

Test-Driving Trial Strategy: Crossing the Finish Line First

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THE STARTING LINE: DETERMINING YOUR GOALS

Mock trials, often considered expensive because of the professional investment of time and the expenses for facilities and mock jurors, can save clients millions, if not billions, of dollars. Winning at trial is the epitome of success. Achieving success takes considerable preparation whether you test drive the case with a mock trial or not. Scientific jury research and refining case strategy provides confidence in a stronger case at trial.

Mock trials are available for more than just the “bet-the-company” case. The first step in making decisions about implementing jury research is identifying the research goals. Jury research gives the trial team an advantage in developing case strategy, jury selection, and settlement decision-making.

Goals such as selecting the best case strategy, which jurors to strike, and determining or alleviating potential awards and damages vary from case to case. Is the venue conservative or also known as the bank for plaintiffs? Are the media covering this trial or have jurors heard previous verdicts? These questions and others shape the mock trial methods to be used.

Is this a winnable complex case? The best way to tell is to test drive the case through a mock trial. It is better to discover jurors’ perceptions in the mock trial than at trial, especially if there are emotional hot buttons. In-house lawyers’ goals include evaluating the liability risk, who should try the case, whether this case should be settled or ultimately tried, how jurors value the case, and the likelihood of punitive damage awards. Making the best business decision, in either going forward with a winnable case or early settlement of a problem case, can be substantiated by jury research.

IN THE PITS: BUILDING THE TEAM

Great trial lawyers have talent for developing case strategy. Jury consultants have talent for measuring attitudes. Combining the two talents makes a formidable team. In building the team, there are time demands in development of mock trial presentations. Trial lawyers take valuable time from the litigation battles to brainstorm and discuss case strategy with the jury consultants. However, jury

research saves time and money by helping clients understand perceptions of the issues and avoiding costly mistakes at trial.

Scientific jury selection takes ten to thirty days from inception or development of the initial study to the report. Studies range from \$10,000 to \$100,000 for trial consultant services and fees. There are two basic factors determining the range: 1) professional services; and 2) research expenses. Professional services vary with experience. Research expenses include recruitment costs and incentives for mock jurors, facilities, refreshments, and videotaping. Graphic production generally is separate. Mock trial research expenses depend upon the mock trial length (e.g., 3 hours vs. 3 days), how many mock jurors are recruited, and how difficult the recruit from a given venue.

REVVING UP THE ENGINE: FINE-TUNING CASE STRATEGY

In fine-tuning case strategy through use of a mock trial, there are many concepts to consider (e.g., witness appearance, case issues, jury venire, community standards, length of trial). Mock trials help uncover unforeseen factors or issues that stick in a juror's mind. There are many ways of conducting jury research and mock trials. Matching the correct model to your case is critical, whether it be an online mock scenario or a full blown mock trial with all the bells and whistles.

To fine-tune case strategy, trial teams can assess jurors' reactions to themes, witnesses, graphics, case strategy, damages, jury instructions, and verdict forms. There are trade-offs in what can be measured in any one particular study. Twelve jurors deliberating is not enough jurors to find predictors for jury selection. A single group will reveal ideas about possible themes, but has its limitations. Multiple panels can be used simultaneously or consecutively to sufficiently compare strategies.

Mock trials are a means of practice for lawyers to test-drive different strategies (e.g., when is it better to suggest a dollar amount to the jurors or when is presenting an alternative medical diagnosis viable.) Mock trials using jury research questionnaires have extra benefits in rating issues. For example, in a patent case, mock jurors who favor the plaintiff's case may believe that the patent is valid and that the technology was laboriously researched and original. Mock jurors who favor the defendant's case may believe that the technology was obvious and the patent should be invalid. They may believe that a company lost sales in the marketplace because of honest competition rather than a valid patent. Knowing the contentions that make a difference in determining verdict is crucial.

Balancing witnesses' presentations for both sides in mock trials is important in determining witness credibility. Credibility cannot be measured on direct examination alone. Videotape depositions are easier than using actors for the other side's witnesses' testimony. Testing jury instructions and verdict forms can aid settlement decision-making.

GREEN FLAGS, RED FLAGS AND CAUTIONS

Just like a hammer is not as effective as a screwdriver to turn a screw, a mock trial is not as effective as a venue study in determining predictors for jury selection. It is important to match the study to the research goals. Other cautions a trial team should take include:

- *A caution with recruiting mock jurors.* Jury research conducted with friends, family or employees can mislead the strategy development and produce an undesirable result at trial. Random samples are more desirable.
- *A caution with perception analyzers.* Perception analyzers display communication changes when there are spikes or peaks. Sometimes there are flat-line highs and lows as jurors do not continually turn the dial. Don't lose sight of the forest for the trees with focus on a word rather than concepts.
- *A caution about jury selection without scientific study.* Hypothesizing about jury profiles without testing the case is less costly, but involves guesswork. In less complex cases a couple hours of case strategy consultation may suffice.
- *A caution about jury selection with scientific study.* Jury profiles from the research can be used by the trial lawyers or the jury consultant at trial. While it is better to have research supported jury profiles, jury profiles should not be rigidly used. Hearing the jurors during voir dire talk about their life experiences is most revealing.

CROSSING THE FINISH LINE FIRST

Properly conducting jury research gives great insight for developing case strategy for trial or mediation. Different mock trial models produce different work products. There is no one right method for every kind of case. It depends on the goals of the research for choice of research methods and subsequent reports.

