



THINK INSIDE THE BOX: WHEN TO ENLIST JURY CONSULTANTS AND CONDUCT PRETRIAL RESEARCH

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Think Inside the Box: When to Enlist Jury Consultants and Conduct Pretrial Research

Joshua Metcalf and Taylor White

Mock trials and focus groups can be powerful tools in helping trial lawyers and their clients evaluate cases and prepare for trial. From narrowly-tailored presentations of specific issues to full-blown mini-trials, jury research services can help attorneys identify the strengths and weaknesses in their cases, see how potential jurors react to key witnesses, facts and themes, and gauge potential damages. This article will address two relatively modern litigation tools: focus groups and mock trials. When utilized properly, these tools can inform attorneys how to best prepare for trial. After highlighting the advantages of these jury research tools, this article will explain how to maximize the effectiveness of both focus groups and mock trials, based on: (1) the types of information the attorney wants to glean from the jury research data; and (2) which stage of the litigation cycle a case is in. Finally, this article will discuss the costs associated with conducting jury research by taking into account the relationship between the client's budget and the potential risk of exposure.

Selecting a Style: Jury Focus Group vs. Mock Trial

When considering whether to conduct jury research, attorneys and litigants usually have two major questions: (1) "what type of research design would best serve our needs;" and (2) "how much is this going to cost?" Almost invariably, these questions can be answered with a question in return: "what do you want to learn from the process?" Depending on the scope of information a trial team hopes to gather from the process – ranging

from simple brainstorming over effective case themes to predicting the persuasiveness of certain witnesses and demonstrative evidence – most litigators choose to employ one of two types of jury research: focus groups and mock trials.

Jury Focus Groups

With a wide range of applicable uses, focus groups are the first and most common type of jury research. Dr. Richard Krueger, an academic marketing researcher and expert of systematic data analysis, defines a focus group as: "(1) people, (2) assembled in a series of groups, (3) possess[ing] certain characteristics, ... (4) provid[ing] data, (5) of a qualitative nature, (6) in a focused discussion."¹ Borrowing Dr. Krueger's "focus group" definition from the marketing context, his description can also be used to describe a civil jury. In the context of civil litigation, however, focus groups are not intended to predict how individuals on a particular jury might vote (given the limited sample size), nor are they necessarily useful in predicting a future damages award. Instead, focus groups are used to develop qualitative information by giving attorneys insight into "big picture" data – like how a particular case theme might resonate with the venire of an unfamiliar trial venue – along with more nuanced, sometimes-overlooked details – like how to use the jurors' colloquial language persuasively.

Focus groups, usually consisting of 8-10 people, differ from mock trials in that they present information in a brief and non-adversarial manner, not intended to simulate trial results. They are often used as an informal brainstorming exercise while the case is still in its infancy.

¹ Richard A. Krueger & Mary Anne Casey, *Focus Groups: A Practical Guide for Applied Research* (5th Ed. 2015).

When employed early in the litigation process, focus groups allow attorneys to better understand the jury pool, to use the information they gain to develop an effective theme, and to formulate a smooth presentation once trial begins.

There are two key advantages to using a jury focus group. First, focus groups are effective in helping to tailor messages to an audience. Even given the small sample size, a focus group can be an ideal environment to test potential themes – allowing advocates to frame their case in a way that maximizes central facts and neutralizes seeds of doubt. As an instrument for developing a trial narrative, focus groups can help encapsulate evidence into presentation form that jurors will find memorable and engaging.

Second, using a jury focus group permits more flexibility than a mock trial. Because focus groups are generally directed toward evaluating a few key issues or key themes in the case, a presentation can easily be altered to test a variety of scenarios that could arise at trial. Because focus groups are usually less cost-intensive than mock trials, advocates can also use this approach multiple times throughout the course of litigation to obtain more reliable feedback about the perceived merits of their case. Moreover, there are a variety of ways to conduct jury focus groups, depending on the budget of the case – from quick and informal roundtable discussions to in-depth comparative analyses of multiple deliberating groups.

