



2023 Transportation Practice Group Seminar

April 26-28, 2023

Conducting Focus Groups Early and Often — Stealing a Tactic from the Plaintiff's Playbook

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Conducting Focus Groups Early and Often is Critical — Five Benefits and Five Mistakes

INTRODUCTION

With the exponential rise in nuclear verdicts, defense counsel and clients need to work together to develop tools to rein in these extreme results. Plaintiff attorneys are becoming more and more sophisticated in preparing their cases, starting early to develop case themes and push cases forward by executing a well-orchestrated plan. Early investment on the defense side is critical to defending high exposure cases. Jury research, including focus groups, is a great way to evaluate the strengths and weaknesses of any case which leads to better results.

A myth in the trucking litigation world is that discovery needs to be completed prior to conducting mock jury research. This is incorrect. Early jury research is critical for achieving superior litigation outcomes and the plaintiff's bar openly advertises their use of early jury research as a critical part of their case assessment process. Focus groups are where trucking trial attorneys can find out the true strengths and weaknesses of their case and gather the most quality feedback possible in a "town hall meeting" format. A focus group can pinpoint various issues, highlighting what jurors do and do not understand, demonstrating what witnesses, exhibits, and facts a defense attorney has that are most effective, and perhaps most importantly, what confused the group. These focus groups have the potential to produce valuable insights to drive critical decisions in handling discovery, settlement negotiations and trial strategy, resulting in better financial outcomes. While there are several benefits to such early research, to effectively test the elements of your client's case, there are focus group mistakes that trial attorneys need to avoid. From too many mock jurors to presentations that are too long, there are many common mistakes made when conducting focus groups. This paper will describe both the key benefits and mistakes when conducting focus group research early in a case.

BENEFITS

Benefit #1: Guided Discovery

Understanding how a jury would evaluate key case facts, evidence, and testimony early in the discovery process can allow the defense to make optimal decision on a file as discovery progresses. Defense counsel has plenty of core case information that can be "bounced off of" mock jurors very early in the life of a case. For example, the dashcam video and the police report are two key pieces of evidence that jurors highly value in their assessment of liability. These can be shown to jurors during discovery and *before* key depositions to determine how jurors see the basic facts of the case. Additionally, both the plaintiff's initial allegations and defense's preliminary responses can be tested with the mock jury to determine which fundamental story carries more weight with jurors. How mock jurors perceive the case facts can help the defense choose the correct trucking experts, develop cross-examination strategy of opposing experts, and determining overall case strategy. Empirically determining what issues are "hot-warm-cold" with jurors early in discovery can help defendants make better strategic decisions while working up the case.

Benefit #2: Improving Juror Comprehension

Jurors often simply do not understand key aspects of the case and are prone to misunderstanding or misinterpreting various exhibits, concepts, and definitions. Things that seem to be plainly obvious to defense counsel and clients can be grossly misunderstood by jurors. Therefore, early jury research allows for an assessment of how well, if at all, do jurors understand the key issues in the case. Many cases involve complex scientific theories from both sides, and if these explanations aren't appropriately simplified for jurors, it decreases the likelihood that jurors will understand them. Early focus group studies allow defense counsel to assess their effectiveness in their ability to teach key concepts to jurors and how to make the necessary adjustments to improve juror comprehension. Such areas may include the trucking company's training manual and practices, hiring practices, policies and procedures, accident reconstruction, and other areas.

Benefit #3: Assessment of Witness Credibility

Fact witness performance is a crucial element of jury decision-making overall and a primary causal factor of nuclear verdicts and settlements (Kanasky, W. F., Speckart, George *The Nuclear Verdict: Old Wine, New Bottles.* (2020, April). *For the Defense*, 14-21.). Early focus group research is an excellent way to measure jurors' perceptions of a witness' credibility and believability. If depositions are pending, or are completed but were not videotaped, defense counsel can conduct mock depositions (on video) with key defense witnesses and play them to the focus group participants. If depositions are complete and were videotaped, various video clips from the actual depositions can be played to the mock jury. Defense counsel and clients often misjudge the credibility and believability of their own witnesses. Therefore, using early focus group research represents an objective and effective way to accurately assess the effectiveness of defense witnesses and identify areas of improvement. Specifically, accurate witness assessments of the driver, safety director, director of human resources, executives/owners, and the corporate representative is imperative to effective mediation and trial preparation efforts.

