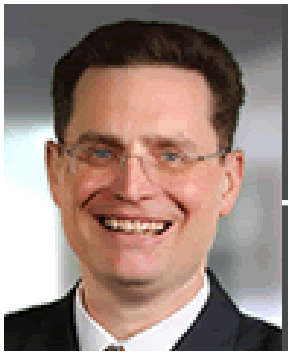

THINK INSIDE THE BOX - MAXIMIZING MOCK TRIALS AND FOCUS GROUPS

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Think Inside The Box: Making the Most of Mock Trials & Focus Groups
John Jerry Glas and Raymond C. Lewis

Jurors are changing, and jury trials are rare. More and more, trial lawyers and their clients are turning to mock trials and jury focus groups for answers. But all mock trials and all focus groups are not created equal. The return on your investment will always depend on the choices you make months before your mock trial or focus group starts.

Every mock trial and every focus group involves a finite amount of presentation time and a finite amount of jury deliberation or interaction. Do not waste a second of that valuable time. Meet with your jury consultant and discuss your goals and options before you schedule anything. Know your options for structuring jury research. Consider the best way to layer the evidence. Limit the legal issues. Narrowly-tailor your factual questions. Eliminate unnecessary evidence and potential distractions. And minimize the risk of Lions dominating the Lambs during discussions and jury deliberations. Make sure that you get the most bang for your buck.

Here are ten (10) suggestions for making the most of your opportunity to learn: (a) what jurors think before they hear any evidence about the parties and the issues; (b) how jurors react to the evidence while it is being presented; (c) what jurors think after all the evidence has been presented; (d) what jurors will say about the evidence (and everything else) during jury deliberations; and (e) what arguments ultimately influence other jurors.

Consider Doing a Focus Group Prior to a Mock Trial.

Remember that you do not always have to choose between doing a focus group and doing a mock trial. Consider the advantages of doing a focus group before doing a mock trial. Starting with a focus group allows the jury consultant who is running the focus group to:

- Ask more detailed questions regarding each juror's prior bias and prejudice toward a client, witness, product, or specific issue;
- Solicit opinions on specific issues, evidence, and arguments--instead of hoping jurors will discuss those issues, evidence, and arguments during mock trail deliberations;
- Solicit opinions on specific demonstrative exhibits (i.e., "is this helpful?"; "what does this exhibit tell you?"; "what questions do you have about this chart?");
- Solicit opinions from all of the jurors, instead of allowing one juror to dominate the conversation or intimidate/influence other jurors (because Lions eat Lambs);
- Control the direction of jury deliberation (i.e., "let's talk more about liability"; "what do you think about the causation issue?"; "is anyone concerned about…");
- Test-drive and compare different themes and metaphors ("does that make sense?"; "do you like that metaphor better?"), instead of picking one theme for an entire mock trial and finding out after the mock trial only whether that metaphor worked; and
- Add a fact or introduce an exhibit in response to something that a juror says.

With this information, the attorneys can decide what

evidence to emphasize, what questions to answer, what demonstrative exhibits to use, and what bias to address during the subsequent mock trial. By starting with a focus group, you can learn more about streamlining and presenting your case than what you might learn from watching several mock trial deliberations. If you only have time to do two mock trials, you might be better served by doing one focus group and one mock trial.

Ideally, you should hold the focus group weeks before the mock trial to give the attorneys time to change their presentations, get answers to the questions asked by jurors, and to obtain any documents requested by the jurors. In reality, to reduce the cost of out-of-town jury research, we have often scheduled a focus group on Day 1 and a mock trial on Day 2 (after a very long night of changing PP slides). We have even done a focus group in the morning and a mock trial in the afternoon (after a very intense lunch break of changing PP slides and modifying arguments).

Consider Intentionally Skewing the Results.

