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How to Botch a Mock Jury Trial

CBS's "48 Hours" recently covered a high-profile Texas murder case involving the death of Jessie Bardwell. Defense attorneys believed that allowing the defendant to tell his story would lead to an acquittal.

By **Geri E. Satin** | February 06, 2018



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CBS's 48 Hours recently covered a high-profile Texas murder case involving the death of Jessie Bardwell. Defense attorneys believed that allowing the defendant to tell his story would lead to an acquittal. To gauge jurors' reaction to the defendant's story, defense attorneys put on a mock jury trial. Having never done one before, the attorneys conducted the mock trial on their own using a single panel of jurors. After brief deliberations, mock jurors found the defendant not guilty.

Defense attorneys used the mock trial results to inform their trial strategy—deciding to put the defendant on the stand at trial to tell his story. This time, however, the jury found the defendant guilty of murder. He was sentenced to 50 years in prison.

How could mock jurors so clearly come out one way and the actual jury the exact opposite way? While there is no guarantee that a mock trial will mirror a jury's findings, what happened in the Bardwell case is a prototype of what NOT to do when conducting a mock trial.

Experimenter Effects

The Bardwell attorneys conducted their own mock trial. This can create demand characteristics. Attorneys go into a mock trial with a certain goal (e.g., a not guilty verdict). During the mock trial, jurors may form an interpretation of this goal and change their behavior to fit with that goal. The very short and uninformative Bardwell deliberations speak to the likelihood of demand characteristics.

The Bardwell mock trial may have also suffered from the observer-expectancy effect. Every trial I've worked on includes at least one document, witness, thematic point, or jury instruction that the trial team is convinced will drive the case outcome. These predisposed viewpoints turn into what are known as Cognitive Biases, which can subconsciously influence mock jurors.

Recruitment and Sample Size Problems

Juror recruitment may have also been part of the problem. Too many attorneys mock-try cases before co-workers, family/friends, and even people pulled off the street. There is no doubt that convenience samples are, well, convenient. However, they are almost assuredly not representative of the population of eligible jurors who will be subpoenaed for jury duty. If all of your co-workers have the same view on damages caps, their collective opinion tells you nothing about how jurors will award damages. Same goes for pulling people off the street—everyone may be in a certain part of town for the same reason (e.g., socioeconomic status, attending an event, etc.).

Using one group of mock jurors is also problematic. What if this group was uniquely pro-defense? What if there was a strong juror in the room who commandeered deliberations? What if this group of jurors misread the verdict form? To attain predictive case results, a larger sample size involving multiple deliberation groups is needed.

The Problem with Relying on Verdicts

A key misstep by the Bardwell defense team was treating the mock jury verdict as the Holy Grail. Sure, it is nice to pat yourself on the back for winning a mock trial, but a unanimously pro-defense verdict is virtually worthless to a defense team preparing for trial.

The point of jury research should be to unearth the PROBLEMS with a case and to devise strategies and solutions to combat those problems before trial. Which themes are not resonating with jurors? Which pieces of evidence are damaging? What don't jurors understand about the facts/law? Which witnesses are hurtful? Do jurors understand the jury instructions and verdict form? Are the demonstrative aids effective? Which juror types are problematic in jury selection? Each of the above-questions should always be followed by WHY to understand juror's attitudinal dispositions on key case issues.

How Do We Fix These Problems?

The above-problems are likely the tip of the iceberg. But, they are a great jumping off point for discussion on how to execute a sound, reliable mock trial.

As to experimenter effects, avoid them completely. Independent trial consultants should be designing, running, and analyzing the results of any mock trial. DIY jury research threatens the internal validity of a study (or, the extent to which the study findings can be relied upon). And, if you can't trust the accuracy of a mock trial, why do it at all?

Juror recruitment must be randomized and comprehensive using multiple sources. The mock venire should reflect a pieced-together mosaic of jury-eligible citizens who properly reflect the key demographics of the trial venue. Each juror must be prescreened using cognitive-based questioning for eligibility and psychosocial appropriateness for jury duty.

Sample size can be a tricky budgetary issue. A larger sample of jurors means more expense for a trial team. But it also means more accuracy and precision. Using small sample sizes can provide important qualitative juror feedback. However, attaining quantitatively significant results (e.g., juror profiles for voir dire, reliable forecasts of liability and case value, etc.) requires using a large number of jurors, stratified into different deliberation groups.

Finally, as to misplaced reliance on mock jury verdicts, I often tell clients that a successful mock trial should be a "worst case scenario"—to see the good, the bad, and the ugly in terms of what might happen at trial. In attaining that goal, jurors' viewpoints must be unearthed and analyzed at every juncture of the mock trial using research-tested psychometric measures designed to elicit unbiased information.

Final Takeaway

A mock trial is of incomparable value to a trial team—IF and WHEN conducted and analyzed correctly. Mock trials are not what you see bar associations put on via CLEs and trial skills workshops. They are not what attorneys put on before family, friends, and co-workers. They are scientific jury research studies performed by specialized

PhDs and legal experts who use psychology, the law, statistics, and human behavior to create winning trial strategies, reliable jury verdicts, and predictive case valuation profiles.

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