Mock jury trials

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In 1989, MCI Communications Corporation went to court in an antitrust suit against AT&T. The lawyers who represented MCI disclosed that as part of their preparation for the trial, they had argued their case before a mock jury. Of course, the lawyers for AT&T also tried out their arguments—on friends and colleagues. The net result—MCI won from a six-person jury a $1.5 billion suit, the largest in antitrust history.

The idea of refining one’s courtroom instincts with empirical data is hardly revolutionary. Ever since 1971, when a team of social scientists developed a probabilistic “recipe for a jury” in the Harrisburg-Seven conspiracy trial,¹ the employment of psychologists and public opinion pollsters as consultants for jury selection has become almost commonplace.² In this capacity, they utilize demographic and attitude surveys, in-court rating systems based on prospective jurors’ demeanor, and community information networks.

Although scientific jury selection enables the trial advocate to maximize his or her chances of obtaining a favorable jury, virtually all experts agree that the overwhelming majority of jury verdicts is decided by the direction and strength of the evidence and not by personal characteristics of the triers-of-fact.³ As such, performing mock jury trials in order to empirically evaluate and improve the presentation of one’s case could be the single most effective method of pretrial preparation. In this article, I will report on a specific experience I had doing pretrial mock jury research, and then develop some general principles and guidelines that would enable others to do the same.

In the MCI trial, the lawyers presented a brief synopsis of the case on three successive nights, each time to a different 8-person mock jury. Using evidence but no witnesses, they prepared the arguments for both sides and delivered it all within 90 minutes. Afterward, the jury deliberated over a verdict while the attorneys observed them through a one-way mirror. This procedure provided the lawyers with some useful tips. On the first night, for example, their jury decided in favor of MCI but awarded the company only $100 million in damages—a far cry from the $900 million they requested. Having eavesdropped on the group decision-making process, the lawyers were able to trace their disappointing award to two factors. First, they observed that the jury was uncomfortable with the idea that AT&T was bound by law to
to collect as much reliable information as possible and to do so as efficiently as possible.

Method and procedure

We began by recruiting, over the phone, a randomly selected sample of men and women from the Chicago area to serve as mock jurors. Specifically, 18 people were offered $100 apiece to participate in a full-day (Saturday) research project. They were not informed about the specific nature of the study or about who was sponsoring it. Upon their arrival at the courtroom, these 18 participants were assigned to three six-person groups.

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The mock trial was performed live in a federal courtroom by four of the plaintiff’s attorneys, two of whom represented the defense. An actual judge presided over the proceedings which, incidentally, were videotaped for possible future use. Overall, the presentation lasted for over five hours. It included a voir dire that was supervised by the bench (30 minutes), opening statements by both parties (45 minutes), the examination of nine witnesses (three hours), a lunch break, closing arguments (60 minutes), and instructions from the judge (15 minutes). The number of witnesses and the amount of trial time allotted to the two sides were approximately balanced. Three of the plaintiff’s top witnesses—a consumer, an expert auto mechanic, and an attorney specializing in trademark law—actually appeared live at the mock trial. The testimony of the remaining six witnesses consisted of their depositions as they were read aloud from the stand.

Immediately after the conclusion of this presentation, the three mock juries were escorted to their deliberation rooms. Their opinions, individually and as a group, were then assessed in four phases.

1. Each juror privately filled out a very brief questionnaire in which they were asked for a personal verdict preference (plaintiff or defendant) and a monetary award. This took less than two minutes to complete and was collected immediately.

2. The three groups were then instructed to elect a foreman, deliberate, and render a unanimous decision. In each room, a cassette audiotape recorder was placed on the center table and the groups’ discussions were recorded for subsequent listening and analysis. The deliberations lasted for 25, 35, and 40 minutes.

3. As soon as a group handed in a final decision, its members were asked to complete an extensive, eight-page questionnaire that turned out to provide the meat-and-potatoes of our data. The questionnaire opened with a description of 15 pivotal arguments and counterguments in the case. For each one, the participants indicated whether they agreed or disagreed with it and then rated the extent to which their opinions on the matter had influenced their verdict. All the ratings were made on 10-point scales (where 1 = not at all, and 10 = very much). Next, we had everyone rate (a) the overall effectiveness of each witness and his or her testimony, and (b) the persuasive appeal of each attorney and his arguments. Finally, participants were asked to write in their own words about any general impressions they had during the trial presentation that was not covered in the questionnaire.

