

The Consumer Finance Podcast — Mock Jury Exercises: Enhancing Litigation Strategy in Consumer Financial Services

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Guests: Matt Hansen, Michael Lacy, and Jason Manning

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Chris Willis:

Welcome to [The Consumer Finance Podcast](#). I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. Today, we're going to be talking about mock jury exercises, what they are, and how they can be used in consumer financial services litigation.

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Now, as I said, today, we're going to be talking about a very interesting topic, which is how and why you use a mock jury exercise in consumer financial services litigation. Joining me to talk about that are three of my partners; Matt Hansen and Jason Manning, who are partners in our Consumer Financial Services group, and Michael Lacy, who's the practice group leader of our Consumer Financial Services group. Gentlemen, thanks for joining me on the podcast today.

Matt Hansen:

Thank you, Chris. It's great to be here.

Jason Manning:

Happy to be here. Good to see you.

Michael Lacy:

Good to see you again, Chris.

Chris Willis:

All right. Well, let's jump into it. Just for starters, some people may not even know about this, particularly if they haven't done a lot of litigation in the past. What are mock jury exercises? What is that?

Jason Manning:

There's a wide range of this. But anytime you're taking a case to trial in front of a jury, there's a very high degree of uncertainty. Who's going to be on the panel? How are they going to think about your case? How are they going to receive the information? Will they understand it? A mock jury is essentially designed to do a practice run. Call it a pre-season game, if you will. Let's test our theories. Let's help clarify the evidence. Let's see what the jury thinks and feels in response. It could be informal. We're talking – let's just do openings, and we'll have five people that are non-lawyers that are just going to listen to it and give us feedback.

Or it could be very sophisticated, and you actually stage a trial. You go to a courtroom, you got a judge up there, you've got a jury of 12, and you're going to go through the first half of the plaintiff case. I mean, it can be as sophisticated as having jurors wear biometric watches with real-time feedback of software running, accumulating that data as it goes, and somebody's watching it. It just depends on what you want to spend.

Chris Willis:

That's very interesting. Thanks, Jason. Matt, let me turn to you. Why would you do a mock jury exercise? Jason alluded to the uncertainty of trying a case to a jury, but can you give the audience a little more color about why the client and its legal team would choose to do one of these?

Matt Hansen:

Yes, absolutely. That's a great question, Chris. I think really the why, there's a few things that come to mind. One, you want to test the themes in your case. As you're getting ready to try a case to a jury, you're thinking a lot about the themes and how those themes will be presented, through which witnesses, and the evidence is there in the case. A mock jury exercise can be very helpful to understand how well your case resonates with the jury. Also, it's important you're testing your opponent's case too, right? That's a very important aspect of this.

To get good feedback, you have to be able to present both cases in an equal manner, and you want to do just as good a job presenting the other side's case as you are your case. It's also helpful to identify the jurors that you would like to have on your jury pool. The flip side of that, the jurors that you would like to avoid. Through this exercise, you've seen how various jurors react to different aspects of your case. You can determine what type of individuals. When these tests are put together, you'll get a lot of demographic information, a lot of just background information about the jury. You'll find out which jurors your message resonates with and which ones are resistant to your message, and that would be very helpful in the jury selection process.

Chris Willis:

Okay.

Michael Lacy:

Let me jump in here, Chris. A couple other things. I mean, usually, at least in my experience, when you're at the mock jury stage, you clearly appreciate that there's a risk of an adverse liability finding. What you're trying to test, again testing those themes, those witnesses, as Matt and Jason alluded to. You're also trying to test or trying to get a handle on how much exposure are we really talking about. These mock jury exercises usually include some type of, obviously, liability finding, but also if there's a finding by the mock jury of liability on behalf of your client. How much is the case worth? That's where things get quite interesting. Watching these mock juries, you discuss damages.

As some of our clients know, some portions of the public have definite thoughts about financial institutions and how they're perceived. That really comes into play when you participate in these mock jury exercises.

Chris Willis:

Michael, that's a perfect segue into the next question I was going to ask. You mentioned, for a case where you anticipate some possibility of an adverse result, what kind of cases would a client and legal team do a mock jury exercise in? I mean, obviously, it's not every case. What makes a case special enough to warrant that exercise?

