

# **SHADOW JURIES, FOCUS GROUPS, AND OTHER METHODS FOR EVALUATING YOUR APPROACH**

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## **I. INTRODUCTION**

Anyone who has ever tried a lawsuit more than once, because of a mistrial or after an appeal, is readily familiar with how much better a case can be presented after a “practice run.” For some years now, focus groups and mock trials have provided a private screening of cases for litigation involving massive dollar amounts. Much benefit can be obtained, however, from using somewhat scaled down versions of these techniques to prepare for and evaluate medium size and smaller cases. This article will explore some of these techniques and develop some of the practical hints for case preparation, evaluation and experimentation using these tools. Focus groups, for purposes of this discussion, are intended to include relatively informal presentations made to a small group of people who are then asked to give immediate comments about their impressions of the facts presented. Mock trials are more extensive presentations in which there is a distinct plaintiff versus defendant presentation and a jury or juries are then asked to deliberate and actually decide the issues presented much as a real jury would. They can then be debriefed for comments and suggestions similar to those which might be elicited from a focus group, but only after they have actually made a bottom line decision.

## **II. WHAT IS TO BE GAINED BY THE USE OF FOCUS GROUPS OR MOCK TRIALS?**

### **A. An Opportunity to Experiment and Explore Alternatives**

Any of the decisions which the lawyer has traditionally been compelled to make by intuition can profit by empirical data developed during a focus group or mock trial. Perhaps there is an opportunity to settle with one defendant by a Mary Carter Agreement. However, if the jury learns of such a settlement, would it affect their decision? This specific alternative can be explored in a focus group or mock trial and the lawyer can find out just what a jury's reaction might be. Perhaps a complete settlement with one party is being contemplated, but this will lead to the "empty chair defense" by the remaining party at trial. Will the remaining defendant be able to shift all of the real blame to the party who has been sued but is no longer present? This alternative scenario can be submitted to a mock trial for testing. Perhaps the relative culpability of the plaintiff is somewhat apparent and the lawyer thinks that the most credible approach is to address the issue head-on and say that the plaintiff was probably 50% responsible for the accident - but not more than half. The lawyer may believe that this technique is more likely to bring about success than to attempt to minimize how much the plaintiff had been drinking or how fast the plaintiff had been driving, but would feel more comfortable after checking the reactions of a mock jury panel. The beauty of a mock trial or focus group is that many alternatives of presentation may be specifically explored before it is necessary to take a final position with a real jury.

### **B. A Vehicle for Planning, Preparation and Practice**

Even a junior high school play gets a dress rehearsal before the young thespians finally go before a real audience; yet jury trials involving enormous sums of money are sometimes presented without a similar level of practice. The focus group and mock trial both provide means for all the participants in your side of a case to participate in planning and practicing their role for the ultimate jury trial. Ideally, the complete trial team should participate in the focus group or mock trial

presentation. This should involve all of the lawyers, paralegals, secretaries, investigators and sometimes the parties and various key witnesses. The deadline of an approaching presentation helps everyone involved get their part of the task complete, whether it be preparation of exhibits, the court's charge or proposed lines of testimony and argument. Both the attorneys and the witnesses have the opportunity to look some of their fellow citizens in the eye and find out specifically how their testimony or presentation will be received.

### **C. An Improved Tool for Evaluation**

After working on a case for a year or two, it's easy for any lawyer to "get too close to a case" and become distracted by its detail. Losing sight of the big picture is especially easy to do after the attorneys have formed an emotional bond with a case. They may be "in love with it" or "hate it," but it's not unusual for the attorneys who are closest to the case to lose a considerable amount of objectivity about its true merits. Presenting the facts to a focus group or mock trial can have the salutary effect of causing everyone involved, lawyers, witnesses and clients, to see the case with fresh eyes and recognize its strengths and weaknesses for what they are. When the client has drawn a line in the sand and said that he will never consider a settlement under \$500,000, and the client then sees one focus group and two successive mock juries quickly reach a finding of no liability, it often causes even the most thick-headed client to reevaluate. On the other hand, sometimes the lawyer or the client will be intensely concerned about the difficulty of some particular matter only to find that after various mock trial presentations that the jurors who heard the case thought these problems not nearly so significant. In those circumstances a modest settlement offer, which may have been somewhat tempting before the experiment, may then be rejected with a greater comfort level.

