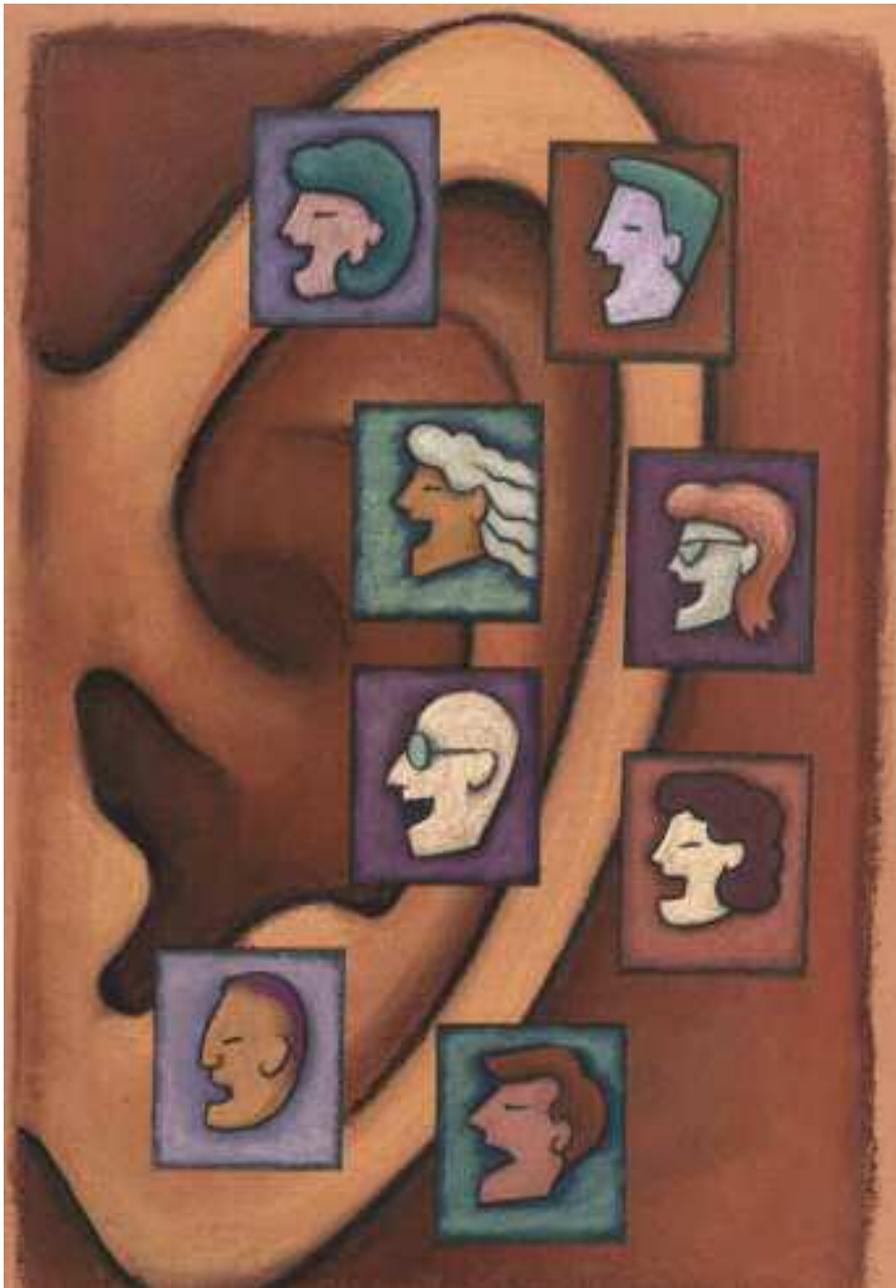


What can a mock trial tell you?

Setting up a mock trial may be time-consuming, but the feedback you receive from jurors could be invaluable to your case. The most important part of this exercise is listening.

ANNE W. REED



For every task, we choose our tools. The better we understand the tools, the better we choose. One difference between a professional photographer and a snap-shooting tourist is that the professional has learned what sophisticated cameras and lighting equipment can and cannot do, and knows how to use these tools to shape the picture.

One of the most powerful preparation tools available to a trial lawyer is also one of the most widely misunderstood: the mock trial. If many lawyers think of mock trials as an expensive waste of time—and many do—the main reason is that they are trying to use them for the wrong task, like using a camera to pound a nail.

