

Strategy, Planning Lead to Success

By R. Craig Smith and Theodore O. Prorise, Ph.D.

Before mock trials, there was the “shadow jury.” Nearly 30 years ago, defense lawyers in the IBM antitrust suit in New York brought in a “shadow jury,” mirroring the demographics of the venue and six identified personality types among the 12 actual jurors.

The IBM case was, at the time, one of, if not *the* largest antitrust suit ever to be tried in America. Shadow jurors sat in the gallery simply observing, but during the noon recess and at close of day they were carefully debriefed by attorneys and communication consultants in order to measure their reactions to the events of each trial day. This was done to identify weak and strong points, areas of confusion and questions that needed to be answered.

Input from the shadow jurors helped defense attorneys plug holes in their arguments and capitalize on missed opportunities by opposing counsel. At the end of a stunningly successful defense, attorneys for IBM interviewed actual jurors and found significantly similar reactions to those of shadow jurors and important information about the group dynamic of the decision making process.

Is jury research unique only to New York, Los Angeles and the mega-markets? Not anymore. In today’s legal arena, it’s not just the “big” cases that are getting the attention of Washington litigators, but a wide range of cases, from employment to intellectual property, complex business litigation to medical malpractice and product liability to land-use issues.

In litigation, taking any case to settlement or to trial involves professional judgments based on thorough and thoughtful evaluation of the advantages and costs of a particular strategy. Assessing available options that can help develop and inform case strategy and may ultimately result in a more favorable outcome can enhance such an evaluation.

Few things are as beneficial to success in the courtroom as a second chance to present a case theory to jurors. With recent developments in trial preparation practice, it is becoming more and more common to see lawyers testing their cases and theories in front of mock juries. This presents the opportunity to fine tune trial skills, arguments, case themes and witnesses in courtroom-like settings before people who are much more like the jurors who may eventually hear the case.

Barry Richard wrote recently in the *National Law Journal* that “properly used and understood, mock jury exercises can enable parties to make the right critical choices. Improperly used or understood, they can lead to disastrous results.” He also pointed out that “the increase [in mock trials] reflects a realization that mock juries offer the first meaningful source of data upon which to evaluate case themes, issues, and key witnesses and to calculate settlement value.”

Observing the dynamics of group decision making by mock juries is an enlightening process for even the most seasoned trial lawyers. Rarely do attorneys who have observed the process on live, closed-circuit

video maintain the same perspective with which they entered. No matter how long the lawyers have worked on the case or how well they think they know it, a mock jury may perceive case issues in entirely different ways than were anticipated, necessitating a review and revision of one’s strategy.

Cases with troublesome, tangled fact patterns or those with substantial exposure benefit most from mock jury research. But there are other, less costly and less time-consuming efforts that lawyers can benefit from, no matter how large or small the case or firm.

Use a Courtroom Setting

Once in trial, there are no “second takes.” But a realistic courtroom setting is second only to being in trial when it comes to honing advocacy skills and testing issues in a variety of formats. Persuasion involves much more than just disseminating information; it involves entertainment and the ability to “move” and lift an audience to take action. Persuasion works best when an audience is engaged, motivated to elaborate on facts and messages and compelled to become an advocate for a particular side. Credibility and juror involvement require a tight and compelling opening statement and closing argument delivered in a juror-friendly, familiar and logical way.

Increase Witness Comfort

Working with witnesses in a realistic setting gives them a better understanding of the process and the environment they will face in trial. The courtroom is an unnatural communication environment that can overwhelm a witness’s ability to speak confidently and credibly.

Part of the preparation process is making sure the witness can effectively articulate the information the jury needs to hear. The more comfortable and relaxed a witness is, the more he or she will be able to remain calm, confident, natural and in control. Witnesses who can communicate clearly and in a natural and credible manner create better-informed judges and juries and, in turn, better decisions and, ultimately, justice.

Develop the Case Story Early

One of the most important and measurable benefits of case preparation is an exercise in early strategy design developed with professionals skilled in the non-legal aspects of courtroom communication. A successful case must tell a story in a clear and compelling way that resonates with the audience. What matters is how jurors have interpreted and made sense of themes, evidence and observed behavior, and what they retain after the case has been presented.

All of the dots need to be connected in ways that are familiar and understandable to jurors. Miss a dot along the way and jurors often will adopt the opposing case story as a framework in which to evaluate the evidence or fill in the blanks with “facts” of their own invention. This leads them down unimagined paths to arrive at disappointing destinations, spurious conclusions and surprising judgments.

Communication Experts

An effective trial or settlement strategy draws on extensive jury research and the experience and feedback of non-lawyer, communication consultants. A case strategy session is a full day, preferably early in the discovery process, where lawyers can sit down with communication consultants and look at the case from the standpoint of developing a credible and compelling story.

We see lawyers who often have been working on their cases for months — even years — frequently push back from the conference table at the end of the day and declare, “I finally know what I will say in my opening statement to make sure that the jury is with me throughout trial.” After one intense case strategy session, an experienced trial lawyer, who had already invested several months in depositions and discovery, said, “So, *that’s* what this case is about!”

Perhaps one of the most inviting benefits of such an exercise is the value-to-cost ratio. In a single day, the process can distill complicated issues or mountains of information into a clear and compelling strategy to guide attorneys through discovery, point to opportunities or risks in depositions and focus on the issues and evidence jurors will need to reach the desired verdict — all for about the cost of deposing an out-of-town expert.

The world is changing, as are courtrooms and the expectations of judges and jurors. More and more litigators are realizing that, in trial law, a competitive advantage not taken is a card left on the table and the odds are getting better that opposing counsel may be using strategic tools to gain the upper hand. So, as lawyers and firms consider what benefits and resources are available to assist them in increasing the quality of their litigation practice, knowing how to access the resources, facilities and outside help necessary to gaining every possible advantage in trial is essential.

For young lawyers and associates who don’t have the benefit of years of trial practice, resources that will directly contribute to their understanding of courtroom procedures, rules and practices are benefits to look at firm-wide or in considering just a single case. Providing lawyers, at all levels of experience, with a feel for the courtroom and the case in a realistic setting may be one of the most valuable benefits the firm can offer. ■

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