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The Ultimate Power of Persuasion: Using the Mock Trial to Enhance Litigation Strategy

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By Mary A. Bedikian and Jerome D. Hill

Information is power. For the lawyer who functions regularly in the courtroom, this means the ability to persuade. Today, the trial lawyer's arsenal of weapons is not limited to computerized legal research, extensive discovery or a trial "team". An innovative technique—the mock trial—is now available to supplement this arsenal.[1]

Litigators tend to view a case from general experience. Often, their view does not involve an issue-by-issue approach. The mock trial is useful because it (1) targets and evaluates critical issues; (2) identifies appropriate juror profiles; (3) exposes litigation risks; and (4) enhances overall case strategy.

This article will describe how a recent mock trial in Michigan was designed and used to fine tune trial strategy by restructuring evidence presentation to maximize the likelihood of a favorable jury verdict.[2] Although this mock trial was limited to improving litigation skills, mock trials also may be used to gauge settlement or pursue binding or nonbinding ADR. Settlement considerations and ADR forms are described later in this article.

THRESHOLD ISSUES— "DISCOVERY" OF THE MOCK TRIAL

At the outset, there are several issues which a practitioner should consider before using the mock trial. Although generally outside the scope of this article, brief treatment of these issues is given below.

First, is the mere occurrence of a mock trial discoverable? This issue, essentially limited to single-party mock trial, can be addressed under attorney work product.[3] Attorney work product consists of assembled information, mental impressions, legal theories and strategies pursued in preparation of litigation, and is usually derived from interviews, statements, memoranda, legal and factual research, personal beliefs and other tangible or intangible devices. Only work which forms an essential step in the procurement of data and which represents duties normally attended to by attorneys is protected.[4]

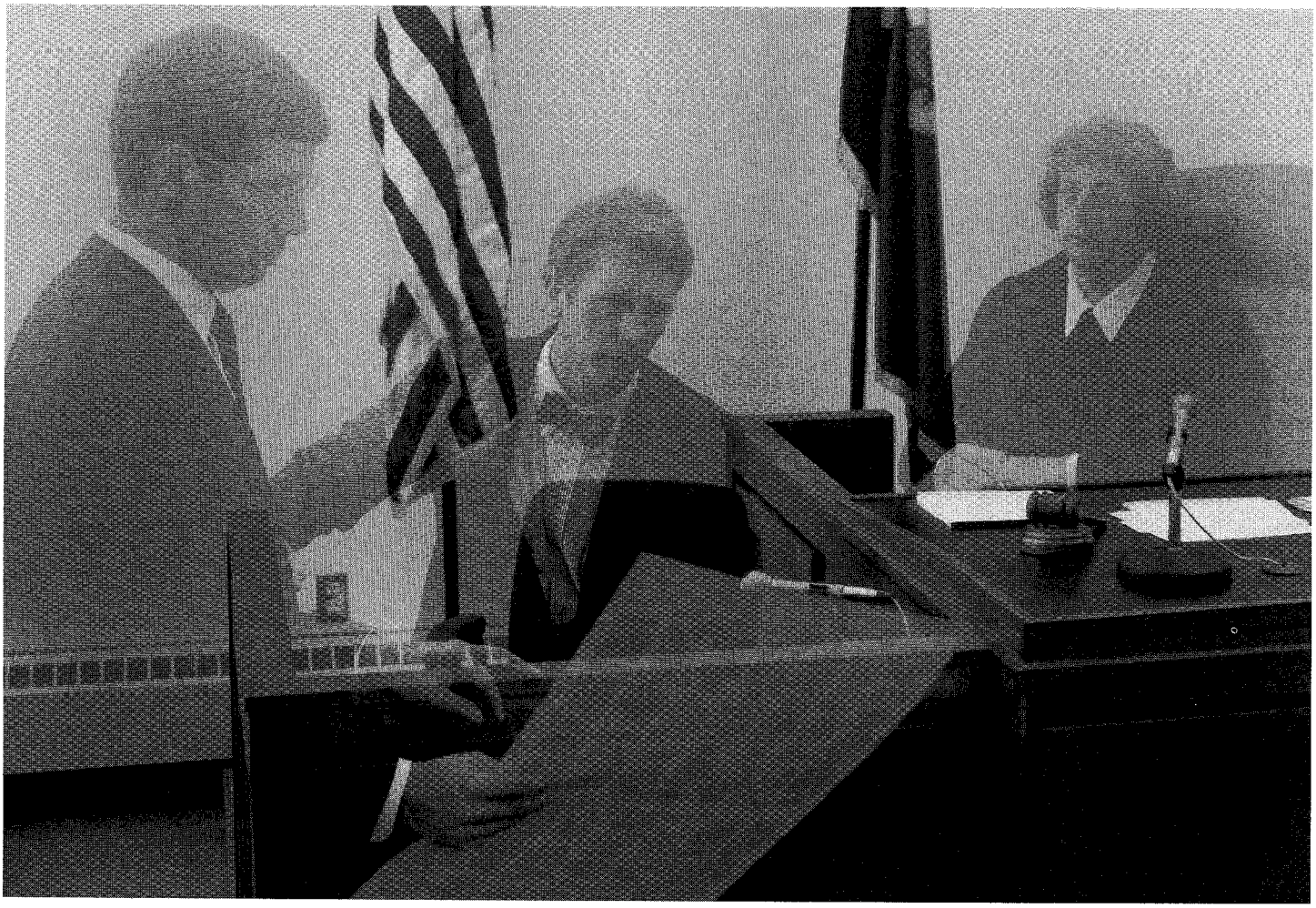
Although this mock trial was limited to improving litigation skills, mock trials also may be used to gauge settlement or pursue binding or nonbinding ADR.