If you hope to predict the outcome of the real trial or pick your jurors in advance, a mock trial is the wrong tool. But if you're willing to really listen to mock jurors talking about your case, you'll gain insight no other tool can provide.

Over and over, lawyers tell me they want a mock trial for one or both of two reasons. They want to predict how the real jury will decide, or they want a demographic profile of the perfect juror. Over and over, I explain that a mock tri-

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al won't do either of those things.

It's obvious that mock trials aren't predictive, if you think about it even briefly. The list of elements that will vary from the real thing includes practically every aspect of the exercise:

- The judge, who often will have a huge influence on the real trial, won't be there.

- The legal team for the defense will be entirely different at the real trial, and the plaintiff's legal team probably won't be entirely the same either.

- While lawyers are typically competitive in a mock trial, the incentive to win in a real trial is, of course, much stronger.

- The mock jury usually won't hear (and thus won't like, dislike, or be confused by) live witnesses in the presentation phase of the mock trial.

- The lawyers will condense their presentation of evidence and documents—which will almost certainly improve the presentation but also will make it different from what the real jury will see.

- Jurors' relationships with each other and group dynamics after a short mock trial are different from those of real jurors, who sit through longer actual trials.

- The lawyers will learn from the mock jurors' reactions to what they say and how they say it and will alter their arguments and voir dire accordingly.

- Most important, the real trial will have different jurors.

Repeat it over and over until you believe it in your heart, and then repeat it again until your client believes it, too: Mock trials don't predict real outcomes. That's not why you do mock trials.

Nor can a mock trial tell you whether you want white men or young parents or people who own pickup trucks on your jury. You can certainly gain insight from a mock trial about what aspects of a juror's background might make him or her react favorably or unfavorably to your case. But if anybody tells you that a mock trial will reveal your perfect demographic, that person

is mistaken.

A mock trial sample is usually too small to predict the behavior of an entire segment of the population. For example, a typical Midwestern mock trial group of 18 or 24 or even 40 jurors will have only a handful of African-Americans. Even if they all vote the same way, the group isn't large enough to let you sensibly interpret their vote as representative of African-Americans in the community. You need many, many more mock jurors before you can begin to draw demographic conclusions.

More important, the real jury is *al-*

and wacky, that the legal team certainly never considered.

Mock trials show how jurors' experiences shape their decision-making. What you need in voir dire is not a checklist of ages and ethnic groups to keep or strike, but a real understanding of how jurors with different backgrounds can view your case differently.

Say you have a products liability case against a large company, and the venire includes a juror who has been laid off from a good manufacturing job and is now struggling to feed his family. If you have watched jurors with similar back-

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ways too small to give accurate predictive results. Say you somehow had the budget to hold mock trials including hundreds of jurors, and you decided that 90 percent of Asian-American women would sympathize with your themes. Now you're doing the real voir dire, and sure enough there's an Asian-American woman on the panel. Is she in the 90 percent or the 10 percent? The mock trial might help you play the odds, but it can't tell you for sure.

Why do mock trials?

If it doesn't predict the outcome and it doesn't automate voir dire, why is a mock trial one of the most powerful tools a trial lawyer can use? Here are some of the reasons:

Mock trials bring important insight every time, without fail. You do a mock trial not to see what *will* happen, but to see what *could* happen. Lawyers and especially clients are always shocked to watch juries discuss their case—mispronouncing names, screwing up the math, reacting with deep emotion, and identifying counterarguments, both sensible

grounds in mock trials, you'll know this experience will shape the juror's thinking—and you'll know you need to ask more before you have any sense of how it will shape it.

Your juror may blame plaintiff lawyers like you for the loss of his job, or he may resent big manufacturers in ways that even he doesn't really understand. If you're looking for easy answers, a mock trial will not offer them, but if you want to learn how experiences alter thinking, mock trials will teach you.

Mock trials can help predict specific thought processes. Didn't I just say they weren't predictive? No, I said they don't predict results. Narrow the question, though, and you can predict a lot from a good-sized mock jury.

If the mock jury doesn't understand your damages analysis, the real jury probably won't, either. If the mock jury hates your expert, maybe your ex-

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pert isn't as appealing as you thought. If three mock juries insist on reducing the damages award against a likeable defendant, you're probably going to have to work harder to explain that damages aren't supposed to depend on sympathy.

Mock trials fill the gaps. By definition, you don't know what's missing from your case. (If you did, it wouldn't be missing.) Mock jurors will tell you, very clearly and often with great impatience, what you should have included.