## **III. WHAT CASES SHOULD THESE TECHNIQUES BE USED ON?**

### **A. Any Case Can Benefit**

It's hard to imagine a case which would not profit by being presented to a focus group or mock jury. Even the simplest case certainly has alternative possibilities of presentation which can be explored by either technique or perhaps both. A great deal of the benefit from such a presentation is achieved merely in getting the case ready. Most attorneys can benefit from preparation deadlines which are considerably in advance of those which would be imposed by a real trial and therefore the exercise of presentation itself can be useful. Even a world class athlete continues to practice, practice, practice for every contest, and lawyers certainly need to do the same. Expert witnesses who have testified before many, many juries sometimes find it difficult to continue to practice their presentations, and the requirement of presenting their case to a mock jury may be a means to force them to prepare.

### **B. Cases With Unusual Issues Profit the Most**

Although every case is different, the cases which trouble us the most probably involve issues or personalities which we have never seen "tested" before a real jury. Perhaps the theory of liability itself is somewhat novel e.g., "handguns are intrinsically dangerous and should be outlawed" and we simply have no real insight into how a jury will react to the basic proposition of a case. Perhaps

a child is suing his father for reckless driving, causing severe injury. Since cases like this were not legally possible in many jurisdictions until recently, virtually no one has any real knowledge about what a jury's reaction will be to this type of case. Will they feel that it is wrong for a child to sue a parent? Or, on the other hand, will they feel that a parent's duty of care not to injure their own child should be an even higher duty than to a stranger? Perhaps the plaintiffs who have been killed in an airplane crash are homosexuals and the case is being brought by their surviving parents. Will the jury reduce the value of the case and award less than one might otherwise expect? Or will they agree with the lawyer's argument that, although they may not approve of the decedent's lifestyle, the surviving parents should not be penalized for it.

#### **IV. WHERE DO YOU GET THE PEOPLE TO PARTICIPATE?**

##### **A. Focus Groups Can Include Friends, Family, Lawyers and Employees**

It is not necessarily essential to go outside your own circle of family, friends and the office to assemble an appropriate focus group. However, if you do recruit a few "outsiders" to be a part of the group, it may lend a greater air of objectivity to the comments which are given at the end of the presentation. If the focus group comes entirely from persons selected by an employment agency or a similar source, such as you would probably use for a mock trial, the quality of the feedback will undoubtedly be more objective, although not necessarily more insightful. The key purpose of a focus group is to help recognize all the many different aspects of a case and to fully consider the various opportunities for developing it. Sometimes the best ideas come from strangers and sometimes they come from those who are involved in the litigation process. One advantage of the focus group procedure is that it is quick and inexpensive and it may be useful to do more than one focus group, each with a different composition.

##### **B. Mock Trials Need Attention to Age, Race, Sex, Education and Occupation**

Obviously, you would like your mock jury to resemble as closely as possible the real jury which will ultimately hear the case. You will probably want to use the services of an employment agency to recruit the mock jury. It is a good idea to ask for 15 jurors if you want to make sure that you will have 12 show up who are suitable for the project. You should specify the type of people who are needed with respect to age, race, sex, education and occupation. Normally this will mean that you are recruiting about half at the "basic wage" quoted by the agency and the remainder at a higher wage in order to get a fair mix of educational and occupational backgrounds. A good approach is to present the entire mock trial presentation to the group as a whole and then split the jurors into two groups to allow them to deliberate separately. By using this technique you can be reasonably certain of achieving a proper mix for at least one of the groups. Assuming that you have reasonable information about the probable composition of the jury which would actually hear the case, you should be able to approximate that mix for at least a group of six which you have selected from the 12 or 15 people the employment agency sends you. Although the remaining group may less accurately reflect the true jury composition which would be found at the courthouse, it can nevertheless be very useful. The mock jury should be given a juror information questionnaire, similar to the one which they would fill out at the trial. This will enable you to record the key data about each juror and have it at hand when analyzing the results presented by each juror. One of the benefits of following up on the mock trial by individual juror questionnaires or phone calls is to

correlate the results obtained with respect to the background of a particular juror.

