

MOCK JURY EXERCISES

Mock jury exercises offer trial attorneys insight into how prospective jurors perceive a case, enabling the trial team to test and hone a trial strategy that will tap into a jury's emotions and core beliefs. Jury exercises are as complex and varied as trials, however, so counsel must understand their options to develop a research program that best suits the client's objectives.



DAHLIA S. FETOUH

PARTNER
GOODWIN PROCTER LLP

Dahlia is a member of the firm's Business Litigation and Appellate Litigation practices. Her practice

focuses on complex business and commercial litigation, including representing public and private companies in contract disputes, business torts and related issues. Dahlia works on a wide variety of significant civil cases in federal and state courts at the trial and appellate levels throughout the country.



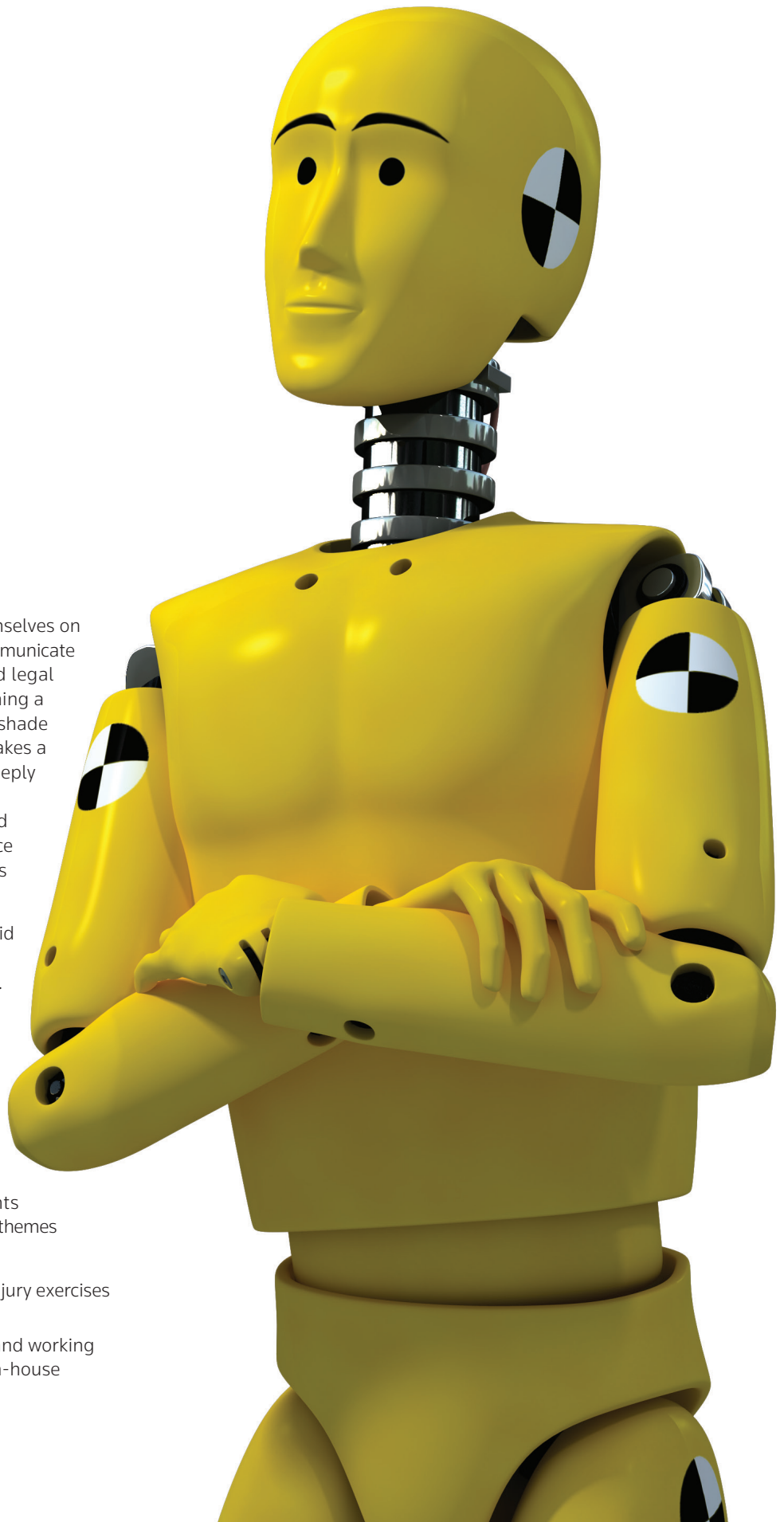
CHRISTOPHER LAND

SENIOR ATTORNEY
GOODWIN PROCTER LLP

Christopher is a member of the firm's Products Liability & Mass Torts and Business Litigation practices. He

represents clients in various industries, including pharmaceutical and medical device manufacturers, power and energy companies, and academic and research institutions. Christopher has extensive trial experience, with an emphasis on cross-examination, scientific experts, depositions, fact discovery, media strategy and jury exercises.