Arguably, a mock trial satisfies these requirements. The attorney does perform duties normally attended to by attorneys—trial preparation or settlement procedures depending on the mock trial used. The work forms an essential step in the procurement of data—reaction to presentation of a case. The information assembled from a mock trial, statements and personal beliefs, form the necessary mental impressions used to prepare for litigation.[5]

The second issue is more complex and has greater ramifications for trial counsel. Is information which inheres in a mock trial discoverable? Assuming that the mock trial is used as a settlement technique, under FRE 408 and its Michigan counterpart, the proceedings including the result would be "protected."[6]

The only case addressing confidentiality which the authors have discovered pertains to summary jury trials, a slightly different ADR form, and the accessibility of the proceedings by the general public and press.[7] In *Cincinnati Gas and Electric Co v General Electric Co*,[8] the non-party appellants filed a motion to intervene to challenge closure of the summary jury trial proceedings. The case involved design defects in the construction of a nuclear power plant. The parties had negotiated a comprehensive order, with documents to be separately filed under seal. The summary jury trial order included a provision which required the proceedings to remain confidential.[9]

In a 2-1 decision, the 6th Circuit Court of Appeals concluded that a summary jury trial is not analogous in form or substance to a real trial[10] and therefore the First Amendment right of access which encompasses civil and criminal trials and pretrial proceedings is not applicable. Second, assuming such a right exists, public access



would not play a significant positive role in the functioning of the judicial system.[11] While recognizing the therapeutic value of community residents to view proceedings which impact on their welfare, the court held that allowing access would have a chilling effect on the settlement process. Stated simply, the public cannot observe negotiations leading to traditional settlement.

BACKGROUND TO MOCK TRIAL

Plaintiffs were two former students of Wayne State University who sued the University claiming that the English Proficiency Examination discriminated against them on the basis of race in violation of the Elliott-Larsen Civil Rights Act and the Michigan Constitution. Each plaintiff sought compensatory damages; one also sought exemplary damages, asserting that the University's conduct in precluding matriculation caused severe emotional and psychological distress.

Given time constraints and a limited pool of jurors, it was critical to evaluate juror responses by using a combination of questions likely to uncover existing bias.

PRE-MOCK TRIAL ACTIVITY

Establishing the Jury Pool and Profiling of Jurors

The American Arbitration Association[12] ("AAA") mailed 550 letters of invitation to Wayne County residents from a random list purchased from a list broker; the nature of service and the terms of payment were clearly set forth. Those residents who returned signed letters of interest were invited to join the jury pool.[13] Prospective jurors were requested to complete qualification questionnaires. The questions, though general, yielded basic answers to areas involving occupation, felony and misdemeanor convictions and participation in criminal or civil lawsuits. These questions served as a prelude to the more stringent sensitizing of jurors in the next stage.