## **V. WHEN SHOULD THE PRESENTATION BE MADE?**

### **A. Focus Groups are Particularly Good for the Early Stages**

As soon as you know enough about the case to have some appreciation of the key facts involved and the various alternatives which the case may present, it may be useful to assemble a focus group. A focus group may provide valuable insights about where a case may be most profitably filed, what theories of liability are most likely to succeed and which defendants are most likely to be held liable. A focus group can also be useful after suit has been filed and a fair amount of discovery has been accomplished, to enable the attorney to more accurately determine the most appealing arguments to be made in a case or the most effective way to handle particular evidentiary difficulties. A focus group may be thought of as essentially a "brainstorming" exercise and this will be most useful early in the case where there are still a lot of options about further case development.

### **B. Mock Trials Are Best When Preparation is Advanced**

In a mock trial the goal is to get a fairly accurate reading of the evidence and the arguments which will actually be presented at trial. The more specific and concrete the evidence presented in the mock trial is, the more accurate the reading should be. It is important to have the real trial exhibits, the real trial arguments, and certainly the actual charge which will be submitted by the court in order to get a useful result from the mock jury. On the other hand, it is important to hold the mock trial far enough in advance of trial so that if the mock jury results are not favorable, then it will not be too late to amend pleadings, hire new experts, conduct additional discovery or take other steps in response to what has been learned. Certainly, the optimum timing will vary on a case-by-case basis, but usually not later than 90 days before trial is a good guideline.

## **VI. WHERE SHOULD YOU CONDUCT THE EXERCISE?**

### **A. Your Office Has Some Advantages and Disadvantages**

#### **1. CONVENIENCE, COST AND CONFIDENTIALITY ARE A PLUS**

If you invite the focus group or the mock jurors to your office to present the case, you certainly have the advantage of a location which is convenient to the lawyer and the rest of the trial team. All of the materials of the case are close at hand and easy to use. There is no additional cost associated with the premises and it should be easier to prevent eavesdroppers from seeing or hearing the presentation.

#### **2. A DRAWBACK IS THAT PEOPLE MAY POLITELY TELL YOU WHAT THEY THINK YOU WANT TO HEAR**

Probably the principal disadvantage involved in holding a focus group or mock trial presentation in your own office is that it tends to cause the participants to want to please you and tell you what you want to hear. Clearly, the most important part of the exercise is for the participants to be extremely candid with you. In a mock trial it is certainly a good idea not to let the participants know whether the plaintiff or the defendant is putting on the presentation, and it may be easier to accomplish this when the mock trial is held at a neutral site.

## **B. A Neutral Private Place Has Advantages**

### **1. THE LAWYER AVOIDS THE DISTRACTIONS OF THE OFFICE ENVIRONMENT**

One of the benefits of holding the focus group or particularly the mock trial presentation at a location such as a law school classroom, a lecture hall auditorium or a hotel conference room is that the lawyer and the trial team are better able to exclude all of the distractions of everyday practice and concentrate on the case as they would at trial. For mock trials particularly, it gives everyone some practice in the logistics of transporting the case to the courthouse, and this can be a valuable part of the "dress rehearsal" effect. Particularly where the volume of trial materials is substantial or the exhibits are unwieldy, it is helpful to practice handling these logistical matters in advance of trial.

### **2. COST, CONVENIENCE AND CONFIDENTIALITY MAY BE A DRAW-BACK**

There will usually be some cost associated with a location outside the office. This normally requires not only a place to put on the mock trial demonstration, but a separate room or set of rooms to house the mock jury during their deliberations. It is a great advantage to be able to videotape the deliberations of the mock jury, ideally without them being unduly aware of the videotape equipment, and accomplishing this outside the lawyer's office may be a bit more difficult. Whenever an outside location is chosen, special attention must be given to the environment so that the nature of the proceedings will not be inappropriately "leaked."