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Trial attorneys often pride themselves on their ability to simplify and communicate complicated fact patterns and legal theories. But living and breathing a case for months or years may shade counsel's objectivity concerning what makes a clear and persuasive argument. Once deeply immersed in a case, trial attorneys risk jargon creeping into their arguments and examinations, and can allow the confidence they have in their position to cloud issues that present real concerns to jurors.

Mock jury exercises help trial counsel avoid these pitfalls and are a powerful tool for testing case theories with a potential jury. Although jury exercises cannot be used as a predictive measure of trial outcomes, they provide a trial team with important insights about their case from a community of mock jurors that mirrors the size and population demographics of the jurors who will actually hear the case. Jury exercises let the team practice its trial presentation, refine its arguments and delivery, and see which messages and themes are best received by jurors.

This article provides an overview of mock jury exercises and gives counsel guidance on:

- Staffing the appropriate jury experts and working with these retained consultants and in-house specialists.

- Understanding the various types of jury exercises, including the advantages and disadvantages of each approach.
- Preparing for jury research, including key considerations to determine the appropriate size, scope and timing of jury exercises.
- Conducting jury exercises and analyzing the research results.

ASSEMBLING THE EXPERTS

Organizing a mock jury is difficult and time-consuming. Because trial attorneys are focused on the merits and procedure of the case, and most law firms are not equipped to internally perform the tasks associated with jury research, trial counsel often engage:

- External jury consultants to organize the jury exercises and provide expertise on issues like juror selection and theme testing.
- Internal firm jury specialists to facilitate trial counsel's communications and goals with outside jury consultants.

JURY CONSULTANTS

Jury consultants play a critical role in jury research. Typically a former social psychologist or veteran trial attorney, a jury consultant can give valuable third-party insight into case arguments, and is well-versed in managing, developing and overseeing jury exercises. Moreover, jury consultants have the necessary logistical systems in place. With their extensive experience and resources, jury consultants almost always provide jury research services more efficiently and cost-effectively than a law firm. The jury consultant's services typically include:

- Selecting and hiring mock jurors for the jury pool.
- Choosing the venue and amenities that will be used to conduct the jury exercises (often corporate testing facilities with one-way mirrors and audio visual systems or hotels with cameras and microphones to record deliberations).
- Running the jury exercises, including:
 - chaperoning the jury pool during the exercises and breaks;
 - collecting questionnaires and feedback from the mock jurors;
 - setting schedules and ensuring presentations run on time;
 - addressing any personal issues raised by the mock jurors; and
 - managing the facility and audio visual needs.
- Providing real-time feedback to presenters.
- Facilitating post-verdict mock jury debriefs.
- Preparing a final report summarizing the data and results.

While a jury consultant usually directs the set up and organization of the jury exercises, trial counsel's awareness of the important questions and issues in the action make them indispensable to a successful jury research program. Jury consultants need clear guidance and oversight from trial counsel to develop research that is properly aligned with counsel's objectives. Accordingly, trial counsel or their in-house specialist must stay informed and involved in the process to ensure all facets of the jury research support the trial strategy and the client's best interests. Specifically, trial counsel's role includes:

- Explaining the overriding strategic trial goals to the jury consultant to ensure the jury research is appropriately targeted in light of those goals.
- Reviewing and analyzing the different types of jury exercises and the timing to conduct them.
- Overseeing the jury consultant's organization and development of the jury exercises.
- Keeping the jury exercises and research analysis within the client's budget.

Ensuring the jury consultant has the right background for a particular case is also key. Jury consultants' experiences and expertise vary by industry and area of law. For example, a consultant may have tremendous experience in pharmaceutical and mass tort trials, but lacks securities class action experience. Additionally, their backgrounds vary. Some consultants boast impressive psychology credentials, but lack any actual trial experience. Trial counsel typically hires consultants based on past experiences, preexisting relationships and recommendations from colleagues. Although these factors are informative, counsel should also review the consultant's expertise as applied to the case at hand and interview several consultants before making a final decision.

IN-HOUSE SPECIALISTS

There is a trend among some trial firms to develop in-house jury research specialists who work on most of the firm's trials. An in-house specialist, as an attorney who is uninvolved in the day-to-day management of a case, can offer a detached perspective to the trial team while remaining deeply invested in the outcome of the case and often possesses significantly greater substantive knowledge than an outside consultant. Although moving the entire jury consulting process in-house is generally unworkable economically, having an in-house specialist who is knowledgeable in jury research can reduce costs and burdens on the trial team and enable outside consultants to function more efficiently.

Deputizing a senior attorney or counsel as a jury research specialist has several other strategic advantages. An effective in-house specialist has participated in numerous jury research exercises and has familiarity with attorneys at the firm. With this background, an in-house specialist can:

- Assist the trial team in selecting, managing and overseeing the jury consultant and jury exercises.
- Work with the jury consultant in choosing and pre-screening jurors.
- Assist with, or take the lead on, drafting mock jury presentations.
- Bring a fresh set of eyes to the issues and trial strategy and see errors in previously accepted arguments.
- Lead the opposing party's mock jury presentation, allowing trial counsel to prepare for trial with less burden and interruption.

