



Mock trials for solos and small firms

A small outlay of time and money can produce an enormous amount of information, influencing the success of your case.

BY NOELLE C. NELSON, PH.D.

Say the words “mock trial” to most lawyers and they cringe, fearful of the huge costs involved and the time (of which there is never enough) such an endeavor will take. Indeed, certain high profile cases involve lengthy and extensive preparation, and employ the services of a small army of consultants at considerable expenditure of time and money. However, mock trials come in many shapes and sizes, some of which are suitable to smaller cases and smaller law firms.

Mock trials as focus groups

For a surprisingly small outlay of time and money, these mock trials can produce a wealth of information, which, without exception, will considerably influence the success of your case. How can I say “without exception” with such assurance? Common sense dictates that the more information you have about what your mock jurors (those people most similar to the “real” jurors) find persuasive, the more you will know about what will likely convince your real jurors.

Instead of thinking of a mock trial in the conventional sense (a full-blown trial put on before the actual trial that may run two to three weeks), think of the mock trial as a highly specialized focus group. A focus group is a group of indi-

viduals who are brought together to give feedback on specific questions. Focus groups are held for any number of reasons and for varying lengths of time. Therefore, they can accommodate all sorts of budgetary and time constraints.

What is a mock trial focus group?

A mock trial focus group is composed of a mock jury of individuals, ranging from six to 12 persons, who match the demographic profile of the jury pool that you will actually be working with at trial. As long as your mock trial focus group reflects your jury pool, you can use that focus group in a variety of ways that are tailored to your specific concerns, needs and pocketbook.

Ways to use a mock trial focus group

• Determine whether you have a case.

Present the issues in the case, from your perspective and that of opposing counsel, to a mock trial focus group. This is an efficient and objective means of deciding whether a case is worth a trial. It will also give you an idea of what the issues will be – from the jury’s perspective – and thus provide a better basis from which to discuss the case with your potential client. Depending on the case complexities, this type of mock trial focus group can be done with a group of six demographically

matched individuals, and usually in a morning or afternoon session.

• Use a mock trial focus group to determine those issues that will be of greatest concern to the jurors.

Jurors are usually willing to tell you which issues they feel need to be addressed in greater detail and which ones the lawyers pummel to a boring demise. Unfortunately, this enlightening discussion usually takes place after trial, at a jury debriefing.

You can get the enormous benefit of a jury debriefing *before* trial with a mock trial focus group. Although you cannot present the entire trial as you would to a shadow jury, you can present the issues, generally as an opening statement, to your mock jury. This will give you excellent insights on those points you need to more thoroughly address, and those that the jurors are likely to find obvious.

Members of a mock trial focus group will also let you know what they see as the problems and weaknesses in your case and the strengths of opposing counsel’s case. If you ask them, members of a mock jury will usually be happy to elaborate on why something made sense, why a point had impact, why a particular issue is a problem, how your description of a situation could have been clearer, what was missing from your argument, etc. The benefits of a mock jury are only limited by the number of pertinent questions you can think to ask.



Question of the Month

Why go to trial if I lose the mock trial?

Answered by Katherine James, MFA, ASTC

This question comes from a distraught new client who called me on the phone this past week. He was calling to cancel our witness preparation sessions for his client after he learned the results of a mock trial that he had just conducted on the case. He was getting ready to settle, he said, because, "What is the point of going to a real trial if you lose the mock trial?"

"Losing" the mock trial isn't the worst result you can get by a long shot. "Winning" the mock trial is.

I know this sounds counter-intuitive, but, as Dr. Noelle Nelson points out in this month's article, what you are after is information. You are especially looking for information that tells you where the large gaping holes are in your case or where the mock jurors have a problem with the story. You want to "lose" before you are in front of a real jury – not after.

A great example of this occurred in a case involving an 18-wheeler that crashed into a car, killing a young mother from the Central Valley of California. The mock jurors looked at the time of day that the truck struck the car – 7:00 a.m. – and "got stuck on the sunrise." They decided that the truck driver must have been staring into the rising sun. He

didn't see the car as he smashed into it, so how could he be held responsible?

It was an easy fix in the story. During the real trial, we showed that the time of sunrise on that morning was 6:00 a.m. and that the angle of the road made it impossible for sunlight to be in the truck driver's eyes. The "real" jurors came back with a very favorable verdict.

I call that winning where it counts!

