

Blago 1: The Ultimate Mock Trial?

BY ALAN TUERKHEIMER

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Did the prosecution benefit from the ultimate mock trial in the Rod Blagojevich prosecution? An experienced trial consultant offers observations on what they learned and how we can all pay attention to feedback from pretrial research.

While the first trial of former governor Rod Blagojevich ended with a conviction on one count of lying to the FBI, it was the defense that properly claimed victory as the jury could not reach unanimity on the 23 other counts against the ex governor. There was a major silver lining for the prosecution however - the first trial offered tremendous insights into how it could retool and strengthen its case for the second trial and that is exactly what it did. Remember, the defense did not present a case the first time around so juror comments were predominantly geared toward the prosecution's case. Any advantage the defense may have gained by having the government locked in its case was offset by the abundance of critiquing that took place on the prosecution's case against Rod Blagojevich. Jurors spoke and the government heeded what they had to say. In essence, the prosecution conducted the ultimate mock trial. The good news for litigators on the 99.9% of cases that are not high profile cases such as what occurred in Illinois, mock trials are every bit as beneficial and do not cost millions of dollars.

After the verdict in the first trial, the prosecution had to decide whether it would retry the ex governor. Had the jury been 11-1 in favor of "Not Guilty" on the 23 other counts, a retrial would not have occurred. However, based on what the foreperson of that jury had to say, as well as comments from other panelists, the group was only one juror away from convictions on multiple counts, mostly relating to the attempted sale of Obama's vacated senate seat, the marquee charge in this criminal indictment.

While the prosecution should have known this before the first trial, jurors felt the case was too

complex, and as one juror said, “it was like giving us the keys to the space shuttle and telling us to go fly it.” This happens all the time to litigators and that is why the smart ones conduct jury research. The prosecution was too immersed in the case: it forgot that to explain its case to a jury, it had to offer a persuasive case story supported by various themes, and it had to empower jurors to connect the dots without getting too technical and caught up in details that only someone living and breathing the case for years could understand. And this is what the prosecution did. It learned from the first jury that the case was too circuitous, complex, and bulky which means in jury terms it was unmanageable. Blago I jurors screamed out for a timeline. The first trial, according to jurors, had the prosecution bouncing back and forth between events and it was very hard to keep track of the key events. Keep in mind, confusion hampers the party with the burden so in this instance it hurt the prosecution.

Jurors complained about the length of the instructions and verdict form. Sure enough, the law was pared down, charges were dropped, and instead of a verdict form that looked more like a maze that took days to even figure out, they had more simple questions of guilty or not guilty in the second trial. Some Blago I jurors thought the prosecution “overcharged” and did not understand why the former governor’s brother was on trial. Not surprisingly, prior to the retrial charges against Robert Blagojevich were dropped. And of course Blago II jurors were accorded a succinct, jury-friendly timeline.

During a mock trial, lawyers are able to present their case, offer evidence, present witness testimony, and show competing case narratives. Mock jurors provide invaluable feedback that arms the lawyers for the actual trial. Far more often than not, attorney reaction to mock juror feedback is, “I never thought of that,” and changes in trial strategy are then made which strengthen the case. This learning process was demonstrable in the Blagojevich case as the prosecution benefited from the changes it made based on what it learned from the first jury.