UNDERSTANDING THE TYPES OF JURY EXERCISES

Jury research involves a wide range of information sources and techniques to gain data on potential and likely jurors. In

general, there are six basic categories of jury exercises that most jury consultants employ, each having various advantages and disadvantages and providing assorted insights into the likely jury pool. Some consultants may, at various times, use all of these or only favor certain methods. Choosing one kind of jury exercise does not preclude using another. Indeed, combining two or more types of exercises often provides the fullest data set to prepare for a trial. The six types are:

- Full-scale mock trials.
- Mock juries on damages or other discrete topics.
- Shadow juries.
- Focus groups and message testing.
- Online mock juries.
- Telephone surveys.

MOCK TRIALS

A standard mock trial is like a dress rehearsal for the final trial and includes a mock *voir dire* followed by a series of evidentiary presentation modules. The trial team practices their examinations and arguments at the mock trial while other attorneys, such as an in-house jury specialist, outside jury consultant or firm attorneys otherwise uninvolved in the action, assume the adversary's position. This jury exercise uses a jury pool sufficient to make multiple jury panels. Each panel deliberates separately with the assistance of the jury consultant or other facilitator. The segregation of jury pools allows greater insight into the behaviors, questions and responses of a likely jury. Having a pool of jurors sufficient to make multiple panels gives the trial team a wider pool of data from which to draw conclusions (see below *Conducting Mock Voir Dire*).

Mock trials are most useful when the goal is to develop full case themes, evaluate multiple issues in the case and assess damages potential. Full-scale mock trials typically take two to three days to conduct, depending on the size of the case.

There are several advantages to mock trials, including that they:

- Provide the most accurate reflection of likely trial developments.
- Let the trial team observe, in real time, a jury deliberate over the evidence, arguments and strategic decisions made by the trial team.
- Enable the trial team to gauge how jurors react to each attorney's style and interactions with the relevant jury pool.

However, there are also several disadvantages to mock trials, including that they:

- Require the trial team to devote considerable time to developing, preparing for and participating in the exercise.
- Are expensive to conduct, given the costs of jury consultants, costs for the trial team to attend and high production costs.
- Risk wasting significant resources, for example, if trial decisions by the court or actions of the witnesses nullify much of the information gained from the exercise.

LIMITED MOCK JURIES

Instead of investing in a full-scale mock trial, the trial team may choose mock jury exercises that are smaller in size and

scope. The purpose of these exercises is to examine, review and develop only specific case issues, such as damages or particular claims and defenses. These jury exercises are most useful when budgets are tight or when the verdict on liability is predictable but the potential damages are unknown, making settlement negotiations difficult.

Limited mock juries are particularly helpful when the goal is to answer discrete questions, where prior trials or research have given some insights on the case, or to test new alternative arguments or issues. A trial team can complete these exercises in a single day, depending on the issues to be tested.

Jury exercises on discrete topics:

- Are significantly less expensive than mock trials.
- Enable the trial team and mock jury to focus on and precisely review key issues.
- Can be easily duplicated after further discovery is developed.

On the other hand, these smaller exercises:

- Do not cover all of the relevant issues for trial.
- Provide only limited feedback on trial counsel's style and the presentation's effectiveness.
- Offer less valuable insights from mock jurors given the jurors' narrow knowledge of the case.

SHADOW JURIES

A shadow jury is comprised of three to 12 mock jurors pulled from the potential jury pool (see below *Selecting the Mock Jury Pool*) who watch the actual trial, rather than a mock trial. Shadow jurors usually review daily tapes or a simulcast of the trial, but, in some cases, may observe the trial in the public gallery.

Shadow juries are most helpful when the goal is to see how the case is being viewed by jurors in real time as the trial is unfolding.

Because they are viewing the real trial, shadow jurors can:

- See and hear the exact same evidence as the real jurors, eliminating the concern of any disconnects between a simulation and the actual trial.
- Provide live feedback on the trial attorneys, witnesses, exhibits and arguments.

Despite the real-time benefits of a shadow jury exercise, there are also certain drawbacks to this approach. For example:

- Shadow juries can be logistically difficult to organize.
- In some cases, the high cost of this exercise may be disproportionate to its value.
- The trial team has a limited ability to correct errors made during their presentations because of the live nature of this exercise.
- The trial team might get distracted from their prime audience — the real jury and the judge.

FOCUS GROUPS

Focus groups typically involve a jury consultant explaining the facts of a case to mock jurors and then leading a question and answer session with them. This usually requires mock jurors to use handheld dial-testing devices to record their immediate

DIAL TESTING



Dial testing is a powerful tool when conducting jury research. It can be used for full-scale mock trials, smaller mock juries and focus groups. Dial testing uses handheld devices for mock jurors to rate, in real time, the speaker, evidence or presentation. Without dial testing, trial teams must rely on post-presentation questionnaires for insight into how the mock jurors were moved by the arguments. Typically, these questionnaires provide only the mock jurors' general impressions. In contrast, dial testing gives instant feedback on jurors' reactions to specific stimuli, arguments, statements and mannerisms. Dial testing is now often seen during televised presidential debates to show how viewers are reacting to each and every statement made by the debate participants.

responses to key phrases, terminology, arguments and presentations by the trial team (see *Box, Dial Testing*).