4. When all the jurors had completed and handed in their final questionnaires, they were brought back to the courtroom for debriefing and informal posttrial interviews. Here, the lawyers questioned the jurors about the effectiveness of their style, about exhibits that were not presented, and so on.

Results and conclusions

Overall, 71% of our individual participants and, later, two of the three juries found in favor of the plaintiff, both with an award for damages of $500 per consumer. What elements of the case contributed to this result? It is toward answering this question that the mock trial yielded a wealth of valuable information. What follows is a sampling of the kinds of discoveries we made and the implications they had for how to structure and conceptualize the case for a jury.

In looking at the impact of the 15 critical arguments, we turned to two complementary sources of data—the individuals’ questionnaire responses and

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the group deliberation tapes. The questionnaire data were analyzed with two distinct questions in mind—(a) was an argument convincing, that is, did it elicit a high rate of agreement, and (b) was it important and influential, that is, did it significantly predict jurors' personal verdict preferences? Viewed in this twofold manner, we can see that an argument is truly effective and should be retained as if jurors agree with it and if it weighs heavily in their verdicts. At the other extreme, an argument is perfectly ineffective if it may as well be dropped if jurors disagree with it and it is unrelated to their verdicts. Intermediate in overall effectiveness are those arguments that are either convincing or important, but both arguments that fall in this latter category offer large potential gains and should probably be retained but presented differently in order to appear more valid (hence an increased agreement rate) or more relevant (hence a stronger correlation with verdict), depending on the nature of the problem.

Presenting the plaintiff's case

As it turned out, the questionnaire data revealed that the plaintiff's contention that GM had, in various ways, attempted to cover up the engine switch, proved to be extremely important. That is, those jurors who agreed with this position were overwhelmingly likely to vote for the plaintiff. The problem, however, is that only if it may as well be dropped if jurors disagree with it and it is unrelated to their verdicts. Intermediate in overall effectiveness are those arguments that are either convincing or important, but both arguments that fall in this latter category offer large potential gains and should probably be retained but presented differently in order to appear more valid (hence an increased agreement rate) or more relevant (hence a stronger correlation with verdict), depending on the nature of the problem.

Counteracting the defendant's case

In looking at the defendant's case, we found that the "common practice" argument was extremely effective, as it produced an 88% rate of agreement as well as a statistically significant correlation with juror verdicts. Consistent with this result was the additional fact that a marketing professor, the wit- ness through whom this line of defense was introduced, turned out to be the defendant's most impressive witness. Interestingly, the stronger argument that interchanging parts is an acceptable and even beneficial practice in the automobile industry did not go over well. Only 59% of our sample shared this opinion and it bore no relationship to their verdicts. The recommendation to the plaintiff: Make every attempt to counter the common practice argument, perhaps by emphasizing its unacceptability. There were other instances in which GM had persuaded the jury of its position on an issue that proved to be unrelated to their decisions. For example, 71% of our sample jurors agreed with the argument that the EPA gas mileage differences between the Oldsmobile and Chevrolet engines were trivial.

Those who were so persuaded, however, were no more likely to favor the defense in their awards than those who were not. The recommendation: Do not confront the issue. It was not worth the risk of drawing unnecessary attention to it and inflating its perceived importance.

Conducting mock trials: general principles and guidelines

Having illustrated how mock trial data were collected in one case, let us develop some general principles and guidelines for how to obtain valid and useful information from such endeavors.

The participants

First, consider the mock jurors themselves. Who are they, that is, demographically? Representativeness is essential. As such, the larger the sample of jurors is, the better. Certainly no fewer than three 6-person groups should be employed as a means of neutralizing the possible idiosyncrasies of any single collection of individuals. Next, the participants should be recruited from that population of ven- irepersons from which the real jury will ultimately be drawn. Accordingly, they should be selected from the same list and excused for the same reasons. The reason for this is perhaps obvious—the more closely the mock jury resembles the real jury in its background characteristics, the greater is your ability to generalize from the former to the latter.

The trial presentation

A second important consideration is the presentation itself. What precisely should sample jurors be exposed to? Mock trials may differ in (a) the amount of information they contain, and (b) the
medium by which that information is presented.

