

Practice Center

LAW AND MANAGEMENT

Due Diligence

Mock trials and pretrial research can save time down the road

By Tara Trask

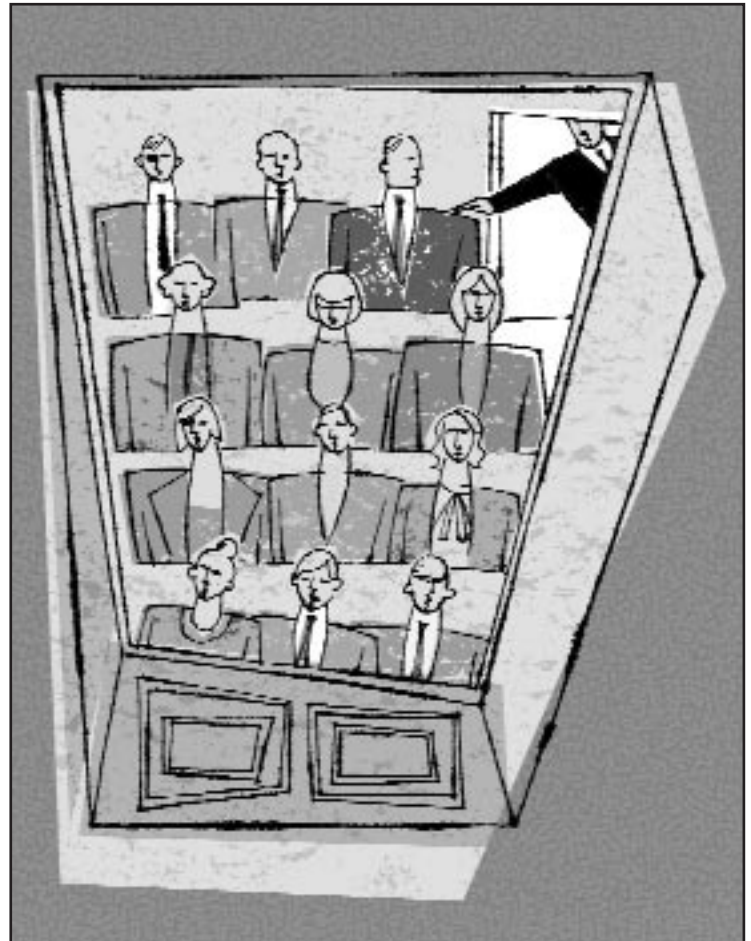
As the litigation environment continues to evolve, the number of cases in which focus groups and mock trials are utilized is increasing. Gone are the days when only extremely large damage cases could afford the “luxury” of pretrial research.

There are many reasons to employ scientific jury research. Complex circumstances or concepts, problematic facts and difficult witnesses are all excellent reasons to employ pretrial research to help determine how to best frame a case for a jury. Furthermore, pretrial research can help narrow the focus, perfect arguments and allow for practice. And research results can be an excellent tool in settlement negotiations.

Mock Trials

The costs associated with pretrial research are decreasing. Depending on the consultant, and other research variables, a one-day focus group can be prepared, facilitated and a full report generated for a reasonable amount. In fact, when taken in the context of the risk of potential exposure or the windfall of a large award, pretrial research can seem like a bargain.

Once the decision to conduct pretrial research has been made, there are steps that an attorney should take to ensure that money is well spent and that valuable time is not wasted. Working closely with a skilled trial consultant to develop a carefully designed, goal-oriented project is



an important first step. Investing the time and energy to thoroughly prepare arguments, witness excerpts and exhibits is also crucial to the success of the project. Finally, retaining a consultant with the expertise to effectively evaluate juror feedback and provide insightful analysis will in-

crease the validity of the project, and add value to the case.

DETERMINE GOALS OF RESEARCH

Determining the ultimate goals of the research is a fundamental first step to a successful exercise. The design and timing of the research is a function of these goals, so it is extremely important to identify them at the outset. Failure to determine the goals prior to the beginning of the exercise often results in a

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MOCK TRIALS

project that fails to answer the pertinent questions that counsel has about the case, and often leaves counsel frustrated with the process.

The timing of the project is important. For example, research conducted early in the litigation process can streamline themes of the case and assist in directing discovery. Usually, this type of exercise is conducted within a day or less and often requires less preparation; however, it can yield important feedback, ultimately saving the attorney and the client time and money. Research conducted closer to trial usually allows for empirical testing of comprehensive, detailed arguments, and demonstrative exhibits and graphics. Research conducted at this juncture also provides an excellent arena for testing live witnesses in front of mock jurors.

There are several design templates that are commonly used, and the variables within each template are too numerous to name. Effective consultants will help you tailor the project to the specific goals you have, the resources you can allocate and the ultimate questions you want answered.

