

It's a scrimmage or a trial run for savvy lawyers

Attorneys iron out their cases by trying a fake trial first

By
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UNIONDALE – Call it a tale of two trials.

When John P. McEntee was trying a breach of contract case in 2003 involving a Fortune 500 company, he received a verdict even before the trial started. But then that's not as unusual as it sounds.

Like many attorneys, McEntee, a partner at Farrell Fritz, hired a jury consultant who let him test his arguments out on "mock jurors" before real jurors got the case.

Lynbrook-based Doar Litigation Consulting brought in "mock-jurors" who heard statements on both sides.

"They ruled in our favor," McEntee said. But the mock jury was troubled by the issue of fairness, he said.

By the time the real trial started, McEntee had modified his approach, presenting arguments showing not only his client was right about the contract, but that the contract was indeed fair.

McEntee won, hands down.

While lawyers have always known that picking a jury is crucial – some say a case is won or lost at jury selection – selecting and tailoring cases to jurors has become a science.

Jury consultants like Doar and DecisionQuest craft profiles for desirable and undesirable jurors (whom lawyers can challenge or "deselect") and help lawyers craft appealing cases in a process dubbed "reverse engineering" a verdict.

"That's what juror psychology is," said Nicholas Croce, president of Doar Litigation Consulting, which worked cases ranging from the World Trade Center insurance dispute to run-of-the-mill contract feuds. "The facts are the facts. You don't change the facts. What you have to understand is the filter that human beings use to translate those facts."



John McEntee

While jury consultants may once have been the province of high-profile, high-stakes cases, that isn't so anymore.

"There is no limit any longer," said Croce. "There's limit to the size of the case for the amount of research that can be done."

Doar holds quick focus groups in which mock jurors hear brief statements summarizing the case.

Doar even lets attorneys watch full deliberations through one-way glass.

"It goes all the way up to mock trial," said Croce. "There could be a week of bringing in jurors, presenting details for a case, testing which witnesses are credible."

Mark Mulholland, the chair of the

litigation department at Ruskin, Moscou Faltischek, said consultants help with the crucial "psychological aspect, in terms of understanding the folks on the street who might be more receptive to a particular theme or less likely to buy into it."

Jury consultants will even send mock jurors to sit in the back row of the courtroom of the actual case. Attorneys get daily reactions – the way a movie director gets rushes of the day's shooting.

"The lawyers can adjust their game plan along the way," Mulholland said. "The lawyers can go back to court the next day and be ready to retune their case."

While there are benefits, there are risks to all this pre-trial focus on psychology. What if, for instance, a lawyer loses with the mock jury? That, according to Croce, can be helpful.

"We hope we lose the first focus group," said Croce, whose firm uses sociologists and psychologists to dig deep into a juror's mind. "Every client gets nervous. But from a psychological perspective, you find out the holes in your case."

Then there's the question of whether the attorney might simply have won without the consultant.

McEntee, after all, found his arguments went over well in the 2003 case. But he believes his focus on showing the contract was fair may have been an important part in winning the case.

"You have to make the jurors feel comfortable that the right thing was done, not only the legally correct thing," McEntee said. "You want to make them comfortable with the decision they're going to render." ■