Focus groups are most useful to test unique arguments, complex issues that are difficult to communicate and messaging for a litigation public relations campaign. In general, these exercises can be completed in one day or less.

Message testing with focus groups gives the trial team the opportunity to:

- Experiment with and examine the efficacy of different messaging and arguments on the same topic to determine what is most effective.
- Assess the "stickiness" of messages to determine what information jurors are likely to retain over time.
- Tackle certain sections of arguments without replicating the entire trial to focus on key concerns and to contain costs.

However, focus groups can still be expensive and:

- Provide an incomplete trial outlook.
- Do not have juror deliberations.
- Rarely include attorney presentations, leaving no way to gauge jurors' reactions to the trial team.

ONLINE MOCK JURIES

For the more budget-sensitive cases, some jury consultants offer online mock juries. In this type of exercise, the trial team condenses its case presentation into a series of slides and uploads the presentation, including any exhibits or videos, to an online platform. Mock jurors can then review and comment on the presentation, typically on their own schedule.

Online mock juries are most helpful when the goal is to test certain arguments and evidence on a limited budget. Indeed, a trial team can often conduct these exercises in a matter of hours.

Although attorneys are divided on whether an online mock jury can truly mirror a real jury where jurors share opinions with one another, an online mock jury offers several advantages. For example, these juries:

- Are significantly less expensive than live mock juries.
- Allow the trial team to get the individual opinions of the jurors before they are influenced by their peers.
- Enable the trial team to conduct many more exercises with a larger pool of jurors.

The disadvantages of using online mock juries include the following:

- There are limited, if any, deliberations among the jurors.
- The presentation may have a muted impact due to the lack of personal interaction and physical remoteness between the trial attorneys and jurors.
- There are constraints on the style of the presentation, for example, the jurors cannot handle exhibits or demonstratives (which can be done with live jurors during either presentations or debriefs) and space is limited to the screen.
- A post-verdict analysis cannot be performed as a group.

TELEPHONE SURVEYS

Telephone surveys are an older method of outreach that aids trial attorneys in assessing current views on potential case issues and facts, and offers certain strategic advantages when conducted fairly early in a litigation. In these exercises, several hundred jury-eligible individuals are contacted through random telephone number sampling. Interviewers follow a written questionnaire, asking the participants a series of questions designed to determine and analyze community attitudes toward relevant topics, reactions to case publicity and opinions on the type of litigation at issue. The results of the telephone survey give the trial team a representative sampling of the thoughts and prejudices of jurors at the time of trial.

Telephone surveys are most useful when the goal is to acquire basic information about the knowledge and biases that potential jurors may bring to the case. Each call typically takes between five and ten minutes, depending on the level of detail in the questionnaire.

Additionally, telephone surveys:

- Are cost efficient. Repeating the sampling at different times is also relatively inexpensive once the initial questionnaire has been developed.
- Can be particularly helpful in highly publicized cases to determine biases and actual public knowledge of the case issues. Bias data from a poll could possibly be used for a venue transfer motion (if used this way, however, counsel should be mindful of the danger of work product waiver).
- Provide a statistically accurate baseline for evaluating jurors' attitudes.

There are obvious shortcomings of telephone surveys, such as the following:

- They offer very little insight into messaging and trial issues.
- The participants do not consider demonstratives or evidence.
- They lack juror deliberations.

PREPARING FOR JURY RESEARCH

Before initiating any jury research, the trial team must assess the specific goals of each type of jury exercise and how they fit into the overall trial strategy. Additionally, before the jury exercises get underway, trial counsel should:

- Determine the appropriate size and scope of the exercises.
- Consider the optimal times to conduct the exercises, including the benefits of performing exercises before the close of discovery.
- Understand the jury consultant's process for choosing the mock jury pool.
- Prepare the mock jury presentations and other necessary materials, including, for a mock trial, the jury instructions and verdict questionnaires.

