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INTELLIGENT SELECTION

21st Century Approaches to Mock Trials and Jury Selection P28

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21st Century Approaches to Mock Trials and Jury Selection

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Pity the litigant who fell victim to the jury manipulation schemes of Rankin Fitch, the fictional character in John Grisham's novel *Runaway Jury*. In the 2003 movie adaptation, Gene Hackman plays Fitch, who is forced to retire after his manipulations fail to deliver the promised jury verdict. While not nearly as exciting, and without the life-and-death risks encountered by juror-for-hire Nick Easter and his accomplices, Grisham's characters may find electronic jury analysis a lot simpler than the dramatic twists of a cinematic thriller.
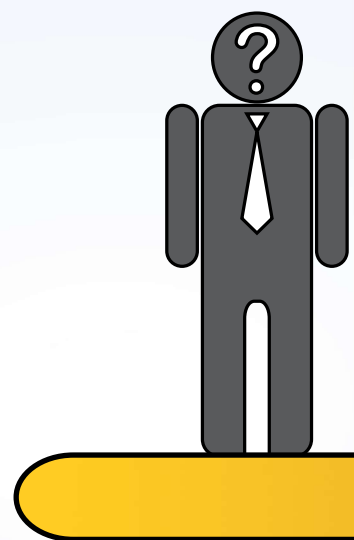
Computers, the Internet, and social media are transforming all aspects of our personal and professional lives. It should be no surprise that such changes also are impacting the manner in which we select jurors to decide civil and even criminal cases. We all know it is much easier today to conduct background searches on potential employees, witnesses, and adversaries. This same technology can be utilized to better identify and select jurors charged with reaching decisions in cases where tens, if not hundreds, of millions of dollars are at risk. The technology to both test and select jurors is not futuristic but is available today. While basic use of computer technology in the jury selection process began more than a decade ago, like all technology, the advancements since are quite amazing.
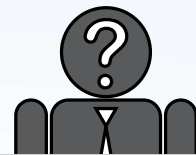
Insurers traditionally used mock juries to test cases before going to trial, both for presentation content and potential verdict ranges. In just the past few decades, mock jury research has spanned from the back room of a local restaurant, where civic organization members were paid to listen to a mock presentation and render a verdict, to an extremely expensive three-day production, with nearly 100 mock jurors answering questions on electronic tablets during each phase of the re-created jury trial while the client watches in a nearby hidden control room. While these advances alone are significant, what we are capable of doing now via the Internet is taking the concept of virtual jury research to better and more cost-efficient realms.

Many insurers are beginning to embrace the concept of virtual jury research. Jury consultants have long assisted litigators with services ranging from focus groups to actual assistance with courtroom *voir dire*. In contrast to past decades, virtual jury research utilizes electronic communications embracing such new avenues as videoconferencing, Internet Relay Chat (IRC), and even impaneling of "avatar" juries.

When you consider that the entire concept of using jury consultants did not even exist a half-century ago and compare that to the work being done today with electronic jury simulations and monitoring, we have transformed from the equivalent of the grandfather clock to the Apple Watch in an amazingly short period of time. The advantages of electronic jury research span both time and economy. Traditional jury research often takes weeks or months to organize with all of the attendant expenses for rooms, video equipment, and trans-

portation. Services now allow attorneys and their clients to impanel online jurors from the millions of Web users who form mock juries simply by logging in from their laptops or tablets. The question then becomes one of what amount a client is willing to pay for the quality and depth of service and results received.

There are two primary ways of using virtual juries. The first, and more traditional, is using electronic methods to assist in the impaneling of the real jury in the actual case. Developing quickly is the more advanced use of electronic communications and methods for virtual juries to give insight into the case long before it reaches the real courtroom. Before entering the world of the avatar jury, consider first the more traditional avenues that are available but often overlooked in preparing for trial.

We frequently spend less time on the *voir dire* process than on witness preparation, opening statements, and closing arguments; however, the jury we select is truly the most important aspect of any trial. Debate has raged for as long as the jury system has existed regarding whether selecting the "right" jury is an art or a science. In truth, it is a combination of both. Jurors watch the attorneys' every move, and the attorneys, in turn, try to decipher from the jurors' words and actions not only whether they will be fair but whether their inclination will be to rule in favor of their client's position. Research repeatedly shows jurors often make up their minds about the facts of the case and the attorneys they like or dislike during the jury selection process, before opening statements ever occur. To give strategic advantage, myriad online services and apps—such as Jury Guru, Jury Duty, Jury Strike for iPad, and Jury Star—can assist lawyers in categorizing juror information to improve the *voir dire* process.

One of the hardest aspects of any trial is quickly processing the juror questionnaires, which are often handwritten and disseminated to counsel while the potential jurors are literally walking into the courtroom. More innovative courts are experimenting with jury questionnaire forms being uploadable electronic documents. This information then can be sent securely to counsel for the respective parties via electronic data transfer. While new to us today, there is little doubt this will be the format used for jury questionnaires in the not-too-distant future.

Already, programs exist to allow this data to be downloaded into a computer program so the attorney has instant access to all of the biographical information concerning the juror, literally at the touch of a finger. Many of these programs also allow both standard and case-specific questions to be preloaded into the application and the ability to quickly categorize and summarize juror responses to each area of questioning, whether done by the court, opposing counsel, or yourself. Instead of making a written note of which jurors the attorney needs to follow up with regarding a question, the program accommodates simply tapping a box to highlight each juror whose response requires additional inquiry. Basic programs also allow the user to track the number of jurors removed for cause or peremptory strikes, while more advanced programs keep track and predict whether the jurors coming up on the list would be better or worse than the jurors currently under consideration to be stricken from the panel.