We once paid for a mock trial in a case involving a nationally-recognized, truly-famous plaintiff attorney. At the end of the mock trial, approximately twenty-five (25) of the twenty-six (26) mock jurors zeroed the plaintiff. And, when the mock jurors were asked whether the "famous" plaintiff attorney's involvement would have "changed" their opinion, the jurors insisted that it would not. Reassured the case was meritless, our firm took the case to trial. After trial, the first alternate juror, who disliked the famous plaintiff attorney, told us he would have zeroed the plaintiff. The second alternate juror, who loved the famous plaintiff attorney, told us that plaintiff's counsel "didn't ask for enough money." A few hours later, the jury awarded more than $50 million dollars. After the verdict, some jurors got the plaintiff attorney's autograph, and some jurors posed for pictures with the plaintiff attorney. Lesson learned.

Since then, when we identify a (game-changing) confounding variable, we avoid hiding that confounding variable from the jury prior to their deliberation. After all, what is the point of leveling the playing field for a mock trial if the playing field will not be level during the real trial?

Instead, we consider ways of intentionally skewing the results to test the strength of our case. If we are facing a trial against a particularly charismatic plaintiff attorney or a particularly sympathetic plaintiff (or a particularly unsavory client), we consider telling the jury they were hired by plaintiff's counsel to see if the jury will still return a defense verdict. That is a much better test of our evidence and argument. When the jury is intentionally skewed toward the plaintiff's side (or against our side), will the mock jurors reach a contrary verdict? Will they swim upstream?

Before one mock trial, we did not have videotaped depositions of either parent, but we knew their testimony in their child's wrongful death case was going to be very powerful. We were able to find online an (incredibly moving) video interview of the parents talking about the loss of their child. While the video would never be admissible at the real trial, we chose to start the mock trial by playing that video because we anticipated the plaintiffs calling the parents to the stand at the start of the trial, and similarly skewing the jury in their favor. The video included a beautiful montage of their child set to haunting music, and we chose to play that video with sound because we wanted to bias and prejudice the jurors against us during the plaintiff's case. We wanted to see whether we could take a 100%/0% (Plaintiff/Defense) polling result at the end of the plaintiff's case and turn that into at least a 40%/60% (Plaintiff/Defense) polling result at the end of the defense case.

Use Mock Trials to Determine Effect of Stipulating to a Legal Element.

Jurors today know that the vast majority of cases settle before trial. Consequently, jurors often walk into the courtroom wondering why your case did not settle and asking themselves one question: who is being unreasonable? If you don't immediately answer that question for the jury, they will answer the question for themselves by the end of opening statement, and their opinion will influence how they listen to the evidence and weigh that evidence.

By stipulating to as much as humanly possible, you can answer that question for the jury. Picture the judge instructing the jury that "defendant has stipulated that they were 100% solely responsible for this accident, and you are only being asked to determine whether the accident caused any injuries." Right or wrong, jurors who hear that the defendant stipulated to responsibility will wonder what injury the plaintiffs is claiming that "probably wasn't caused by the accident." In one case, we even stipulated that our client was 100% solely responsible for causing the accident and that the accident caused all of plaintiff's orthopedic injuries, but reserved our right to challenge whether the accident also caused plaintiff's alleged traumatic brain injury. In so doing, we gained credibility with the jury, took the poison out of the trial, and focused the jury on only those factual issues we needed them to determine.

Mock trials and focus groups are the perfect opportunity to determine the likely effect of stipulating to one or more legal elements. If your client cannot decide whether to stipulate to being "100% solely responsible for an accident" and challenge only medical causation, consider holding two mock trials and stipulating to liability during the second. See for yourself whether stipulating to liability: (a) increased the amount of time the jury spent discussing medical causation; (b) changed the tone of deliberations; (c) improved the quality of the discussion regarding medical causation; and/or (d) resulted in a different finding regarding medical causation.

Exclude Any Sexy Evidence that MAY be Excluded from Trial.

