

Practical Guidance

Legal Profession, Professional Perspective - Making the Most of Your Mock Jury Exercise

Making the Most of Your Mock Jury Exercise

Editor's Note: For disclosure purposes, the authors' firm, Weil, Gotshal & Manges LLP, represented Defendant C&S Wholesale Grocers, Inc. in the matter, *In re Wholesale Grocery Products Antitrust Litigation*, which is discussed in this article.

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June 2024

In bet-the-company litigations, the “you explain too much you lose” principle is paramount. The quickest way to lose a jury is with overly complex and long explanations of the claims or defenses in the case. Factfinders are human and need to make sense of a detailed set of facts. Therefore, a good trial lawyer knows that it is not enough to be right on the law if the story is not compelling.

The mock jury exercise is a powerful tool for trial preparation that, if used correctly, can help litigants and their counsel better assess—and in turn, enhance—the strength of their arguments, witnesses, and overall case presentation. The exercise is especially critical for antitrust trials, where complicated economic theories, abstract market concepts, industry jargon, multiple parties and defendants, and sometimes, the appearance of allegedly “smoking gun” evidence must be dealt with or presented in a way that resonates with a lay jury.

Test and Refine Your Case Themes

In order to create the strongest opening and closing statements, as well as structure the presentation of evidence during the trial in a coherent fashion, the trial team must identify its no more than three most salient case themes. But case themes should not be developed, let alone finalized, in a vacuum among the lawyers who have been focused on the myriad details of a case for months if not years. Rather, the mock jury exercise is an ideal testing ground to discover and confirm which case themes resonate with lay jurors. One or more mock jury exercises also can help assess how many of these themes are appropriate for the case—although fewer is typically better as a rule of thumb, for more complex antitrust cases where certain nuances might require additional case themes, the mock jury exercises may help determine the tipping point.

In *In re Wholesale Grocery Products Antitrust Litig.*, [957 F.3d 879, 880-81](#) (8th Cir. 2020), the plaintiff grocery stores had alleged that C&S and another wholesale grocer, SuperValu, had conspired to allocate territories and customers, purportedly forcing the plaintiffs to pay super-competitive prices for wholesale supply in the Midwest and New England. Throughout the litigation, the plaintiffs advanced an allegorical David-versus-Goliath theme, whereby C&S was portrayed as a Goliath allegedly oppressing the various plaintiff Davids (mom and pop grocery stores) who were allegedly “overcharged” hundreds of millions of dollars. Jury testing helped C&S evaluate that narrative. At trial, C&S prevailed before a Minnesota jury while reinforcing one basic economic theme: the plaintiffs had many choices, and they did not have to use any particular wholesale grocer as they alleged.

Using jury testing to test case themes is also helpful to the extent your client is one of multiple co-defendants. Mock juries can help answer questions such as: what case themes apply to all of the co-defendants and which

ones are client-specific? Should—and can—your client try to set itself apart from its co-defendants, or should there be a united front throughout the trial? And in the event any co-defendants settle, how will your client be received by the trial jury? Certain case themes that would have applied if all of the co-defendants remained in the case may no longer be the strongest case themes for your client, especially if it is the sole remaining defendant.

Test the Credibility of Your Witnesses

When conducting the “argumentative” version of a mock jury exercise as described below, testing the credibility of your witnesses is often critical: a deposition witness that was previously prepped to be short (but truthful) in their answers might now be seen as evasive, or a key fact witness might come off as unconfident in their recollection of the facts because of the way they held themselves on screen. And in particular, depending on the venue and the corresponding juror pool, antitrust economics experts who are perceived to be condescending, pedantic, or dull and difficult to follow could undermine the technical strength of their testimony. Conversely, the mock jury exercise may help reassure that your fact and expert witnesses will be well-received and provide feedback on which aspects of their testimony to emphasize during the actual trial.

To evaluate, jurors can be asked to numerically rank each of the witnesses from both sides and share their overall impressions of each witness in focus groups. Knowing this feedback can help sharpen the examinations of witnesses at trial to elicit points (and avoid others) in a jury-friendly manner.

Test, Test, and Test Again

If the case schedule and timing and budget permit, do more than one mock jury exercise to test different aspects of the case and different ways to present critical evidence. In preparation for trial, our preference is for the first exercise to be structured as a “neutral” exercise based on written submissions alone, with no opening presentations or video testimony from depositions in the case: in essence, how does each side’s case sound on paper? The presentation should cover the factual background, the opposing side’s allegations, and the arguments in response, but the overall tone should be as even and objective as possible. It is also important to include the “worst” documents for your case to test the mock jury’s reactions when there is no opportunity for strategic arguments and clever lawyering to soften the blows.

The second exercise can then be more “true to life” by introducing live oral arguments and video deposition testimony of fact and expert witnesses, as though it were an actual trial. The lead trial attorney(s) should consider presenting both sides of the opening statement as well as a brief closing statement based on the evidence they anticipate will become part of the record over the course of the trial.

However, trial preparation is not the only purpose for jury testing. Mock jury exercises could also shed light on settlement and whether and to what extent alternate dispute resolution should be attempted before proceeding to trial. Keep in mind for budgeting and scheduling purposes that not all jury testing need be done with a jury consultant (although an experienced one can be invaluable), and that in the age of virtual proceedings, virtual mock jury exercises are also an option where multiple rounds of testing are to be conducted.

Conclusion

As a final note, it is important to remember that testing is about *testing*, not about winning. Therefore, mock jury exercises should aim to present the other side’s case in the manner that it is expected to be presented at trial, i.e., highlighting your adversary’s best evidence and best arguments. Only then will litigants and their counsel be able to accurately evaluate how their counter-evidence and counter-arguments are likely to hold up in court.