Jury Research and Mock Trials

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Overview

- Our mock jury hit us for $50M
  - What went wrong?
    - Absolutely nothing

- Jury Research is becoming the norm in shaping trial strategy in large cases, particularly on the Plaintiff’s side

- Why do we test cases?
  - Jurors construct private stories based on their predispositions and perception of the evidence at trial
    - These stories serve as powerful filters
  - Developing a persuasive story that makes the jury the hero is the key to success
Two Types of Mock trials: 
*exploratory vs. traditional*

- Which approach is best? Depends on where you are in the life cycle of the case

**Exploratory mock trials are summary based**
- Informal interactive model
- Designed to explore jurors’ preconceptions, what they need to move their needle

**Traditional mock trials are closer to a trial**
- Designed to provide insights into jurors’ decision making process and trial outcome
- Designed to test sensitive or complex positions
Exploratory Mock Trials or Focus Groups

- Use a small sample of jurors
  - Not verdict oriented
  - Issue testing, theme & story development

- Provides litigators with:
  - Which themes, evidence and arguments are most convincing
  - Juror misperceptions and misunderstandings
  - Slight intel on jury selection

- I don’t generally recommend, unless early in the case
Traditional Mock Trials

- Designed to Capture:
  - Verdict Oriented: Likely trial outcome, unless changes are made
  - Likely course of juror deliberations
  - Juror receptivity to contemplated case themes
  - Juror reactions to key witnesses, unless changes are made
  - Juror reactions to technical arguments vs. moral imperatives

- The study should employ a larger sample (36 or more jurors in 3 juries) and simulate the trial as closely as possible

- A balanced and accurate presentation is essential
  - Put best lawyer on the other side
Traditional Mock Trials

Assess juror decision making

• Juror biases and pre-dispositions

• Which narrative or story resonates most with jurors?

• Degree of acceptance of plaintiff and defendant case themes

• Juror perceptions of litigants and key witnesses

• Juror reaction to key documents and evidence

• Assignment of legal and moral responsibility

• Points of conversion: The impact of group dynamics observed in deliberations
Traditional Mock Trials (cont.)

- **Enhance Voir dire and Jury Selection**

  - Mock trials can generate profiles of ideal and adverse juror characteristics

  - Sidebar: Observable characteristics such as race (illegal), age, and gender receive inordinate attention by attorneys; demographics have not been shown to correlate with verdict

- **Evaluate Jury Questions and Instructions for Comprehension**

- **In sum, allows the litigant to package the case in a manner that meets jurors’ needs**
Virtual Mock Trials: Magna’s JuryConfirm Online Jury Research

- **Overview**
  - Methodology is the same as traditional in person groups
  - Cost effective & streamlines the process
  - No travel necessary
  - Test multiple venues in one session

- **Goals:**
  - Strategy development for further discovery
  - Jurors’ predispositions towards case issues
  - The case strengths and weaknesses
  - How to best develop strategies and case themes
  - Effectiveness of graphics, documents, and arguments
Pros and Cons of Virtual Jury Research

- **Pros:**
  - Cost savings
  - Time savings
  - No travel for clients or the trial team
  - The better plaintiff’s attorneys obtain such feedback routinely

- **Cons:**
  - Limited to a half day exercise, which impacts how much can be accomplished
Shadow Juries

Overview

- The shadow jurors said we won...and I didn’t believe them
- The shadow jury serves as an in-trial navigational aid
- Once the actual jury has been seated, the shadow jurors are selected from a larger group of recruited participants
- The shadow jurors are blind to sponsorship, ensuring unbiased, candid feedback
- Each shadow juror is interviewed nightly and the findings are presented to the trial team in a nightly report
  - It’s unsettling at first
Shadow Jury Uses

- Developing themes and refining case at trial
  - Opening Feedback
  - Witness Feedback
  - Clarifying Issues
  - Focusing on important evidence to the shadow jury

- Predicting Case Outcomes
Shadow Jury Process

**Shadow Jury Benefits**

- Identifying jury comprehension of opening statements and witnesses’ salient points
- Strategy shifts can evolve from jurors’ feedback
- More intel to make reasoned settlement decisions during trial
- Intel on how hard to push on punitive damages at closing
- Witness assessment and preparation
- Closing arguments are refined by incorporating feedback
Sample Shadow Jury Demographics

Linda M. / 62
Blue-Collar
Upshur County

Spring R. / 46
Blue-Collar
Harrison County

Gary G. / 64
Ret./Professional
Cass County

Linda P. / 65
Blue Collar
Upshur County

Bob M. / 53
Ret./Blue Collar
Upshur County

Cathy J. / 47
Blue-Collar
Upshur County

Barrie B. / 46
Blue-Collar
Harrison County

Willie T. / 66
Ret./Professional
Harrison County

Susan J. / 57
Blue Collar
Harrison County

Victor H. / 40
Blue Collar
Upshur County

Actual Jurors
Shadow Juries

Overview (cont.)

- **Opportunity for Adjustment**
  - Gives the litigator the ability to assess the trial on a real-time basis and make adjustments to approach, style or strategy
  - Limits guesswork as to how case presentations are likely affecting the actual jury

- **Informs counsel about areas that have not been covered adequately**

- **If the shadow jurors have poor comprehension, then the actual jurors will as well**
  - The team needs to fill in those gaps

- **Similarly, a shadow jury will indicate when they have understood the point and counsel can move on without risk**

- **Comments from shadow jurors favorable to opponent are the most helpful**

- **Settlement opportunities**
  - Knowledge of the potential verdict allows the team to evaluate final settlement opportunity.
Perceived Cons

- Interference
  - Damn unsettling
  - Shadow juries do not suit every attorney’s trial style
  - There will always be those attorneys who are unable or unwilling to adjust their course
  - My response: “It is a bad plan, the one that cannot be altered”
  - Do not dismiss the feedback because “they just don’t get it”
    - It is quite possible that the real jury it not “getting it” either
  - Some attorneys are concerned about being “graded” in front of their clients
Perceived Cons

- **Correlation with Outcome**
  - There can be a concern that the reactions of the shadow jury differ from the reactions of the actual jury
  - While this scenario is *possible*, it is not probable
  - When both the shadow jury and the actual jury deliberate there is a strong correlation between the two verdicts
    - Post-trial interviews have determined that the analysis and decision making processes of both juries have been similar
    - Both juries identify the same evidence and arguments as strengths and weaknesses and they have very similar perceptions of the witnesses and attorneys
  - Notwithstanding, the primary purpose of a shadow jury is to provide relevant daily feedback, not to predict the verdict of the actual jury

- **Cost**
Shadow Juries Benefits

- It is challenging for counsel to “think like a juror”
  - i.e., to think about the case from the perspective of an outsider, a person without the benefit of years of legal training

- Attorneys are necessarily advocates and can easily fall into the trap of viewing a case exclusively from their client’s point of view.

- Senders of information overestimate the degree to which their audiences understand what they are trying to communicate.

- Unlike mock trials, these research participants hear the real thing—the trial itself.

- It’s not perfect, but shadow juries are the best means to peer into the black box.
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