The goal is not to "win" the mock trial. The goal is to learn from the mock trial so that you can "win" the actual trial. It is a rookie mistake, but some lawyers will give in to the temptation to tell the mock jury about a prior conviction or show the mock jury a devastating Facebook post without knowing whether either will be admissible at trial. Yes, that evidence is "sexy." Yes, it could affect the outcome of the trial. But do not make that mistake.

Nothing is worse than watching a mock trial jury walk into the deliberation room and proceed to talk only about the sexy evidence that may be excluded from the trial. What have you learned? Do you know whether you can win the trial without that evidence? Do you know what jurors like and dislike about your other evidence and argument? Always resist the temptation to introduce controversial evidence. You are better served to schedule the mock trial on a date after the court rules on Daubert motions. And, whenever possible, schedule the mock trial on a date after the court rules on key Motions in Limine (if the evidence is that sexy, you shouldn't be waiting until two weeks before trial to file your motion in limine.

Layer the Evidence & Start with the Least Persuasive Evidence

It is so important to layer the evidence presented to the jury from (what you think is) your least persuasive evidence to (what you think is) your most persuasive evidence. That allows you to poll the mock jury or discuss with the focus group what they think about each layer of evidence after your presentation. It may be counterintuitive, but never start by presenting the jury with your most persuasive evidence because that evidence will dominate the juror's deliberations and the focus group discussions. All you will learn is that the jury was most impressed by your most persuasive evidence (which you already knew). What you won't learn is how you could have better presented your other evidence so that evidence is also discussed during jury deliberations.

For example, let's say that you have four key categories of evidence: math, product modeling, expert testimony, & video demonstrations (in order from least to most persuasive). Never start by showing the jury the most persuasive evidence (video demonstrations) because that is all they are going to talk about during deliberations. Start with the least persuasive evidence (math) and ask the jury what they think about that evidence. Then present the third most persuasive evidence (product modeling) and ask the jury what they think about that evidence. Then present the second most persuasive evidence (expert testimony) and ask the jury what they think about that evidence. Finally, present the most persuasive evidence (video demonstrations) and enjoy the jury's discussion about that evidence. By layering the evidence, you will always learn about each layer—instead of only learning about the one or two most persuasive layers or not really knowing which layer or combination of layers really impacted the jury or focus group.

Try General Damages only to Identify "Favorable" Jurors.

Nothing is more subjective than a jury's award for general damages, and a mock trial general damages award is rarely a reliable predictor of what different jurors will award. Different jurors will always have different backgrounds, different experiences, and different opinions when it comes to general damages. Even jurors with similar backgrounds and experiences will often have very different opinions on what constitutes "a lot" of money and what constitutes "a little" money.

Ask yourself. What would a year-end bonus of two thousand dollars mean to you? What would you award for "physical pain and suffering" for five months of 8/10 cervical pain? What would you award for "physical pain and suffering" for six months of physical therapy? What would you award for "mental pain and suffering" for a concussion that lasts six months? What would you award for "physical and mental pain and suffering" for a moderate traumatic brain injury that resulted in PTSD? How much would your award increase if the plaintiff's family and friends all testified that the plaintiff was "different"? Now look at the lawyers sitting to your left and your right. Even if they look exactly like you, and even if they have the exact same job as you, what are the odds they will give the exact same answers?

All jurors can be divided into "Lions" and "Lambs," and the Lions eat the Lambs, especially during mock trials and focus groups, and especially with regard to awarding general damages. When a mock jury or focus group agrees that a defendant is liable and on the injuries, a

Lion will often propose a specific number to be written down on each line of general damages (i.e., "How about we put down $100,000 for physical pain and suffering?"); and the Lambs will agree. Sometimes, another Lion will propose a larger or smaller number, and the two (usually tired by then) Lions will reach some sort of compromise—to which the Lambs will quickly agree. Thus, the final damages award really only tells you what one or two Lions on your mock jury would award. It is not, and it should not be considered, a reliable predictor of what the Lions on the actual jury will award.

