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To Mock or Not to Mock: Can You Really Improve The Odds with Mock Trials and Focus Groups?

I. Introduction

Mock trials, focus groups, and other jury research can absolutely improve your odds of winning cases. This paper will provide insight into how to effectively use these techniques to maximize your chances of success. Part I of this paper will focus on one of the primary ways in which jurors make decisions – through the use of mental shortcuts known as "decision making biases." By understanding these "decision making biases," the parties to a lawsuit can tailor their messages in persuasive ways that will increase the chances of winning. Part II of this paper will focus on some of the actual tools available to parties, including some lesser known tools like in-person surveys and on-line jury research. These tools can help parties identify and ultimately take advantage of jurors' "decision making biases." Part III of this paper will address some of the legal issues to consider surrounding the jury research, including confidentiality issues and the potential for recovering costs and fees associated with conducting a research project.

II. The Use of "Decision Making Biases" By Jurors

Research has shown that jurors often use mental shortcuts, known as "decision making biases," to make decisions during deliberations. To a large extent, this is simply a function of human nature. When people are faced with complex or unfamiliar information, they often use these "decision making biases" to help process that information to make a decision. The most commonly used "decision making biases" include: (a) the hindsight bias, (b) the confirmation bias, (c) the anchoring bias, and (d) the availability bias. Each of these biases is addressed in turn below.

A. The Hindsight Bias

The "hindsight bias" is a belief by jurors that an outcome was predictable, even though there was little to no basis for predicting it. Knowing that the outcome occurred makes it easier for jurors to believe that various parties should have "seen it coming." This bias allows jurors to use "magical thinking" to invent better ways that parties could have acted in order to prevent an incident. For example, if jurors know that a plaintiff was injured while using a product, the hindsight bias may lead jurors to believe that more

warnings should have been given to prevent the injury, or that more safety features could have been included with the product. This is a potentially dangerous bias for defendants. One technique that is available to combat this bias is the use of a timeline. Timelines can help jurors evaluate the decisions of a defendant based on what was known at the time the decisions were made, not in hindsight. A timeline can also be effective in showing the state of the art of knowledge at the time of relevant decisions.

B. The Confirmation Bias

The "confirmation bias" is a tendency by jurors to favor information that confirms their pre-existing beliefs. All jurors harbor preconceptions that influence their interpretation of a case. The trick is to identify those preconceptions that favor your side, and then to frame the case to activate those preconceptions. For example, jurors believe that once a patent is issued, it should not be taken away. Jurors think that if the Patent Office issues a patent, then the invention in question must have been new and different. Jurors are very hesitant to invade a patent. They have an easier time finding infringement rather than taking away an inventor's patent. Therefore, with respect to any particular case, it is important to determine what kind of "confirmation biases" may exist. If certain biases already exist *in your favor*, you will want to embrace them as you prepare your case for trial. Conversely, if there are confirmation biases which exist that are generally harmful to your position, then do not try to fight them. Advancing arguments that are inconsistent with jurors' preconceived beliefs can backfire. Thus, you should try to avoid themes that go against jurors' preconceptions (i.e., that large corporations put safety ahead of profits) and focus on different themes instead which have a greater chance of being accepted by jurors.

C. The Anchoring Bias

The "anchoring bias" is a tendency by jurors to rely on a particular fact, perception, or issue in making a significant decision related to a complex problem. In other words, jurors tend to rely heavily on one piece of information when making a decision. This bias tends to manifest itself when jurors are unable to reconcile each party's position on a complex subject matter. For example, in a past research study, jurors in a tire defect case focused so heavily on the plaintiff's testimony that she took her hands off of the steering wheel that this single fact overwhelmingly took on a life of its own and overshadowed all other aspects of the case; jurors could not get past this one fact to consider other facts relevant to the plaintiff's case. Post-trial juror interviews discovered that this was the single greatest fact driving the ultimate defense verdict. Not every case is characterized by a single psychological anchor. Jury research is the tool to identify if there is a psychological anchor in your case to determine what jurors may focus on so heavily.