Of course, there are many examples of the other scenario: win the mock trial; lose the case. I will never forget the howls and hollers when one attorney and his associates told me about how they had "won" the mock trial and could not wait to demolish the defense. The bad news was, of course, that the attorneys didn't present a strong case for the defense case in the mock trial. In fact, their mock trial consisted of only putting on the plaintiff's side of the case – something that, as Dr. Nelson points out in her article, is an error. Patting themselves on the back for winning the mock trial didn't help at all when these lawyers were defended in the real trial – over issues that would have been fairly easy to discover in a properly conducted mock trial.

Remember: when it comes to mock trials, often winning isn't everything – losing is.

Don't forget – this column relies on you, our readers, to ask questions. We will respond with articles aimed at answering those questions. If you have a question that cannot wait, I will endeavor to make sure that it is answered by me or by one of my colleagues at The American Society of Trial Consultants. Please feel free to telephone me at 310-391-9661 or e-mail me at katherine@actofcommunication.com.

•Use a mock trial focus group to learn whether your expert and lay witnesses and visual aids are effective.

A mock jury will reveal the perceptions of a jury in ways you could only otherwise guess. The witness you find so compelling may be considered arrogant by the mock jury. Another witness you believe too meek and mild may be seen by the mock jury as kind and believable. An expert you think is highly professional and erudite may appear condescending and distancing. A visual aid you thought stunningly captured the point may appear confusing or overwrought.

A mock trial focus group cannot only help you assess the effectiveness of a given witness or piece of evidence, it can also give you wonderful ideas on how to increase the impact of your witnesses and visual aids. Given that mock jurors are

far more likely to see the world through the same eyes as your "real" jurors, their input will be invaluable in guiding you to those persons and visuals likely to be the most convincing.

•Use a mock trial focus group to determine your personal effectiveness.

Ask the mock jurors what they thought of your presentation. This is especially useful when presenting material as though it were your opening statement or your direct or cross examination of a witness. Mock jurors have valuable opinions that can let you know how the jury will assess your courtroom style, including how sympathetically you come across and whether you are credible (and if not, why not.) If you are willing to give mock jurors free rein, you can find out much about how your voice, general demeanor, bearing and mannerisms will most likely affect the "real" jurors at trial.

It should be clear by now that there are innumerable ways to use a mock trial focus group. Properly used, the mock trial focus group can give you an awesome advantage. The key words are "properly used."

Properly preparing for the mock trial focus group

You must prepare thoroughly for the mock trial focus group. Present your case and that of opposing counsel as accurately and explicitly as you can. Jury studies show that the opinions of mock juries are of value only when the jurors have the opportunity to hear both sides. The more thorough and accurate you are in presenting both sides of the case, the more thorough and accurate the mock jurors' reactions will be.

Mock jurors can only give opinions and insights based on what is presented



to them and can only answer the questions they are asked. Arm yourself with as many questions as you can for the mock jurors. It is not up to them to know what kind of feedback you want to hear; it is up to you to present them with the appropriate material and ask them the relevant questions.

Matching the demographics of your mock jury to your jury pool is critical. These demographics generally include: 1) number of persons of different ethnic backgrounds; 2) gender proportion; 3) age ranges; 4) educational level; and 5) median family income.

A trial consultant should be able to provide you with an appropriately matched mock jury and offer recommendations at the end of the mock jury session or you can assemble the focus group yourself. Either way, a mock jury can, within the context of a mock trial focus group, give you extremely valuable information on specific issues, all within a short time and expense frame.

To create your own mock trial jury,

you must have access to a sufficiently wide network of demographically diverse people not personally known by you.

Since you cannot know the “real” jurors in your case, you must not know the “mock” jurors. (Editor’s note: some plaintiffs’ firms have had success by posting an ad on www.craigslist.org.) You can obtain the demographics for your jury pool from library sources. Once you have done this, you can select the mock jurors and offer them a reasonable hourly fee for a half or full day. Choose the issues you want the mock trial focus group to consider and prepare your questions to elicit detailed responses.

Another important point: if you do not schedule the mock trial focus group far enough in advance, you will usually find yourself rushed, ill prepared and you will not reap the full benefits that focus groups have to offer. Give yourself plenty of time to benefit from the mock jury’s insights and suggestions regarding your trial strategy and the overall design and presentation of your case.

Conclusion

With a little imagination and preparation, plaintiff’s attorneys can use mock trial focus groups to obtain the same kinds of pretrial advantages currently being enjoyed by large law firms – but without the hefty price tag.



Nelson

Noelle C. Nelson, Ph.D., is a trial and business consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. She is the author of the booklet, “101 Winning Tips: How to Give a Good Deposition and Testify Well in

Court.” Her published books include A Winning Case (Prentice Hall), Connecting With Your Client (American Bar Association) and The Power of Appreciation in Business (MindLab Publishing). You can contact her through her Web site at www.dr.noellenelson.com or e-mail