff would be at a decided disadvantage at trial if it did not match that expenditure. I find that, under all the circumstances, this expenditure was reasonably necessary to the successful prosecution of the action and is compensable as part of Plaintiff’s attorney fees.”

—Selecting the Jurors—

Since the usefulness of a mock jury rests largely on the composition of the mock jury,

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professional jury consulting firms appropriately focus strongly on the juror selection process. Usually, the mock jurors are drawn from the same demographic areas as the real jury panel. Efforts to mirror the true panel include careful selection of jurors by gender and occupation to provide mock panels as close to the real panel as possible. Many jury consultants also limit participation to individuals who have not previously served as mock jurors.

The challenge is the artificiality of the sample of people available for a mock jury during regular business hours and willing to accept the modest payment offered to sit on a mock jury. Such a sample is not likely to match the sample of jurors selected by attorneys in an actual trial from a jury pool of people forced by a jury summons to appear, with many actual jurors continuing to be paid nicely by their employers while serving. If there is a significant difference between the composition of the mock jury and the real jury pool, mock jury results may vary significantly from actual jury results. But paying the amount necessary to attract different jurors to get a more accurate result is not likely to be feasible.

Some attorneys have taken the mock jury selection process one step further. In a recent high profile criminal case in Orange County, the defense counsel retained some of the jurors from the initial jury that had granted a mistrial for his client. These former jurors are now acting as consultants for the re-trial, likely offering their own opinions on strategy, evidence, and jury selection.

—Selecting the Players—

Counsel for the party conducting the trial for the mock jury usually play the role of trial counsel in the mock trial, and percipient witnesses for that

side also generally play themselves. The role of expert witness is generally not played by the actual expert because of concerns about protecting the mock trial from discovery, given the great breadth of information that experts must provide under interrogation. This is particularly unfortunate because expert witnesses have become increasingly important in trials.

The opposing counsel and party, of course, do not participate in the mock jury process. Their roles are often played by attorneys from the same firm as the trial counsel, whose role is to present the opposing side as effectively as possible. Efforts may be made to realistically portray the opposing counsel and witnesses, but even an Academy Award winner could not capture all the nuances that each witness and counsel present to a jury for evaluation.

This raises another serious challenge to the accuracy of many mock juries. Many experienced trial counsel think that the most significant aspect of a trial is the believability and likeability of witnesses. Evaluating honesty and affability is a very complex dynamic of factors that are unlikely to be fully replicated in a mock jury. If John Kennedy had staged a mock debate in 1960, and the person playing Richard Nixon's role had a better tan and sweated less than Nixon, JFK might have falsely concluded he would lose the debate, and would lose the election. Many voted against Nixon after the real debate because his appearance did not communicate honesty and affability, and the nuances of honesty and affability would be hard to fully capture in a mock debate. The difficulty of accurately portraying experts, opposing counsel, and opposing witnesses may be the biggest factor challenging mock jury reliability.

—Setting the Stage—

Recently, some online mock jury services have

been offered on the Internet, where attorneys post information about cases, and Internet users can respond, perhaps for a fee. The accuracy of online mock juries is particularly suspect, and the typical mock jury process thus continues to involve jurors appearing in person for one day of a mock trial and deliberations.

Typically, the mock jurors are assembled in the morning and asked to confirm their basic demographic information. To preserve confidentiality, it is best not to reveal the real names of the parties, not to allow access to unauthorized people, and to obtain confidentiality agreements from those involved.

The jury consultant generally instructs the mock jurors on the process. The mock jurors learn they will hear arguments from counsel representing both the plaintiff and the defendant, as well as live testimony of witnesses, and they may see actual trial exhibits and demonstrative charts.

At various points during the day, the mock jurors may be asked to complete evaluations, showing how the jurors view the arguments, the evidence, and the witnesses. More sophisticated programs may give mock jurors electronic devices that can provide a running, real-time evaluation. These evaluations can provide a barometer of jury perceptions as the mock trial unfolds, pinpointing when jurors become confused, or develop strong feelings toward one side, or become interested in an issue or a piece of evidence.

A mock jury is clearly useful as a dress rehearsal. It gives counsel the chance to practice lines and presentations, and gives the real witnesses who participate a dry run on their testimony. It is undoubtedly helpful to have the live audience and the feedback provided by a mock jury, even if the audience ultimately does not closely match the actual jury.

But a dress rehearsal is not the real thing, and

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the predictive value of a mock trial is diminished by not capturing all the nuances of a real trial. A one-day mock trial presents an unrealistic picture of the length of a real trial (just like trials on television or in films are unrealistically short). This abbreviated proceeding creates a different dynamic for decision making by the jury. During a typical longer trial, the day-to-day interaction between judge, jury, and counsel develops a special dynamic for decision making. The true personalities of the clients in the courtroom and their counsel are revealed to the jury over time. Was lead counsel polite to her younger co-counsel? Was counsel's dress too flashy, eroding her credibility? Did drama build daily with the ongoing presence of a severely injured plaintiff in the courtroom? Did the client or counsel sigh in frustration (like some believe Al Gore did in his 2000 presidential debate) or appear disrespectful and annoyed (like some believe George Bush did in his 2004 presidential debate)? The jury's day-to-day observation of such things can win or lose a trial (or a presidential election). Even if they are replicated briefly in a one-day mock trial, the impact will not be the same.

In assessing the predictive value of mock juries, other aspects such as the drama of a real trial should be considered. A mock trial cannot duplicate the passionate closing argument of skilled plaintiff's counsel after weeks of trial in an austere courtroom with a severely injured plaintiff present. Skilled counsel presenting a passionate argument to a mock jury in a rented hotel room might find there is insufficient drama and energy to be effective. The lack of real drama in a mock trial weakens the predictive value of the mock verdict.

—The Reviews—

Perhaps the best part of the mock jury process comes at the end when the deliberations of the mock jury can be observed by counsel, usually through a one-way mirror. Typically, there are 24 mock jurors who are separated into two jury

panels. The mock jurors may be provided with abbreviated jury instructions and their notes from the mock trial.

During jury deliberations, the attorneys and the jury consultant can observe areas of confusion, which jurors appear to favor or disfavor the client's case, and what the jury found effective about the mock trial presentations.

Mock trials can be particularly helpful when juror votes are statistically correlated with individual juror demographics. If for example every retired person in the panel voted one way, and the sample is sufficiently large, a statistically significant correlation might be made. If the correlation is strong enough, counsel will have exclusive access to powerful information during voir dire selection. Sometimes, these correlations match generally accepted opinions, like the notion that nurses generally want to help injured plaintiffs. But sometimes, surprising correlations appear that become particularly valuable because opposing counsel will not be looking to excuse jurors with a helpful characteristic revealed by the surprising correlations.

Another helpful, but humbling, benefit of observing mock jurors deliberating is the information provided on the occasional capriciousness of some jurors. An attorney will likely always remember the mock juror who stated that among the decisive factors in the verdict were the scuffed shoes worn by the attorney. Such information, though not statistically significant, will no doubt flash through that attorney's mind every day of trial when selecting shoes.

Attorneys practicing the art of convincing juries are understandably hungry for information that provides an advantage, and mock juries provide lots of information, from the selection of shoes to far more useful information. Although the verdict of a mock jury may not be a perfect prediction of the real verdict, the process can provide valuable information.