First, how much of the anticipated real trial should mock juries receive—the entire event in condensed form (and, if so, should it be summarized within one hour or two days?); only the arguments, only the testimony of a key witness, or what? To some extent, the amount of information that should be presented depends specifically on what the attorney hopes to achieve. In the AT&T case, the lawyers presented a 90-minute summary of the major arguments and counterarguments. The data they received and the inferences they could draw from them were thus limited accordingly. In the GM case, highlights from the entire trial, from voir dire through the judge’s instruction, were summarized within a period of five hours. As such, we were able to assess people’s reactions to the lawyers, the arguments, the evidence, the instructions, and so on.

Despite the differing goals with which attorneys might approach a MJT, there is a general rule-of-thumb that should always be considered: The more closely the conditions of a MJT approximate the characteristics of the real event, the greater is the generalizability from the former to the latter. This principle of external or ecological validity, considered basic in all areas of experimental psychology, translates into simple advice about staging mock trials.

The MJT should contain a relatively complete and balanced representation of material from both sides of the case, even when one is focusing on a highly specific question such as “should witness X be called to testify?” The danger of an incomplete, grossly oversimplified presentation is that estimates obtained for those portions of the trial that are presented will be inflated because they are overrepresented and hence salient and distorted (because they appear out of context). The balance requirement suggests further that you should anticipate the opponent’s counterarguments and give them equal time. Remember—the goal of a MJT is not to win but to test hypotheses about how your case will stand in the context of an entire trial.

A second, related issue concerns the medium by which the MJT is presented. Specifically, should mock juries view the trial live, on videotape, on audiotape, or in written-transcript form? Research has shown that people respond to live trials no differently than they do to their videotaped (color or black & white) counterparts. The latter medium apparently retains much of the relevant information that is extracted from the original live event. As such, the data obtained from videotaped presentations could be considered valid. If we stray any further in the choice of a presentation mode, however, difficulties in generalizability to the real trial may arise. Audiotaped presentations retain the factual information available in a live setting but eliminate nonverbal cues such as facial expression, posture, and bodily movements. A written transcript further eliminates paralinguistic cues that are associated with speaking such as pitch and intonation. Some people often rely on various nonverbal behaviors in their perceptions of demeanor and credibility, the absence of such information increases to an intolerable degree the contrast between these presentation modes and the live setting to which we hope to generalize. Indeed mock jury research has shown that the written and audiotaped media do elicit different reactions than even videotaped trials.

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So what is the best way to present a MJT? On the one hand, the live event, staged in a real courtroom, cannot be matched in its verisimilitude. When planning a one-shot study such as those described earlier, the live MJT is thus ideal. Compared to the videotape medium, however, the live trial is limited for those who want to test specific hypotheses through experimentation. Suppose you were interested in gauging the impact of an expert witness. Better yet, suppose you were interested in estimating which of two experts would be the more effective. You could stage a live MJT, present both witnesses, and then ask jurors to choose the one they think is better. This method of comparison is seriously deficient because it is based not on subjects’ actual decisions but on the verbal report of their opinions and their projection of how the case would look with only the preferred witness. This task is more hypothetical than real. Instead, the ideal strategy is to use expert A on one rendition of the trial, and expert B in the other. Could this be achieved within the live-trial format? You could stage the same trial twice, so that one mock jury observed expert A, the other B. Although this procedure approaches the goal, it requires almost twice as much work and still provides ambiguous data. The problem here is that despite conscious efforts to replicate the rest of the trial, the two versions will inevitably differ from each other in many ways. Professional stage actors are the first to admit that no two performances are identical. Consequently, if your two presentations elicit different responses, is that difference due to the variation in expert witnesses or to some other unique and perhaps subtle feature? In the context of the live-replication strategy, this question becomes unanswerable.

The alternative is simple. The basic idea is to present two stimuli that are identical except for the intrusion of a systematic variable such as the choice of a witness. To achieve this experimental ideal without a great loss of generalizability, videotape the MJT and include the testimony of both witnesses. Edit the videotape so that one jury observes expert A, the other B. Since the two presentations are otherwise identical, any verdict differences obtained may be attributed to the variation in witnesses.

