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ARE YOU MOCKING ME?

FUN WITH FOCUS GROUPS AND MOCK TRIAL MADNESS

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ALFA MOCK TRIAL AND FOCUS GROUP EXERCISES COURSEBOOK MATERIAL

Why Conduct a Mock Trial?¹

The emphasis in a trial is on advocacy and involves listening, questioning, thinking, and learning. Analysis and sound reasoning coupled with effective communication to a judge and jurors is paramount to success in a mock trial. The modern approach of conducting a mock trial provides attorneys with a great advantage of, among other things, assisting with case evaluation, trial preparation, and even sometimes to settle cases. In addition, it provides trial attorneys with critical information about how potential jurors view their case.

I. How Mock Trials Differ from Focus Groups:²

- Focus groups are usually conducted by psychology and marketing professionals that claim to possess sophisticated methodologies for identifying the most and least ideal jurors for a particular case.
 - Techniques in focus groups include requiring prospective jurors to use special keyboards to indicate positive and negative reactions to specific arguments presented by the trial attorney.
 - Focus groups are very costly because they include detailed psychological analysis and data collection.
 - The juror responses collected are used at the end of the focus group to determine the most and least effective responses.
- In contrast, mock trials tend to be less expensive than focus groups and are conducted more like a real trial.
 - They are an abbreviated form of an actual trial, including opening statements, testimony, presentation of documentary evidence, closing arguments, and jury deliberations.

II. Focus Groups:³

- A facilitator assembles the focus group and guides the discussion by posing questions relevant to the subject under consideration to the group.
- The facilitator should not participate in or lead the discussion, and should not provide information that might affect the group's ability to answer honestly.
- The facilitator may present the case facts and suggest the arguments/legal strategies of one side or the other to the focus group. Then, both the decision-making process and decisions made by the focus group are compiled and studied.
- Information derived from conducting focus groups may help counsel to:
 - "(1) predict juror reaction to certain arguments and strategies;
 - (2) identify confusing or false perceptions;
 - (3) evaluate the chance for success;
 - (4) suggest a range of compensation;
 - (5) improve the overall presentation by flagging the strongest and weakest issues;

¹ Mark B. Wilson, *Mock Trials One of the Most Powerful Tools for Case Evaluation and Trial Preparation*, KLEIN & WILSON, P.C., available at <https://www.kleinandwilson.com/publications/mock-trials-one-of-the-most-powerful-tools-for-case-evaluation-and-trial-preparation/>.

² *Id.*

³ § 15:13. Scientific jury selection—Focus groups, 2 Toxic Torts Litigation Guide § 15:13.

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- (6) pinpoint the most confusing substantive issues and help attorneys reevaluate the presentation of evidence on these issues prior to trial;
- (7) provide information useful for settlement purposes;
- (8) determine whether group bias against a manufacturer or product played a role in the decision-making process; and
- (9) assist in the selection of expert witnesses, particularly in determining whether potential jurors perceive local experts as more credible than out-of-state experts.”⁴

III. Mock Trials: Information Learned Through Mock Trials:⁵

- Mock trials provide an unbiased evaluation of the case.
- Mock trials help attorneys evaluate whether juries understand the case themes and accept the attorneys’ arguments.
- Mock trials help attorneys evaluate their cases and their witnesses.
- Mock trials can be used as a settlement tool.

IV. Mock Trial Evaluation Criteria: Effective Ways of Structuring/ Conducting Mock Trial:⁶

- **Opening Statement:** Introduce self and co-counsel; clearly present a credible case theory; summarize witness testimony; well-organized statement summarizing key facts; review applicable law; explain what jury was to decide; use legal terminology appropriately; good public speaking skills.
- **Closing Argument:** State decision you want from jury; accurately identify weaknesses in opposition’s case; effectively tie law with facts; highlight key facts from witness testimony during mock trial; good public speaking skills; and rebuttal makes effective use of final pleas and identifies weaknesses in oppositions case.
- **Direct Examination:** Effectively ask witnesses to provide all relevant background information; demonstrate effective rapport with witness; questions support theory of the case.
- **Cross Examination:** Ask questions that relate to direct or witness statements; suggest the answers; keep it short and simple, place witness’ credibility in question; support team strategy.
- **Tactics that will assist a trial attorney in conducting an exemplary mock trial include:**
 - Clearly, accurately, and specifically explain what you want the judge/jury to decide and why they should decide that way. Analogies should fit and enhance jury understanding.
 - Organization should include effective, creative introduction and conclusion.
 - Opening and Closing statements should have clear sequencing that logically weaves together all required content, effectively tells the story of the case, balances details, and has effective/creative conclusion.
 - Public Speaking/Delivery: Skillful delivery includes:
 - Eye contact
 - Enunciation and pronunciation
 - Fluent delivery

⁴ *Id.*

⁵ Wilson, *supra* Note 1 (emphasis added).

⁶ Classroom Law Project, *Classroom Mock Trial Evaluation & Rubric Resources*, CLASSROOM LAW PROJECT, available at <https://classroomlaw.org/wp-content/uploads/2019/03/Classroom-Mock-Trial-Evaluations-Rubrics.pdf>.