Yes, there are times when it may be beneficial to try general damages to identify favorable jurors in a specific venue. Trust your jury research consultant. Based on their jury research and experience, they may already have an idea of what jurors would be favorable for your client, but they may want venue-specific information regarding certain neighborhoods or local high schools. Ask them to make the case for trying general damages. If the reason is to identify favorable jurors, ignore their final general damage award, and focus more on identifying which jurors supported higher general damage awards and which jurors supported lower general damage awards.

Yes, there are times when your client will want you to try general damages to determine a "range of damages," despite your begging to spend that time on other elements like liability or medical causation. When that happens, discuss with jury consultant the possibility of having every juror write-down on a piece of paper what they personally would award for each category of damages before allowing the jurors to deliberate together. Polling the Lambs before they are eaten by the Lions is often the only way to discover what the Lambs really think and the best way to identify a more accurate range of possible awards for general damages.

Try Specific Factual Questions Regarding Disputed General & Special Damages.

Time is money. When possible, try only specific factual questions about disputed general and special damage awards. Do not ask jurors to also determine the value or quantify the corresponding general damage or special damage award.

If the burning question is whether the plaintiff can work, present the conflicting evidence on that issue (i.e., expert medical testimony, functional capacity evaluations, vocational rehabilitation expert testimony, etc.) and ask the mock jury to make a factual determination about whether that plaintiff can return to work and what type of work he can do. But do not ask the jury to spend additional time quantifying plaintiff's (special damages) claim for lost earnings.

If the burning question is whether the plaintiff sustained a traumatic brain injury ("TBI"), present the conflicting evidence on that issue (i.e., conflicting neurological, neuropsychological, and neuroradiology testimony) and ask the mock jury to make a factual determination about whether the plaintiff sustained a "permanent" TBI or whether the TBI "is responsible for plaintiff's current symptoms/complaints." But do not ask the jury to spend additional time quantifying plaintiff's (general damages) claim for "future mental pain and suffering."

Show Video Clips Instead of Describing Testimony

Some trial lawyers are lazy, and some trial lawyers like the sound of their own voice. Perhaps you've noticed. Not surprisingly, when given the choice between playing a video clip from an expert's deposition and simply telling the jury what that expert will say, many lawyers will choose to talk instead of stand silently. Not surprisingly, when given the choice between identifying specific start/stop times for a video clip (1:03:21-1:03:45; 1:07:23-1:08:02), and simply slapping a photo on a Power Point slide, many lawyers will conveniently decide that "jurors get bored watching videos." Always show the jury a clip of the witness. Jurors are suspicious of lawyers. When a lawyer tells jurors that Dr. Wonderful "will testify that this type of injury is impossible," jurors will wonder (see what we did there) whether the lawyer is exaggerating. Jurors need to see and hear Dr. Wonderful. And you need to know whether the jurors liked Dr. Wonderful. We are constantly surprised by the way jurors react to certain witnesses. We've had jurors dislike the tone or manner of witnesses who we thought were going to be our "star" witnesses, and we've had jurors adore witnesses who we personally disliked. Again, the purpose of a mock trial and a focus group is not to confirm what you already think about your witnesses; it is to learn what the jurors think about your witnesses. Press "play," and you will find out.

Record Prejudicial Comments During Deliberations for MILs & Closing Argument.

Some lawyers myopically focus on the verdict reached during the mock trial or focus group, and that is a mistake. Pay attention to every comment that distracts or prejudices the jury against your client. Label a page "Ideas for Voir Dire & Closing Argument," and write down every prejudicial comment during jury deliberations and focus group discussions. That way, after the mock trial/focus group, you can decide whether: (a) to file a motion in limine to prohibit opposing counsel from making those remarks; (b) to address that bias during voir dire; and/or (c) to call that bias to the jury's attention during closing

argument.

