



# Learning Without Losing

## *Trial Simulation Isn't Just for the Big Ones*

Recently, in a blue-collar New Jersey town, a young woman who lost an eye sued for medical malpractice. Where she lived other like young women tended to work briefly at an entry-level factory or clerical job and then marry and raise a family. The woman's attorney worried that social and economic expectations would limit her jury award.

And, in New Mexico, a developer sued a local property owner for breaking their land contract. The developer feared that local sentiment against development would result in an adverse jury verdict.

In these cases, the lawyers used trial simulations to test juror reactions to their cases. In the New Jersey malpractice case, the young woman's attorney learned how actual jurors would react to her background, and what range of damages could likely be awarded given that background. And, in the New Mexico real estate contract dispute, the developer's lawyers learned that the jurors' belief that "a deal is a deal" prevailed over their dislike of further local real estate development. In each of these cases, trial simulations led to either a successful jury verdict or a favorable settlement.

Recently the use of trial simulations as a tool for trial preparation has dramatically increased. The reason? Trial counsel have come to realize that jurors often view the issues and themes of a case far differently than do lawyers, and that proper trial preparation requires investigating just what jurors will think of the case.

Trial simulations can demonstrate how

emotional and legal issues will interact with the jurors' biases, predispositions, and experiences to produce a verdict. Much in the way that companies test-market a new product before actually producing that product, you can try out your case on mock jurors in order to prepare for presenting the case to the actual jury at trial.

When should you try trial simulation? The key is not the dollar value of the case, the severity of the crime, or as shall be seen in this article, the size of the client's budget. Trial simulations are useful for any jury case. Simulation should be most seriously considered in cases where non-legal issues may substantially affect the jury's ability to reach its decision solely on the trial evidence.

### Uses

Used early in the litigation process, trial simulations guide discovery. You benefit from knowing prior to taking depositions and reviewing documents what jurors will want to know to decide the case. Jurors often focus on non-legal issues; if you are aware of jurors' particular interests, you can satisfy them by eliciting information on these issues throughout discovery.

Later in the litigation process, simulations help you develop trial strategy. They reveal what jurors do and do not believe about the case, and what approaches you can use to modify those beliefs. They also demonstrate how jurors' pre-existing attitudes interact with case issues, thereby providing insights on how to appeal to jurors' predispositions while presenting the

case. You can also learn what issues attract and hold the mock jurors' attention, for later use as a "hook" upon which to hang the trial themes.

Trial simulation can also help determine how sophisticated or complex your trial presentations should be. Excessively complex trial data lead to juror confusion and lack of comprehension, and consequently to a loss of credibility, because jurors who cannot understand the lawyer or witnesses will not believe the lawyer or witnesses. Conversely, excess simplicity leads to boredom and a similar loss of credibility. Also, jurors are highly offended when an attorney patronizes them by oversimplifying the presentation. When trials contain complex or technical information, trial simulations not only enable counsel to learn what the jurors will and will not understand, but also what aspects of technical information the jurors consider most important.

You can also test the order of proof for maximum impact in trial simulations. In addition to establishing which witnesses and themes to present, the order of presentation has strong psychological importance. Psychologists assert that "primacy" and "recency" guide human thought processes, so that the first and last information received have particular impact. Although trial lawyers have always recognized the value of "burying" weak witnesses in the middle of their cases, you must be careful not to lose the most persuasive elements of your case by inadvertently burying them. Varying the order of presentation during pre-trial research allows you to determine in what order information will have the most effective impact on jurors.

Mock jurors can also test issues such as the effectiveness of demonstrative evidence and witness credibility. Exhibits which may appear perfectly clear to counsel often mystify jurors. Even worse, jurors sometimes misunderstand demonstrative evidence in ways that allow the jurors to draw inferences that favor the

opposition. You can present charts, graphs, models, and other exhibits in a trial simulation to determine how actual jurors will understand and utilize them.

Psychological research shows that witness credibility heavily influences jurors' evaluation of witness testimony. Since trial counsel can not always objectively assess their own witness' credibility, questioning key witnesses before mock jurors, either live or on videotape, helps you evaluate jurors' reactions, and allows you and your witnesses to further scrutinize taped testimony.