This videotape technique has numerous advantages. The first is flexibility. Suppose both versions of the trial produce a negative outcome. You might then question whether your case would be stronger without the aid of an expert witness or, conversely, whether both are needed to support each other. Using the same videotape, show the trial again—once with the expert testimonies inserted and one with them deleted. Coupled with the original test, you can now compare the outcomes of four versions. Still other hypotheses could be tested through the editing procedure. For example, is the expert more effective if he or she appears early or late in the trial? Experimental answers could be obtained efficiently for questions about other witnesses, specific pieces of testimony, exhibits, opening statements, closing arguments, and so on—all without having to restage the original trial. There is a second dis-
tinct advantage of the videotape medium compared to the live MJT. I mentioned earlier that the larger the sample of mock jurors is, the greater is our confidence in the stability of the findings. With the videotaped mock trial, large numbers of groups could be tested in a relatively short space of time.

The data and their analysis

In order to obtain as much information from jurors as possible without sacrificing the realism of the MJT, four stages of data collection are recommended. First, pass out ballots and have all participants provide a pre-deliberation verdict (and an award, if applicable). This procedure will yield a distribution of individual jurors’ verdicts (e.g., the percentage of guilty votes, the average award uncontaminated by the group influence). The utility of these data are straightforward—the single best predictor of the jury verdict is the distribution of first-ballot votes prior to deliberation. At this point, jurors should not be questioned about their impressions in any further depth. The reason for such caution is that in order to simulate the proceedings of a real trial, subjects should not be unduly sensitized through questioning to specific issues. Implanting ideas in jurors’ minds at this point would surely bias the substance of their deliberation.

Second, collect the individual ballots and have participants retire to the deliberation room with their respective groups. Allow as much time as possible for the groups to achieve unanimity. Audiotapes of the deliberations will reveal what issues are discussed, the frequency, duration, and intensity with which they are discussed, turning points in the movement toward a consensus, and of course the final outcome. Clearly, any testimony, arguments, points of law, questions, and sources of confusion that consistently arise from one juror to another, should be carefully evaluated. It has been estimated that jurors spend nearly half of their deliberation time discussing personal experiences.11 Toward this end, the tape will reveal the kinds of unique experiences that jurors cite as relevant and applicable to the case and, hence, provide some clues to jury selection. In the GM case, for example, one juror, who was employed by an import company, argued persuasively that interchanging component parts was common practice in her industry and so probably others as well. With this compelling line of reasoning, she turned her jury around to a verdict in favor of the defendant. Needless to say, we became sensitive to this aspect of prospective jurors’ occupations during the actual voir dire.

Third, once a group has rendered a decision, its members should be interviewed extensively about whatever could have contributed to their individual and collective judgments. For purposes of efficiency and standardization, it is a good idea to conduct this inquiry through a thoughtfully prepared questionnaire modeled after the one used in the GM case.12 That is, participants could be asked about their opinions of the witnesses (e.g., their appearance, demeanor, and testimony), the attorneys (e.g., their appearance, style, and arguments), the applicable law, exhibits, and so on. And, as reported earlier, each of these factors could be analyzed with two fundamental questions in mind—(a) How did the jurors feel about the person, object, or idea, and (b) to what extent did these impressions influence jurors’ ultimate decisions.

Finally, with all the “objective” information collected, reveal to participants your identity and the purpose of the mock trial, and then enlist their aid.13 It is probably worth the time and effort to get your ex-jurors to talk openly and informally about the case. Probe about aspects of the trial that were not covered in the questionnaire, ask them to introspect about their own decision-making processes and speculate on how they might have reacted to alternative approaches (e.g., different witnesses, differently worded instructions from the judge). The information that is obtained in this open-ended session will provide a good check on the questionnaire and deliberation data and perhaps reveal important but previously obscured sources of influence.

Conclusion

Ever since the inception of the jury system nearly seven centuries ago, trial advocates have lamented about the apparent capriciousness and unpredictability of their verdicts. In order to help cope with such uncertainty, a number of lawyers have turned, in recent years, to the techniques of systematic jury selection. There is reason to believe, however, that juries do tend to perform in a legally prescribed manner, and that the single most important determinant of a jury verdict is not the particular collection of individuals who sit in the box, but the strength and presentation of the evidence. As such, the MJT, as described in the foregoing pages, provides the most efficient vehicle through which “systematic case presentation” could be achieved.

Footnotes

4. The real jury ultimately awarded that same amount.
5. The data permitted other, more specific recommendations about which witnesses to introduce and what evidence and exhibits to spend time on.
6. Perhaps even more interesting was our finding that a GM executive, whose deposition was obtained and used by the plaintiff, may actually have damaged the plaintiff’s case. That is, mock jurors who rated him highly were inclined to find for the defendant!