Sharing mock trial results at mediation can be effective depending upon the presentation of jury results and the mediator's understanding of jury research methods. Mediation presentations encompass a cooperative effort to share research results with the mediator and the other side. A study conducted for mediation may differ from a mock trial conducted for trial purposes. The mock trial report for mediation focuses more on evaluating issues than trial strategy.

Testing hypotheses about stereotypes such as mothers with children, teachers, postal workers, or overweight jurors can prove to be the difference between eliminating an unfavorable juror or not. Adhering strictly to stereotypes can lead to incorrect peremptory challenges. In developing a juror profile, empirical research assists in determining factors readily seen such as demographics and those that are not so readily seen, such as attitudes and past experiences.

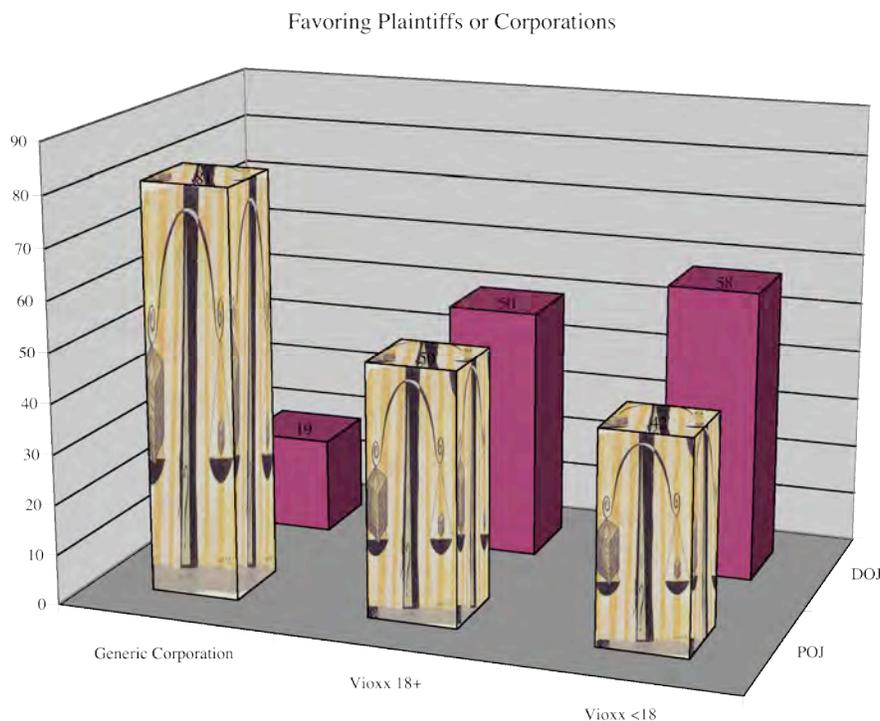
The key to using jury questionnaires at trial is being more prepared than your opponent, especially if there is a lengthy questionnaire or a large pool of jurors. Designing a system for extracting background information will speed up decision-making at trial. Jury questionnaires used at trial differ from jury questionnaires used during a mock trial in that more open-ended questions are necessary. Test driving a jury questionnaire with a mock trial obviously is advantageous in finding selection criteria. Confidence in the jury research results is critical.

AN EXAMPLE FROM AN ONLINE MOCK TRIAL

In a study of over 600 juror qualified Los Angelinos, when asked generically if they tend to side with the plaintiff or the corporation when they read or hear news coverage of civil lawsuits:

- 81% would favor the plaintiff or be a plaintiff-oriented juror (POJ)
- 19% would favor the defendant or be a defense-oriented juror (DOJ).

However, when more facts were brought into the scenario, the predisposition of being for the plaintiff decreased. The study included a paragraph of news coverage about Vioxx followed by two questions. The first question asked, without hearing the evidence, do you think that Merck should be held responsible for heart attacks or strokes in those who used the product MORE than 18 months. The second question asked do you think that Merck should be held responsible for heart attacks or strokes in those who used the product LESS than 18 months.



- 50% favor plaintiffs when asked about Vioxx used MORE than 18 months.
- 42% favor plaintiffs when asked about Vioxx used LESS than 18 months.

CONCLUSIONS

One can never know with certainty what a jury will decide. Without mock trials one can only guess about jurors' perceptions of winning arguments. Developing case strategy is an active process with changes in discovery and summary motion rulings. Some trial teams use jury research to help shape discovery. Other trial teams choose to wait until all discovery is completed. Jury research for complex cases is not a cookie-cutter endeavor. Test-driving trial strategy provides flexibility for mediation or at trial. If you want more certainty about winning arguments, mock trials can make that happen.

ABOUT THE AUTHOR

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Currently an active member of the ABA Section of Litigation's *Image of the Profession Task Force* and *Membership Subcommittee Co-Chair of the Products Liability Committee*, Dr. Cohen contributes to the world of psychology and law. In 1986, she founded Verdict Success, a firm specializing in jury research, trial strategies, and settlement decision-making. Integrating psychological and communication theories, Dr. Cohen conducts mock trials, case strategy research, focus groups, venue studies, online jury studies, witness preparation, opening statement clinics, video-deposition analysis, jury selection, trial analysis, and juror interviews. She is a graduate of UCLA (B.A. 1977) and University of Southern California (M.S. 1979; Ph.D. 1984). Born and raised in the Midwest, she has a deep understanding of people across the nation and has assisted trial lawyers in winning major complex cases. She may be reached at 310.545.7914 or ccohen@verdictsuccess.com.