DETERMINING THE SIZE AND SCOPE OF THE JURY EXERCISES

The type, size, number and frequency of jury exercises are as varied as jurors themselves. Deciding how many pools of mock jurors to recruit and determining which issues to present (for example, limiting the jury exercise to specific issues of liability or certain claims rather than testing all issues in the case) are strategic and economic decisions that the trial team must make based on its client's needs and budget, as well as the circumstances of the case. Common factors considered in this decision include:

- **The amount in controversy.** Significant verdicts may require larger jury research projects because of the risks involved.
- **The client's budget.** The client's finances or risk contingency plans usually dictate the size, complexity and number of jury exercises.
- **Whether the litigation is a mass tort or class action.** If a case has the potential to set precedent in other jurisdictions and will likely be repeated in trials throughout the country, as with some mass tort and large class actions, more frequent jury research is typically needed.
- **The likelihood of trial.** If a case is more likely to go to trial than settle, jury research is probably necessary. Even if the case may not go to trial, however, the analysis gleaned from jury research can guide settlement parameters and values.
- **Whether similar cases have been tried in the same jurisdiction.** Jury research may be less critical where similar cases have proceeded to trial in the same jurisdiction, although limited jury exercises to develop arguments, strategy and style still may be useful.
- **The complexity of the issues involved.** With complex issues, it may be difficult to develop clear, simple and persuasive arguments. In these instances, combining more types of jury exercises (for example, conducting telephone surveys, message testing and a mock trial) may be advantageous.
- **The publicity surrounding the case.** If a case has attracted significant publicity in the jurisdiction, telephone surveys to assess local knowledge and biases should be conducted.
- **The relative importance of the outcome to the client.** In "bet the company" trials, a client may be more willing to expend substantial funds for more frequent and robust jury exercises, given the high cost of a negative verdict.

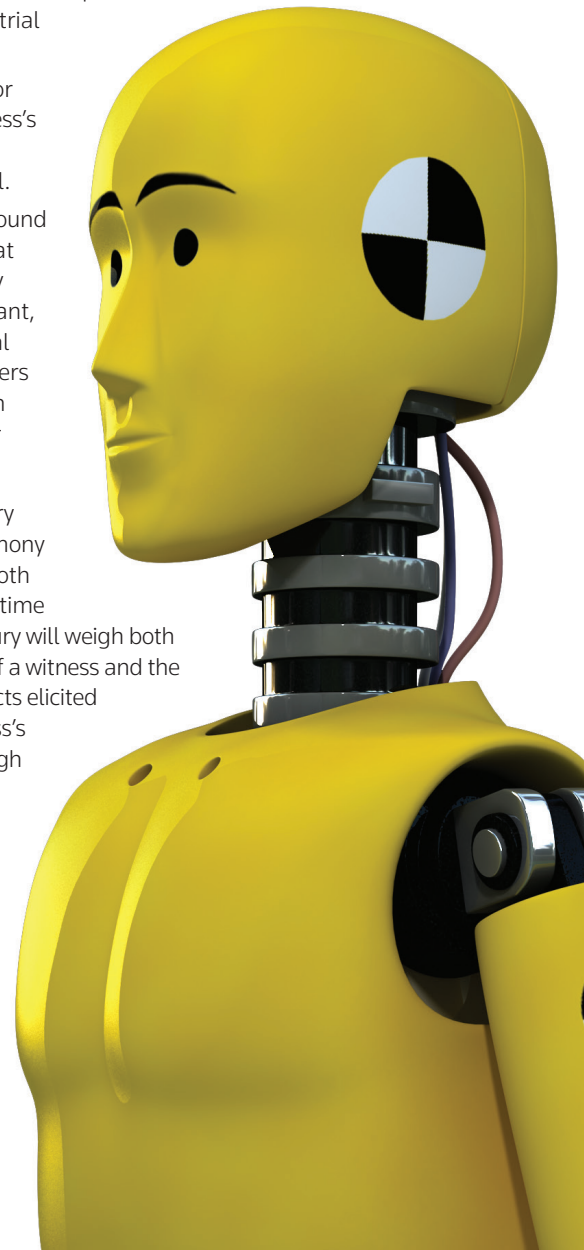
CONSIDERING WHEN TO BEGIN THE JURY EXERCISES

Trial teams often wait to engage jury consultants until they are in the midst of their final trial preparations and, as a result, miss opportunities to use jury research early on to guide discovery plans and trial strategies and to test alternative theories. Early jury exercises also avoid the common pitfall of mock jurors requesting evidence or answers to questions that, on the eve of trial, counsel will not have the opportunity to develop and successfully answer.

If time and the client's budget permit, it can be helpful to conduct a combination of jury exercises during depositions, especially before trial preservation depositions that include direct and cross-examinations of witnesses who will be unavailable for trial. For instance, the trial team could use small focus groups early in the litigation to test themes and evidence and conduct a standard mock trial later on. As discussed in more detail below, early jury research permits trial counsel to:

- Experiment with and test key evidence as it develops, including any credibility concerns with witness testimony.
- Gather information and prepare answers to counter arguments for impeachment and minimize any inconsistencies between a witness's deposition testimony and trial testimony.
- Address gaps or errors in a witness's testimony in advance of trial.
- Identify background information that jurors will likely view as important, even where trial counsel considers the information unnecessary or irrelevant.

Having a mock jury observe the testimony of witnesses for both sides gives a real-time gauge on how a jury will weigh both the truthfulness of a witness and the accuracy of the facts elicited during that witness's testimony. Although a discovery deposition is less suited for assessing future trial testimony than a trial preservation deposition, subjecting either to mock juror



BY TESTING DEPOSITION SEGMENTS WITH A MOCK JURY WELL IN ADVANCE OF TRIAL, COUNSEL CAN CONDUCT NEW DISCOVERY, COLLECT ADDITIONAL DATA AND DEVELOP ARGUMENTS TO CREDIBLY COUNTER POTENTIAL ISSUES.

scrutiny provides valuable feedback on a witness's testimony and credibility.