Michael Lacy:

Sure. In my experience, there are two components that don't necessarily have to both be present. But usually, when both are present, they're the best candidate. One is you have a particularly difficult set of facts in real time. A lot of times, you're talking about in our world a foreclosure of a home, which obviously has an incredible personal sentiment to it.

Also, you're in a jurisdiction that historically has – you've seen jury awards that are pretty significant, and you know that that's a possibility, and you normally combine that with your opposing counsel. Is this opposing counsel someone who tries cases, has gotten significant jury verdicts? In my experience, that's really the sweet spot in terms of when you really need to think about whether to do a mock jury exercise.

Chris Willis:

Okay, makes sense. Jason and Matt, let me turn to you and ask you kind of another detailed question. When in the timeline of a case does it make sense to do a mock jury exercise if you think it's a good idea to do? Is it near the beginning? Is it in the middle of the discovery? Is it a week before trial? When would you do it?

Matt Hansen:

Yes. I think the timing's very important, Chris. Like a lot of things, it's probably going to vary case to case. But I think you have to have been far enough into discovery that you have a good grasp on what the facts are. You know what the case is going to be. As has been alluded to, it's

very expensive to do a mock jury exercise or can be very expensive, and so you'd want to wait to incur those costs until you fairly confident you're going to be trying this case to a jury. You want to make sure you're past that threshold.

But then once you get to the point where you think, "This really isn't a summary judgment case. I think we're going to be in front of a jury, and it looks like we're not going to be able to resolve it. We need to start thinking about investing the money in this," you want to give yourself as much runway to learn what you can from it and still put a case together. You use the example of a week before trial. That wouldn't be very effective. You want to give yourself enough time to be able to adapt your case and work with your witnesses. Put together and emphasize the themes that resonate well in your mock jury exercise.

Chris Willis:

Makes sense.

Jason Manning:

Yes. I'll just add, Chris, part of the answer to your question is what does the scheduling order allow? Some courts – I'm in Richmond, and of course we've got the rocket docket, so trying to fit in a mock jury exercise can be challenging. Other courts where you have more time in between the close-up discovery and the actual trial, obviously, that makes it more amenable to doing this. I hope folks appreciate this is different than when you're getting ready for an appellate argument, and you might want to mock that argument. That record is static. The briefs are in. You know what the other side's going to say. You know what you've said, obviously. You have the underlying decision from which the appeal comes.

Here, you're really doing it all in the fly as evidence. The depositions are taken, and the documents are being produced and the like. That's why Jason alluded to earlier, these mock jury exercises can really take as many different forms as the imagination has, from anywhere just doing opening statements, to playing deposition testimony to mock juries, to doing closing statements or something in between.

Chris Willis:

Yes. That, I think, is a great way to lead into our next question. I was actually going to ask Jason. How do these mock jury exercises work? How do you go about just putting one together? I mean, are there like consultants or companies that help? How does it work?

Jason Manning:

It really depends on what you want to spend. The truth of the matter is there's a whole range of this. Most of the ones that I've done, my client didn't want to go full court. We're going to retain a jury consultant and do a full mock jury. It's usually a hybrid. For example, it was opening and the key witness. That's what we presented where we had someone play the role of opposing counsel and do their opening as well. We're both testing our themes. We're framing it for the jury.

Then the key witness who both sides agreed, the testimony is going to turn on the credibility of the witness as to who – I mean, it comes down to who does the jury like and who do they believe. It's invaluable to test that on a disinterested, diverse demographic group that are not lawyers, right? We always talk about our cases internally amongst the team, and we're always brainstorming those things, but we're all lawyers, right? It's nice to have a non-lawyer's perspective. Usually, we cut it off after the openings, and we do one witness, opening and crossed, and then we pause.

I've found that the jury consultant piece of it almost always adds value. The jury consultant has done these professionally more than almost any attorney has tried cases. So they have a lot more experience in identifying commonality amongst juror types and themes that are likely going to resonate with those juror types, which is really important so that you can take that with you when you're actually at the trial picking the jury, which is always a harrowing experience.

Chris Willis:

I'm sure it is. Well, I don't think this episode would be complete without talking about some war stories. I'd love some of you to share those. What are some things that have happened that you've learned in mock jury exercises that you've done? Michael, do you mind if I start with you?