Both attorneys and clients also must be mindful of the perception and fear jurors may feel about having too much information at our fingertips. Attorneys also may appear distracted by the technology, impeding actual human communication with those being questioned as potential jurors. Many programs for courtroom use caution that they are most useful when a second person is running the application and entering the responses, allowing the attorney at the podium to proceed with more traditional personal questioning.

The second and more intriguing use of this technology is sampling potential jury reaction to cases long before the jury is seated in the courtroom. This is the world of the avatar jury. Most of us think of the word "avatar" as relating to the 2009 James Cameron film by the same name. The word actually dates back to Hinduism, and its first known use was in the 18th century referring to a human or animal form of a Hindu god on earth. While jurors may not be "gods," they can have a dramatic impact on our professional lives. Avatar juries utilize real people connected by electronic communication methods to evaluate a case prior to the actual trial. Differing levels of service exist depending on how much you are willing to pay.

The primary distinction in considering use of avatar juries is whether to seek random versus representative sampling; this is a hugely important distinction. Random sampling services use individuals who, either for personal interest or income, register to serve as virtual jurors. These individuals are usually required to complete questionnaires detailing personal, professional, and financial information, so their reaction to the presented case can be tracked and monitored by various socioeconomic indicators. As with anything else on the Web, there is normally no verification of the truthfulness of the information provided. Additionally, your case may be in California, with the reviewing jurors residing from Maine to Florida. Most of these services allow the opportunity to know what geographic location the reviewing juror is from, but you are not securing a representative jury from the jurisdiction where the trial will occur. Services such as Virtual Jury promote virtual juror services not only to the legal profession, but also to potential jurors—touting that avatar jurors can make up to $100 for each case reviewed and that it is a good side income option.

From the attorney/client perspective, these services afford the opportunity to submit a written outline of the case for jurors to initially determine whether it is a matter they would like to review. Once selected, the avatar jurors are provided links to documents, exhibits, witness statements, and even video presentations of opening statements and closing arguments. Following review, they return their verdict. How much information is uploaded and reviewed is a factor of the cost the client
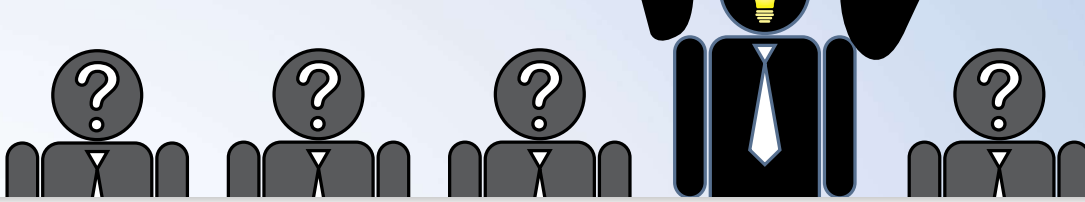
is willing to invest. The clear advantage of these programs is that they afford the opportunity at a relatively low cost for a great deal of potential juror feedback across a wide geographic, social, and economic spectrum. It is then incumbent upon the legal team to analyze the data and apply the information learned from the various individual and group responses in selecting the appropriate jury for the actual trial.

More advanced representative avatar juries are those where considerable time and research are invested to data mine the specific jurisdiction where the trial will occur. Using historical information from prior cases, services develop actual profiles of what a typical juror for a civil case or bad faith litigation in that jurisdiction has been and then seek out and identify jurors who match as closely as possible the historical profile.

Services such as Magna's Jury Confirm promote their ability to amass avatar juries, who then log on to enter a virtual courthouse where they are greeted by the electronic judge who tells them about the case. Jurors are able to view in real time presentations made by counsel. These may include statements, direct or cross-examination of witnesses, and exhibits. Jurors record their responses and feedback instantaneously using the same monitoring most will remember from the 2012 presidential debates, where selected voters rated the candidates on a red to green scale appearing at the bottom of the screen. This allows the attorney and client to see the jurors' immediate reaction and to later review the electronic data and analyze the responses based on the specific demographic information of each individual juror or group.

Whether random, representative, in advance of trial, or actually in the courtroom, the ability to use electronic data, social media, and the world of the computer has now truly reached every aspect of the jury selection process.

Organizations, including the American Bar Association, have published articles regarding the use of avatars to help litigators select juries. Law firms now have the technology in-house for video links to perform mock trials, and insurers and corporations recognizing the higher stakes of litigation are turning in serious cases to these new avenues to control risk.

As with all forms of technology, new and improved innovations await on the horizon. Already, though, we have come far in a short period of time regarding how we use technology for jury research and predictive purposes. No doubt Rankin Fitch would be amazed. **CM**

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What issues challenge your staff, and what to do to eliminate them.

No manager wants their appraisers, adjusters and estimators passing out blank checks, but if their claim-handling skills aren't sufficient, the misapplications, oversights and errors they commit could be just as costly. For example, the difference between repairing or replacing a set of kitchen cabinets when adjusting a fire loss can be anywhere from $3,000 to $12,000, and that's just one example of the kind of misjudgments we see both beginners and experienced professionals make all too often.

In fact, we've identified five types of weaknesses that challenge even the most efficient and profitable claims departments.

(1) policy interpretation
(2) basic practices
(3) core knowledge
(4) estimating proficiency
(5) technology application

Programs can also be designed specifically for your business needs and training can be brought directly to you.

Your location...our trainers!

We make training accessible. Our courses can be modified to address specified training criteria for your employees.

To see which issues are the biggest obstacles for your staff and what to do to eliminate them, call us or visit our website today.