Benefit #4: Assessing Damages

Trucking companies and their insurers have been the recipients of many nuclear verdicts over the last few years. While early focus group research isn't intended to precisely evaluate damages, it can certainly give you a preliminary assessment of jurors' general thoughts on the economic value of the case. First, focus group research allows you to gauge jurors' emotional reactions to the case. Jurors can display an array of feelings about a case, including sympathy, sadness, anger, disappointment and even apathy. Sometimes jurors' strong emotions can inflate damage awards against trucking companies, so assessment of their emotional reactions to evidence, testimony, and the overall story is important. Second, while focus group research does not include jury deliberations, it does provide the opportunity to test what general range of damages are fair and reasonable to jurors, given the extent of the injuries or outcome. Once discovery is complete, a mock trial research methodology would be most appropriate in more precisely assessing damages as jurors could be presented with expert testimony on damages from both sides and deliberate as a group as to specific damages amounts.

Benefit #5: Young Attorney Growth and Development

Over 95% of cases settle before reaching a courtroom, leaving little opportunity for younger attorneys to hone their skills in front of a jury. Focus group (and mock trial) research is an excellent and low-risk opportunity for younger attorneys to practice their presentation and communication skills with mock jurors. It is well-known that the plaintiff's bar invests ample time and money into training their younger attorneys to be rock stars in the courtroom by having them heavily involved in mock jury research. Experienced defense attorneys can use early focus group research to train their younger, inexperienced attorneys in effective courtroom communication skills.

MISTAKES

Mistake #1: Slides with Too Much Information

The way the slides are presented in many focus groups is ineffective. Juror attention span is poor, and when slides have too much information, the juror's brain won't be able to handle or process that amount of material. In addition to too much information, other common problems with slides are that the font is too small to be legible or the font colors make them difficult to read.

When it comes to slides, less is more. Rather than trying to cram 12 bullet points onto one slide, including three to four bullet points at a maximum would better serve trial attorneys. This format allows the font size to be large enough to be read by the participants and keeps them from being overwhelmed with information. Another way to make the slides more effective is to have the bullet points build on one another. Rather than having all your bullet points come up simultaneously, have them appear one at a time; this leads to better attention and better memory retention, allowing jurors to take notes more specifically on each point.

Mistake #2: Too Many Focus Group Members

If a focus group has 30 mock jurors, it's virtually impossible to get quality feedback from all 30 people. Instead, that number needs to be half. Influential focus groups need approximately 12 to 18 people, ideally 14 or 15. This group size ensures that the trial attorney can get quality information from each participant. When assembling the focus group, recruiting a sample that matches your demographic for that venue is essential.

Mistake #3: Juror Fatigue

Focus groups that start at 9:00 in the morning and then run until 6:00, 7:00, or sometimes even 8:00 pm are much too long. Remember that a start time of nine in the morning means asking jurors to show up around 7:00-7:30 am to get processed and fill out paperwork. It leads to jurors that are far too exhausted later in the day and won't be able to provide the quality information desired.

Anything presented to these jurors from approximately 4:00 pm onwards will likely be a wasted effort. Rather than overwhelming jurors and causing juror fatigue, focus groups should be spread over two days or even a day and a half, allowing for information to be presented the next day when jurors are fresh. If jurors are so overloaded with information that they are wearing down, the focus group has ceased to be successful. Therefore, focus groups are most effective when scheduled to end between 4:00 and 5:00 pm. Trial attorneys and moderators can also work to combat juror fatigue and ensure they are still getting quality feedback by scheduling more breaks in the afternoon.

Mistake #4: Presentation Length

One of the primary ways that jurors can get overwhelmed with information is by having presentations that are too long. Giving jurors a 90-minute presentation that covers three different topics and then asking them for feedback is too long and gives them too much information. Like with slides, less is more when it comes to presentation length.

Rather than a few long presentations, it's more effective to divide up your topics into subtopics. This way, a mock jury will hear a 15 to 20-minute presentation and immediately be asked to provide feedback. Any presentation that starts to go over 30 minutes is too long and should be subdivided. For example, if you think about liability, that often can be as many as two or three sub-topics. Look at your topic list and try to break it down, isolating topics as much as possible. Topic isolation allows for much more focused feedback on these subtopics. In addition to the input, focus group and mock trial sessions should allow time to take questions, as these questions can frequently be just as valuable as the feedback in these focus groups.

Mistake #5: The Approach to Testing Damages

In the focus group methodology, you're just looking for ballpark figures while testing damages. Don't go into the focus group thinking you'll be able to test damages for accuracy and precision. Instead, understand that what you are looking for is where these people are regarding the bigger picture. To scientifically test for damages, you must do a mock trial. Present the damages information as the final information at the end of the day, testing what big picture numbers jurors find to be reasonable vs. offensive.

CONCLUSION

Early focus group research has multiple benefits to both clients and defense counsel involved in civil litigation. Make your focus groups more effective and get the quality information you are looking for by avoiding these common focus group mistakes. Litigation research experts can help you test the elements of your client's case, including the litigants, evidence, themes, and witnesses, to quickly know how they are likely to be viewed by a jury.