



THE MODERN JURY



WIN YOUR CASE BEFORE THE TRIAL

Mock Jurors Mirror Actual Jurors in High-Profile Case

BY ALEXANDRA C. FIGARI AND ROBERT B. HIRSCHHORN

Imagine your next trial. Wouldn't it be great if before the trial even began, you knew exactly how the jury was going to react to the evidence presented in the case? Think how powerful it would be if you had unabashed insight into the jury's interpretation of not only the evidence, but also the credibility of witnesses, the traction of case themes, and the effectiveness of delivery. Welcome to the world of mock trials.

Lawyers often spend an exorbitant amount of time and energy preparing for trial, but each case always comes down to the same thing — the jury. No preparation could be more helpful, more powerful, or more profound than the opportunity to enter trial with foresight concerning how the jury will react to and understand your case.

An attorney who recognized the unparalleled value of obtaining an early glimpse into the minds of jurors recently hired the authors to conduct a mock trial for a case that was on its way to trial. The client was a high-profile doctor who was being accused of domestic abuse by his wife. Counsel's decision to test out the defense with a mock trial proved to be a good one, and the mock jury not only provided accurate insight into jurors' interpretation of the case, but it also gleaned information that was fundamental in driving the direction of the case for trial.

Four main themes emerged during the mock trial deliberations, and it would be those same four themes that would again reemerge weeks later when the actual jurors were interviewed by the media after returning a "not guilty" verdict. When quotes from the actual jurors were considered with quotes from the mock jurors, the similarities and overlap were profound and unmistakable. Upon closer comparison of the trial jurors' quotes in the media, it became clear that the mock trial deliberations accurately reflected the deliberations that took place in the jury room at the Harris County courthouse.

One of the greatest benefits of conducting a mock trial is the abundance of genuine feedback ascertained from the mock jurors, which is typically extracted through written evaluation forms, deliberations, and post-verdict debriefing. Although the mock jurors identified a number of important issues in the case, each deliberation group seemed to touch on the same four themes. That all of the deliberation groups keyed in on the

same four themes was very revealing in itself, but it was also deemed significant for another reason. The discussions that emerged between the mock jurors allowed the trial team to pinpoint both the strengths and weakness of their case, as well as distinguish the evidence and themes that gained the most traction. As a result of the knowledge acquired through the mock trial, the approach to the case was modified, and the case was tried based on the recommendations gleaned from the research.

It is one thing for a lawyer to learn from a mock trial, but it is another thing for a lawyer to take that knowledge and modify or transform his or her approach to trial accordingly. During trial, the defense team drew on the four central ideas that had surfaced during the mock trial deliberations, and at the end of trial, the commentary from the actual jurors served as proof that the themes were powerful motivators in driving them to their verdict.

The first theme to emerge during the mock trial was the idea that the injuries from the alleged domestic abuse were exaggerated. This theme was originally brought to light through comments made by the mock jurors such as, "I think the prosecution is exaggerating the physical contact between [the husband and wife]"¹ and "if he wanted to hurt her, he probably could have."² A number of weeks later, the case went to trial and the *Houston Chronicle* published several quotes from the actual jurors. The article stated that "Most of the jury thought that [the wife] exaggerated the injury," said [one] juror [...]" and that "[the husband] probably could have hurt her if he had wanted to. There was some pulling and tugging going on."³ This quote is almost word-for-word what the mock jurors expressed during their deliberations, illustrating how useful jury research can be when it is done properly.

The second theme to emerge was the role of intent in regard to the alleged abuse. In two separate deliberation groups, mock

jurors remarked that “[the husband] did not knowingly and intentionally twist [the wife’s] arm to cause bodily harm”⁴ and “I don’t believe that [the husband] intentionally committed the act with the intent to harm [the wife].”⁵ Making almost an identical statement, the foreman for the real jury was quoted after trial as saying, “To call him guilty, we would have had to say that he intended to catch her at the door and he intended to twist her arm, and we just weren’t there.”⁶ Furthermore, other news sources reported that the jurors identified the doctor’s intent as the most important issue⁷ and said “they just didn’t believe [the doctor] intended to hurt his wife.”⁸