When it comes to timing, focus groups are often most beneficial in the early stages of litigation. This is because the information gleaned from a focus group can serve as a guide to discovery and to conducting depositions. For example, as a planning tool during case preparation, focus groups can help persuade an advocate who tends to think too theoretically about a case to consider simpler themes that may resonate better with real people. When obtained before the discovery period closes, focus group feedback provides insight into avenues to explore in supplemental discovery and depositions. This can help advocates construct their story from the start, allowing a trial team plenty of time to fill in gaps that may otherwise have been overlooked.

Mock Trials

Mock trials, often referred to as “trial simulations” or “mini-trials,” consist of the presentation of evidence to a mock jury panel in a similar format to that of an actual trial. The presentation typically lasts two to three days, and includes all the key components of trial: opening and closing statements, video or actor portrayal of witness

testimony, actual and demonstrative evidence, and closed-door jury deliberation. The purpose of a mock trial is to evaluate how well a representative sample of surrogate jurors respond to an advocate’s overall trial strategy and style. While jury focus groups are less useful when it comes to predicting jurors’ reactions to key witnesses and demonstrative evidence, conducting a mock trial is a particularly effective way to identify and minimize these potential vulnerabilities before it really counts.

A key advantage of conducting a mock trial is that it is the most comprehensive way to test the persuasive value of both evidence and lawyer advocacy. Even the most competent trial attorney typically dreads the “unknowns” of trial, agonizing over things like whether their client was likeable; whether their argument style came off too strong (or not strong enough); what pieces of evidence the jury found most convincing; and so on. Conducting a mock trial can help provide answers to these questions by giving trial attorneys the distinct advantage of having tested the water before diving in.

A second advantage in conducting a mock trial, as opposed to a jury focus group, is the degree to which a mock trial requires attorney involvement. A properly constructed mock trial requires the trial team to: (1) prepare an actual court charge (even if abbreviated); (2) present real exhibits for the mock jury to use during deliberation; (3) prepare direct and cross examinations of key witnesses; and (4) deliver opening statements and closing arguments designed to test mock jurors’ receptiveness. By contrast, the trial team plays less of a role in jury focus groups, which are often conducted by an outside facilitator who presents both sides in a neutral (rather than argumentative) manner. The level of attorney involvement in the mock trial process provides more qualitative feedback over how and why jurors reached certain conclusions, what specific evidence influenced their verdict decision, and how they arrived at the damage award (if any).

As for timing, mock trials are ideally conducted closer to trial, after critical witnesses have been identified and prepared. Most consultants agree that it is crucial to afford the trial team three to four weeks prior to trial to incorporate changes and rectify problems that have been revealed through the mock trial exercise. But because mock trials can be used as an effective settlement tool, the proper timing of the simulation could vary from case-to-case. In any event, the key to obtaining the most reliable information from a mock trial is to ensure the case is fully developed – making this type of jury research particularly well-suited for use in the later stages of litigation.

The Cost of Consulting

When it comes to cost, clients typically wonder whether their case is large enough to justify the expense of jury research. As Senior Trial Consultant and CEO of Opveon, April J. Ferguson, explains, the answer is simple: “if there is significant risk and/or exposure to your client, some form of jury research is warranted.” The cost of jury consulting can vary depending on the needs of the case, the client’s acceptable level of risk, and the degree of potential exposure.

If a client’s jury research budget is low (\$5,000 or less), most consultants recommend using some variation of the jury focus group. Focus groups are typically more cost effective due to their shorter (and, for lack of a better word, more focused) scope. Many consultants pay participants between \$120-\$200 for a half-day session, depending on the location. Full-day focus group participants are commonly paid between \$150-\$300 for eight to nine hours. While some researchers suggest cutting this cost by running classified ads or simply posting on Craigslist, keep in mind that this approach will not yield useful results in all trial venues. In many larger metropolitan areas, jurors in the venire may earn household incomes of over \$100,000 per year. These jurors are unlikely to read classified ads for temporary work, and even less likely to participate for a hot meal and \$30. Thus, if a client is working with a low research budget, it should be noted up front that their focus group results may not take into account the perspective of higher-income jurors (who often have more influence during jury deliberation). By contrast, if a client has a more substantial research budget (\$50,000 to \$100,000 or more), a full-scope mock trial is advisable. However, research indicates that the cost of conducting a mock trial is nearly impossible to predict without knowing the client’s potential exposure. A case involving a joint defense team of several large law firms, representing clients facing claims worth tens of millions in a multi-week trial should invest much more in litigation consulting efforts than a small firm defending a single-plaintiff claim. Generally speaking, many trial consultants advise that the greater the value of the case, the more clients should expect to invest in conducting jury research.