## **VII. WHAT MATERIAL SHOULD BE PRESENTED?**

### **A. Focus Groups Are Short and Informal**

#### **1. USUALLY THE PRESENTATION WILL BE A SHORT NARRATIVE BY ONE PERSON**

The acronym GIGO, "Garbage In-Garbage Out" is certainly a good thing to keep in mind with respect to both focus groups and mock trials. Clearly, the more accurate and informative the information which is presented to these groups, the more useful the feedback will be. Although usually the presentation made to focus groups will be relatively brief and by one person, it is essential that both the strengths and the weaknesses of the case be presented if the exercise is to be really beneficial. All too often lawyers spend a great deal of time thinking about the strengths of their cases and how they may be best presented, without giving adequate thought to the weaknesses

and how the other side will exploit them. Indeed, one of the real benefits of the focus group or mock trial exercise is that it forces one to think about the other side's strategy. Another benefit to the exercise is that it compels the lawyer to compress facts which are sometimes quite complex into a relatively short period of time. This is excellent practice for boiling down the essential facts of the case to their essence, which is good trial preparation, as well as focus group/mock trial technique.

## 2. GRAPHICS ARE HELPFUL FOR RAPID COMMUNICATION

Although usually one will not have final trial exhibits prepared at the focus group stage, it is often very useful to use charts, photographs or other graphics in order to enable the group to grasp the essentials of the case rapidly and accurately. If the person who will ultimately design the graphic aids for trial is enlisted at this stage, it will allow experimentation with respect to suitable trial graphics at the onset which can be extremely beneficial. In an age in which people are accustomed to learning from graphic presentations at school and on television, it is probably wise to spend as much time and effort working on the graphic "witnesses" for a case as is spent in preparing the expert witnesses who will testify.

### **B. Mock Trials Are More Detailed and Comprehensive**

#### 1. A BALANCED AND ACCURATE PRESENTATION IS ESSENTIAL

The two hardest things about putting on a good mock trial are (1) compressing the facts of the case to their essentials for a brief presentation and (2) presenting the other side's case with sufficient insight and intensity to test the strength of their position. Cutting an expert witness' testimony down to ten minutes for the purposes of an effective mock trial presentation causes both the lawyer and the expert to do a great deal of focusing on the issues which are most crucial to the presentation. With care and with practice the truly essential outcome-determinative aspects of the testimony are presented to the mock jury and tested. Obviously, if the mock trial is to be limited to two to three hours, only a relatively small number of witnesses can be presented. The witness selection in and of itself will cause some thinking with regards to what testimony is likely to be pivotal in the real trial.

Probably the best means of ensuring that the opposing side is adequately presented is to have the lawyer who is the most familiar with the case play the opposite counsel's role at the mock trial. It is a real challenge to defend a case which you have been planning to prosecute for months or even years, but in many ways this is one of the most beneficial aspects of the exercise. To be forced to stand up before a group of people and argue exactly the opposite of which you have been planning to advocate can cause identification of case weaknesses which have been otherwise overlooked.

#### 2. PREPARE AN ACTUAL COURT CHARGE FOR THE MOCK TRIAL

It is absolutely essential that the actual charge which will be used at the trial of the case be prepared by the time the mock trial is presented. If the charge is very lengthy, then it may be necessary to abbreviate it for mock trial purposes, but only after the real one has been prepared. It is often helpful to give each juror a copy of the charge at the beginning of the case so they can read it and orient themselves to the questions which they will be asked to answer at the deliberation stage. Videotapes of the deliberation will provide useful information to the lawyer about how desperately

jurors struggle with the language of the court's charge and how they deal with legal terms such as "proximate cause" which may determine the outcome of the case. Watching the deliberative process often helps the lawyer formulate comments for opening statement or summation which will help the jury understand the issues which they must decide.

### 3. USE REAL TRIAL EXHIBITS

It is just as important during the mock trial to test the effectiveness of trial exhibits as it is to test the effectiveness of various arguments and witnesses. Does the mock jury readily grasp what the exhibits are designed to communicate? During the jury deliberations do some jurors actually use the exhibits to persuade others to their point of view? One of the benefits of a mock trial is that after the deliberations are completed and the jury is being questioned by the attorneys, they often give suggestions for improvement of the presentation of the case. Many times these suggestions are excellent and the exhibits can be changed to reflect them.