- Variations in rate, volume, tone, and voice appropriate to audience
- Using appropriate use of nonverbal techniques (i.e., facial expressions, gestures, body movements, and state presence)
- Exemplary Attorney Questioning of Witnesses includes:
 - Questions related to case theory: Purpose of questioning should be clear and effective. Questions should show relationship to and help assist advance theory of the case.
 - Attorneys should be responsive by listening and reacting effectively to witness responses.

V. Mock Trials: Useful Preparation for Taking Your Case to Court:⁷

- A well-run mock jury trial at a minimum should provide answers to the following inquiries:
 - (1) What are the most persuasive arguments, strategies, and evidence?
 - (2) What are the optimal juror characteristics and jury composition for your case?
 - In addition, an effective mock trial should reveal a range of monetary damages and the factors that escalate or reduce those damages.
- When conducting a mock trial, a representative participant pool is imperative to achieving valid and reliable results. Improper selection of “jurors” will result in a faulty participant pool and can lead a trial attorney in the wrong direction.
- Thus, a participant pool *must be representative of the venue* where the case is to be tried.
 - In doing so, jurors should be randomly selected after careful screening to remove people who would never serve or appear in a jury pool normally.
- Generally, mock trials are limited to 6 to 8 hours and the average “cost” for an individual juror for one day is approximately \$100-\$200.
- Careful consideration should be given when choosing your opposition and it is advisable either to select an attorney within the firm of at least equal ability and experience or to hire an effective trial attorney from an outside firm to represent your opposition in the mock trial.
 - You should try the “worst case” scenarios because you can learn as much from losing the mock trial as you can from winning it.
- Deliberation is the most important part of conducting a mock trial and must be videotaped to allow trial attorneys to effectively evaluate juror responses to issues in your case.
 - The more you can recreate the feeling of a real courtroom and experience the better, so many mock trial jury rooms are set up with hidden cameras and microphones.
 - In addition, deliberations can provide trial attorneys with common sense themes and arguments that may evolve into trial themes.

VI. Case Themes:⁸

- Jury research shows that: “(1) jurors deliberate in themes; (2) the case theme operates as the primary mental organizer that assists jurors in remembering the facts; (3) a quality case theme

⁷ Robert Garvey & Stephen Hnat, *Mock Trials: Useful Preparation for taking your Case to Court*, 81 OCT. MICH. B.J.40 (Oct. 2002).

⁸ Jordan B. Tinsley, *Case Themes*, Tinsley & Youngdahl, PLLC, (emphasis added) available at <https://higherlogicdownload.s3.amazonaws.com/ARKBAR/33b45bfd-0934-44c0-85af-7757094ae532/UploadedImages/MockTrial/Lecture%20Series/Case%20Themes.pptx>.

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enables jurors to look for evidence that “fits” the story and to disregard evidence that does not “fit;”⁹ and (4) case themes facilitate evidence comprehension and allows jurors to reach pre-deliberation verdict decisions.”

- Using focus groups or multiple focus groups is a great way to test your trial themes.
- They are a helpful way to compare how different themes will resonate with potential jurors.
 - In addition, focus groups provide ample opportunities to come up with the right theme for your case.
- ***What Makes a Good Theme?***
 - Brevity: Easy to explain, understand, and 30 seconds or less
 - Memorable: Think about movie taglines, advertising jingles, memorable lines from movies etc.
 - Consistent with facts/evidence and consistent with juror’s beliefs/common sense
 - Identify Shared Values: Creating a sense of shared values between the attorney and the jury.
 - Avoid “correspondence bias”
 - Don’t assume people perceive things the same way you do
 - Avoid legalese
 - Make the jury feel good and important, themes should motivate jurors to (1) care and (2) act. Make the jury identify with your client
- ***Employing Themes Effectively.***
 - Integrate the theme into every aspect of the trial attorney’s presentation, including during opening statements, direct examinations, cross examinations, and closing statements.
 - Example: For a negligence case with the theme being “prevention”:
 - Opening Statement: “Could the defendant have *prevented* the injury from occurring to my client.”
 - Direct: “What steps could they have taken to *prevent* this type of injury from paralyzing my client?”
 - Cross: “How many of these injuries could have been *prevented* if proper safety measures had been implemented.”
 - Closing: “We’ve been here for six days but not once has the defendant described a single step it has taken to *prevent* injuries from taking place, like the one that has condemned my client to a wheelchair for the rest of his life.”

VII. Testing Witness Credibility:¹⁰

- The mock jury should rate the witnesses on credibility, likability, truthfulness, knowledge, level of ease in understanding, evasiveness and demeanor.
- To maintain a balance, have at least one significant fact witness from each side be presented and have the mock jury answer questions about their reactions to the testimony.
- If you’re the sole or lead trial attorney, strongly consider playing your opponent to put yourself in a position to fully understand your opponent’s position.
- Attempt to impeach a few witnesses during the mock trial and ask the mock jury to comment specifically on the impeachment.

⁹ This is often referred to as “confirmation bias”.

¹⁰ David A. Schaefer, *Testing Your Evidence: Before and Even During Trial*, 42 A.B.A. J. LITIGATION 4 (2016), available at https://www.americanbar.org/content/dam/aba/publications/litigation_journal/summer2016/testing-your-evidence.pdf.