There are several ways to expose mock jurors to these depositions:

- If the depositions were videotaped, they can be played before the mock jury.
- Attorneys or hired actors can read copies of the deposition transcripts.
- Attorneys or hired actors can recite scripts based on the transcripts.

Presenting audio or visual recordings of witness testimony is typically the most compelling option and can give counsel vital insight into how each witness will be perceived by the eventual jury at trial. For example, if the mock jurors view a witness as over-prepared or lacking in credibility, trial counsel can focus trial preparation efforts on confidence, clarity and veracity, and tutor the witness on how best to stay on message. Although stock responses may seem useful or easy during a witness's deposition preparation, they often come across as evasive and untruthful to a jury.

Additionally, some deposition tapes will likely be played on cross-examination at trial for impeachment of unavailable witnesses. By testing these deposition segments with a mock jury well in advance of trial, counsel can conduct new discovery, collect additional data and develop arguments to credibly counter potential issues. Further, there may be sufficient time to revise interrogatories, amend expert reports and provide disclosures to mitigate any perceived discrepancies between a witness's deposition testimony and trial testimony.

If the value of calling a witness at trial is uncertain because of his demeanor, apparent insincerity or other undermining factors (such as prior impeachments, convictions or opinions that deviate from trial strategy), presenting his deposition to mock jurors offers a prime opportunity to test that witness before a jury.

Early review of the deposition testimony also allows counsel to evaluate how well a witness is prepared for trial. There is often a discrepancy between what a trial attorney considers factually developed and unambiguous and a mock juror's reaction to the same evidence. Jury exercises highlight issues and facts that mock jurors still find opaque or unclear. If these holes are correctable, counsel can address them before trial.

Moreover, jurors have been known to read purposeful intent to blur or hide facts when information they see as important has not been addressed. Information a trial attorney may deem superfluous to necessary findings may be viewed by jurors as important background information that illuminates the motives and goals of principal players. Similarly, a witness may not recall or be knowledgeable about certain issues or facts that the mock jurors consider key. These issues or facts can be further investigated and developed if the jury exercises expose them while discovery is still open.

SELECTING THE MOCK JURY POOL

Regional schools of thought, understandings, beliefs and concerns greatly affect trial outcomes. For this reason, the mock jury pool should be recruited from the locality where the trial will take place. Although a mock jury is usually organized, recruited and first-level screened by the jury consultant, trial counsel should understand the logistics behind the process to ensure the validity of the data and to appreciate and negotiate the costs associated with the jury exercises.

Credible screening is essential to the accuracy of the jury research. The primary functions of the initial screening process are to:

- **Gather a pool of mock jurors that reflects the jurisdiction's typical jury pool.** The jury consultant should show the trial team data on the residents of the relevant jurisdiction and demonstrate that the mock jury pool reflects the gender, ethnicity, age, education, marital status, personal and household income, political affiliations and occupations characteristic of that jurisdiction.
- **Eliminate potential conflicts.** The initial screening questions typically mirror the preliminary *voir dire* questionnaires and court questions adopted in most jurisdictions, and aim to root out conflicts such as a mock juror's familiarity with the parties, attorneys, law firms or judge.
- **Protect the confidentiality of the jury research.** An effective screening process can help to ensure that individuals connected to or with an interest in the trial are not inadvertently exposed to the confidential trial strategy and presentations shown during jury exercises.

Jury consultants use various resources in recruiting the mock jury pool, including online recruiting and advertising in local newspapers. The number of mock jurors summoned for the exercise directly affects not only the organization of the exercise

but also its cost, as each mock juror is paid an hourly fee to attend and participate. The number of mock jurors recruited for the pool can vary greatly depending on:

- The needs of the trial team.
- Whether the trial will have a six, nine or 12 person jury.
- Cost concerns.

For mock juries and focus groups, the trial attorneys ordinarily recruit between two and six panels of mock jurors, resulting in anywhere from 12 to 72 mock jurors.

As discussed above, finding the jury pool is a logistical and sizable task usually handled by the jury consultant. However, when budgets require, trial counsel can put together small focus groups and short surveys for these groups without the expense of a full screening process. These informal focus groups have obvious limitations in their ability to accurately reflect the community and perform detailed analytical assessment, but they still may provide helpful information.

PREPARING THE MOCK JURY PRESENTATIONS

Crafting effective mock jury presentations requires careful consideration of the trial strategy for the case. To maximize the usefulness of a mock jury, the trial team should use the presentations as an opportunity to test risky arguments and unconventional approaches.