### 4. CONSIDER LIVE TESTIMONY BY THE PLAINTIFF

If the real plaintiff is questioned and cross-examined before the mock jury, it will provide excellent insight into how well the testimony will be received. It will also demonstrate the effectiveness of that particular person in a public courtroom and how he will withstand the rigors of cross-examination. If further preparation and practice for cross-examination are necessary, that need will be painfully underscored by the mock trial experience. If the mock jury finds the testimony of the plaintiff truly compelling, the strength of that aspect of the case can be accurately factored into the prediction of its trial outcome. An alternative to live testimony by the plaintiff could be excerpts from a videotape deposition or a videotape interview specially prepared for this purpose. This might be particularly beneficial where multiple presentations of the same set of facts are desired before various mock juries.

### 5. USE VIDEOTAPE EXCERPTS FROM DEPOSITIONS

Accurate testimony forcefully presenting the opposite party's point of view is one of the most difficult problems of mock trial presentation. If the depositions of the adverse parties have been videotaped, then excerpts from these depositions stating their point of view are probably the best technique available for conveying to the mock jury the essence of the other side's position. If they have not been videotaped, then it is important to recruit someone to play the role of that party and give appropriate testimony in as convincing a manner as possible. In this case it will be necessary to provide them a "script" or checklist of facts so that they will testify correctly.

### 6. USE A SHORT "VOIR DIRE" AND/OR OPENING STATEMENT

In beginning the mock trial, it is often helpful to do a short "voir dire" even though there is no plan to strike any of the panel members. It is a good opportunity to test some of the actual questions which one would plan to use with the real jury panel. It provides the lawyers with good practice in getting ready for this portion of the trial and helps to give the proceedings an authentic "feel." An

opening statement can also be used to give the mock jury the appropriate factual context for the relatively limited testimony which they will hear. Often it is necessary to allow each side more latitude in opening statements than would normally be allowed in an actual trial in order for enough information to be presented in a very short period of time.

7. ALLOW BOTH SIDES TO USE A SHORT SUMMATION

Before the mock jury retires to deliberate they should be guided by a short summation or jury argument by both sides. This is a good opportunity to test the lines of actual argument which would be used at trial and it will be important for the lawyers to integrate the witness testimony, trial exhibits and the court's charge, so that the jury will understand what they need to do when they retire to discuss and vote on the case.

**C. The Entire Presentation Can Be Made By Videotape**

When it is desired to present the same case to multiple mock juries in order to zero in as accurately as possible on the probable outcome, it may be useful to videotape the entire presentation. Once the mock trial is "in the can," then it is possible for someone on the lawyer's staff or even an independent contractor to recruit multiple mock juries to watch the videotape and record their reactions. If it is desirable to explore specific trial alternatives, these can be incorporated into various versions of the videotape to test the different reactions.

**VIII. WHAT IS THE BEST WAY TO GET QUALITY FEEDBACK?**

**A. Focus Groups Can Provide Spontaneous Group Reaction**

At least half the value of the focus group/mock trial experience is in the planning, preparation and presentation itself. The other half of the value comes from the quality of the feedback. A typical means of obtaining feedback from a focus group is simply to present the material to the group and then request their reactions and observations as a group at the end of the presentation. It is also possible to issue individual questionnaires to each person or discuss the case with each of them individually. Sometimes it will be desirable to use a combination of these techniques in order to make sure that the true reactions of each member are being accurately obtained. Politicians and corporations sometimes use a high-tech version of this process in which the focus group participants are actually "wired" so that their skin responses can be electronically measured while they are listening to the presentations; however, it is doubtful that such an elaborate approach is really necessary to gather the data in most cases.

