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Forewarned is forearmed: The growing trend of mock trials

By Ken Hagen

"Find me an expert who lacks expertise." While this may sound like an oxymoron, it is not an uncommon request when a law firm seeks a former federal judge to serve on a mock panel. The reason: the underlying adjudicator has limited familiarity with the subject matter governing the dispute so the former judge should have the same level of ignorance. Mock often means imitation — the idea where something lacking serves in the place of the genuine item.

Gaining an Edge

Mock trials have evolved from a litigation weapon only used in the biggest of cases, to a tool commonly employed by many major law firms and corporations on a wide variety of cases. Intrinsically, this makes sense. Most professions and leading technology companies have a practice of testing something so that they can perfect their product or service before going full bore in committing to a plan or idea.

Historically, lawyers were understandably reluctant to use mock trials for fear that the results could unduly influence the client ("this is not a strong case") or subject the lawyers to criticism. However, it is now generally recognized that mock trials conducted with a three-judge panel are an important tool that provide valuable insights to improve the quality of the actual oral argument or trial advocacy. Indeed, in certain situations, it is almost a form of malpractice not to deploy a mock trial for evaluating what arguments will best advance a litigant's case. As the damages and reputational issues that result from litigation have exploded, the additional costs of hiring an independent mock panel to critique trial counsel and bring a fresh set of eyes to the litigation has become a relatively small investment. A new twist, but for the same reasons, we are also seeing the growth of mock trials in arbitrations (mostly domestic, but some international cases) as well.

Helping to Manage Management Expectations

The growth of mock trials is partially driven by general counsels who actively oversee large litigation matters. Mock trials allow general counsels and company management to test the readiness of their counsel, evaluate the strengths and weaknesses of the case, provide a discussion point to evaluate whether the case should settle and manage client expectations. As noted in a recent law review article that canvassed numerous users of mock trials:

"As one commenter … stated, in a situation that was described as having bad facts for the client, "The use of the mock arbitration allowed the client to see how the bad facts influence the arbitrator. This helped the in-house legal team to prepare the business for a bad result. In the end we did not do as bad[ly] as was expected and the mock arbitration [did] help to shield the in-house lawyers and my firm from a backlash due to unrealistic expectations. In fact it made the outcome seem more like a 'win' because liability was half of what the mock arbitrator awarded." Edna Sussman & James Lawrence, "A Mock Arbitration for Your Case: Optimizing Your Strategies and Maximizing Success," Fordham Int'l L.J. (2018).

General counsels are not the only ones responsible for the growth in mock trials. Litigation finance firms and private equity firms that either acquire or invest in legal rights increasingly use mock trials to better evaluate the risks of proceeding on dispositive motions or adjudicative proceedings. They view the cost of a mock trial as a way of de-risking their investment in litigation they have funded. Indeed, some hedge funds make it a practice to have all major matters subject to a mock hearing in advance of any dispositive motion.

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Selecting the Right Mock Judges

As alluded to, it is critical to match the profile of the mock panelists with the profile of the actual adjudicator. Factors to consider include judicial temperament, judicial predisposition based on written or other opinions and political leanings. Often time there may be little or no history or facts on which to gauge the predilection of the jurist in question, in which case getting a sense of judicial activism can act as a surrogate. In cases where little is known about the jurist, mirroring demographic factors such as age/sex and geographic factors can be helpful.

In the past, law firms have selected lawyers from inside the law firm to act as mocks. This had the advantage of being cheaper and protecting the law firm overly harsh critiques in the mock trial. However, the best practice now seems to be to select three neutrals outside of the law firm for several reasons. First, there is a bigger pool of potential mock jurists and this better enables one to select a jurist who best mirrors the profile of the actual decision maker. Second, jurists outside of the law firm have the ability to be more critical and open with their observations than does a mock panelist who is critiquing one of his colleagues.

While selecting the right judges for a mock exercise may be the most obvious and perhaps the most challenging task, it is only one of the many issues that litigators need to understand to effectively use mock trials. Other important issues include preserving attorney-client privilege and the work product doctrine (have the outside counsel retain the mock panelists and require an NDA), timing (before a dispositive motion but with enough time to incorporate the learning) and getting the maximum feedback from the judge (individually interview each of the mock panelists and then watch them collectively deliberate).

So while ignorance may be bliss, the failure to conduct a mock trial may result in ignorance that can be fatal to effective advocacy.

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