One of the most popular design templates is the adversarial focus group. This type of exercise usually takes less preparation time, and generally takes less time to implement. Typically, counsel prepare an extensive “presentation” that is not unlike an opening statement. The length of this presentation is a function of the time available and the amount of important information the jurors need to hear. Counsel for both sides should be portrayed to the jury. This means one side must be role-played. These presentations are often complete with pertinent demonstratives, exhibits and deposition clips from important witness testimony. Jurors may or may not deliberate, but an oral focus group and written questionnaire are usually utilized to determine their thoughts on the case.

For example, in a patent infringement case involving a well-known vaccine, we tested our infringement claims and defenses on validity in a quick and simple one-day exercise. Using the adver-

sarial group format, we were able to determine that one of our validity defenses did not resonate with the mock jurors, particularly because of the credibility of one witness. This was valuable information to have early in the process, and we were able to make a few changes and test again, with a more positive result.

The other two general templates for pretrial research are the mini-mock trial and the full dress rehearsal. Both of these tend to take on a more trial-like feel. Generally, the format includes

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opening statements, witness testimony (either live or by video), closing arguments and deliberations. These are also conducted in an adversarial format, and again, fairly weighting the advocates, the evidence, the exhibits and the demonstratives is important.

In any pretrial research exercise, I often suggest that lead counsel assume the role of opposing counsel. This fulfills two goals. One, it ensures that the exercise will be fairly weighted. Stacking the deck in your favor by squaring off against a younger and less-experienced attorney will do nothing but provide a feel-good session for you and the client if you win. Two, it allows counsel to fully prepare the case from the other side’s perspective, which is always a learning experience. Attorneys frequently express to me the usefulness of putting themselves in their opponent’s shoes

and having to advocate that position.

The importance of carefully preparing both sides cannot be overstated. The most reasonable worst-case scenario must be tested, and it must be tested fairly for the exercise to be worthwhile. In fact, the most valuable lessons are often learned from losing.

SET ASIDE TIME TO PREPARE

Conducting a successful focus group or mock trial that yields significant results that aid the trial team requires a time commitment from everyone involved. This is time well spent, whether you are preparing the case for trial or for a strong settlement posture.

Making streamlined arguments, parsing down exhibits, refining demonstrative aids and contemplating the position of the opposition are all exercises that will prove to be fruitful. As one attorney puts it: “Every time I mock try a case, I am surprised by how well organized my case is in my mind when I emerge from the process. It takes time, but it is worth it.”

Failure to properly prepare for a focus group or mock trial exercise wastes time and money. It is impossible to obtain reliable, useful data when the presentations are sloppy, hastily thrown together, not well organized or skewed. A good consultant can assist you in making sure that both sides are adequately presented, but at the end of the day, the real work of prepping the case falls to the attorney trying the case.

GUARANTEE USEFUL RESULTS

There are many variables that go into the costs of pretrial research, including the selected research venue (i.e., conference centers, market research facilities), how many jurors are used, the length and type of exercise (i.e., one day, multiple day, deliberation groups), the sophistication of the data collection (i.e., “real time” high-tech analysis, questionnaires, qualitative focus groups) and the sophistication of the video (i.e., multiple camera, closed-circuit viewing).

Decisions about all of these variables must be made with the goals of the project and the resources available in mind. While cutting costs is always a goal, it is impor-

tant not to undercut the ability to analyze the data. For example, while not videotaping deliberations might seem like a great way to save money, it is next to impossible to hear what each juror says at any given time, certainly not when there is more than one deliberation group involved. It is imperative to have a video record so that the consultant can review the tapes to provide useful analysis; it also provides the attorney and client with a record of the discussions for future review.

This data can be used in settlement negotiations, for juror profiling and to assist in preparing witnesses. There is nothing that gets a witness in line more quickly than showing them mock jurors' negative reactions to their testimony. Mock jurors' reactions can also be used to help begin preparing damage models.

In a case involving an insurance dispute, an excess carrier was refusing to

cover a large oil company for one of the most highly publicized oil spills in the United States. Jurors had heard so much about the original case in the press that they actually seemed to reverse the plaintiff and defendant in the insurance case because they considered the plaintiff such an evildoer. The plaintiff in this case was still "on trial" so to speak. This presented multiple issues about how best to frame the case.

After several mock exercises, one of the most enlightening pieces of information was the juror profile that emerged. The plaintiff "ideal" and "non-ideal" juror profile that we developed from the data completely defied conventional intuition. While the attorneys were initially reluctant to rely on data that was counter-intuitive, they eventually realized that reliable, valid data cannot be ignored. They utilized the profiles when exercising perempto-

ry challenges and the plaintiff ultimately prevailed. That verdict was one of the largest awards in the state that year.

The litigation environment is more competitive than ever. Attorneys are learning to use cutting-edge tools and technology to their advantage. Pretrial research is one of these tools. Veteran litigators have long understood that designed carefully, with budgetary considerations in mind, many cases can benefit from the information that can be gleaned in the pretrial research setting.

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