In sum, there is no “one-size-fits-all” budget for jury research. Given the increasing number of research design options from which clients can choose, consultants have

become much better at tailoring project designs to meet the needs of the case. For example, larger trial consulting companies often offer an “initial assessment” of the case, after which they recommend a few options for research designs based on the client’s goals. A consultant may offer: (1) a lower-budget option, limited to jury profiling for voir dire; (2) a mid-range option, including a focus group report, mock jury questionnaire, or abbreviated trial simulation; and (3) a higher-budget option, involving some combination of multiple focus group panels, a full-scale mock trial, or shadow juries. Consulting companies typically provide a cost range for each option. However, because the cost of conducting a mock trial varies based on individual case factors (the amount at stake, the length of trial, the complexity of the case, the quality of the trial team, etc.), most consultants cannot recommend a trial simulation budget without first understanding the details of the case.

Conclusion

Conducting some form of jury research prior to trial is no longer considered a luxury in civil litigation, but a necessity. To varying degrees, focus groups and mock trials provide advocates with vehicles to better understand the psychology of their potential jury pool by allowing them to test the seaworthiness of their vessel before actually setting sail. When conducted early in the litigation cycle, a focus group can give attorneys insight into effective case themes and new avenues to explore in discovery. Due to the limited scope of focus groups, they are best suited for zeroing in on a handful of particular issues in the case, but can easily be duplicated to cover different topics as litigation progresses.

By contrast, mock trials provide a much more comprehensive prediction of jurors’ reactions to both the evidence presented and the advocate’s litigation style. Ideal for use as a “dress rehearsal” in the late stages of litigation preceding trial, mock trial simulations can uncover key insights into what pieces of evidence jurors find most persuasive. Regardless of which type of jury research best suits a client’s needs, trial consulting is becoming an essential component of trial preparation. From early-stage venue evaluation to strategy development in the weeks leading up to trial, focus groups and mock trials help advocates confidently and effectively communicate with any jury.

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When to Enlist Jury Consultants and Conduct Pretrial Research



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Knowing when to invest in a mock trial or focus group



Benefits of Group Trial Research



Objective Look

Focus groups and mock trials allow attorneys to evaluate how potential jurors react to the facts and law.



Try Out Themes

These types of research groups allow attorneys to test out different themes in front of a group of people with similar characteristics to a future jury.



Probe Key Points

Often, one of the most surprising aspects of reviewing the data from a mock trial or a focus group is which facts made the difference with the group. Identifying key points in advance allows attorneys to focus on the most crucial parts of the story.



Two Main Formats



Focus Groups

A group of people who participate in a guided discussion to help develop a qualitative understanding of specific aspects of a case (e.g. themes).



Mock Trial

A type of group research that allows lawyers to evaluate the potential reactions of jurors to attorneys, evidence, and arguments by simulating all or part of a trial.

Focus Groups

Length Two to three hours per session	Format Non-adversarial/objective presentation	Benefits <ul style="list-style-type: none"> - Develop qualitative information - Evaluate themes and big-picture ideas 	Number of Participants Approximately ten people per group
	Timing Employed early in litigation	Cost Lower cost than mock trial	

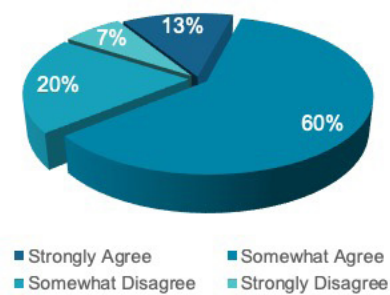
Mock Trial

Length One to three days	Format Persuasive trial simulation/mini-trial, including: Opening/Closing; Witnesses, Jury Instructions; Deliberations	Benefits <ul style="list-style-type: none"> - Test persuasiveness of specific evidence - Fine-tune advocacy - Evaluate damages 	Style Attorney-driven process
	Timing Employed nearer trial date	Cost Higher cost than focus groups	