MOCK TRIAL

Voir Dire

Given time constraints and a limited pool of jurors, it was critical to evaluate juror responses by using a combination of questions likely to uncover existing bias. *Voir dire,* conducted by the "judge," a

seasoned trial lawyer, focused on (1) the prejudice for or against universities and colleges in general, (2) racial bias, (3) assessing the impact of youth and freedom versus authority and conformity to the requirements. Among the specific questions posed:

- Prior racial discrimination lawsuits, as a party or a witness;
- Prior litigation involvement, as a party or a witness;
- Prior jury service, civil or criminal;
- Opinion on testing students, as a way of measuring proficiency in a subject area;
- Phobias or fears regarding test taking;
- Failing an examination, and attributing the failure to a teacher's or school's requirement; and,
- Ability to assess damages, without regard for the fact that defendant is a corporation or may have more money than plaintiffs.

In general, the judge avoided such leading questions as, "Can you be fair and impartial" since this type of question was unlikely to discern any preexisting bias.

Two separate juries of eight and seven respectively were impaneled to hear the case. Alternates were permitted to deliberate but not participate in the verdict.

Opening Statements

The case, which involved a complicated "story" emphasizing G.P.A.'s, English composition, academic freedom and degree requirements, was presented primarily through experts, psychometricians and sociolinquists. The mock trial was presented by one counsel—in this case, the defense.[14] Since it would be a disservice to the client to "soft pedal" the strengths of the opposing position, the presentation of the opponent's case had to be effective, forcefully argued and clearly presented. To do otherwise would falsify the results of the mock trial data.

The theme selected by "plaintiffs" counsel was the "tale of two cities," *i.e.,* the same institution which graduates scholars and feeds vital academic services to the community also represents a source of despair and false hope for many students, particularly minorities. Plaintiffs focused on the weakness in policy—tracking and forcing those who were eligible to actually take the exam, many of whom were seniors. Defense counsel chose the theme of fairness and equity. The University had designed the best exam and administered the best, most equitable policies.

In this mock trial, it was important to permit the jury to hear the most credible "arguments" of plaintiffs' case, even if the jury could not judge the demeanor of plaintiffs' witnesses.

Testimony of Witnesses

Depending on the time involved, some witnesses will not be "called" at all; other witnesses will have the "summary" or key passages of their sworn testimony presented by counsel. Thus, counsel must decide what those key passages are for each lay witness. In this case, the sequence of witnesses and the limited use of expert testimony required additional preparation and handling. Expert testimony in this case was presented live for the participating counsel.[15] Since the opposing nonparticipating counsel and experts were not used, key passages from the expert's sworn deposition testimony were provided ("read") by the opposing participating counsel. While the nonparticipating counsel and their witnesses were not assessed, the participating opposing counsel did have the opportunity to cross-examine the live experts used.

The actual testimony of witnesses for plaintiffs' case necessarily focused on plaintiffs' expert witnesses. Plaintiffs had retained two sociolinguists, an econometrician, a psychologist and a vocational rehabilitation specialist. It was clear that plaintiffs needed credible experts to support the lay witnesses' criticism of the English Proficiency Exam (EPE). To reduce the effect of race, plaintiffs had retained prominent black sociolinguists who were critical of such exams and able to articulate the impact and consequences of these exams on minority students. The statistician was useful in providing the factual/statistical basis required to show "disparate impact" under the Elliott-Larsen Civil Rights Act and assessing the enormous economic damages, primarily wage loss that plaintiffs would sustain because of a failure to secure their B.A. degrees. The vocational rehabilitation specialist would confirm the dwindling and shrinking job market and the failure of plaintiffs to be able to seek higher income professions.

In this mock trial, it was important to permit the jury to hear the most credible "arguments" of plaintiffs' case, even if the jury could not judge the demeanor of plaintiffs' witnesses. Counsel could still assess the impact of these arguments on ordinary citizens. How would a real jury respond to arguments about the shortcomings of the administration of the exams, the failure to monitor the alleged impact on minority students, and the failure of the EPE to meet the most rigorous of modern testing methods? Would the jury respond favorably to the substantial damage claims? Would the jury believe the psychological evaluations?