**B. Mock Juries Should Deliberate and Then Be Debriefed**

1. STUDY THE DELIBERATION  
PROCESS ITSELF

A standard technique for profiting from the mock jury evaluation is to observe the jury

deliberation process through a one-way mirror or record the deliberations on videotape for later study. In some instances it will be useful to do both. It is interesting to observe that in situations where it has been impractical to conceal the videotape apparatus during jury deliberations, the obvious presence of the video camera and recorder (which was turned on before the jury came into the room) seemed to have almost no impact upon the deliberative process.

2. AFTER THEY HAVE RETURNED THEIR VERDICT, A GROUP DEBRIEFING IS USEFUL

After the mock jury has had sufficient time to deliberate and reach a verdict, it is useful to assemble them and to hear their comments as a group. This will be much like the commentary which is delivered by a focus group and may well be the most valuable part of the feedback. The facts are fresh on their minds and they are often eager to "speak their peace" after having listened to the case for several hours. Even when the jurors are not told that their deliberations are being monitored, they will want to report the result of their verdict and their reasoning process. It is interesting to note the discrepancies between the reasons which they give for their answers and those which the attorney has heard them give each other as they engaged in the deliberation itself.

3. QUESTIONNAIRES ALLOW INDIVIDUAL RESPONSES

The value of giving each mock juror a questionnaire to fill out individually is that they may tell you things privately on paper which they are hesitant to voice more openly. These can be either filled out on the spot or given to each juror to take home and return by mail. When using the latter method it is wise to give them a self-addressed, stamped envelope for this purpose.

4. TELEPHONE FOLLOW-UP ALLOWS DEEPER PROBING

A final step in this progress can involve a follow-up telephone call either by the lawyer or some other member of the trial team in order to probe a little deeper. This should be conducted within a couple of days of the mock trial proceeding. By this time they will have had an opportunity to think things over a bit. A good indication of the strengths and weaknesses of the case can be determined by which parts of the presentation they remember vividly and which parts they have forgotten. Also, because of the privacy of this approach, the mock jurors may give feedback which they have been unwilling to voice in any other way.

## **IX. SHOULD THE EXERCISE BE REPEATED?**

### **A. It Allows an Improved Presentation**

The lawyers invariably think of things which they could do after a mock trial to make the presentation better. Presenting a second mock trial allows those improvements to be incorporated into the case. Additionally, the mock jurors often have suggestions for improvement which are not only very good, but which no one on the trial team ever even thought of. In order to integrate these

various improvements into the case, a second or additional mock trial presentation can be extremely valuable.

### **B. It Allows a Refinement of Evaluation**

Certainly, the changes which are made from the first mock trial presentation can profit by a new jury evaluation. But even if there are not any significant changes, an additional presentation to a new mock jury allows a greater opportunity to confirm the original assessment. It may be particularly useful to repeat the presentation where the mock jury has returned an evaluation which was much different than expected. If the client expected a mock jury to return with a damage finding of \$500,000, and instead they return with a \$75,000 damage award, it naturally leaves everyone blinking their eyes and wondering if the low finding is an aberration. If the next two mock juries bring in awards of \$50,000 and \$100,000 respectively, then the participants will begin to think that they need to reevaluate the case or make a significant change in the way it is presented.

## **X. WHAT IS THE BEST USE OF THE EVALUATION?**

### **A. It Can Sharpen the Client's Understanding**

Before the mock trial begins, it is important to condition the client to understand that the mock jury's evaluation may not be accurate. The client should be warned that the mock jury may come back with an award which is unrealistically high or unrealistically low. Also, the client should be told that we are more interested in the reasons the mock jury gives for reaching the amount which it determined rather than the magnitude of the amount itself. Certainly, a very low finding can be unduly discouraging to the client and a very high finding can inflate expectations beyond that which the lawyer will probably be able to deliver. Nevertheless, with proper preparation before the determination is received, the findings of the mock jury and the entire mock trial experience itself should materially sharpen the client's understanding of the process by which his claim will be evaluated, both by the lawyers and the parties on the other side of the case and eventually a real judge and jury. Because the client achieves a better understanding of the entire process, he may often become a better witness in his own behalf and be better able to contribute information which will be useful to the overall case.