Nothing else intensifies preparation in the same way a mock trial does. Even before the gavel falls in a mock trial, most lawyers—even the really good ones—learn something about the case that has convinced them to present it differently at the real trial. More than once, I've seen lawyers have an epiphany on the eve of a mock trial, suddenly realizing the significance of a document or a piece of testimony.

Mock trials powerfully sift the evidence. In the months, weeks, and even days before a mock trial, I often see lawyers mired in their exhibit lists, unable to see which among the scores of documents they've listed that could be left out. When you need to give a short presentation to a roomful of strangers in a couple of days, the 10 best documents and four best deposition quotes have a way of standing out from the rest.

So the question is: Can you use a tool that will reveal your gaps, suggest how jurors will handle specific challenges, illuminate your most critical evidence, and deeply focus your preparation, even if it won't give you the value of your case or make your *voir dire* decisions for you? Many lawyers say they can.

Learning to listen

And how do you obtain these magic benefits? Like Dorothy in the Land of Oz, you already have the tools to get what you want; you just need to use them. As you watch jury deliberations, the most important thing you can do is listen.

This may be different from other advice you've either heard or read about working with mock trials. This is because many jury consultants are social scientists who approach mock trials from the

point of view of data collection and analysis. For these consultants, the starting point for a mock trial is often an existing database of attitudes on key issues in the case. Mock jurors answer questionnaires, which can be extensive, and the data from those questionnaires is analyzed.

A "data collection" mock trial can have enormous value—but it's not the kind of mock trial I'm talking about, primarily because it is the kind of mock trial that is most widely misunderstood and misused. A "listening" mock trial is simpler for most lawyers to participate in and absorb, and every lawyer can listen.

What are you listening for? Among other things, this is what you hope to learn:

- How are decisions made? As you watch deliberations, look for the reasons decisions are made—what evidence and reasoning get the group to consensus on each key point.

- How do positions change in deliberations? Notice what positions jurors take at the beginning, and who is able to change whose mind in order to reach consensus.

- Which tools and arguments do jurors use to convince each other? In particular, you will see that jurors often pick up on a particular part of the story, filling in gaps with speculation if they cannot fill them in with evidence. Likewise, the narratives and language the jurors choose can become powerful themes for the actual trial. In one mock trial focusing on business practices in a large company, for example, jurors coined the phrase "the corporate world" to describe their perception of corporate ethics very different from their own. The almost-palpable reality of this perceived foreign land was striking, and it was very helpful to the lawyers in framing their arguments.

- How do jurors' backgrounds come into play? Especially if you've done mock trials for other cases, you'll start to see patterns in how jurors with different backgrounds respond to particular kinds of evidence. African-American jurors don't all vote the same way, but some of them share a dis-

trust of police officers, for example—in part because many have friends or relatives they believe were unfairly treated by the criminal justice system. In a case where police officers will testify, it makes sense to keep this possibility in mind. Again, any patterns you observe won't predict how future jurors will respond, but they help you understand the ways that background and decision-making are related.

- Are the jurors confused? It is a near certainty that some part of the evidence will confuse the jurors. Keep a separate list of these points so that you can work on graphics and clearer explanations for the actual trial.

- Is there something you weren't expecting? Anything you didn't see coming is, well, something you didn't see coming. Now you do.

- What do jurors think of you? Mock jurors talk about the evidence more than they talk about individual lawyers. If they do talk about you, though, listen well. It can be painful, but for most lawyers, it's the most candid feedback they'll ever get.

Planning a 'listening' mock trial

Once you decide to do a mock trial, it's easy to get caught up in the details of planning. If it's your first mock trial, keep it simple.

Format. Don't worry about openings, evidence, and closings. The simplest format is two or three presentations to the jurors—one for the plaintiff, one for the defense, and a plaintiff's rebuttal if the defendant is conducting the mock trial—in which they hear evidence and arguments on each side.

The lawyers can use clips of videotaped testimony, written excerpts, documents, and PowerPoint or similar presentation software to combine what the jurors would hear from live witnesses into a more coherent, shorter presentation. Once jurors have heard the presentations, let them deliberate in groups, and watch the deliberations both as they're happening and later on tape, stopping the tape as you need to.

Size of the jury. In a large mock trial

aimed at data collection, juries deliberate in large groups of 15 to 20 or more, but smaller groups are more effective for watching deliberations. Jurors often change their minds in the deliberation process, and that process is most dynamic in juries of 6 to 10 people. Groups of that size work harder to reach a consensus and elicit more input from quieter members.

