

## Mock Trial Exercises *Podcast Transcript*

# Prevention and Protection a United Educators Risk Management Podcast

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### Guests:

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**HEATHER:** Hello, and welcome to *Prevention and Protection*, the United Educators (UE) risk management podcast. I'm Heather Salko, senior risk management counsel. I'm joined today by Jill Huntley Taylor, a director at the trial consulting firm, Dispute Dynamics, from its Philadelphia office. Dispute Dynamics is a national trial consulting firm that works on cases across the country conducting mock trials and focus groups, preparing witnesses for deposition and trial, assisting counsel with trial strategy and trial themes, and assisting in jury selections. DDI, as it's also known, consults on cases of all types, although primarily civil defense. Jill has a doctorate in social psychology and has been with DDI for 20 years. She's conducted hundreds of mock trials with thousands of mock jurors. In the education space, Jill and DDI have worked on cases involving employment disputes, such as discrimination, and revocation of tenure cases, catastrophic injuries, Title IX, wrongful death, slips and falls, and virtually any other type of case for which educational institutions are sued.

Just to note, DDI has worked on at least 100 cases for UE over the past 20 years. I should also note that Jill's views expressed in this podcast are hers and are not intended to speak on behalf of any client or entity for which she has provided services. Today, Jill and I will be discussing trial consulting, specifically mock jury exercises and how they work. With that long intro out of the way, Jill, welcome and thank you for joining me.

**JILL:** Thanks, Heather. I'm really glad to be here.

**HEATHER:** Jill, in my previous work in UE's claims department, I worked on a number of claims that utilize some form of trial consulting mock, or mock jury exercise, and I've been fortunate enough to work with you. Would you begin by providing our listeners today with an overview of what trial consulting is?

**JILL:** Sure. So, trial consultants work to help lawyers best position their case for trial. We use our experience and background, often in social psychology, to look at the case from the jurors' perspective. What's the story of the case that best resonates with jurors in this venue and based on these facts? Often the legal arguments are not the same as the jury arguments, and we aim to help bridge the gap between the law and jurors' own common sense understanding of what is just and what is fair.



**HEATHER:** What exactly do trial consultants such as yourself do?

**JILL:** Trial consultants offer a whole range of services, depending on the goals of the trial team, the potential case exposure, and the status of the case. There are times we're consulted simply to brainstorm case themes and strategy, but more often than not we're asked to conduct a mock jury research exercise with mock jurors selected from the trial court venue. Trial consultants can also assist with other aspects of trial preparation, such as witness prep, jury selection, opening statements, closing arguments, and other aspects of case presentation.

**HEATHER:** When are trial consultants such as yourself typically brought into a case?

**JILL:** Well, that depends on a lot of different variables. Most typically, I'd say we are consulted when a trial setting is in the foreseeable future. For example, if a trial setting is expected to take place in the next three months, then we conduct a mock trial aimed at testing and refining trial themes and trial strategy developed by the litigation counsel. However, there's a wide range of when we're contacted. We have been contacted pre-suit, before discovery on matters where there's an expectation of a high level of exposure, and perhaps even publicity surrounding an incident. The type of jury research conducted in those situations is much more aimed at theme development and understanding the types of issues mock jurors gravitate toward, as well as what questions they have. That type of research can be very instructive in guiding discovery or in assessing the case for early settlement negotiations. Other times, a case comes to us much closer to the eve of trial. This can happen when an expected settlement falls through or you expect a summary judgment and it's unexpectedly denied. We can pull a jury research project together very quickly, even with the trial set a few weeks out, still with the aim of testing and refining trial themes and trial strategy. It's not ideal to have such a short timeframe, of course, but not conducting jury research means the first jury that will hear and decide your case will be the real jury, which is of course even less ideal.

**HEATHER:** Yes, I agree. Jill, you just mentioned mock trials, which I often hear referred to as the mock jury exercise. Could you explain what that type of mock trial or mock jury exercise is, and what typically happens during that kind of exercise?