On the flip side, as the defendant, counsel had to evaluate the jury's response to the defenses presented: Fairness, equity, the majority of minority/black students passing the EPE, and the fact that the plaintiffs themselves were not exemplary students. The expert witnesses had to be evaluated on the basis of their ability to interact with a jury. Would the experts appear arrogant or straightforward and fair? Would their explanations be too complex to be understood? More importantly, would their personal presence and manner of speaking offend or persuade the jury? If the jury was not persuaded, the defendant's case would be lost.

As the mock juries listened, plaintiffs presented the sworn testimony, in edited form, of the plaintiffs' expert deposition testimony. Cross-examination was conducted by using the actual quoted phrases from the deposition transcripts. The use of only sworn testimony for nonparticipating lay witnesses was a means of maintaining the accuracy of what was likely to happen at trial [paraphrasing may state too much or too little]. Certain aspects of plaintiffs' depositions were also used to provide the core of plaintiffs' testimony. For example,

the jury was informed as to the number of times the plaintiffs took the EPE, the minimum number of English courses taken, and the failure of the students to meet the standard admission requirements of the University.

The defendant's experts provided live testimony. The evaluation and critique of the live experts had to be measured in a relatively short presentation. Were they nervous? Did they look at the jury? Was their presentation clear? In sum, were the experts persuasive? It was also important for participating counsel to evaluate testimony on the alleged damages. What is the range of damages that a jury would assess against the client? What kind of experts—academics or psychologist and rehab specialists—would be the most effective to rebut the damage claims?

Demonstrative Evidence

Graphics and charts, bullet outlines and blowups of actual documents are essential to conveying the "facts" to the jurors without the benefit of live or, in some cases, abbreviated testimony. In this case, opening statements were accented with demonstrative evidence by both counsel. Demonstrative evidence was also helpful in presenting expert testimony, *e.g.,* the statistical analyses and the mathematical calculations used in evaluating the reliability and validity of tests.

Final Arguments and Legal Instructions

In making final arguments to the two juries, plaintiffs' counsel focused on the conflicting themes of gloom and brightness. Essentially, without these degrees, the University's promises of a better future for the plaintiffs would remain elusive. Defendants, on the other hand, reemphasized that plaintiffs' plight, while unfortunate, was not the direct result of the University's conduct. Wayne gave these students an opportunity—the students closed the door to these opportunities.

After closing arguments, regular, not truncated, jury instructions were read to the juries by the judge. The juries were then placed in separate rooms to deliberate. Deliberations were taped for later study and evaluation.

A special verdict form, containing the following questions, was presented to each jury:

1. Does the examination have a discriminatory impact on black students?
2. Despite the statistical disparity in the pass rate of black and white students, is the examination valid?
3. Did plaintiffs fail the examination because they are black?
4. What is the total amount of plaintiffs' damages?

After 45 minutes, the first jury returned a verdict in favor of the University. The second jury came back with a verdict within the hour. Although it found disparate impact, it also found that Wayne had a legitimate basis for imposing the EPE requirement.

A common lament today is that litigation is expensive, both in terms of financial and human costs.

Following their decisions, jurors were asked to complete three questionnaires addressing different aspects of the case and the effectiveness of counsel in presenting the evidence. More than half of those responding indicated their decision was made before the end of closing arguments. Of the 15 jurors, only four indicated that they waited until all evidence was offered to reach their decision. Jurors stated that lack of proof of discrimination was central to their decision. Only one juror found the expert witnesses not credible.

POST-MOCK TRIAL ACTIVITY—SETTLEMENT

Wayne's posture, even at the outset of the pretrial stage, was to maximize its trial position, not settle the case. For the defendants, the case was a matter of principle, and one for which they were prepared to fully litigate, irrespective of cost and time. For others who use the mock trial, settlement not only will be viable, but perhaps their primary goal, particularly if the damage exposure is great, *e.g.,* products liability cases.

By assessing the risks of litigation, counsel can formulate a settlement position which best suits the needs of the client. This analysis should take into consideration the following:

- Whether public policy issues are involved;
- Whether constitutional claims involving life or death or serious liberty and property interests are at issue;
- Whether one party has a strong contractual claim or defense;
- Whether precedent needs to be established;
- Whether client resources can withstand protracted litigation proceedings.

In many cases, settlement is an appropriate, desired substitute for judgment from either a court or an arbitrator.