The size of the jury is a function of budget and the size of the facility you're using. If you want to analyze statistics, you'll need a group of around 50 or more. If your budget and facility are large enough, consider dividing the jury into groups of six or eight to allow for more dynamic deliberations.

On the other hand, if the main goal is to observe deliberations, a group of 18 or 24 jurors, divided into three groups of six or eight, will provide ample new information. Twelve jurors, in two groups of six, would also be instructive if the budget is small.

Using a consultant. Even a simple mock trial is a complicated event to plan. The logistics alone are challenging: You need to find a facility, recruit and pay jurors, plan the schedule, make sure the presentations and deliberations are properly recorded, get confidentiality agreements signed, make sure there are notepads and pens, get everybody fed, and make sure cars are legally parked. Then there are judgment calls, like where to hold the mock trial, how best to get jurors' reactions to witnesses, how to handle evidence that may be excluded, how to work with confidentiality orders, and how long to let jurors deliberate.

Finally, even if you're planning a "listening" mock trial, specific questions posed to the jurors in writing can be helpful. These range from simple baseline "where are you" questions after each presentation to questions about specific issues or evidence.

You can handle all this yourself, but it's difficult, especially when you're preparing the mock trial presentations at the same time. A jury consultant can handle the logistics for you and provide sound advice on the judgment calls. If you don't know a consultant,

the American Society of Trial Consultants (ASTC) has a directory at its Web site (www.astcweb.org), but talk to friends and colleagues as well. Many good consultants are not ASTC members, and those who are come from many different backgrounds and approach mock trials in different ways.

If you want help with the logistics but not the planning or questionnaires, talk to a local market research firm that recruits jurors and provides facilities for mock trials. Traditionally, these firms contracted with jury consultants for aspects of mock trials the consultants were planning, but many of these firms are expanding their services to provide logistical mock trial support directly to lawyers.

If you decide to conduct a mock trial without help, invest in a little book called *How to Do Your Own Focus Groups: A Guide for Trial Attorneys*, by the prominent consultant David Ball. It's a wonderful resource.

Costs. The out-of-pocket costs of a mock trial—facility, taping, recruiting, payments to jurors, and catering—depend mainly on what city it's in and how many jurors are involved. Even before consultants' fees and your own preparation time, the out-of-pocket cost of a mock trial with 18 jurors or more will exceed \$10,000, and once you add your time and a consultant's, the overall cost is considerably more.

One way to use mock trials economically is to have them do double duty—that is, use them to accomplish work you would have done anyway. The mock trial will cost more than the tool you were using, but it will eliminate the cost of the other tool, and it will be more effective. For example:

■ Several weeks before discovery closes, you will review the discovery you've collected and decide whether you need more. A mock trial performs this task automatically and effectively. In preparing the presentations, you'll find many points on which you'd like to have additional evidence. Where you don't find those points, the mock jury will. Mock jurors are very clear about what evidence would have been helpful to them.

■ In most trials, planning voir dire amounts to simply brainstorming, whether it's one lawyer with a blank legal pad or the trial team sitting around a table. A stronger way to prepare is to focus on how the attitudes and experiences of actual people can affect the way they hear your case.

■ Opening statement needs to be carefully planned and rehearsed. In the disciplined structure of a mock trial, lawyers are able to rehearse in a much more focused and intense way than they usually can do on their own.

Other ways to keep costs down:

■ Reduce jury size. The fewer jurors, the less the study costs. Even a group as small as 12 can give useful input if the goal is just to listen.

■ Use an informal mock trial format in a conference room. With this strategy, the cost of a facility and the incremental cost of getting each side's case to full "presentation quality" are eliminated.

■ Omit or reduce data collection. Questionnaire answers provide valuable information, but jury research can be done without them. Preparing questionnaires and analyzing data can be time-consuming and often account for a significant part of the cost of a mock trial.

Just listen

Mock trials have a bad name in many circles. I was talking recently to an impressively experienced and successful personal injury trial lawyer. "I hate mock trials," he said. When I asked him why, he explained that the juries always come to different results, so the exercise was "worthless for valuing the case."

"Do you know what I do instead?" he continued, explaining that he recruits mock jurors and then just watches them talk about the case. "I watch what arguments they use to convince each other," he said.

That's all a mock trial needs to be, or should be. If you've tried mock trials before and have been disappointed because they didn't offer easy answers, consider trying again and just listening this time. There's a value in listening to mock jurors that can't be matched by any other trial preparation tool. ■