
James Nowak discusses mock juries in The Buffalo Law Journal

James Nowak discussed the use of mock juries in trials in the June 21, 2007 issue of The Buffalo Law Journal.

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Mock juries help firms predict trial outcomes BY JODI SOKOLOWSKI

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Rhonda Ried, president of Cornerstone Research and Ruth Diamond Market Research Services Inc., stands in her facilities, which feature a one-way mirror that allows lawyers to observe mock juries.

JIM COURTNEY/BUSINESS FIRSTA lawyer could lose a case because of the way she approaches the jury box.

Another lawyer might get hundreds of thousands of dollars less in an award judgment because of a particular juror's background. But by conducting a mock trial with a mock jury, litigators can adjust their arguments and jury-picking strategies to result in a favorable verdict or a higher award amount. "They're sharpening their swords. It's a good dress rehearsal," said Tony Diina, president/CEO of Insight Associates, a Buffalo marketing research company that provides trial preparation services. Mock trials and trial consulting may cost several thousand dollars, and sometimes they're a cost benefit that just can't be passed on to the client. However, several area lawyers say they're still a worthwhile resource. What they are Many law firms stage mock trials in-house with staff and attorneys acting out the various roles and offering constructive criticism. When litigation consultants are brought in to conduct a mock trial, they usually create a test jury based on the demographics of potential jurors to get "real" feedback. "Sometimes what lawyers will focus on is not necessarily what an average citizen would, and they're the ones who are typically the final decision makers," said Christopher Potenza, an associate at Hurwitz & Fine PC who practices in the area of insurance defense. Getting that input enables the attorneys to adjust their arguments — even minuscule details — so they gain a more favorable result. "It clues you in on what the jury may be thinking, what types of questions will develop in their mind during the trial," Potenza said. "What you think might be mundane details, they might think are significant." In the damages stage of a personal injury case, when they're trying to determine how large of a settlement or award to seek, attorneys may use mock juries to see how far they can go, or if they're aiming too high. "That's the multi-million dollar question," said Jim Nowak, a partner at Kenney Shelton Liptak Nowak LLP. "You get a sense of what they feel [the case] is worth." Although Nowak and his client ultimately settled a particular case they used a mock jury on, the process gave them perspective on what the real jury might have done. The ultimate settlement was "hugely less than what the mock juries wanted to award," said Nowak. "Not that we had a weak case, but [we settled based] on the feedback from the jurors on how they valued cases," he said. Shadow juries are essentially mock jurors who sit in the courtroom while a case is on trial. After listening to the day's proceedings, the shadow jurors will report back to the jury consultant and lawyers. "They give you running feedback as the trial is going on," Potenza said. Though the comments may range from the client's and attorney's appearances to how effective an argument is, "It's not really criticism but a barometer of how the case is going," he said. Services provided Companies that recruit mock juries often let clients use deliberation rooms with one-way mirrors. They conduct focus groups and surveys to obtain attitudinal responses on current issues, attorney advertising and client representation. Diina, who runs Insight Associates with partner Raymond Owczarzak, first heard about these kinds of trial-preparation services from some West Coast lawyers in 1993. The same methodologies of mass marketing are now applied in the legal field. "It's interesting to see the parallelism between consumer and jury behavior. It's not surprising because we're all people, and we know what and who we like and don't like," Diina said. Rhonda Ried, president of Cornerstone Research and Ruth Diamond Market Research Services Inc., stressed that it's important to conduct the mock jury where the trial will be heard. One firm had a trial in Buffalo but wanted its mock trial conducted in Syracuse. "Even though the demographics were the same, the verdict came back very differently," Ried said. "Regions are very different." However, in the majority of mock trials, the actual verdict is virtually identical to the mock verdict. Sometimes the attorney's client isn't persuaded by the mock jury's decision and may demand, for example, to take the case to trial. Diina recalled that one firm lost at trial because lawyers pushed for an award judgment when the mock trial result suggested a settlement. The client forfeited several hundred thousand of dollars in a settlement, Diina said. "If you knew that there was an 80 percent chance the jury would give you a million, you wouldn't settle for half a million," he said. "It's like playing the casino but knowing the odds of what that game will be." Jurors are typically paid \$75 for an hour and a half. A consulting company's fee to an attorney or firm might range from \$1,500 to \$3,000 for the jury recruiting and use of facilities. The cost depends on how hard it is to recruit the mock jury based on client specifications and how many mock juries are requested. Sources say it's crucial to have at least two mock juries: one for the first presentation, and a second to test the adjustments. "Sometimes [lawyers] have four or five of these, but when you're talking about millions of dollars in damages, that's nothing," Ried said. How it works Nowak was defending a complex product liability case in New York County Supreme Court for a client that had faced similar cases all over the country, but had never had a case in New York City. "We were very curious as to how different members of the jury pool would respond to [our] statements," he said. To see what the potential reaction would be in Manhattan, the firm hired jury consultant Decision Quest to gather two pools: one arguing in favor of the plaintiff's case, and

the other arguing in favor of the defense.” We basically pulled the mock jurors from the same jurisdiction that the commissioner would be sending out for jury-duty requests,” Nowak explained. With each mock juror responding every 15 seconds on a hand-held remote — indicating both positive and negative reactions to the proceedings — the attorneys, watching along on closed-circuit television, could easily observe and analyze their reactions.” It gives you insight into what the jurors will be most inquisitive about and the types of evidence they’ll be swayed by,” Potenza said. And because the mock juries are usually held before the real jury selection, attorneys can use the mock jurors’s comments to their benefit by trying to select jurors who would vote in their favor.” The most important thing in a mock jury is getting the right person in the room,” Ried said. Cost-benefit analysis The decision to use a mock jury or mock trial depends on whether there’s significant exposure to the client.” There has to be value in it from the client’s mind because there’s a lot of time and effort [put in],” Potenza said. “The potential exposure from the case would have to warrant something like this.” Even though Nowak ended up settling that one case, the mock-jury experience was still valuable, because there will almost certainly be more lawsuits to defend against the same client, he said.” The value of it wasn’t just for the case we were working on, but we could be in the same position many more times,” Nowak explained. And the lessons can also be extracted again for future cases in the same jurisdiction.” We had a better understanding on how jurors in that jurisdiction would respond to our defenses and how they assign values to certain cases,” Nowak said. “Certain places are more conservative than others.”