AVOIDING TRIAL RISKS—USE OF BINDING OR NONBINDING ADR

Mock trials are used to prepare for litigation, or to create movement toward settlement. A common lament today is that litigation is expensive, both in terms of financial and human costs. For this reason, lawyers should consider recommending some form of ADR—not necessarily as a prelude to, but in lieu of litigation.

Nonbinding ADR[16] permits the litigants to learn more about the strengths and weaknesses of their case. In one sense, it serves the same function of a mock trial—to get a "read" from a neutral third party on the legal or factual issues, and thus encourage each side to more realistically appraise their case, with a view toward settlement.

Binding ADR,[17] on the other hand, is a virtual substitute for trial. Appeals are rare, save for egregious conduct on the part of the arbitrator or decision-maker.[18]

Some of these forms are discussed below:

Mediation. Mediation involves the active intervention of a third-party neutral. Unlike the arbitrator, the mediator does not make a decision. Rather, the mediator persuades the disputing parties to reach a mutually acceptable settlement of their differences through issue clarification, suggestion and reality testing. This process, voluntary and party-driven, is useful in situations where you:

- Have multiple issues;
- Are concerned about time;
- Are not interested in acquiring precedent; and,
- Are anxious to preserve your professional relationship.

Conversely, you should not consider mediation if you:

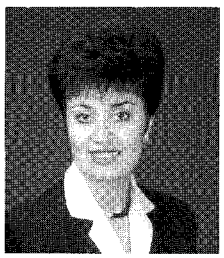
- Have an extremely strong contractual claim or defense;
- Need a victory for political reasons;
- Require a judgment with a *res judicata* or collateral estoppel effect; or
- The other party is or likely to be in a bankruptcy proceeding.

Mini-trials. Treated primarily as an offshoot of litigation, the mini-trial is a structured settlement process which allows litigants to conceptualize the outcome of a factually complex dispute in an informal context. It is particularly well-suited for multi-party, multi-issue proceedings, and cases involving mixed questions of law and fact.

The informal structure of the mini-trial allows parties to more directly control the format. Case settlement is facilitated by the presence of senior executives with complete settlement authority.

Mini-trials should not be considered if one party:

- Is unsophisticated;
- Has strong negative feelings or distrust toward the other. (The mini-trial will heighten tensions and animosity); or,
- Has a hidden agenda in the litigation unrelated to the merits of the case, *e.g.*, to gain a competitive advantage, discover confidential materials, direct adverse publicity toward an opponent, make new law or enforce a principle.



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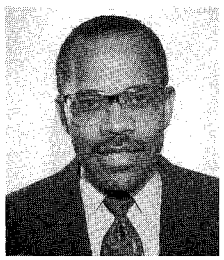

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Case settlement is facilitated by the presence of senior executives with complete settlement authority.

Arbitration. Arbitration involves the intervention of a third-party neutral who listens to the parties argue the merits of their case and renders a final and binding decision, enforceable in a court of law. This process can be used in all civil cases including those with appended RICO claims.[19] Minor criminal cases also can be arbitrated.[20]

Arbitration is a highly successful ADR mechanism which offers numerous advantages over litigation:

- Reduces uncertainty of jury trial results;
- Increases speed of resolution;
- Reduces costs since arbitration does not involve discovery, jury venire, motion practice, pretrials and post-award appeals;
- Uses knowledgeable neutrals; and,
- Includes finality.

CONCLUSION

Mock trials can have tremendous value in settlement dialogue, attorney-client relations, trial strategy development and examination of witnesses. Costs are not prohibitive; the proceedings can be molded to suit a party's needs and budget. The conscientious lawyer should treat the mock trial as a vital part of pretrial preparation, and a way to solidify and enhance the client's case.

In other instances, especially where litigation is not feasible, lawyers should consider ADR. The use of ADR is not meant to trivialize the remedial dimensions of lawsuits. Rather, ADR may offer the benefits litigation cannot—speed, efficiency and an opportunity to shape the outcome. ■