It may not be a popular trial strategy, but we have found it effective to use our closing argument to warn the Lions on the jury what they might hear other jurors say and give the Lions the soundbite they need to confront and kill that bias. During closing argument, we will warn jurors that "if a juror says 'x' during deliberations, you should say 'y." For example, to combat prejudicial remarks heard during a mock trial, we might tell jurors during closing argument: If a juror says "that's the price of doing business," that juror has stopped weighing the evidence;

- If a juror says "that's why they have insurance," that juror has stopped weighing the evidence;
- If a juror says "why wouldn't they warn about everything?" that juror has decided to ignore the judge's jury instructions on inadequate warnings;
- If a juror says "if it happened on their property, I don't care if it's their fault," that juror is ignoring the jury instruction that there is no strict liability.
- If a juror says, "this is a drop in the bucket for them," that juror has stopped weighing the evidence and stopped treating my client fairly and impartially."
- If a juror wants to talk about what another insurance company did to them once, that juror has stopped weighing the evidence and has stopped being fair and impartial.

There is always a risk/reward to addressing bias and prejudice during closing argument, and that risk/reward should always be discussed with a client, but the first step is always to figure out during mock trials what type of prejudice will rear its ugly head during jury deliberations. Toward that end, attorneys should encourage jury consultants not to "kill" prejudicial comments or "stop" tangential discussions during focus group and mock trial discussions. There's gold in 'dem hills!

For Virtual Mock Trials, Beware Telephone Tough Guys.

As virtual or online mock trials become more popular, it is important to remember the difference between talking with ten people at a dinner table and talking with ten people during a telephone conference. It's impossible to know whether somebody is finished talking. It's easy to accidentally talk "over" somebody. It's hard to know whether people agree or disagree with you. And people have a tendency to become more belligerent more quickly. The same is true for virtual trials. Whereas people sitting around a table at least try to respect each other (for a little while), telephone tough guys have no problem speaking their mind and monopolizing the jury deliberations. These Lions can intimidate Lions into not speaking up or not speaking at all.

Tame those Lions by polling all of the jurors and on every specific issue. When the virtual mock trial programs allow jurors to "raise their hands," make sure the jury consultant enforces that rule. And make sure you discuss with the moderator before jury deliberations how you want telephone tough guys to be handled (i.e., muted, called down, warned, disconnected). If you don't, your virtual mock trial will become a single-juror telephone tirade.

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John Jerry Glas is the Chair of the Civil Litigation Department. He has tried more than 70 jury trials to verdict, and serves as lead national trial counsel for the worldwide leading manufacturer of conducted electrical weapons.

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He has been admitted pro hac vice to handle cases around the country, including California, Connecticut, Michigan, Missouri, Nevada, and Virginia. He recently authored "Feeding Lions During Closing Argument," Chapter 19 in the ABA's 2015 peer-reviewed textbook: From The Trenches: Trial Tips From 21 of the Nation's Top Trial Lawyers.

Practices
- Commercial Transportation
- Appellate Litigation
- Aviation Litigation
- Manufacturer's Liability and Products Liability
- Premises Liability

Successes
- Stroud v. Commerce & Industry Ins. Co.
- White v. Occidental Fire & Cas. Ins. Co.
- Commercial Transportation - Crayton v. Campbell, et al
- Product Liability - Ricks v. City of Alexandria, et al,
- Product Liability - Fahy v. TASER International, Inc., et al.
- Retail Defense - Wiltz v. Meraux
- Transportation - Automobile - Grisoli v. Bradley, et al

Accolades
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Missouri Lawyers Weekly, Largest Defense Verdicts, 2013
- 2016, 2018 "Top Lawyers" list by the New Orleans Magazine
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017
- Louisiana Super Lawyers List, 2015-2019
- Best Lawyers® in America, Personal Injury Litigation, 2012-2019
- Federal Bar Association's Camille Gravel Public Service Award, 2009
- Louisiana State Bar Association's Pro Bono Publico Award, 2009
- New Orleans CityBusiness "Leadership in Law" 2012, 2017

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- J.D., Louisiana State University, 1996
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