

Being practical about virtual

Online mock juries can offer case insight — if approached realistically

By: [Douglas Levy](#) in [News Stories](#) June 15, 2015

Which is the better form of litigation focus group: the in-the-flesh mock jury or the one that just calls for mouse clicking?

Michigan trial attorneys say there's no right answer, only a question of what the lawyer expects to get out of each — and is realistic about it.

The online jury services are affordable — a session costs approximately \$4,000 — and can provide quick answers on case merit and damages. But the sampling groups can't answer follow-up questions, provide clarification or be subject to probing.

Mark J. Bernstein of The Sam Bernstein Law Firm explains an online jury's results for a horrific pit bull mauling case he tried in Wayne County. (MiLW photo by Douglas Levy)

Live focus groups can be pricey, averaging \$20,000, including facility rental, catering and participant recruitment. But the participants can provide crucial data an attorney needs, such as body language in response to certain evidence or testimony, or immediate follow-up on why a group determined a case the way it did.

"Real juries do not serve virtually," said plaintiff's medical malpractice attorney Jesse M. Reiter. "Jurors are subject to the pressures of other people, discussing their opinions together to come to their decisions. The experience of having live focus group participants in a room is closer to the reality of what a jury will do."

Yet, as the Internet has changed how information is searched for and found, some lawyers will use that to their advantage in trial preparation, using such services as E-Jury, Online Verdict and Jury Test.

"I don't think there's a disadvantage to using this approach," said Mark J. Bernstein of The Sam Bernstein Law Firm in Farmington Hills. "We have used it in arbitrations and facilitations, we've used it to manage client expectations and our own expectations, and we use it from time to time to test themes that we think might be resident in a trial.

"The jurors fill out two or three pages of information about the case, and it's a very effective way to learn about a case, to dissect it."

Trying it out online

Auto accident lawyer Steven M. Gursten said that online juries can help when the attorney, on the eve of trial, is faced with a new or foreign legal issue “to you and you want to do a quick test to see if it has any merit to it ... where you just need an immediate response and an idea of what direction to take or how much weight to give an argument.”

As an example, he said 10 years ago he represented a man who lost both of his legs in a car accident.

“I was asking millions of dollars for him, and the defense was saying, ‘There are people coming back from Iraq and Afghanistan who are losing their legs from IEDs in war and aren’t getting anything. And if we make this argument, you’ve got some real issues,’” said Gursten, of Michigan Auto Law in Farmington Hills. “And it scared me. I didn’t really know what kind of effect it would have on the case.”

So he turned to an online jury focus group to see if his argument would hold water.

“What I found is, universally, the jury got very angry at the defense for making that argument, and it would backfire and hurt the defense,” Gursten said.

Bernstein recently used E-Jury to contest damages in a horrific pit bull mauling case, where a 51-year-old Detroit man lost his left arm, left leg and left ear. The defendant went into default and liability wasn’t contested.

Bernstein asked for \$100 million for the 51-year-old man who lost his left arm, left leg and left ear. To come up with that figure, he and co-counsel Brian R. Zaid “tried” the case to the virtual jury.

The online service selected 50 Wayne County-based people who were eligible to be jurors — 24 men and 26 women with an average age of 42. They returned damage figures ranging from as high as \$365 million to as low as \$40,000. The average of the 12 highest verdicts was \$160 million, the average of the lowest 12 was \$6 million, and no participant said he or she would reward nothing. The overall average award was \$66.6 million.

“What we said to the judge is, ‘This is an indication that this not an outrageous amount of money, and if we were able to present this case in front of a jury, if they could meet [plaintiff], meet his family, meet the defendant, we would get more than this \$66.6 million,’” Bernstein said. “That plus the need to give dignity to this injury and this experience justifies the \$100 million.”

Wayne County Circuit Judge Daphne Means Curtis granted plaintiff the \$100 million in a default judgment. (A Verdicts & Settlement report on *Constantine v. Felton* can be found [here](#).)

But some trial attorneys say they question how much reliance a lawyer should place in online juries’ damage figures.

“There are sometimes wide, inconsistent results with live focus groups in terms of damage awards,” said Reiter, of Reiter & Walsh PC in Bloomfield Hills. “The critical questions that need to be answered are why the results differ and how to get everyone on the same page. [T]he most reliable way to test damages is with live participants deliberating in a room together.”

Johnson said a virtual jury's "awarding" \$30 million to a plaintiff does not mean a real jury will do the same.

"I do mock trials for discussion of issues and so forth as opposed to using it to try and establish a value," he said. "With all due respect to those of us who try cases for a living, value is one of the easier parts of our job."

One piece of the planning

Sometimes, the virtual jury can be just the first step of the litigation process, Gursten said, and are often means of supplementing the overall litigation preparation, not supplanting the live mock jury process.

"It's good to give you some insight and some direction, but I wouldn't bet the farm on" going simply with those results, he said. "Normally, what you want to do is take the results from the virtual focus group and use it to then prime a live, contested focus group and see if you get similar results."

That's just what he did when preparing for an out-of-state auto accident trial in 2014; his firm spent \$400,000 doing focus groups for a case that garnered a \$34 million settlement.

"I always think that if you have the time and the money, because those are the two variables, it is always better to do an in-depth, live focus group. Normally, in all my big cases, I do at least one, and for some I've done two or three."

Detroit personal injury attorney Ven R. Johnson said he doesn't prefer to use online juries and has never gone that route. But he added that he's not against it, because in litigation preparation, "doing something is better than doing nothing. If it costs less, again, it's something. Me going to the bar and cornering 10 people and running my case past them, that's better than me not doing even that."

Yet, Johnson said, "if someone is trying to claim that doing something over a computer is better than me doing a full-blown mock trial — with real jurors and real people who are being taped, with two or three different juries in different rooms deliberating on your issues and they're using the same jury form you're using [for the trial] — it's not going to be as reliable and as informative for the lawyer who's going to try the case."

Bernstein said that the live mock trial is good for "scrimmaging" the case and practicing a dry run of the trial.

"It allows you to not only get feedback on your case but also on your delivery of the case — the opening, the closing," he said.

"[Online] jury does not really provide that; it's effective when you're more interested in learning about your case and less concerned about practicing. It gives you insight into arguments."

But Bernstein added that any means of getting feedback on the case — whether case evaluation, facilitation, or live or online mock juries — depends on what the lawyer provides, which is why the argument presented must not be sugarcoated.

“It’s the old adage of, ‘Junk in, junk out.’ All the juries have is what you present, and if you really want a thorough, helpful consideration of your case, you have to provide them with all the information, or it won’t be reliable,” he said.