D. The Availability Bias

The "availability" bias manifests itself when people have a bias towards information that is available to them. People are more heavily influenced by information

that can be easily brought to mind and accessed. The more "*available*" a party is, the more available it is for jurors' criticism. Therefore, the defendants in a lawsuit should take advantage of availability bias by enriching the background of the plaintiff and third parties. Similarly, the defense should provide detailed descriptions of potential alternate causes of accidents. In other words, the defense wants jurors thinking about *the plaintiff's* role and conduct, and the role and conduct of third parties. The richness of the storytelling makes a difference. The defense should focus on *the plaintiff's actions* leading up to an accident (i.e., the plaintiff failed to wear her seat belt; the plaintiff lived an unhealthy lifestyle; etc.), or the actions of third parties.

III. The Tools Available to Identify "Decision Making Biases"

By identifying and taking advantage of the biases discussed above, a litigant can increase the chances of success. There are many tools available to uncover "decision making biases," but some of these tools include the following:

A. In-person surveys (including breakout group)

In-person surveys typically involve a sample of at least 50 jurors who provide insights into the attitudes and perceptions that jurors will use as a psychological filter through which they see the case. These surveys also provide insight into how jurors view key case issues and potential themes. Typically, 50-100 jurors hear neutral key case facts and a subset of the jurors are retained after the survey for small group focus interviews. In-person surveys with a breakout group combines quantitative and qualitative analysis and is a perfect methodology for early case issue identification. The cost can vary depending on the number of jurors.

B. On-line jury research

On-line jury research is an alternative data collection methodology to traditional telephone surveys. It allows for initial case evaluation and issue evaluation in the same way the in-person survey does but without the benefit of the focus group that provides insight into why the jurors feel the way they do. One benefit of on-line jury research is that it can often be accomplished at a lesser expense than in-person surveys. One limitation of on-line jury research, however, is that the research subjects may not constitute a fair demographic representation of a particular venue.

C. Feedback panels/opening statement studies

Feedback panels are informal exercises done with a small group of typically 6-12 jurors and can be conducted in the attorney's office. This is a great vehicle to get feedback on opening statements before trial.

D. Traditional mock trials and focus groups

Mock trials provide a deeper analysis into theme testing and juror profiles for jury selection. This entails lawyers putting on adversarial presentations for each side and there is the option for jurors to rate the presentations in real-time to learn how jurors view the themes as they are hearing them. Then the jurors deliberate to a verdict, which demonstrates which themes are working and which themes need to be reframed. Mock trials can also uncover psychological anchors that jurors drive jurors' decisions.

IV. Legal Issues to Consider

A. Confidentiality

Mock trials, focus groups, and other jury research all *should* remain confidential and protected from discovery based on the work product doctrine and/or the attorney-client privilege.

Generally speaking, the work product doctrine states that a party may not discover documents and tangible things that are prepared in "anticipation of litigation or for trial" by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer, or agent. *See, e.g.,* Federal Rule of Civil Procedure 26(b)(3)(A)(Emphasis added.). While there are certain exceptions to this rule (i.e., if the opposing party can show "substantial need" for the materials), the rule additionally makes clear that the courts "must protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Id.* at 26(b)(3)(B). In other words, there is even greater protection for the thoughts and mental impressions of a party's "attorney or other representative." This doctrine, by itself, should keep the results of a jury research exercise confidential.

Generally speaking, the attorney-client privilege protects confidential communications between a client and an attorney, or his agents, for the purpose of obtaining legal services or advice from that attorney. The attorney-client privilege belongs to the client. It is customary that statements made to representatives of the lawyer (i.e., clerks, secretaries, paralegals, etc.) are also protected by the attorney-client privilege. This protection also extends to non-testifying experts, such as jury consultants. Thus, this privilege should provide additional protection for a jury research exercise.

Proper application of the work product doctrine and the attorney-client privilege should result in jury research exercises being kept confidential. Fortunately, the case law on this issue has generally kept such research exercises confidential, although no without debate.

For example, in *In re: Jefferson County Appraisal Dist.*, 315 S.W.3d 229 (Tex. 2010), one party chose to conduct a mock trial exercise and have its testifying expert participate in it. When the testifying expert was deposed, he revealed that a mock trial

exercise had occurred, and answered several questions about it. The opposing party then sought to take additional discovery about the mock trial. Among other things, the opposing party sought to depose the jury consultant who spearheaded the exercise, and also sought to obtain the jury consultant's report, opinions, conclusions, and other information. The trial court ordered production, but was reversed on appeal. The appellate court noted that the information sought "goes to the core of the work product doctrine and is not discoverable." The court also disallowed discovery concerning the identity of people present during the mock trial, or during any follow-up communications about it.

