

The Value Of Mocks When Preparing For A Judge

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Mock exercises are common in cases to be tried to a jury, but are underutilized in matters that will be decided by neutrals. When presented to three retired judges or attorneys, mocks can be better predictors of how the real “decider” will understand and assess key evidence and complex lines of argument. In matters to be decided by neutrals, it is easy to locate the center of things. The center is law and evidence, logical and inferential reasoning. When we know where the center is, we can shape mocks to deliver efficiently what we need.



Judge Wayne Brazil

Even a center that consists of law and evidence can be clouded and elastic. Often courts have imposed multifactor tests, insisting on “flexible rules” (an oxymoron?) and “common sense” outcomes. These circumstances increase uncertainty, but in matters to be decided by a neutral, it is a kind of uncertainty on which neutrals can help counsel get leverage.

Lawyers I have interviewed identify the following ways mocks can deliver significant benefits, many of which are accessible not only because a well-chosen mock neutral can offer new and independent perspectives, but also because they may have more credibility than lawyers with clients. Clients and counsel are likely to listen, carefully, when a panel of retired judges or attorneys have the same reaction to a claim, defense, witness or line of argument.

Enhance counsels’ credibility while educating their clients and managing client expectations.

Clients can underappreciate their lawyers and overappreciate the strength of their case. Counsel (in-house and retained) can bolster the credibility of their own analyses and presentation skills with their clients through mocks that generate independent assessments from neutrals whose experience and credentials clients respect. Mocks can be especially helpful when a client is unwisely refusing to consider settling.

Resolve differences between subgroups or key players within a client.

Big institutional clients have lots of lawyers and nonlawyer decision-makers. Because neutrals may have greater credibility than lawyers with clients, mocks can help resolve differences between groups or between key players within a client. Mocks can also help parties decide which theories, claims, or defenses are most promising or which should be dumped for lack of muscle.

Provide in-house counsel with independent bases for their advice to management.

In-house counsel do not want to be perceived as intellectual hostages of the outside counsel they helped hire. Instead, they want their clients to have confidence in the independence and reliability of their own analyses and advice. Mocks can be an important source of credible second opinions, providing in-house counsel with visibly independent bases for their views — as well as ammunition for persuading the business-side people to move in directions that in-house counsel think are advisable.

Provide clients an opportunity to assess their counsel.

For their part, clients can use mocks to assess the quality of the work their lawyers are doing and the reliability of the advice their lawyers are providing.

Help credibly educate foreign clients and/or counsel about the realities of the U.S. judicial system and about the seemingly implausible substance of some U.S. law.

Foreign lawyers and their clients can be educated effectively by neutrals presiding in mock exercises about the realities of discovery practice in the U.S.: its scope, its penetration of privacy, and the consequences of noncompliance.

Give clients (and counsel) a credible place to locate responsibility for tough decisions — and some peace of mind when going forward.

Clear and emphatic feedback from mock neutrals can help counsel and client feel more confident about or comfortable with their decisions to emphasize, play down, or abandon specific claims, defenses, lines of argument, or evidence.

Escape the cocoon of your own team.

Good mock neutrals know they are useless to you unless they are honest — and they don't worry as much as your partners and associates might about saying something critical about your analysis or presentation. Equally important, they haven't lived with the case for so long that fresh, independent perspectives — or new ideas — have become very difficult to generate.

Pull back from the weeds.

Complex cases (especially intellectual property cases) can become nothing but weeds. The view mock neutrals have initially (and that your trial judge is likely to have) is of the forest. When you mock your case, you either learn to pull back and focus on the big picture or the mock neutral teaches you to do so.

Develop verbal shorthands for capturing complex concepts.

Well-crafted verbal shorthands help counsel stay in on analytical track and keep their arguments flowing. Such shorthands also improve the neutral's ability to follow complex arguments — and the more closely a neutral can follow, the longer the neutral's mind will stay engaged.

Prepare at a detailed level while there is still time to make changes, adjustments.

Human nature invites us to postpone, especially tasks that loom difficult. Too often in litigation, the only

minute is the last minute. Mocks force you to prepare when there is still time to learn and to make important changes.

Expose issues you haven't seen; hear reactions you haven't anticipated; reassess rebuttals to or weaknesses in arguments you've underestimated.

Teach important witnesses (expert or percipient) how to testify more cogently and what kinds of tones or remarks are counterproductive or distracting.

Witnesses with big egos or counterproductive styles/manners are more likely to listen to "suggestions" made by a neutral than by their own counsel — "suggestions" about how best to behave on the stand and how to make their points most clearly and persuasively.

Refine decisions about clock management in time-limited cases and sharpen the presentation of key evidence and argument.

Mocks help counsel identify the subissues, the arguments, and the pieces of evidence that are most important to save the most time for — to be sure to cover well — when working under court-imposed time limits in trials or hearings.

Learn where your communication is unclear or your points are not reaching your target mind.

Structure the mock to limit cost and yield more certain bang for your buck.

Parties can control the expense of mocks in several ways. They can limit the exercise to the most critical issues. For example, the mock can focus on a single factual or fact/law dispute, or on testimony from key percipient witnesses, or on competing justifications for opinions from dueling experts. Counsel also can limit the expense of a mock by providing the neutrals with the key authorities and documentary exhibits up front. In addition, parties could keep costs down by using only one or two neutrals. While input from multiple sources might well be richer, especially if it is informed by debate between neutrals that counsel can watch, parties can derive great value from intelligent, objective feedback even from just one neutral mind.

—By Judge Wayne Brazil, JAMS

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