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Why Mock Trials Are Bad Diagnostic Tools

By Edward P. Schwartz

A jury trial has a lot in common with a theatrical performance - the client pitches the script to the lawyer, who becomes the editor, director and producer. The courtroom becomes the stage and the jury is the audience. Many of the same methods that make for a good stage play also make for a good trial.

It is then puzzling to me that some lawyers (and some trial consultants) advocate running a mock trial early in the trial preparation process. It amounts to running a dress rehearsal before everyone has learned her lines or the director has even settled on a theme for the production. A mock trial is a useful way to avoid surprises at trial, but it is a very inefficient (and expensive) diagnostic tool.

One major problem with a mock trial is that too much is going on. It is very difficult to determine with any certainty whether an unfavorable response, for example, is attributable to the litigator's style, the themes that were emphasized, the demeanor of a particular witness, the clarity of an exhibit or any number of other factors. This problem will be present in any jury study, to some extent, but it is exacerbated by a full-blown mock trial run early in the process.

I am not suggesting that an attorney should not test out her case in preparation for trial. (I would be out of business in a hurry.) Quite to the contrary, I think that a litigator should run several jury studies for any complicated case. Those studies, however, should be small and targeted to specific strategic issues facing the lawyer in preparing for the particular case at hand. This allows the lawyer (and her client) to control the experimental environment and increases confidence that the responses they observe can be sensibly interpreted.

If a lawyer's primary concern is how her client will come across on the stand and how that client will handle cross-examination, a study should be designed to look at just that issue. Videotape a realistic direct and cross-examination of the client and show the tape to a focus group (or two, or three) and find out what they think. After reviewing the responses (preferably with a good jury consultant), incorporate the feedback into a second videotaped cross-examination and see if a new focus group responds more positively. One can run a study like this four or five times for what it would cost for a simple mock trial.

Much to the surprise of trial lawyers, when it comes to broad trial themes, studies have shown that mock jurors respond very similarly to live presentations, videotaped ones and even trial transcripts. (Clearly, if the issue is how your client or witness will do on the stand, then a videotaped performance is preferable to a transcript.) If a lawyer experiences uncertainty about which trial themes jurors are likely to gravitate towards, a simple study can be run by presenting a fairly neutral written abstract of the case to a focus group. Supplement the synopsis with a few exhibits and/or snippets of testimony where necessary and let the focus group deliberate, watching carefully for which issues they focus on initially and which issues they spend the most time discussing.

A study like this can be run in just a few hours and it does not require any of the attorneys or witnesses to be present. Once the presentation has been generated, it is a simple (and inexpensive) matter to run the study again to increase confidence that the focus group's reaction was not an aberration.

One factor in jury deliberations that is frequently overlooked during trial preparation is the wording of the judge's instructions. Since the explanation of core legal principles (probable cause,

preponderance of the evidence, gross negligence) can have a significant impact on the outcome of a case, it is wise for lawyers to test various options on focus groups to determine which wording will be most favorable to their clients.

While mock trials are usually bad *diagnostic* tools, many lawyers think of them more as *predictive* tools. The predictive value of a mock trial depends critically on its *external validity*. That is, the more closely the simulation resembles its real-world counterpart, the greater confidence one can have that the mock jury's behavior foreshadows that of the real jury.

One way to increase external validity, of course, is to make the mock trial feel as much like a real trial as possible. Run it in something that looks like a courtroom. Have a judge (or someone playing one) preside over the proceedings and follow the rules of evidence.

This is all fairly intuitive. What is less appreciated is how a premature mock trial can compromise its external validity. A mock trial will only have predictive value if the lawyers argue the case the way they expect it will be argued for real. This means having the witnesses properly prepared, the exhibits in final form, the closing arguments scripted, and so forth. This cannot be accomplished until *after* the trial team has resolved the central questions of trial strategy. First, settle on a trial theme. Prepare your witnesses to your satisfaction. Identify the instructions that are likely to be used. Get your exhibits in order. In short, *identify your ideal trial strategy before running a mock trial.* The mock trial can then be used fruitfully to explore how successfully you have implemented those strategies.

Whatever the strategic issues you face in your next jury trial, make sure to work them out in advance with the right set of jury studies. It is only then that you'll want to run a full dress rehearsal in front of a mock jury.

Think of the full-blown mock trial jury as the New Haven preview of your Broadway play - you wouldn't want to run the whole production before a live audience before you've tested the lighting, practiced with the orchestra and fine-tuned every scene for maximum impact.

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