

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



By: Bill Kanasky Jr., Ph.D. and Steve Wood, Ph.D.

Cedar R. Abadie, Esq., Director of Litigation at Mohave Transportation Insurance Company, and
Larry D. Warren, President, at Naman Howell Smith & Lee, also contributed to this article.

CONDUCTING FOCUS GROUPS EARLY AND OFTEN IS CRITICAL: FIVE BENEFITS AND FIVE MISTAKES

With the increasing monetary stakes of civil litigation, counsel and clients must work together to develop tools to increase or decrease the likelihood of nuclear verdicts and nuclear settlements. Early investment by attorneys on both sides is critical to high exposure cases. Jury research, including focus groups, is a great way to evaluate the strengths and weaknesses of any case, which can lead to better results.

A focus group can pinpoint various issues, such as highlighting what jurors do and do not understand; identifying the most effective witnesses, exhibits, and case facts; and perhaps most importantly, what confused the group. Focus groups have the potential to produce valuable insights for handling discovery, settlement negotiations, and trial strategy – all of which can result in better financial outcomes.

While there are several benefits to focus group research, to effectively test the elements of a case, there are several mistakes trial attorneys need to avoid. This paper will describe the five key benefits and common mistakes when conducting focus group research.

**A COMMON LITIGATION MYTH IS THAT
DISCOVERY NEEDS TO BE COMPLETED PRIOR
TO CONDUCTING MOCK JURY RESEARCH.
THIS IS INCORRECT. EARLY JURY RESEARCH
IS CRITICAL FOR LITIGATION SUCCESS.**

5 KEY BENEFITS

A common litigation myth 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. The plaintiff's bar openly advertises their use of early jury research as a critical part of their case assessment process. The defense bar is slowly increasing its use of early jury research; however, defense attorneys and their clients could do better. Focus groups are a critical tool that attorneys can use to find out the strengths and weaknesses of their case and gather quality feedback in a "town hall meeting" format. Below are five key benefits of early focus groups.

BENEFIT #1: GUIDED DISCOVERY

Understanding how a jury would evaluate key case facts, evidence, and testimony early in the discovery process can allow attorneys to make optimal decisions as discovery progresses. Attorneys often have plenty of core case information that can be "bounced off" mock jurors very early in the life of a case. For example, dashcam video and police reports are two key pieces of evidence that jurors highly value in their assessment of liability in trucking cases. These can be shown to jurors during discovery and *before* key depositions to determine how jurors see the basic case facts. Additionally, 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 attorneys choose the correct subject experts, develop cross-examination strategy of opposing experts, and determine overall case strategy. Empirically determining what issues are "hot-warm-cold" with jurors early in discovery can help attorneys 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 obvious to attorneys and clients can be grossly misunderstood by jurors. Therefore, early jury research allows for an assessment of how well, if at all, jurors understand the case issues. Many cases involve complex scientific theories from both sides, and if these explanations are not simplified for jurors, it decreases the likelihood they will understand them. Early focus group studies allow attorneys to assess their effectiveness in their ability to teach key concepts to jurors and how to make the necessary adjustments to improve juror comprehension.

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.² Early focus group research is an excellent way to measure jurors' perceptions of a witness's credibility and believability. If depositions are pending, or are completed but were not videotaped, attorneys can conduct mock depositions (on video) with key 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. Attorneys 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 witnesses and identify areas of improvement.

BENEFIT #4: ASSESSING DAMAGES

While early focus group research is not intended to precisely evaluate damages, it can certainly provide 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 toward a given party can inflate damage awards, 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 to precisely assess 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.

² Kanasky, W. F., & Speckart, G. (2020, April). The nuclear verdict: Old wine, new bottles. *For the Defense*, 14-21.

5 COMMON MISTAKES

As we have identified, there are several benefits to conducting early focus group research. However, properly conducting a focus group takes careful planning and preparation. Below is a list of the common mistakes we see in focus group research which can have negative effects on outcomes and subsequent decision-making.

MISTAKE #1: SLIDES WITH TOO MUCH INFORMATION

PowerPoint slide presentations in many focus groups are ineffective. Juror attention span is poor, and when slides have too much information, the juror's brain is unable to handle or process all the material. In addition to too much information, other common problems with slides are that the type 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 twelve bullet points onto one slide, including three to four at a maximum would better serve trial attorneys. This format allows the type size to be large enough for participants to read 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 the 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 is virtually impossible to get quality feedback from everyone. Instead, the number of participants needs to be smaller. Influential focus groups need approximately 12 to 18 people, ideally 14 or 15, and 8 to 10 for an online focus group. This group size ensures that trial attorneys can get quality information from each participant. When assembling the focus group, recruiting a sample that matches your demographic for that venue is essential as well.

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 p.m. are much too long. Remember that a start time of 9:00 in the morning means asking jurors to show up around 7:00-7:30 a.m. to get processed and fill out paperwork. This leads to jurors who are far too exhausted later in the day to be able to provide quality information.

Anything presented to these jurors from approximately 4:00 p.m. onward will likely be a wasted effort. Rather than overwhelming jurors and causing 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 p.m. 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 is more effective to divide up 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, the topic of liability can be as many as two or three subtopics. The goal is to isolate topics as much as possible. Topic isolation allows for focused feedback on these subtopics. In addition to the input, focus group should allow time to take questions, as these questions can frequently be just as valuable as the other juror feedback.

MISTAKE #5: APPROACH TO TESTING DAMAGES

In the focus group methodology, attorneys are looking for ballpark figures while testing damages. Attorneys should not assume that a focus group will provide accurate and precise damage awards – to scientifically test damages, a mock trial is required. Instead, attorneys should be looking at the bigger picture and identifying the potential range and intensity of damage awards. Attorneys should present the damages information as the final topic of the day, testing the big picture numbers to find out whether jurors view the amounts to be reasonable or offensive.

CONCLUSION

The financial stakes of civil litigation have not been higher. The risk of being on the wrong end of a nuclear verdict constantly looms over attorneys' heads. Early focus groups are an effective tool to help attorneys reduce the risks and uncertainties of trial. However, there is the adage of "garbage in, garbage out." This concept is especially true when conducting focus groups. By avoiding the pitfalls laid out in this paper, attorneys will be in a better position to obtain the quality information they are looking for.