As another example, in *Watts v. United Services Automobile Association*, 993 So.2d 177 (Fla. 1st DCA 2008), an appellate court in Florida succinctly stated that an order compelling discovery of privileged information regarding a mock would be quashed, and the case remanded to the trial court for further proceedings.

Furthermore, in *Hynix Semiconductor, Inc., v. Rambus, Inc.*, 2008 WL 397350 (N.D. Cal. 2008), the defendant filed a motion in limine seeking to prevent the plaintiffs from cross-examining the defense experts and witnesses about any meetings they had with jury consultants. In reaching its ultimate decision, the court relied heavily on the Third Circuit's opinion in *In re: Cendant Corporation Securities Litigation*, 343 F.3d 658 (3rd Cir. 2003)(holding that work product protection extends to non-attorneys who assist in preparation of litigation, and that a litigation consultant's advice to a witness about how to testify is an "opinion" that is protected under the work product doctrine). However, the court in *Hynix* arrived at a "split decision" which ultimately allowed the plaintiff's lawyers to ask some questions about meetings with jury consultants, but not others. Specifically, the court allowed questioning on the following topics: whether a witness met with a jury consultant; the purpose of any such meeting; who was present; the duration of the meeting; and whether witnesses' testimony was rehearsed. However, the court simultaneously prohibited the plaintiffs' counsel from questioning on the following topics: the jury consultant's view on certain facts; trial themes or strategy; strengths or weaknesses of the witness; advice to the witness as to how to improve his or her appearance or credibility. Such questioning was deemed to impermissibly invade work product protection.

In *Lisle v. Owens*, 521 P.2d 1375 (Okla. 1974), the plaintiff sent 250 written questionnaires to the defendant's customers. The defendant learned about these questionnaires and sought to discover both the questions and answers contained on them. The trial court ordered production, but was reversed on appeal. The Supreme Court of Oklahoma ultimately held that the written questionnaires constituted the plaintiff's lawyers' work product which was privileged from production. Among other things, the court reasoned that the defendant could send out its own questionnaires to its own customers, if it so chose. Although not a case specifically concerning jury consultants, the case still makes clear that the use of written questionnaire -- one possible method of conducting jury research -- is entitled to work product protection.

The mere fact that there are reported decisions on this issue indicates that opposing parties sometimes learn, or guess, that jury research has taken place. These decisions further indicate that litigants sometimes try to take discovery concerning jury research projects. Therefore, a careful lawyer should take a few basic precautions to make sure that confidential jury research remains appropriately confidential. The following suggestions are not an exhaustive list, but should help to provide protection:

1. The outside lawyer – not the client –should retain the jury consultant. Proceeding in this fashion will clearly identify the consultant as the representative of the lawyer for purposes of the attorney client privilege, and will also more directly tie the consultant directly to the outside counsel for purposes of the work product doctrine.

2. The outside lawyer should retain the jury consultant with a written retainer agreement which contains a confidentiality provision. This confidentiality provision should require the consultant to only share the research work product with those approved by the outside counsel and/or the client. This retainer agreement, with the confidentiality provision, will help to reinforce the idea that the research was meant to be confidential.

3. The outside lawyer should be present for all mock trial exercises and reports concerning those exercises. While this is not technically required, the presence of counsel obviously bolsters the arguments for application of the privileges.

4. Mock jurors and research subjects should be required to enter into confidentiality agreements whereby they agree to keep everything they see and hear in the research session confidential. Good jury consultants know this and already insist on it, but counsel should assure that it occurs. Such agreements are relevant to the intent of counsel and the parties, and form the basis for arguing that any disclosure by a mock juror is unauthorized.

B. Recovering Costs and Fess of a Mock Trial As a Prevailing Party

Jury research, while invaluable, can be expensive. While there are certainly less expensive research options (i.e., on-line jury research, telephone surveys, etc.), regardless of the cost of your research project, it may be possible to recover those costs and fees if you are a "prevailing party" in your litigation. As with most situations, there are cases going both ways.