Results from a Recent Mock Trial

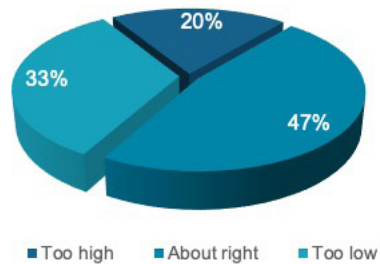
**A lawsuit would not get
to trial unless it had some merit.**

- ✓ Strongly Agree (13%)
- ✓ Somewhat Agree (60%)
- ✓ Somewhat Disagree (20%)
- ✓ Strongly Disagree (7%)



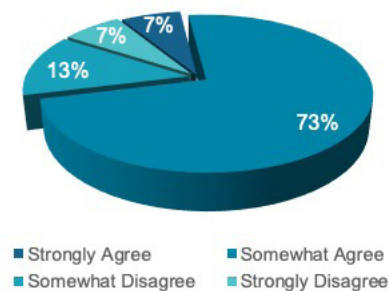
Do you believe that damages awarded in lawsuits are generally:

- ☒ Too high (20%)
- ☒ About right (47%)
- ☒ Too low (33%)



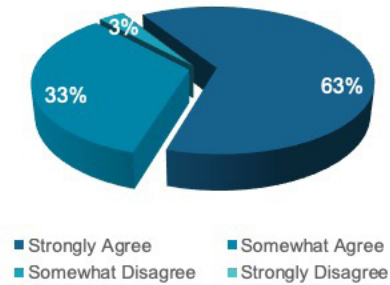
Awarding punitive damages is the best way to get large companies to behave more responsibly.

- ☒ Strongly Agree (7%)
- ☒ Somewhat Agree (73%)
- ☒ Somewhat Disagree (13%)
- ☒ Strongly Disagree (7%)



Corporations have a huge, unfair advantage over individuals in lawsuits and trials.

- ✓ Strongly Agree (63%)
- ✓ Somewhat Agree (33%)
- ✓ Somewhat Disagree (3%)
- ✓ Strongly Disagree (0%)



Costs and how to control them



Focus Groups

- From free to thousands of dollars

Mock Trial

- The sky is the limit
- Varies according to complexity, technology, and goals

Tips for controlling cost

- Identify key issues on the front end
- Tailor to potential risk
- Be creative
- Shop around
- Don't forget to account for attorney time

Mock Jury Deliberations

If you were a fly on the wall...

Never Enough



Ends Justify the Means



You Can't Deny Witness Testimony



Conclusion





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Devoted and driven, Joshua Metcalf never slows down. Always giving 100% of his effort to his work, Joshua has been organizing the defense of complex cases nationwide for fifteen years, building a respected reputation in that time. Having learned the need for attention to detail during his tenure at the Virginia Military Institute, Joshua uses his strong desire to serve and his relentless work ethic to offer his clients a detail-focused but efficient representation, which emphasizes creative strategies and a thorough deconstruction of his opponent's case.

Vowing never to be outworked or out-prepared, Joshua offers clients a strong legal voice and an organized defense to help them identify the issues that really matter to them and to their cases, and to implement appropriate plans to ensure success from both a legal and business perspective. With an insatiable intellectual curiosity,

Joshua loves digging into complex medical and scientific issues, and enjoys collaborating with the talented members of his team to produce a consistently excellent product for his clients. For Joshua, business is personal and, as his clients can attest, a close working relationship and regular communication is at the heart of any engagement with Joshua and his team. Joshua carries this same focused intensity with him away from work, which is reflected in his commitment to his community and his dedication to his wife and four children. If he is not in his office or on the road for a client, chances are you will find him with his wife and kids - at a gymnastics meet or baseball game, on a campout, or doing tractor therapy at the family's tree farm.

Practice Areas

- Appellate
- Asbestos
- Chemical & Mold Exposure
- Commercial Litigation
- Construction
- Environmental Litigation
- Hearing Loss
- Personal Injury
- Product Liability

Recognition

- Martindale-Hubbell® Preeminent AV™ Peer Review Rated
- Mid-South Rising Stars® since 2010: Personal Injury Defense: Products
- Selected as one of Mississippi Business Journal's 2013 Leaders in Law
- Best Lawyers in America®: Litigation – Environmental

Education

- University of Virginia School of Law, J.D.
- Virginia Military Institute, B.A.
- University of St Andrews, Scotland, Study Abroad Program