**JILL:** Sure, the scope of a mock trial can vary to include multiple days, multiple groups, openings, closings, witnesses, it really depends. However, I'd say our most typical type of mock jury exercise involves a one-day study with two groups that end up deliberating the case. This typical mock jury is a nine-to-five day and it breaks down along the following lines. The mock jurors arrive at either a hotel or a market research facility, and that depends on where the case is being tried. The mock jurors are recruited from the venue to be a cross-section of the available jury pool. We use a national recruiter to recruit the mock jurors. The way that works is that we create a summary of the jury's demographic makeup, what we want to see at the mock trial, and the recruiter seeks those people out. We also create the screening criteria for the recruiter, which is used for a cause and confidentiality screening. This is a list of names and entities that we want to be sure the mock jurors do not know or have any affiliations with, including the parties and players for cause screening, as well as any lawyers, the press, etc., for confidentiality purposes.



The demographic criteria and the screening information are provided to the recruiter for use calling up and inviting potential mock jurors from the venue. Depending on the venue, this is done with the use of databases and cold calling. Those who meet the criteria are then invited to attend the mock trial. The mock jurors are not told that they are being invited to a mock jury, but that they are invited to take part in a research exercise. When they arrive for the mock trial, the mock jurors complete a background questionnaire developed by the trial consultants. We include questions that we asked regularly, but most of the questions we developed are tailored to the issues in the case at hand. We ask demographics, experiences, attitudes related to issues that are or could be relevant to how jurors view the case. Our firm developed proprietary software to collect this questionnaire data via iPads that each mock juror is given for the research. Through this iPad application, which we call Onsite Insights, we then display the mock jurors' answers to these questions to the trial team and other observers attending the research. We set up a TV screen and project data charts generated from the mock jurors' responses to each question.

Following this, the attorney from the trial team, the one who's presenting on behalf of the plaintiff, delivers a live, argumentative, evidence-driven statement summarizing the case to the mock jurors. This usually takes about 45 minutes, and it's followed by reaction questionnaire. Then the defense attorney delivers its presentation, which is again followed by reaction questionnaire. There is typically a very brief plaintiff rebuttal, which is followed by a much more extensive jury questionnaire that asks for each juror's reactions to arguments, themes, verdict questions, and damages. All this data is also viewed by the team. Jurors are then instructed and divided into two groups to deliberate. We typically start by asking the jurors to state which side of the case they're on. In other words, who do they think should win and why? We do this before jurors are given a verdict form because it offers insights into jurors' overall feelings and motivations for finding the way they are. Eventually, we do bring in a verdict form and have the jurors answer those questions as a jury.

Finally, we have a consultant monitoring each room. When the group is done deliberating, the consultant will go into the room and ask follow-up questions and probe on other issues and evidence the jurors may not have heard about in the exercise. Often, but not always, we include a witness portion in the jury research. This takes place before the deliberations. It includes videotaped testimony of a few of the key witnesses in the case. The videotaped excerpts are often selected from videotaped depositions, or, in the case of our witnesses, can be a mock Q&A session with a brief direct and a brief cross. Each witness video is a total of less than 10 minutes of balanced testimony. The purpose of the witness component is testing how the witness comes across and how the jurors perceive the witness. It's not intended to introduce new facts or evidence. It takes jurors very little time to size someone up to determine if this person is a good guy, do I like him, is he credible, etc.



**HEATHER:** Yes, and I've seen that in action, Jill, and I say it really does work. You did talk a little bit earlier in your answer about someone from the trial team presenting the other side of the case, which, of course, you need to do in order to create this mock trial. Can you just give us a little bit of information about how and why this portion of the exercise is or can be valuable to the school's case?

**JILL:** Sure. In the mock trial, it's really important to present the strongest opposition case possible to maximize learning that takes place at the jury research. The goal of the real trial is, obviously, to win, but the goal of the mock trial is to learn. I always tell a team that it is better to learn in jury research and win at trial. For this reason, we want to make sure that the person playing the role of the opposing counsel is equipped with the best facts, arguments, and evidence. The presentation should be coordinated so that everyone knows what issues and evidence are being tested. For example, there are often pending limiting motions at the time of the mock trial, and our recommendation is generally to include and exclude information subject to those motions on a worst reasonable case basis. If there's something we want to get in, but there's a reasonable chance it does not come in, we suggest leaving it out. We already know that's good information, but we don't know if we're going to get it. On the other hand, if there's something we want out, but there's a reasonable chance it will come in, we suggest letting it in. The worst thing that can happen is to exclude a very important bad fact or a piece of evidence from the mock trial that ultimately gets let in at the real trial. The mock trial has to be seen as a way to learn how to best present your case under the worst reasonable case scenario. This includes a strong presentation for the opposition as well as decisions about what to allow in and what to keep out.