### **B. It Sharpens the Lawyer's Focus**

One of the hallmarks of a great trial lawyer is the ability to zero in on the truly pivotal issues of a case and concentrate as much firepower on those issues as possible. The mock trial exercise can determine if the focus is truly on target while there is still time to make changes. Very frequently mock jurors will say that they think the lawyers "on both sides" spent too much time in trying to persuade them about things which were really obvious and needed little elaboration, yet presented very little information or argument on issues which were important. The insight gained from this kind of feedback can be worth its weight in gold.

### **C. It Can Be Used to Persuade the Other Side**

If you like the results of a series of mock trials, it may be very useful to discuss them in the

settlement process. If the other side offers you \$300,000 to settle the case and you can reply that you have tried the case to three different mock juries and not one of them came in with less than \$750,000, it may give your rejection of the "lowball" offer greater conviction. If the written comments of the mock jurors are particularly persuasive, you may wish to include copies of those materials in your settlement package. If the deliberations of the mock jury have been videotaped, it may be useful to provide excerpts from those deliberations to demonstrate to the other side how ordinary people are tending to respond to the fact situation at issue. Obviously, your opponent is going to seriously question whether or not there was an adequate presentation of the opposite side during the mock trial and whether or not the presentation to the mock jury was even remotely objective. Nevertheless, a candid discussion of the results can sometimes be persuasive.

## **XI. ARE THERE ANY HAZARDS TO THE PROCESS?**

### **A. Accidental Discovery by the Other Side**

Particularly in smaller communities, there is the possibility that your opponent in a lawsuit may accidentally learn about some aspect of the focus group or mock trial process. To prevent this, reasonable precautions should be taken to hold the exercise in a private place where no one is likely to overhear the proceedings. The mock trial participants should be asked to keep the matter confidential and it may be wise to ask them to confirm that promise in writing. Nevertheless, it is certainly possible that the information may "leak" to the other side. The possibility that your opponent might learn that you are working on the case very hard and testing the impact of various arguments and theories probably will not be of great concern. However, the possibility that your opponent might learn the specific content of the alternative arguments and theories is something else and needs to be kept in mind when conducting these exercises.

### **B. Formal Discovery in Cross-examination**

The only Texas case dealing with the discoverability of this kind of activity appears to be *Southern Pacific Transportation Co. v. Banales*, 773 S.W.2d 693 (Tex. App.—Corpus Christi 1989, no writ). A workman was suing the railroad for a hearing loss injury. The railroad hired a physician to assist in conducting a hearing conservation program. As a part of his preparation to testify by videotape deposition, the railroad staged a practice deposition. During the course of the physician's actual deposition, the plaintiff's attorneys learned that the practice deposition had taken place and requested that the videotape be produced. The railroad objected to the request for production on the basis that it was privileged work product and privileged as a witness statement under Tex. R. Civ. P. 166b(3)(a) and (c). In defense of its position that the practice deposition was work product, the railroad presented the affidavit of its attorney and portions of the physician's deposition. It tendered the videotape to the trial court for review *in camera*. The court did not review the tape but ordered the railroad to produce it for discovery. The railroad's attorney asserted that the videotape contained the mental impressions of the railroad attorneys, thus making a prima facie showing that the videotape was privileged under the work product doctrine. The Court of Appeals held that the trial court abused its discretion in failing to review the videotape *in camera* and in ordering its production. It reviewed the history of the work product doctrine and reminded us that:

An attorney's legal strategy, the intended lines of proof, evaluation of the strengths and weaknesses

of a case and the inferences drawn from interviews with witnesses have all been considered opinion work product. *Sporck v. Peil*, 759 F.2d 312, 316 (3rd Cir. 1985). This type of information is accorded absolute protection because our adversarial system has a serious interest in maintaining the privacy of an attorney's thought processes.

Nevertheless, the Court went on to say that the trial judge should withdraw his order to produce the videotape until after he had inspected it to determine "whether it contained information tending to mold the witness' testimony, which would not be worthy of protection."