Michael Lacy:

Sure. A couple come to mind. I did a mock jury exercise during the COVID time, and the mock jurors actually were in their homes. It was quite interesting to see they weren't together physically, so they had to communicate over Zoom or whatever platform they were using. It was definitely interesting to see how they communicated with each other, which wasn't too terribly different than the ones I've done where they've been physically together, although they're much more comfortable in their own surroundings. We had animals and other pets going through the screens and whatnot. That was interesting.

The other thing I'd say, one of the best times I had, I did a mock jury exercise, and we were partnering with a local council from that particular jurisdiction. Their lead lawyer got the chance to play opposing counsel, and he really played that opposing counsel to a tee, and it was really fun to watch. I mean, it's always – I wouldn't say it's more fun to play opposing counsel. But certainly, you let it loose when you're playing opposing counsel on it. It actually helps you learn more about your case, as you think about what they're going to do and the buttons they're going to try to press.

The last story I'd give is we did one where we had two panels that we were watching simultaneously. They were on the screen, and we had headsets that we could toggle between the two panels. To listen to them talk about how much money they would award if they were to find the client liable was really fascinating. As folks who are listening probably know or may surmise, these damage awards aren't necessarily tethered to the evidence all the time. It's sort of like, "What do we think is right?" It's always very interesting to hear about mock juries talk about damage awards. When you try to bring in an economist or some other rational thought about what damages should be if we're found liable, they don't necessarily follow that logic.

Chris Willis:

I'm sure it's quite an experience to watch that deliberation happen. Matt, Jason, do you have any stories you'd like to share?

Matt Hansen:

Yes. I'm thinking as we're going through this. I'm remembering a mockery exercise I did several years ago, and this was in a case where we were getting fairly close to trial. We'd really developed our case well, we had really good understanding of what case the plaintiffs were going to present, and we wanted to fine-tune our message, make sure we had our message right. But also, the client was very interested in this result from a settlement standpoint.

Our in-house attorney and client was having conversations with all the higher ups in the company, and they were trying to make a decision about whether they wanted to really try this lawsuit or whether they are going to settle it. We set the mock jury exercise up in a way so that we had four separate panels. We presented our case, and then we listened to the four panels deliberate, which is, like I said, it's always a fascinating process. See what they latch onto and what they do. There are two panels. Went as far as they could for the plaintiff, and two panels were completely on our side, right? Here's the client trying to decide what does that mean from a settlement perspective. What can I take from this?

We were able to recognize it's probably not a split the baby type of case. In this case, our defense was going to resonate really well with some jurors, and it wasn't going to resonate well with other jurors. It was going to be higher risk and probably an outcome kind of on the outside tales of the range of possibilities. But we were able to really analyze who those jurors were and learn a lot about the jurors that would resonate with our case. Ultimately, to the client's credit, decided that they were willing to try the lawsuit, and so we went ahead and tried it. We were able to use the data we got from that exercise in our jury selection and get a really strong jury. We ended up with a total defense verdict. No liability and no damages.

Chris Willis:

I assume, Matt, you thought that the mock jury exercises that you had done helped you get to that result?

Matt Hansen:

Oh, yes. Absolutely. We learned a lot of small, nuanced, subtle things about how to present the case, and then the type of jurors we want on our jury.

Chris Willis:

Yes, absolutely. Jason, how about you?

Jason Manning:

Yes. The one that comes to mind for me is a particular relatively complex piece of evidence. We weren't sure how the jury would understand it, and so we wanted to present it in a couple different ways to see which one provided the most clarity to the jurors. Not just clarity, but that they would attach value to it or not. The practice with different panels enabled us to, as Matt and Mike were alluding to, choose the one that worked the best. To me, that's the greatest value of this, where you're presenting it to multiple audiences in a controlled environment, such that you can measure the feedback and adjust your approach accordingly.

Chris Willis:

Makes sense. Well, gentlemen, this has been a really great conversation, and I think it really showcases the special considerations associated with mock jury exercises and the fact that we have such a great deal of experience with them in the large, complex cases that we might take to trial in our litigation team. Thank you all for joining me for the podcast today. Of course, thanks to our audience for listening as well.

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