The decisions on the size and breadth of the exercise (see above *Determining the Size and Scope of the Jury Exercises*) will dictate how evidence presentations or modules are organized and given to the mock jury. Some options include:

- Combined opening statements and closing summations (known as clopenings).
- Fuller modules with separate openings and closings.
- More expansive coverage with modules dedicated to:
 - key evidence issues;
 - damages; and
 - causation.

When preparing a presentation for a standard mock trial, the trial team should:

- Outline the evidence to be tested, taking particular care with any information that is subject to court-ordered confidentiality and should not be disclosed to the mock jury.
- Draft the presentations for both the plaintiff and defense positions, including:
 - opening statements;
 - direct and cross-examination outlines; and
 - closing summations.
- Prepare any PowerPoint presentations, trial graphics, animations or videos that will be used.
- Designate a senior associate, counsel or junior partner to specialize in messaging development (see *Box, Effective Messaging*) and trial argument observation.
- Finalize the *voir dire* questionnaire, jury instructions and verdict questionnaire.

EFFECTIVE MESSAGING



Effective messaging is based on plain speaking and honest communication. Jurors distrust and dislike sarcasm and legal or technical jargon, which often comes across as condescending and patronizing. Complex cases, such as those relating to securities, banking, patents or medicine, often invite witnesses, experts and trial attorneys to fall back on professional terms of art and complicated explanations, making the focus on plain language and communication even more critical. Although the use of formal and professional sounding language can sometimes give an air of authority, reducing the intricate to simple is integral to effectively communicating with jurors.

Before jury exercises are conducted, trial counsel should test the clarity of its presentation by:

- **Preparing a hypothetical “elevator pitch” that explains the action to a non-attorney with limited time and attention.** If there are no confidentiality concerns, counsel should actually give this short speech to a few non-attorneys to gauge their reactions. This can elicit valuable information regarding what terms a juror may find unnecessarily complicated and distracting from the message and goals of the argument. Additionally, this exercise can expose disconnects between counsel’s view of a case and that of a disinterested third party (for example, jurors in criminal cases often seek some explanation of motive even though motive is not a required element of a crime).
- **Conducting at least two dry runs of the case with attorneys, paralegals and assistants from the law firm.** These trained but detached individuals will give insight into demonstratives that are not working, deficiencies or gaps in the arguments and what evidence fails to achieve strategic objectives. Counsel can then use this information to sharpen the focus of its presentation and remove ineffective case jargon.

- Draft confidentiality and non-disclosure agreements for the mock jurors (see below *Issuing Instructions and Confidentiality Warnings*).
- Confirm that the jury consultant has checked and re-checked the venue and its systems to ensure smooth trial presentations on the day of the mock trial.

The jury instructions and verdict questionnaire should be as conservative against the client as possible, in both law and structure, to ensure that the client’s arguments are tested under “worst case” conditions. The trial team should debate and decide on applicable instructions and law early on. Advanced

preparation is especially important to building consensus with a cross-firm trial team. When developing the jury instructions and verdict questionnaire, counsel should consult:

- Model jury instructions for the relevant jurisdiction.
- Jury instructions actually issued by the presiding judge or from a similar trial.

On novel issues, counsel should consider not using jury instructions to avoid prejudicing or otherwise affecting the outcome. In other words, if the actual instruction the court will order is unknown and not clearly decided in case law, it might be best to allow the issue to go to the mock jury without instruction and get their unguided insight on it. If not, there is a risk that the jury will review an issue applying the wrong standard, thereby limiting the usefulness of the jury's conclusions on that particular issue.

CONDUCTING JURY RESEARCH

After the jury consultant and trial team have completed the logistical management and organization of the jury exercises, including recruiting and pre-screening the mock jury pool and preparing the presentations, they can commence the jury exercises. For a mock trial, this includes:

- Issuing instructions and confidentiality warnings to the mock jurors.
- Conducting mock *voir dire*.
- Giving the presentations with as much realism as possible to approximate an actual trial.
- Debriefing and analyzing the results of the research.

ISSUING INSTRUCTIONS AND CONFIDENTIALITY WARNINGS

Before presentations start, the attorney or jury consultant acting as the judge for the exercise gives instructions to the prospective mock jurors and outlines the rules and confidentiality of the exercise. The judge usually instructs the jurors not to:

- Discuss the case with other mock jurors outside of the jury room.
- Discuss the case with family or friends.
- Independently research the case.
- Disclose to anyone what was learned during the exercise, even after its completion.

In addition to the verbal instructions on confidentiality, the trial team must draft a non-disclosure and confidentiality

agreement and circulate it to the prospective mock jurors. This simple but important task ensures that information given to the mock jurors and the data that arises and develops from the research itself are shielded from disclosure as confidential materials and work product. The agreements, signed by the mock jurors upon being hired for the jury research, should be sufficient to protect the process. Any party to the actual lawsuit who violates the agreements by seeking information from the mock jurors could face significant repercussions from the court and the bar.

Because the mock jury panels are created as part of the trial preparation process, most jurisdictions protect the entire process as work product. Any tangible reflections of the mock jurors' work and efforts are similarly considered work product. Counsel should, however, confirm the parameters of the protection by researching the attorney-client privilege and work product standards in the applicable jurisdiction.