For those who do not wish to go to trial, trial simulations also help in developing a settlement posture. Evaluating the strength of your case before mock jurors enables you and your client to determine how to pursue settlement negotiations. Clients otherwise unwilling to settle may accept a favorable settlement after seeing that impartial mock jurors are not reacting favorably to their case. Conversely, clients wishing to settle on unfavorable terms can learn that mock jurors have a favorable view of their case, and thus can re-evaluate their settlement position.

In some cases, presenting the videotape of a strongly favorable mock jury verdict can be a powerful settlement tool when presented to the opposition. Yet this should only be done when the presentation of the case has been fair to the opposing side. It is not persuasive if opposing counsel believes his or her case was not adequately presented to the mock jury. Also beware that presenting such a tape to opposing counsel reveals your trial strategy and the fact that you are conducting this pretrial research.

Finally, trial simulations have strong rehearsal value for you and your witnesses. Performing before mock jurors is excellent preparation for the actual trial.

#### Cost

Trial simulations needn't be costly. In some ways the technique resembles market research, so some trial attorneys mis-

takenly hire market-research-type firms to conduct trial simulations. However, testing trial themes on mock jurors is not market research, and the approaches used for testing consumer satisfaction with a brand of potato chips or a lawn mower do not apply to the trial process. Trial counsel may find they have paid very large dollar amounts, sometimes in excess of \$100,000, and yet have not learned the basic information they need to prepare for trial.

A trial simulation examines what jurors think about the key issues of the case; it does not seek to duplicate the conditions that will occur at trial. Jurors conscientiously fulfill their civic duty. Their decisions are guided by the constraints of the rules of evidence and judicial instruction. Therefore you can conduct this type of research quite inexpensively by limiting the scope of testing to how specific case issues affect mock jurors.

Saving time and money means keeping the research simple. To obtain valid responses to the case issues from mock jurors does not necessitate mock courtrooms, actors to play the roles of judges and witnesses, or a Hollywood production. Smaller-scale simulations, where the key issues of a case are presented to mock jurors who simply play the roles of actual jurors, sufficiently provide you with valuable insights as to how the real trial jury will react. Trial simulations of this type can cost less than \$10,000.

#### Steps in Conducting a Trial Simulation

To conduct a trial simulation, recruit a jury comprised of members of the venue demographically similar to actual jurors, and simply ask them to pretend they are the jurors in a trial. Be careful not to recruit anyone actually serving on a jury. Be sure that the mock jurors validly represent the range of ages, occupations, education levels, and ethnic groups of the venue.

Don't use family, friends, or office staff as mock jurors. This will invalidate your

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jury research, as these individuals have response biases which will slant their opinions in favor of their trial counsel, despite their best intentions. While participants usually attend because of their interest in the research, pay them a reasonable fee to motivate them to attend. Notify them prior to the research that you will pay them.

Every jury has a slightly different demographic composition. Your aim is simply to have the mock jurors reflect the various types of people likely to appear on the real jury. So don't conduct a sociological study of juror demographics in the venue. Simply observe recent local jury panels, or check with other attorneys who have recently tried cases in that jurisdiction to obtain a reasonable match to the demographics of the typical panel.

***“...jurors often view the issues and themes of a case far differently than do lawyers...”***

Recruit mock jurors by placing want ads in local newspapers. Make the ads general; do not reveal that you are studying a lawsuit. Instead, include criteria such as age and residency requirements. When potential participants respond to the ad, screen them in detail for jury duty and knowledge of the litigation before recruiting them for the focus group session. Instead of soliciting jurors yourself, many lawyers hire recruiters to solicit participants for them.

Pay attention to the research site! Do not conduct the simulation in a law office conference room. While this setting may be convenient for counsel, jurors are easily influenced by their surroundings, and the results will be affected by the jurors' efforts to ascertain which law firm is staging the research. Conduct the simulation at a separate research facility. The ideal site includes a conference room with a

one-way mirror so that you and your jury researchers can observe the jury during their deliberations. When such facilities are not available, use a meeting room and use a videotape camera to feed the jury deliberations to an adjoining room for live observation on a television monitor.