Footnotes

1. The reader is invited to review other articles on this subject. Grant, *Focus Group Versus Mock Trials: Which Should You Use?* 16 Trial Dipl. J. 15 (1993); D. David, *Flying With Radar—Use of Mock Jury Research to Target Critical Issues and Fine Tune Trial Strategy,* 54 Inter-Alia F4 (May/June 1989).
2. Settlement was not an option. The case involved the ability of Wayne State University, the defendant, to determine its own academic qualifications (without judicial intervention) by requiring of all students the successful completion of an English proficiency examination.
3. This protection should not be confused with attorney-client privilege. The attorney-client privilege focuses on the client and the right to confidential advice. Once established, the privilege is absolute. The attorney work product protects the lawyer's activities in preparing for trial. Work product may yield to a showing of necessity by opposing counsel. *See* Fed. R. Civ. P. 26(b)(3) which protects any documents or thing regardless of content and whether relating to fact or opinion, prepared by anyone at any time in anticipation or preparation for litigation or trial. Thomas McGanney and Selvyn Seidel, *Rule 26(b)(3): Protecting Work Product, in,* The Litigation Manual: A Primer for Trial Lawyers (ABA Section on Litigation ed., 1989).
4. A.L.R. 3rd 412, 428-29.
5. Attorney work product protection is not absolute. It does not protect oral communications. Also, the second prong of Rule 26(b) leaves in flux the protection for "mental impressions." *See Xerox Corp v IBM Corp,* 64 F.R.D. 367 (S.D.N.Y. 1974) (The court ordered production of notes taken by in-house counsel during an interview of defendant's employees before litigation commenced because the employees could not recall crucial information at their deposition. The court stated that it would remove attorney mental impressions as much as possible, but if it proved impossible to do so, the entire document would have to be produced, in order to avoid one party having sole control over discoverable information); *U.S. v Brown,* 478 F.2d 1038 (7th Cir. 1973) (The court ordered production of a memo containing "notes and legal judgments" made by an attorney acting as counselor, not litigator, prior to the commencement of the IRS' investigation); *In re Grand Jury Proceeding,* 473 F.2d 840 (8th Cir. 1973) (The court held that a lawyer should not

be called to testify to oral communications with witnesses concerning trial preparation).

6. *See* recent article on the pitfalls of Federal Rules of Evidence 408 in Litigation, Fall 1992, Vol. 19, No. 1, pgs. 34-38, 71.
7. In a summary jury trial, parties present summary versions of their case to a judge or magistrate before a surrogate jury. After an abbreviated charge, the jury deliberates and returns a non-binding verdict. If settlement does not occur, the case moves into the regular trial mode. Although the summary jury trial does not affect the parties' right to a trial on the merits, district courts can not mandate its use. *See In re NLO,* No. 93-3065 (6th Cir. 1993).
8. 854 F.2d 900 (6th Cir. 1988).
9. *Id.* at 902.
10. The summary jury trial is a device used to settle disputes. *See Link v Wabash Railroad Co,* 370 U.S. 626, 82 S. Ct. 1386, 8 L.E. 2d 734 (1962); *see also* Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States,* 103 F.R.D. at 469.
11. The court observed, "[w]here a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement," 854 F.2d 154. "[s]ecrecy of settlement terms . . . is a well-established American litigation practice . . . ," *quoting Palmieri v New York,* 779 F.2d 861, 865 (2d. Cir. 1985).
12. The American Arbitration Association ("AAA") is a public service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. The AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.
13. No sample of mock jurors will be fully representative since there is no compelled process. Persons who agree to serve on a mock trial may be the intellectually curious, or those in financial need.
14. Plaintiffs' counsel did not participate in the mock trial. The Acting General Counsel of the University, fully familiar with the strengths and weaknesses of the legal and factual issues, served as surrogate counsel for the opposing party; Mr. Hill served as defense and trial counsel.
15. Budget considerations may require the testimony to be presented on video. General case summaries and opening statements of each side may be handled in the same way.
16. Nonbinding forms, in addition to mock trials, include mediation, neutral expert fact-finding, mini-trial, ombudsman and summary jury trial.
17. Binding forms include arbitration and, in some cases, private judging.
18. MCR 3.602 (J). Awards can be vacated if: (a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights; (c) the arbitrator exceeded his or her powers; or (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.
19. *Mitsubishi Motors v Soler Chrysler-Plymouth,* 473 U.S. 614 (1985); *Shearson/American Express v McMahon,* 482 U.S. 220 (1987); *Rodriguez de Quijas v Shearson/American Express,* 490 U.S. 477 (1989).
20. *Transnational Juris Publications, California Enacts Criminal ADR Legislation Based on Bay Area Program,* 3 World Arb. & Mediation Rep., 287 (Dec. 1992).

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