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PERSPECTIVE

Mock trials help refine case presentation

By Alexander Brainerd

Over the last 25 years of my practice as a trial lawyer, the mock trial became standard procedure when preparing a complex case for trial. During that period, most of my cases involved claims for patent infringement, virtually all of them to be tried before a jury. My mock trials usually consisted of a two- or three-day presentation to one or two mock jury panels. The presentation generally included opening statements, the presentation of fact and expert witnesses, the extensive use of trial graphics and animations, and closing arguments. The mock jurors would deliberate and render a verdict. The deliberations were usually observed by the lawyers and the client. A full debriefing and analysis would follow the jury's deliberations.

The important information gathered from this exercise was not whether the client won or lost, but rather what trial themes should be utilized, how the case could be better organized and presented, what were the compelling and effective aspects of the opening statements and closing arguments, which graphics and animations were persuasive, and which witnesses were effective and which witnesses needed substantial work. In that regard, the mock jurors were always asked what worked and what was confusing or not persuasive. The ultimate questions were always: *What can we do better? What do we need to do to win this case?*

While the mock trial has become standard operating procedure in the preparation of a high-stakes jury trial, it is rarely used in the preparation of a bench trial or arbitration. As bench trials and arbitrations often involve extremely complex, high-exposure disputes, it is surprising that a mock trial or similar exercise is not utilized more often.

Benefits

A mock trial can be extremely useful in establishing themes, strategies and organization for a bench trial or arbitration. All of the same benefits pertain, including the evaluation and refinement of opening statements and closing arguments, graphics and animations, and witness presentation.

While a bench trial or arbitration may

require a somewhat different approach to organization and presentation than a jury trial, the principles of persuasion remain the same. Therefore, the mock trial should be considered as a useful, if not essential, tool to be utilized in the preparation of a complex, high-stakes bench trial or arbitration.

A couple of examples may be instructive.

Case Study 1

In a Hatch-Waxman case, in which a generic drug manufacturer was challenging the patents of a large pharmaceutical company so it could bring its generic drug to market, the attorneys for the pharmaceutical company utilized a mock trial exercise as part of their trial preparation. The drug in question was quite profitable and the generic's entry into the market would most likely have resulted in the pharmaceutical company losing hundreds of millions of dollars in revenue.

As Hatch-Waxman cases are always tried to the court, three mock judges were retained to preside over a three-day mock trial. Two of the mock judges were retired federal court judges and the third was a retired trial lawyer with substantial experience with Hatch-Waxman litigation. The law firm had two trial teams, one of which presented the established pharmaceutical company's case and the other the generic's case. Both teams were thoroughly prepared and aggressively represented their side's position.

The mock trial consisted of opening statements, the presentation of key fact and expert witnesses, the extensive use of trial graphics, and closing arguments. After the presentations of each argument or witness, each of the judges provided a critique and suggestions for improvement. Upon completion of the mock exercise, there was an extensive discussion and critique, which resulted in the modification of trial themes, a change in organization and strategy, a refinement of opening statements and closing arguments, and a significant improvement in witness presentation and graphics.

As a result, the pharmaceutical company's case was dramatically changed and vastly improved.

Case Study 2

In an arbitration arising from a license

agreement relating to valuable technology associated with a certain type of ocular device, the attorneys for one side retained three neutrals to serve as mock arbitrators. One of the neutrals was a patent prosecutor, another was a technology licensing specialist and the third was a trial lawyer with extensive experience with IP and licensing disputes.

Each arbitrator was asked to independently review the license agreement, key documents and arbitration briefs and to render a written opinion and award. The arbitrators were not to communicate with each other during this exercise.

After their opinions were submitted, the three arbitrators met for a full day with the client and its trial team for an in-depth discussion of their opinions and reactions to the materials. The discussion focused on the merits of the party's case and on the most effective way to present its case to a panel of arbitrators.

As a result of this exercise, the party changed its strategy to emphasize what it had considered a secondary issue. In addition, it rewrote its arbitration brief and to some extent focused on different facts and exhibits to present to the arbitrators. As with the other example, this party's case was dramatically improved.

12 steps

The above are examples of how a mock trial exercise can enhance the preparation for a bench trial or arbitration and greatly increase the possibility for a successful outcome. While the examples relate to intellectual property matters, bench trials or arbitrations of any type of case would realize the same benefits — for example, professional malpractice, construction defect, insurance coverage, licensing or other contract disputes.

How the mock exercise is structured and who is selected to act as the mock judge or arbitrator(s) will depend on the type of case and the needs and creativity of the lawyers and the client. Of course, the amount of available resources may also impact the structure and duration of the exercise. However, the following rules and suggestions will enhance the exercise no matter how it is structured and what the particular needs of the client may be.

1. Take appropriate steps to ensure that the mock trial itself and all communications, documents and other materials relating to it are confidential and protected from discovery under the attorney-client privilege and the work product doctrine.

2. Be creative and keep an open mind.

3. Be sure your opponent's side is well represented.

4. Consider having your lead lawyer put on the opponent's case.

5. Prepare for the mock exercise with the same intensity and thoroughness as you would for the actual trial or arbitration.

6. Don't be concerned with winning, but rather with learning.

7. Select a mock panel that is representative of your trier of fact.

8. Test your organization, trial themes and strategy.

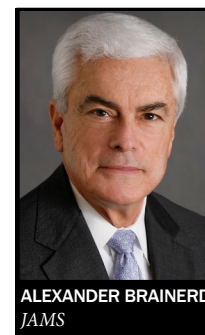
9. Test all critical elements of your presentation, including briefs, graphics, opening statements and closing arguments.

10. Have your critical and troublesome witnesses testify, either live (preferable) or through deposition.

11. Include a procedure and sufficient time for a complete debriefing and analysis.

12. Based upon what you learn, don't be reluctant to dramatically alter some or all of the organization and presentation of your case.

Alexander ("Lex") Brainerd is a neutral with JAMS and focuses his ADR practice on complex commercial litigation, intellectual property litigation and professional malpractice matters. You can reach him at abrainerd@jamsadr.com.



ALEXANDER BRAINERD
JAMS