Whether the simulation takes place at a research facility or hotel, videotape the session for later review. In addition to providing a record of the session, analyzing the tape enables you to ascertain what prompted the jurors' comments, and how the jury discussion impacted individual opinions. The tape can also be reviewed by counsel and clients who could not attend the session.

You may present the case to the mock jury in a number of ways. Live or videotaped presentations are most common. Although mock jurors generally find live presentations more interesting, videotaped presentations allow better control of length and content. In live presentations, if one side's presentation is ineffective, the jury discussion will be skewed against that side. Videotape also allows re-use of the taped presentation for subsequent research sessions.

Your presentation should be simple, and shouldn't exceed 30 minutes. Simply present the key themes of the case to the mock jurors. Presenting excess detail during the short duration of a trial simulation will only confuse the jurors. Post-trial interviews show that jurors tend to ignore and forget irrelevant details at trial, focusing instead on the key issues to reach their verdict.

Who plays the role of opposing counsel? Don't have senior lead counsel represent one side of the case while a junior associate represents the opposition. Jurors easily perceive an imbalance in power and experience. Be sure that counsel of equal abilities make the presentations.

After the case presentations and prior to jury discussions, have the jurors complete a questionnaire about the presenta-

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tions. This preserves the opinions of quieter jurors who may simply conform when they hear other jurors express an opinion in jury discussions. The written questionnaire should ask a few simple questions about who is right and wrong, instead of presenting a full-blown set of verdict questions.

A professional jury researcher should then lead jury discussions of the case issues. A skilled jury interviewer's questions will reveal which of the jurors' attitudes and experiences led to their opinions. The interviewer must therefore probe the jurors' responses without causing any changes in those responses. The interviewer can also conduct additional research by presenting to the jurors hypothetical scenarios based on the case.

If the budget permits recruiting more jurors and using a larger research facility, you can present the case to a large group of jurors, and then divide them into two or more separate juries. The jury researcher can lead one jury's discussion while the second deliberates freely. This allows a comparison of the two groups and an evaluation of what impact the discussion leader's presence had on the ultimate verdict. Additional groups also serve to validate the results of a single group and increase the reliability of the results obtained.

Conducting successive trial simulations which incorporate the information learned in each session into subsequent trial simulations is another valuable research technique. Ideally this follows a "Three E" approach: explore, experiment, and evaluate. In the exploration phase, you simply find out what mock ju-

rors think of the issues in a case. In the experimental phase, these issues are tested in various different presentations to find what approach is most persuasive. The evaluation phase tests and fine-tunes the final opening and trial strategy.

Successive groups also enable you to obtain background information useful for jury selection. Have mock jurors complete a background questionnaire seeking the demographic and personal information usually obtained in voir dire. After completing trial simulation, categorize jurors as unfavorable or favorable, according to the opinions they expressed in the trial simulation. Once sufficient data have been collected from several groups, use an analysis of background characteristics to devise a profile of favorable and unfavorable jurors.

Trial simulations can provide trial counsel with helpful information for preparing a persuasive case. Your efforts at developing and conducting the research parallels the preparation needed for presenting the case at the actual trial. Yet, the benefits go beyond a mere rehearsal of opening and closing statements. Utilizing trial simulation provides valuable information about how jurors will react to your case, and aids you in developing a winning trial strategy.

By Arthur H. Patterson, Ph.D.

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The National Institute for Trial Advocacy thanks the following NITA faculty members for contributing to program scholarships through this fund.

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On behalf of future scholarship recipients and everyone involved in NITA, we express our deepest appreciation and gratitude to these faculty members for their financial support of the Faculty Scholarship Fund.

### D. Calvin Sincock Memorial Scholarship Fund

The D. Calvin Sincock Memorial Scholarship Fund provides assistance for Chicago lawyers to attend NITA's Midwest Regional Program in Chicago. The National Institute for Trial Advocacy thanks the following for their contributions to this fund: Marshall Dickler Richard Glovka Edwin Thomas, Jr.