The distinct mirroring between the mock trial and the actual trial does not stop with the second theme. The third theme refers to emphasizing both the concept of reasonable doubt and the importance it plays in reaching a verdict. One mock juror succinctly summarized this theme when she said, “The issue is not whether he did it or not. The issue is whether the State

prosecutors tried to paint [the doctor] as a violent, abusive husband, while [the] defense attorney [...] tried to bring [the complainant]’s character into question.”¹¹ This theme gained quite a bit of traction with the trial jurors as evidenced through post-verdict comments, such as “We didn’t believe [the complainant], necessarily,”¹² “[S]he lost credibility,”¹³ and “We felt like she tried to portray herself as somebody she wasn’t in the beginning.”¹⁴ Once again, these comments closely mimicked the sentiment expressed weeks earlier by the mock jurors who stated that “[the complainant] wasn’t as believable as [the doctor],”¹⁵ “she wasn’t trustworthy,”¹⁶ “there were inconsistencies in her testimony,”¹⁷ and “it seems like [the wife] blames everyone else.”¹⁸

In addition to identifying helpful and damaging evidence, testimony, and themes for your case, there are other benefits of conducting a focus group (lawyer presentations only) or a mock trial (lawyer presentations plus witness vignettes) that are often unexpected, but just as meaningful. Big cases often turn

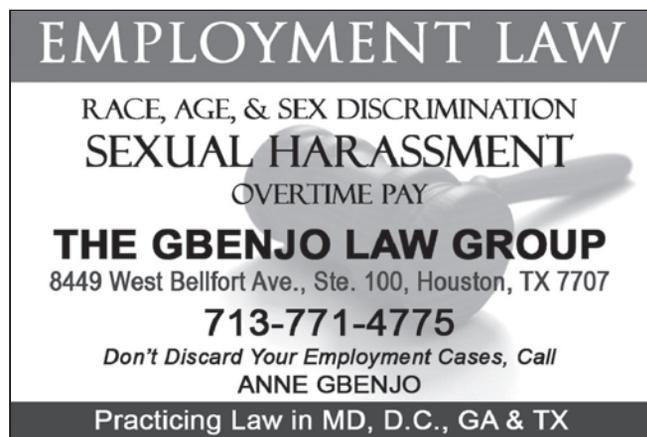
ONE OF THE GREATEST BENEFITS OF CONDUCTING A MOCK TRIAL IS THE ABUNDANCE OF GENUINE FEEDBACK ASCERTAINED FROM THE MOCK JURORS, WHICH IS TYPICALLY EXTRACTED THROUGH WRITTEN EVALUATION FORMS, DELIBERATIONS, AND POST-VERDICT DEBRIEFING.

proved it beyond a reasonable doubt and they failed to do that.”⁹ Referencing the same dilemma, as well as the overriding notion of doubt, one of the trial jurors made the following comment: “It didn’t make [the doctor] innocent, in my eyes or anybody else’s, but it did show enough doubt for us.”¹⁰ The fact that both the mock jurors and the actual trial jurors expressed skepticism regarding the doctor’s innocence confirms that the verdict was never a sure bet.

The fourth theme, which became a significant component in the trial approach, was the focus on the complainant’s character. A Houston-based news station reported that “during the trial,

on small facts, and this case was no exception. The mock jurors were shown police photographs of the scene where the alleged domestic abuse occurred, including a photograph of a vase broken on the floor. The complainant testified that the doctor threw the vase at her, but several mock jurors commented that it looked like the vase had either been dropped or knocked over, rather than thrown, because the flowers were in a neat pile on the floor. This simple nuance proved to be a turning point in the case because it established uncertainty and made jurors more wary of the complainant’s story. Witness testimony proved to be a powerful component in this case, and although the mock jurors were not able to hear the testimony of either the nanny or the bodyguard (both of whom were at the home the night of the alleged incident), the mock jurors taught the trial team that if any inconsistencies existed between the testimonies of the complainant, the bodyguard, and the nanny, then they would be much less likely to believe the charges and, hence, less likely to convict.

At the time of the mock trial, there was still uncertainty among defense counsel about whether it was in the doctor’s best interest to testify at trial. To determine if he should testify, the authors decided to conduct the research project with both a morning and an afternoon session. In the morning session, the mock jurors heard case presentations from both sides, including the defendant’s testimony in the defense lawyer’s



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presentation. In the afternoon, a new group of jurors arrived and heard the same case presentations, except the defense attorney left out the doctor's testimony during the afternoon session. Structuring the research project into two sessions allowed the trial team to gauge jurors' reactions to both the absence and presence of the defendant's testimony, and, therefore, arrive at an informed decision regarding whether it was in the defendant's best interest to take the stand at trial.

