

Mocking The Entire Bar: Applying Jury Research Techniques To Mock Judicial Panels And Mock Arbitrations

Roy Futterman

DOAR LITIGATION CONSULTING

As an increasing amount of litigation moves from jury trials to bench trials and arbitrations, jury consultants are increasingly applying their expertise in running mock jury exercises to running mock judicial panels and mock arbitrations as methods to see into the black box of professionals' decision-making processes.

Judicial Panel Research

In preparation for a bench trial, a mock judicial panel research event can be held to get an understanding of how a judge might perceive the important issues in the case. In the same way that mock jury trials use multiple mock jury groups as a way to predict the decision making of an actual trial jury, judicial panel research uses retired judges to predict the decisions of an actual trial judge. Judicial panel research is usually done as a single research event, but an event is often done in conjunction with a separate mock jury trial event when an issue in a jury trial is to be decided by the presiding judge – for instance, *Daubert* challenges and inequitable conduct allegations.

At the judicial panel research event, three or four retired judges, who are recruited based on having a similar background to the actual judge, watch summarized presentations of both sides of the case. Depending on what the legal team and jury consultants consider to be the issues that should be tested, the event can

Roy Futterman, PhD, is a Clinical Psychologist and Director at DOAR Litigation Consulting, LLC.

be one or two days long and feature various trial elements. For example, to augment the amount of evidence the judges can consider, the judicial panel can be asked to read briefs and evidentiary documents in advance. At the event, they can watch summarized presentations of each side with demonstrative graphics on screens and desktop monitors. In addition, they can watch live direct and cross examinations of witnesses.

If there are concerns about whether the panel judges will be influenced by each other's professional reputation or by knowing each other personally, the panelists can be seated in curtained-off, cubicle-like structures, so that they only see the presentations.

After the panelists have seen the whole presentation, they can complete questionnaires about their individual reactions before being taken to separate rooms for a semi-structured interview by a jury consultant about their decision-making process. They can then be gathered together for a roundtable discussion with the attorneys and consultants to discuss their thoughts and recommendations about the case.

Mock Arbitrations

Arbitrations can be frustrating in that the legal team receives panel decisions without any explanation of what led the panelists to their decisions. This leaves lawyers and their clients to speculate about how the panel reached its decision and to experiment with case strategy without having a true reading of the strengths and weaknesses of their case. Mock arbitration research is particularly impactful because it allows the legal team to watch arbitrators actually deliberate about their case, and thus allows

them to make informed and effective changes to case strategy going forward. The predictive power of a mock arbitration is, of course, highly useful for single arbitrations as well if the damages are large enough or if it deals with a critical business issue.

Similar to judicial panel research, three or more mock arbitration panels of professional arbitrators can be recruited to match an actual arbitration panel that will decide on an upcoming case.

In this type of research, the legal team and consultants can decide whether they would like to provide the mock arbitrators with case materials in advance. At the research event, the mock arbitrators can be shown a variety of types of presentations over the course of one or more days, including such elements as summarized attorney presentations for each side with demonstrative graphics, as well as live witness examinations with an opportunity for the mock arbitrators to ask questions. The arbitrators can be provided with binders of case materials that the actual panel would have at the arbitration, and they can be provided with a portion of time after the case presentation to review the binders.

After the presentations, the mock arbitrators complete questionnaires giving their individual reactions to what they have heard from both claimant's and respondent's presentations. They are then split into three or more groups. Each of these mock panels deliberate and fill out verdict forms while the legal team and attorneys watch from behind two-way mirrors. After each panel has come to a verdict, a consultant interviews each panel on their decision-making process. After this, all of the arbitrators are

For more information about DOAR, visit www.doar.com or call (800) 875-8705.

brought together with all of the attorneys and consultants for a large roundtable discussion of the panelists' reactions to and recommendations about the case.

As an example of this, we were approached by a major investment bank that had lost several FINRA arbitrations regarding a securities fraud case, but it was unclear what the problem was.

When we put on the case before mock arbitrators, the separate mock panels had the same reactions in that they were appalled by the financial institution's failure to take even partial responsibility for their clients' monetary losses. When a second mock arbitration was held, the presentations featured the financial institution explicitly stating what they con-

sidered to be their failings as well as where they felt they were blameless. This time, the mock arbitrators were much more in line with the financial institution's view of the blame and decided overwhelmingly for the institution. The legal team made this strategic alteration in their actual arbitration presentation and won every arbitration going forward.