Search [Attorney-Client Privilege and Work Product Doctrine Toolkit](#) or see page 48 in this issue for a collection of resources to help counsel maneuver the various privilege and secrecy rules throughout the US.

CONDUCTING MOCK VOIR DIRE

In a standard mock trial, the presenting attorneys' first formal interaction with the mock jurors is usually *voir dire*. In a real trial, this is when attorneys question the prospective jurors to ferret out any biases or negative attitudes toward issues relevant to the case and, through "just cause" and peremptory challenges, cull potential jurors from the jury pool. Accordingly, a *voir dire* simulation should follow the procedural rules of the court where the case is pending, including the number of peremptory challenges and the procedure for excusing jurors for cause. This gives counsel valuable information on picking juries in that jurisdiction.

Collaborating with the jury consultant, the trial team should select the jury as they would for trial. The *voir dire* will result in splitting the mock jury pool into two different types of panels, both of which can provide important testing information:

- **Preferred panels.** These are the mock jury panels created by the standard *voir dire*, where both the plaintiff and defense exercise their challenges to create their preferred jury, resulting in a panel that reflects their competing strategic goals. This is not the most favorable jury for either side, but rather reflects a jury composition that counsel is most likely to encounter at trial and need to convince.

BECAUSE THE MOCK JURY PANELS ARE CREATED AS PART OF THE TRIAL PREPARATION PROCESS, MOST JURISDICTIONS PROTECT THE ENTIRE PROCESS AS WORK PRODUCT.

- **Struck panels.** These are mock jury panels created from mock jurors that were struck from the prospective mock jury pool and did not make it onto the preferred panels. While struck mock jurors likely reflect the “worst case” jurors for one side or the other and would likely be struck from the real jury, their deliberations should not be ignored. Trial counsel often can determine the largest and most compelling emotional concerns from these mock jurors.

ENSURING REALISM IN THE PRESENTATIONS

When presenting to the mock jury, the trial team should strive for realism or verisimilitude because it encourages the mock jurors to more actively engage in the process. Mock jurors also can be told that the exercise is part of mediation negotiations between the parties and that the jurors’ deliberations and decisions have a real outcome on the case. This is accurate, as all results of jury research directly affect settlement negotiations and trial strategy. In fact, it is not uncommon for parties to mention verdicts and successes learned from jury research during last minute pre-trial negotiations.

Each side should prepare their cases separately, although occasional meetings between “opposing” sides can be helpful. This allows independent thoughts to develop and some elements of surprise that would occur at the actual trial to develop organically. Other tips for counsel to approximate the real trial include:

- Maintaining the illusion of opposing party status by not congregating with attorneys representing the adversary’s position.
- Staying in character as plaintiff’s counsel or defense counsel when in the presence of the jury.
- Conveying genuine passion, but avoiding unnecessary theatrics which may seem insincere to the mock jurors.

After presentations are given, the jury instructions and questionnaire are distributed to the mock jurors. As in a real trial, the mock jury then deliberates and issues a verdict.

ANALYZING THE RESULTS

At the end of the jury exercise, the jury consultant provides an evaluation of the effectiveness of the arguments and ways to improve. This is usually provided in a detailed, multiple-page report containing in-depth subjective and objective analyses of the jury research. The subjective analysis typically focuses on identifying the messages, themes, animations and demonstratives that proved most effective with the jurors. The objective analysis usually includes data on how a mock juror’s age, employment history or gender influenced or may have influenced that juror’s perceptions of the issues. The report will often include charts and demographics of jurors and how arguments impacted their decision process, as well as how jurors’ decisions may have changed during the exercise.

It is also important for the trial team to have at least one senior attorney providing real-time feedback during the exercise, as the analysis provided by the jury consultant may be limited by the consultant’s relative lack of familiarity with the facts of the case. Having this attorney involved as an observer will help

PRACTICE NOTES

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pinpoint messaging issues and identify ways the trial strategy should be modified.

Additionally, debriefs are particularly useful to elicit feedback from the jury about how they came to their decision and what arguments they liked. A debrief, in this context, involves the jury consultant and the trial team meeting with the mock jurors and asking them a series of open-ended questions to understand:

- What factors influenced the jury’s verdict.
- How the jury logically reached their decision.
- How the jury generally perceived the trial team’s presentation and strategy.

The debriefing session may be colored by the mock jury’s previous deliberations and the group aspect of the review session. During this session, opinions of the panel can shift dramatically as new ideas are introduced by the jury consultant or trial attorneys. For instance, if the facilitator introduces new facts to the discussion, the mock jurors might switch their verdict. This does not necessarily mean, however, that the verdict would have been different if the facts had been included in the presentation. Rather, a change of verdict during the debrief could merely reflect a mock juror’s emotional response to a perceived hidden or unknown fact when a decision was committed to paper for the verdict. To temper the effects of the group dynamic and the debriefing process, counsel should consider briefly questioning each juror individually before and after jury deliberations.