**HEATHER:** Jill, thank you. That explanation I think is very helpful to people who think, why would I want someone on my trial team playing the other side? So once the mock trial or mock jury exercise is over, how then do you at DDI, and obviously the rest of the trial team, use the results?

**JILL:** Once the research is over, we go back and we study the quantitative survey data that they've been answering in their questionnaires, as well as the qualitative data gathered from the group deliberations and their discussions. We use all of that information to create a report. This report summarizes the data with an analysis of where we see the case problems, the case strengths, and then our recommendations for addressing those problems and capitalizing on the strengths. Our report typically includes the recommended trial themes. That is the key thematic points that tell the story of the case.

**HEATHER:** In your experience, then, as you're preparing to go to these mock jury exercises, who typically should attend?

**JILL:** Of course, the trial consultants and the mock jurors. In addition, the attorneys presenting each side of the case are obviously there. Sometimes they invite associates to assist or observe, or interns, somebody that might think it's interesting to be there. In the case of litigation involving UE insured schools, we often have an attorney from the school and from UE observing. At times, there will be named defendants or other key players who observe, but this is something that has to be considered on a case-by-case basis.



**HEATHER:** If a school does conduct a mock trial/mock jury exercise, what happens if the school learns that it has a bad case? How does a jury consultant work with the institution to make the case better?

**JILL:** It's interesting because we always say, "We don't work on the easy ones." But more often than not, there are cases with higher exposure or cases where it's not clear how a jury will perceive the key facts and evidence. Gaining insight into how jurors perceive the underlying issues and facts in the case, the trial consultants offer recommendations for how to best position the case for trial. We examine the mock jurors' reactions to questionnaires, asking about key issues, arguments, and themes. We also examine the jury deliberations and discussions to determine the key problems and strengths in the case. Based on those findings, we develop a set of recommendations aimed at capitalizing on the strengths and addressing or overcoming the problems.

**HEATHER:** Once you make these recommendations, do you as a jury consultant then help with the trial preparation? Do you ever, or do any of the consultants you work with, ever attend the jury trial when it actually happens?

**JILL:** Yes, absolutely. Trial consultants are often engaged in other ways instead of or in addition to mock trials. We often review and offer suggestions for trial openings or closings, including suggestion for trial themes and trial demonstrative exhibits. Two of the most common services we also provide beyond the mock trial include witness preparation and jury selection. Our witness preparation services are always performed in conjunction with trial counsel, and we work with witnesses both before depositions and before trial. The work focuses on identifying and reducing distracting behaviors and teaching witnesses to be selective in word choice or phrasing to maximize the value of their testimony. We provide feedback during attorney question-and-answer sessions with the witness. The goal of these sessions is to give the witnesses practice and find ways to help the witness come across in the most favorable light when he or she appears in court. For jury selection, we are often asked to develop juror profiles, write voir dire questions, or develop a written juror questionnaire to be used at trial. In addition, we'll often be in court and present for jury selection with counsel, providing our thoughts and suggestions for voir dire questions and the exercise of peremptory challenges.

**HEATHER:** Jill, we crammed a lot into this podcast. I have to say the work that you do is incredibly interesting. Thank you so much for this great overview of what you do and how you might be able to help our members as they near trial. Unfortunately, that's all the time we have for today's podcast. We at UE hope our listeners have found this topic helpful and interesting, and that, of course, it helps them manage the risk on their campus and gets them prepared for any big trials and claims they might have coming up. I do want to let our listeners know that additional resources are located, as always, on our website, **EduRiskSolutions**. I want to sincerely thank you, Jill, for joining me today and for sharing your expertise and your experience with this interesting and important topic.

**JILL:** Thank you, Heather. My pleasure.



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