Similarly, one can imagine questions of a witness during trial about whether or not various "practice sessions" had been conducted before testimony was given in this particular case. Although the practice sessions which are held in a mock trial are not really different in kind than the traditional preparation which witnesses have undergone in the lawyer's office before trial ("woodshedding"), nevertheless, it might seem quite different to a jury. Accordingly, it may be appropriate to file a Motion in Limine covering any discussion during the trial of practice sessions or mock trials. Certainly, Rule 403 provides an adequate basis for such exclusion since the discussion of such matters would undoubtedly tend to confuse the issues at the real trial and lengthen it unnecessarily.

### **C. Overestimating the Reliability of the Results Obtained**

Sometimes the mock trial proceeding goes very smoothly and the lawyers may feel that the mock jury has seen a fairly accurate, although condensed, presentation of what will be presented to a real jury. Both sides of a case have been thoroughly marshaled and forcefully presented and the issues seem to be squarely presented for determination. Some mock juries seem to get really caught up in the trial process and conduct their deliberations with enormous intensity. When this happens it is very easy for everyone involved to pay too much attention to the result, whether positive or negative, instead of the reasoning behind the results. This can be truly misleading, particularly when the mock trial is conducted only once. Even where the presentation has been made three or four times and the mock jury results are fairly consistent, it is important not to lose sight of the fact that the real trial process and a real jury may arrive at a significantly different result.

## **XII. EJURY**

The internet has provided increasing capability for obtaining almost immediate feedback on your case much like traditional mock trials or focus groups. [www.ejury.com](http://www.ejury.com) is a website constructed and run by trial lawyers as a way for trial lawyers to conduct quick, efficient, and relatively inexpensive focus groups on their cases. Ejury is similar to mock trials or focus groups except that the jurors participate via internet. This allows for rapid response from large groups (usually up to 50) of people. The ejury system begins with the attorney preparing a case submission form which contains the facts of the case from both perspectives along with the actual jury questions and any other questions designed to obtain specific feedback on the case. Ejury then converts the case submission form into a website format and places it in a secure location. Ejurers

from the specific county the trial lawyers are interested in are alerted that a new case has been posted and they begin to view the facts and answer the questions almost immediately. Once the minimum number of responses has been rendered (usually 50), the case concludes and the results are tabulated, printed and bound.

The ejury system provides for rapid response from a large number of individuals from a particular county. Ejury.com maintains a database of participating ejurors in many counties around the country and in Texas. They specifically have databases in Dallas, Tarrant, Harris, Bexar, Travis, and El Paso Counties in Texas. Ejury is also relatively inexpensive. The drawback to ejury, of course, is the inability to actually interact with the ejurors to follow up on ideas, thoughts, or questions. Some trial consultants are increasingly using the internet to conduct live internet focus groups and mock trials, which allow for a larger volume of participants and cut down on costs.

### **XIII. SHADOW JURIES**

A shadow jury is a group of individuals retained to observe an ongoing trial and provide immediate feedback on a daily basis. Most shadow juries are run by trial consultants but a sufficiently trained and staffed trial team can also conduct its own shadow jury. Shadow jurors are usually retained by a trial consultant and not told who has retained them. They are asked to sit in the courtroom and observe the entirety of the trial. The trial consultant then debriefs and questions the shadow jurors at various intervals during the day and conducts lengthy interviews every evening after trial. This allows the trial consultant to provide immediate feedback to trial counsel regarding pertinent issues in the case, which can provide the trial attorney valuable insight helpful in modifying the approach, conducting examinations, presenting additional evidence, etc. The dangers of shadow jurors are that it is impossible to duplicate the actual bias of the jurors in the case. Therefore, shadow jurors cannot always be representative of the actual jurors in the case and can provide misleading information to the trial team. Some trial consultants have become disenchanted with these shadow juries for this reason.

### **XIV. CONCLUSION**

Focus groups and mock trials provide an excellent means of preparing and evaluating virtually any case. They advance the deadline for case organization and development which is in and of itself helpful. They offer an opportunity for a safe and inexpensive exploration of alternative trial strategies. They present an additional opportunity for practice by both the trial attorney and other members of the trial team. They can help educate the client in both the nature of the adversarial process and its limitations and its possibilities. The focus group/mock trial exercise provides one of the most useful and cost effective means of preparing and evaluating any litigation matter which the attorney may handle.