The jury started deliberations with a 10-to-2 vote for "not guilty" and, after more than five hours of deliberating, they reached a verdict and found the doctor not guilty.¹⁹ Although numerous factors contributed to the defense team's success, there is no dispute that the mock trial was greatly advantageous for the attorneys' preparation, approach, and strategic decisions as to the best way to try the case.

To ensure that a mock trial is as beneficial as possible, it is important to schedule the research far enough in advance of trial in order to give counsel adequate time to react to the information learned (four to six weeks prior to the trial date is recommended). In addition to coordinating the research around the trial date, there are several other key components that must be taken into consideration. First, to ensure the reliability of a research project, it is crucial that the project participants reflect a representative cross-section of individuals, which mirror a jury panel in the jurisdiction where the case will be tried. The second component critical to a successful research project is the notion that counsel must put on their opponent's best case, rather than their own best case. In the example discussed in this article, the attorneys not only presented the prosecution's best case scenario, but they also crafted the defense presentation using a minimal amount of persuasion and were careful not to include any defense evidence that was either speculative or of questionable admissibility. Adopting this approach allows the trial team to obtain feedback from the jurors about which facts are the most damaging to their case, as well as the importance or irrelevance of certain pieces of evidence. In order for the mock trial to elicit as much valuable insight as possible, it is also imperative that any videotaped witnesses shown during the project reflect the testimony most favorable to your opponent. Presenting the opponent's strongest case brings out the true weaknesses in one's own case and allows the attorneys to get feedback on how to effectively manage or debunk those weak points during trial.

The benefit and importance of jury research is neither isolated nor restricted to this example or even to this type of case. When a focus group or a mock trial is conducted properly, the value is extensive and these same results have been seen time and time again with both criminal and civil cases. An attorney can never be completely certain of a verdict, but this type of research goes beyond the scope of traditional trial prep and provides legal counsel with the insight and awareness they need in order to try the best case possible and increase their chances of obtaining a favorable verdict.

NOTES

1. Deliberation Rm2 AM, Cathy E. Bennett & Associates, Inc. (August 27, 2011), DVD.
2. Deliberation Rm1 PM, Cathy E. Bennett & Associates, Inc. (August 27, 2011), DVD.
3. Rogers, Brian, "Brown jurors: There was not enough evidence," *Houston Chronicle* (Sept. 20, 2011), <http://www.chron.com/news/houston-texas/article/Former-hand-surgeon-found-not-guilty-in-assault-2180599.php>.
4. *Id.* at 2.
5. Deliberation Rm1 AM, Cathy E. Bennett & Associates, Inc. (August 27, 2011), DVD.
6. "Former hand surgeon found not guilty of assaulting his wife," ABC 13 HOUSTON KTRK (Sept. 20, 2011), <http://abclocal.go.com/ktrk/story?section=news/local&id=8360994>.
7. *Id.* at 3.
8. *Id.* at 6.
9. *Id.* at 1.
10. *Id.* at 3.
11. Zubowski, Courtney, "Not guilty: Houston hand doctor walks free after assault trial," KHOU 11 News (Sept. 20, 2011), <http://www.khou.com/news/crime/Not-guilty-Houston-hand-doctor-walks-free-after-assault-trial-130200428.html>.
12. Rogers, Brian, "Jury rules Michael Brown not guilty in assault trial," *Houston Chronicle* (Sept. 20, 2011), <http://www.chron.com/news/houston-texas/article/Jury-rules-Michael-Brown-not-guilty-in-assault-2178728.php>.
13. *Id.*
14. *Id.* at 6.
15. *Id.* at 5.
16. *Id.* at 1.
17. *Id.* at 5.
18. *Id.* at 1.
19. *Id.* at 3.



ALEXANDRA C. FIGARI

received her master's degree in psychological counseling from Columbia University and has been a jury consultant with Cathy Bennett & Associates, Inc. since 2010.



ROBERT B. HIRSCHHORN

is an attorney and jury consultant with Cathy Bennett & Associates. He travels around the United States conducting research, giving speeches, and picking juries.

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