<u>Cases Which Award/Affirm Costs and Fees</u>

- *Sigley v. Kuhn*, 205 F.3d 1341 (6th Cir. 2000)(costs of obtaining jurors and paying expenses for a mock trial were recoverable because mock trial conferred a benefit to prevailing party by helping to produce a favorable result);

- *Rozell v. Ross-Holst*, 576 F.Supp.2d 527, 540 (S.D.N.Y. 2008)(fees granted for time spent on mock trial because mock trials preview a case for a mock jury, and mock jury's reaction may influence a party's willingness to settle);

- *Harvey v. Mohammed*, 951 F.Supp.2d 47 (D.C. Cir. 2013)(time spent on mock trial awarded in full, with court noting that "time devoted to exercises such as these generally is deemed compensable so long as the number of hours is reasonable.").

- *Michael v. Windsor Gardens, LLC*, 2005 WL 1320189 (E.D. Tenn. 2005)(total of 55 hours spent on mock trial was "reasonable and necessary" and would be awarded in full);

- *Majestic Box Co., Inc., v. Reliance Ins. Co. of Ill.*, 1998 WL 720463 (E.D. Pa. 1998)(complicated nature of the defense justified defendant's expenditures on mock trial, including attendance of two attorneys and a paralegal);

- *Longs Drug Stores California, Inc., v. Federal Ins. Co.*, 2005 WL 2072296 (N.D. Cal. 2005)(spending over $88,000 on mock trial was reasonable given the nature of the litigation, and would be awarded in full);

- *Wells Fargo Bank, NA v. Konover*, 2014 WL 3908596 (D. Conn. 2014)(time spent on focus group *and* mock jury would both be allowed as recoverable costs and fees);

- *Guzman v. Benova*, 1996 WL 374144 (S.D.N.Y. 1996)(costs associated with focus group were reasonable, contributed to the litigation, and were fully compensable);

- *Lemus v. Timberland Apartments*, LLC, 876 F.Supp.2d 1169 (D. Oregon 2012)(fees spent conducting a moot court oral argument were compensable);

- *HDRE Business Partners Ltd Group, LLC v. Rare Hospitality Intern, Inc.*, 2015 WL 3440277 (W.D. La. 2015)(granting request to award fees associated with mock trial and noting that "the result at trial indicates that the exercise was a sound investment of time.").

Cases Which Deny Costs and Fees

- *Finklestein v. Bergna*, 804 F. Supp. 1235 (N.D. Cal. 1992)(time party spent on mock trial was not compensable where liability issue in the case had already been all but decided);

- *O-Sullivan v. City of Chicago*, 484 F.Supp.2d 829 (N.D. Ill. 2007)(expenditure of fees for mock trial were not compensable where claims were not complex);

- *Cooke v. Town of Colorado City*, 2015 WL 1806751 (D. Ariz. 2015)(fees disallowed because cost-shifting statute only allowed fees to be recovered for preparing for the actual trial);

- *Beach v. Wal-Mart Stores, Inc.*, 958 F.Supp.2d 1165 (D. Nev. 2013)(time spent on mock trial disallowed in slip and fall action);

- *Doby v. Sisters of St. Mary*, 2015 WL 4877786 (D. Ore. 2015)(fees and costs of mock trial denied where mock trial took one day, real trial took three days, and work to prepare for both would have been duplicative);

- *Masimo Corporation v. Tyco Healthy Care Group*, 2007 WL 5279897 (C.D. Cal. 2007)(costs and fees denied for mock summary judgment argument, when court never heard such a motion; costs and fees also denied for a *second* mock trial which occurred shortly in time after the first mock trial);

- *Montanez v. Chicago Police Officers*, 931 F.Supp.2d 869 (N.D. Ill. 2013)(fees disallowed for conducting full-day mock trial where claims in case were not complex);

- *United States v. $40,000 in U.S. Currency*, 2015 WL 5177753 (D. Nev. 2015)(costs and fees associated with focus group disallowed because it was unnecessary; a motion for summary judgment would have been granted, if filed, and case ultimately resolved on pretrial motion practice without a trial).