
See Your Jury Case: The Pitfalls of Lawyer-Vision

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Persuasion Strategies



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It's been two years and your work on the County's biggest case is finally coming to fruition. You know you are ready for the day's proceedings. You've done the workup. You've examined everything in the finest detail. You've envisioned every conceivable response to your key positions. Then, you walk into the room and realize any one of the following terrors is a sudden reality:

- Your Judge failed to grant your motions in limine and your worst case evidence is going to the jury.
- Your voir dire questions failed to identify the most high-risk jurors.
- Your catchy trial theme is aimed at the wrong jury-audience.
- Your carefully-chosen expert witnesses are unable to address the most critical jury question.
- Your star fact witness is not received as you anticipated, but is met with jurors' looks of concern and confusion.

Any one of these realities is enough to jeopardize your position and demand a quick recovery. Any combination is enough to sink the County's winning case altogether. So why didn't you see any of these critical developments coming? What could you have done differently to help foresee the jury gaps in your lawyer-made case?

The Unveiling Power of Focus Group Research

Generally conducted during discovery, focus group research gives counsel a timely opportunity to explore the ways jurors will understand the broad outlines of the case, assess key strengths and weaknesses, and test the general case themes and central messages which will inform the selection of expert and fact witnesses and guide the remainder of discovery. This exploratory research helps the trial team identify an approach for developing themes and evidence, refine the witness list, shape areas of testimony, and highlight successful arguments which are grounded in jurors' ways of viewing the case. Absent this double-check of your case's blind spots, you can easily find yourself confronted with any number of terrifying realities about how actual jurors respond to your case. Effective focus group research helps expose what may otherwise remain hidden, ignored, or underemphasized parts of your case.

Take for example a typical employment case. Counsel had clearly planned and built the defense case based on attack of the plaintiff and some of her unsavory qualities. Focus group research consistently shows precisely how mock jurors react to such attacks and teaches us that jurors will not tolerate defense counsel making overt attacks, but given the right information, jurors will scrutinize the plaintiff on their own. Perhaps more importantly, mock jurors are most likely to tolerate and engage in plaintiff scrutiny only after hearing all the ways that the defendant treated the plaintiff fairly and reasonably.

A Brief Guide to Making the Most of Focus Groups

The value and utility of pre-trial focus group research depends heavily on the approach and the methodology used to execute it. It is helpful to understand the answers to several key questions in order to conduct valid and effective focus group research.

What Is Focus Group Research?

Broadly defined, focus group research is a gathering of a specified group of people who provide feedback in reaction to a focused set of topics or issues. In pre-trial research, this means a group jury-eligible “mock jurors” from a specific trial venue who provide feedback in reaction to a presentation or discussion of issues in a legal dispute. Generally, the issues are broadly presented, particularly if early in discovery when the specifics remain unknown. Focus groups can be designed to assess jurors’ broad views of the parties (i.e. the County and its practices), to assess jurors’ reactions to the litigation issues in a general sense (i.e. jurors’ view of a given constitutional right), to evaluate reactions to both sides’ possible arguments, or to determine gaps in the case story that jurors most need filled with evidence.

However, if your timing or research goals dictate a different approach, focus groups can also be much more specific and tailored to the most problematic case issues. You may want to assess jurors’ views of a few narrow questions. For instance, what are the impacts of jurors’ views of the County’s employment practices in light of recent publicity over layoffs; how do mock jurors react to a municipal Board’s decision-making process in a well-known and controversial local issue? One benefit of the focus group format is that researchers can glean both a broad evaluation of case strengths and weaknesses as well as focused answers to more narrow case questions.

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Who Are the Mock Jurors?

Simply put, you want a mock jury panel that mirrors what you will see in trial so you have increased confidence that the focus group results are a reliable indicator of actual jurors’ reactions to the same or similar information.

To maximize the validity of the research results, we typically insist on statistically valid random digit dial (RDD) recruiting to closely match the jurors in the venue based on a careful demographic and attitudinal analysis. Once recruited and in attendance, mock jurors should be thoughtfully divided into groups (three or more groups of 6-8 is ideal), and purposefully facilitated to provide the most useful and unbiased information possible.

When Should Focus Groups Occur?

Do your focus groups early and often. Consider focus groups the first step of pretrial research needed to get you ready for your big case. Conduct them before the close of discovery if not very early in the discovery process to make the most of the information gleaned. Ideally, the focus groups will occur before the first deposition or in the early stages of depositions so you can use the information to focus your discovery and ongoing case strategy. Focus groups closer to trial are still extremely useful, and are often more specific and involve more narrow research goals.¹

How Are Focus Groups Best Conducted?

There are a number of ways to conduct valid focus group research, and for most rules of execution there is a reasonable exception. However, all versions generally share a few factors including the following:

1. Many times, focus groups conducted nearer to trial take the form of a mock trial that includes jury deliberations in addition to (or in lieu of) focused interviews.

- **A neutral or balanced presentation of information.** To best control for biased results, researchers strive to present the issues from either a neutral perspective or through a balanced presentation of both sides' perspectives. One typical method includes a neutral facilitator providing a neutral description of the issues and prompting mock jurors for feedback. Another typical option includes a neutral facilitator showing videotaped presentations by two attorney-advocates which are carefully controlled and produced to ensure balance and realism.
- **A neutral and professional facilitator.** It is critical for a trained facilitator to deliver information and facilitate feedback in order to minimize bias and gather the most useful feedback possible. Attorneys who interject or conduct their own focus groups are often unaware of the myriad ways their presence, knowledge, questioning style, and nonverbal reactions may be biasing mock jurors and influencing the outcome and quality of the information gathered.

