

## What Mock Exercises Reveal That Briefs Cannot

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Lawyers devote enormous time and care to crafting briefs. They refine arguments, polish language, and anticipate counterpoints. Yet even the most carefully written submission cannot fully answer a critical question: how will these arguments be received by the person who must decide the case?

Mock exercises offer a way to answer that question before it is too late. Among the various roles I have played since retiring from the federal bench (including mediator, arbitrator, and expert witness), serving as a mock judge is the one I find most rewarding. Not because it is particularly glamorous (although it is always challenging), but because it offers lawyers something that formal legal proceedings rarely do: unfiltered, candid feedback at a time when the lawyer can absorb the feedback and adjust her argument.

I have participated in mock exercises covering a wide range of proceedings: appellate arguments before Circuit Courts and the United States Supreme Court, hearings on pending motions to dismiss or for summary judgment in state and federal trial courts, and



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condensed trial simulations where counsel present what they call “clopings,” a combination of opening and closing arguments supplemented by key witness testimony drawn from depositions. Each format serves a distinct purpose, but all share the same animating goal: giving counsel the opportunity to test their theory of the case against an experienced surrogate – naturally a former judge – for the actual decision-maker.

The structure of these exercises is more rigorous than many lawyers expect. Before the mock proceeding begins, the neutral receives a substantial set of materials: pleadings, dispositive motions and supporting briefs, relevant court orders, deposition transcripts, and expert reports.

By the time argument begins, a well-prepared mock judge has read the record and arrived at preliminary views. That preparation matters enormously, because the goal is not to exercise judicial authority but to simulate it as accurately as possible.

One feature of these exercises I have found particularly valuable is the common practice of having lawyers from the conducting firm present the adversary's case. Preparing the other side's best arguments, rather than a straw-man version of them, forces the conducting team to reckon with weaknesses they might otherwise miss. I am consistently impressed by how much sharper counsel's preparation becomes when they have been compelled to articulate, and then defend against, the strongest version of the opposing position.

After hearing argument, and sometimes evidence, from both sides, the mock judge or panel (in my experience, panels of three are common) completes a written questionnaire reflecting their reactions to the key issues. Sometimes the panel is asked to deliberate and reach a verdict. Then comes the part that lawyers have told me is most valuable: individual interviews of each judge, conducted separately, while the lawyers and clients observe through a one-way mirror. The judges have not yet compared notes with one another. What emerges in those sessions, unfiltered and uncoordinated, is

often illuminating in ways that surprise even experienced litigators.

Following the individual interviews, all participants, lawyers, clients, and judges alike, convene for an open group discussion. Everything said in these sessions is strictly confidential. That confidentiality is not a formality; it is the precondition for candor.

A mock judge who cannot speak freely is not worth the investment. I have been in sessions where the honest assessment was something along the lines of: "You are unlikely to prevail and should seriously consider settling," or "I give you no better than even odds on the motion." That kind of direct feedback, delivered without the varnish that often accompanies informal conversations with colleagues, can reframe an entire litigation strategy.

The feedback often identifies issues that have little to do with legal doctrine and much to do with persuasion. Whether a theory is too complicated, whether a factual narrative is unclear, or whether a particular argument, while technically correct, is unlikely to carry weight with a court. These observations can be difficult to hear. They are also precisely the reason the exercise is worthwhile.

It is worth pausing on what makes a mock judge effective, because the answer matters when counsel is deciding whom to engage. Familiarity with the subject matter helps, but it is not the primary qualification. What matters most is that the mock judge commits to serious preparation, reviewing all of the materials submitted by the client, and render an assessment that reflects how the ultimate decision-maker, not an advocate, would process the arguments.

Former judges who have handled complex civil litigation, who are practiced at questioning counsel and identifying weaknesses in both legal and factual presentations, are particularly well-suited to the role. The value of the exercise depends directly on the realism of the simulation.

Mock exercises require time, preparation, and expense. They are not necessary in every matter. But when the case is complex, the potential award or exposure is substantial, and the litigation is at a critical juncture, the cost of a mock exercise is generally modest relative to the exposure at issue. The question worth asking is not whether the exercise is expensive, but what it costs to proceed without it.

Confidentiality constraints prevent me from describing specific matters in any detail. But I can say, in general terms, that I am aware of outcomes that speak directly to the exercise's value: a client who chose to settle rather than proceed to trial after receiving the mock panel's assessment; a party that revised its negotiating posture in a government enforcement matter following the mock proceeding; and a legal team that substantially reorganized the emphasis of its appellate argument based on the panel's feedback. In each instance, the mock exercise changed the trajectory of the case.

The legal profession has developed sophisticated tools for evaluating risk: financial modeling, litigation analytics, jury consultants, focus groups. Mock proceedings belong in that toolkit, and perhaps near the top of it.

Unlike a focus group that assesses juror reactions to themes and visuals, a mock judicial proceeding tests the legal arguments before an experienced judge who has read the briefs and is prepared to challenge counsel throughout the exercise. The feedback is not impressionistic; it is grounded in the same doctrinal analysis a court will apply.

Litigation rarely affords a meaningful opportunity for a preview. Once an argument is made in court, it cannot be taken back. A mock exercise offers something quite different: the opportunity to test, to listen, and, if necessary, to reconsider before the consequences are fixed. Given all of that, I am somewhat puzzled as to why they are not used more frequently. My strong suspicion is that lawyers who have never participated in one simply do not know what they are missing.

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