There are also some commonly-used options for carrying out focus groups, including the following:

- **Staged disclosure of information.** A 'telescoping' style of information presentation lets jurors learn the case in incremental stages – starting with a brief statement of the case, and followed by presentations by the respective parties, with the option to include segments of witness testimony as well. In between each stage, a trained facilitator conducts a debriefing interview with mock jurors, learning their reactions and understanding how additional information influences their view of the case.

This staged disclosure can also be conducted on an issue-by-issue basis and delivered by a facilitator. In this format, jurors learn the case little by little, in the order you choose. This allows researchers to gather feedback and evaluate data on an incremental basis, learning how mock jurors' attitudes may shift as more information becomes available. This also provides for a test that evaluates juror responses to different evidentiary scenarios. For example, if the admissibility of certain evidence is in question, a telescoping format allows all mock jurors to hear certain case facts followed by a segmented case presentation in which half of the mock jurors hear the questionable evidence and half do not. This evaluates the impact of the evidence and enables you to tailor your trial strategy for either evidentiary contingency.

- **Juror deliberations and in-depth follow-up interview.** You can also build in opportunities for jurors to independently "deliberate" regarding key case issues, then follow up with an in-depth focused interview to further draw out mock jurors' responses and reactions. These brief deliberations allow researchers to quickly learn where mock jurors are likely to begin their analysis and get a sense of jurors' initial reactions to case information free of influence by researchers or interviewers. Then, the follow-up interview allows for clarifications and probing for further detail.
- **Testing witness credibility.** When your case depends on the credibility of one or more witnesses from either side, focus group testing of a video-recorded sample of the witnesses' testimony can provide essential unbiased feedback. Either as part of a focus group assessing the larger case, or as its own exercise, this involves testing samples of testimony to mock jurors who are then asked specific follow-up interview questions. The results can tell you whether a specific witness should be used in your case, or how a witness's specific strengths and weaknesses can be addressed.

Putting Your Focus Group Research to Use

The conclusion of focus group research is the beginning of learning to see your jury case. The research itself is the gathering of information. Careful analysis of the information must be translated into practical lessons and meaningful recommendations for shifting the direction of your case based on the clear feedback gleaned from the mock jury groups.

- **Evaluate your overall case.** Focus group results can provide a strong sense of a case's overall worth in the eyes of a jury. While dollars are often the currency of civil litigation – and focus groups *can* give you a general sense of a case's dollar value – focus groups help you learn your primary case strengths and weaknesses, learn what claims are your strongest, and where you face the biggest challenges. This informs critical choices of settlement, discovery costs, distribution of resources, and overall litigation course. For instance, focus group research in a fraud and racketeering lawsuit against a City Commission resulted in a clear finding that the local jury pool supported damages for the plaintiff in spite of the concern that an award would “come out of the City's pocket.” This helped counsel better understand the potential exposure and evaluate their position. It can also help you get more resources to better address the case's challenges and minimize exposure in other ways.
- **Refine and support your case theme.** Civil litigators too often consider their jury-friendly case themes just before trial, when they try to contort the established evidence and testimony into a pithy and memorable package. Instead, we use early focus groups to identify your strong jury themes, then complete discovery and pursue witness testimony that supports and animates those themes. While we always listen to mock jurors' own ideas about what encapsulates the case, thorough analysis of the results from jurors on both sides of your case allows us to craft a theme that addresses your toughest audience on the jury: those jurors who are likely predisposed against your case from the start. For instance, in a case against the County, instead of creating and developing a theme that “preaches to the choir” of jurors who support the County's authority, create a theme that appeals to jurors' need to believe that the County's behavior was not just legal, but also fair.
- **Fill out your witness list.** Focus groups expose gaps in juror understanding and often result in key unanswered questions that must be addressed by the time of trial. Identifying those questions and determining which fact or expert witness can fill the gaps with satisfying answers is a critical result of well-used focus group research. For instance, mock jurors in a rezoning case were extremely curious about a plaintiff's damages claim for profits lost after a property rezoning was denied. Mock jurors wanted to hear from a local real estate expert on supply and demand and reasonable lease rates in the area – a witness whose importance counsel had failed to recognize before the focus groups.
- **Prepare your visual case.** Understanding your central case theme goes hand-in-hand with creating your visually persuasive case. We use mock juror feedback to make your case visual from the start. Mock jurors show us the gaps in comprehension so we can help identify and create the most vital visual concepts, you need to teach, then identify witnesses and testimony to support and endorse those visuals for trial. In a recent employment case, we learned that jurors' understanding of the employer's position changed drastically as jurors learned the case's increasing detail and complexity. A simple explanatory graphic helps keep the defense case simple, focus jurors on the heart of the issue, and ignore the distracting details that interfere with jurors' understanding of the defense position.

- **Test your revised case in subsequent focus groups.** Early focus groups are the first step to refining your case and making it jury-ready. Take mock juror feedback, adapt the direction of your case accordingly, then prepare to test that progress again. Some typical litigation milestones after which focus groups are appropriate: 1) case assessment/case filing; 2) start of discovery; 3) close of discovery; 4) after summary judgment motions; and 5) pretrial.

Focus groups are a critical tool for ensuring that you have prepared your case thoroughly, and with your jury case in mind. Use them to focus your case early on, to identify and avoid the dangerous pitfalls, and to truly see the case through the eyes of your potential jurors.



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