ADJUST YOUR FOCUS EARLY

January 2016 - Phillip Miller and Paul Scoptur

Discovery focus groups let you test out your case before a simulated jury early on, which helps you prepare your case better from start to finish.

Theoretically, an attorney should be able to determine what evidence is needed to prove any case. You can talk to someone about a similar case, read case law, review applicable jury instructions, and look over a chapter from a relevant treatise. Before long, you will know exactly what you must prove. This is called "lawyer proof." But despite your level of experience or confidence, lawyer proof might not be enough to sway jurors.

Jurors might not be as convinced, angry, or sympathetic about your case as you expect. They might want different proof than what you have shown them or what you have focused on in discovery. Parts of the defendant's case might persuade jurors more than you imagined, and you may be unprepared to counter those specific arguments.

These scenarios inevitably diminish your client's recovery in any settlement or deliberation, and the reason is that the jurors didn't get the "juror proof" they needed. Juror proof is evidence that ends up being important in jury deliberations, even though it falls outside the legal "duty, breach of duty, causation, damages" model that lawyers use. It's the proof that drives the jurors' decision-making—for example, the plaintiff's demeanor and credibility. A case that looks good on paper is weak if the plaintiff is unlikeable, and you'll need to minimize the negative inferences the jury will draw early in your case. To advocate successfully for your client, you must ensure that your discovery planning process includes determining what juror proof is needed.

Juror proof is not always a surprise. Every contested case has potential weaknesses or problems, but plaintiff attorneys forge ahead and make the best of them. By the end of the plaintiff's case, or at a turning point in negotiations or mediation, these weaknesses and problems often resurface, or sometimes entirely new flaws

emerge. Problems that you identify early on may be worse than expected, an issue might surface that only the client knew about, or someone in pretrial settlement negotiations may bring up unanticipated issues in your case. For example, you might find out from opposing counsel that your client in a wrongful death case has a new significant other. That fact has nothing to do with the legal cause of action but it is juror proof that may cause the jury to devalue the claim.

Often, confirmation bias is the underlying problem that blinds plaintiff lawyers to these issues. Everyone is affected by it, regardless of education level, social standing, or worldview. As Paul Simon sings in "The Boxer," "a man hears what he wants to hear and disregards the rest." You see what you want, or expect, to see. When you encounter contradictory testimony or evidence in a case, your first response is to minimize it by assuming your witness, expert, or evidence is more persuasive. Similarly, when you look at a photograph, animation, or document, you see what you want or need to see in it and blind yourself to the rest. Confirmation bias is at its strongest when dealing with emotionally charged issues or deeply entrenched beliefs. The deeper you are into the case, the stronger the effect of confirmation bias, the more vested you become, and the more you ignore the juror proof. A discovery focus group can delve into these issues and help you identify the juror proof.

Areas to Explore

To get the most out of a discovery focus group, you need to know what to look for. Here are some questions you should try to answer.

What are the "norms"? What do potential jurors expect of plaintiffs and defendants in similar situations, before and after the event? How might that affect what you do in discovery? For example, when an employee violates company rules repeatedly, jurors likely expect that there was some counseling, training, or discipline as a result. When a plaintiff has a past medical history, jurors likely expect that he or she should share that history with a new care provider who may be unaware of it.

Do potential jurors find anything in the case that might make it important? They will look for meaning and a reason to send a message or to make a change. What do jurors think your case is about? Is it just about your client getting money? Are you looking for information that might make the case important to jurors? If the case is about a plaintiff injured in an intersection collision, the jurors might not see it as important. But if a company vehicle driven by an employee with a history of speeding violations caused the collision, the jury may be more energized and want to send a message.

What suspicions do they have? A juror's suspicion can minimize any piece of evidence you offer—testimony, photographs, or documents. Even if you think your proof is solid, what do jurors think about it? How can you meet their needs with your proof? You should always test your essential and most persuasive exhibits early and often.

What do jurors want to know about the defendant and the plaintiff, and why? They may want to know: Has the defendant done this before? Has the plaintiff had problems before this? Has the plaintiff ever been injured or made a claim before? These questions have nothing to do with lawyer proof, but they may be key parts of juror proof.

Consider a failure-to-diagnose breast cancer case. The jury will wonder: Where was the husband? He's here asking for money, but where was he when his wife's cancer was growing? Why didn't he insist on a second opinion? These items of juror proof may come up at trial, but you may underestimate their importance to the jury. Juror proof has everything to do with jurors' ability to return a just verdict.

What rules do they come up with on their own, or what rules will they be comfortable adopting? Having some rules you think are great isn't enough. If something doesn't seem fair, it often doesn't matter what the law is or even whether a rule has been violated. Jurors' ideas of fairness often tend to favor defendants. For example, they might say, "If it wasn't foreseeable, should we hold the defendant liable?" or "It was just an accident." See what rules the jurors create on their own.

Is there a message the jury would like to send? Jurors don't naturally think about compensation or making someone whole. Instead, they think about and believe in punishing for wrongdoing and sending a message. Your focus group of nonlawyers may come up with a message more compelling than the message you have constructed. For example, a recent case involved a priest sexually abusing a minor. The lawyer message was that the priest had not been appropriately supervised, which led to the abuse. But the focus group crafted a more compelling, more resonant message: that there had been a betrayal of trust and a betrayal of innocence.

What are the anger and disgust factors in the case? You need to find out what angers or disgusts the jurors about the facts in your case. In one case, a man was mortally injured at a manufacturing plant when part of a compressor came loose. The facts were typical of negligence cases, but to energize a jury, something more would be needed. When the focus group was told that the manufacturer knew about the faulty compressor and had been advised to replace it, even the most conservative juror was angered. The focus group was angry and disgusted that the manufacturer would put a small amount of money—the cost of replacing the compressor—over the safety of people in the plant. Without that anger or disgust, it's just another case.

Common Focus Group Mistakes

Mistake #1: Waiting too long. If you wait until written discovery is over, the parties have been deposed, the proof is all but closed, and trial is in two weeks—it's too late. Getting feedback from others early in the case is better.

Mistake #2: Priming the focus group to favor the plaintiff and to oppose the defendant. It is easy to unintentionally prime the focus group, making sure they know that the plaintiffs are worthy and honest, or that the defendant has been grossly negligent, irresponsible, or a threat to the community. But when you do this, you essentially direct the focus group to find for the plaintiff. Instead, the information needs to be presented in a neutral manner, so you can find juror proof and conduct a discussion that makes a difference. Remember, the point of a focus group is not to win. It's to gather information, find juror proof, and find rebuttals to the land mines in your case.

Mistake #3: Giving the focus group conclusions rather than facts. You may be tempted to give focus

group members conclusory language—for example, "this was a negligent hire"—rather than facts. Instead, you need to give them the facts and see if they draw the conclusions you want. Telling them the conclusions is meaningless; they generally reject conclusory assertions as "lawyer talk." But once they reach a conclusion on their own, they are more confident in the answer and have a hard time being convinced otherwise.

A recent focus group dealt with construction developments that had failed in 2007. The developers were suing each other, claiming mismanagement and accounting irregularities. We could have told focus group members that developments had failed due to a severe downturn in the condo and development market, but we wanted to see whether they would come to that conclusion on their own. And they did.

Mistake #4: Minimizing negative or hostile conclusions. Bad answers should be embraced, not run from or ignored. They can help show you the flaws in your case. Sometimes, these bad answers represent fights you cannot win, but also cannot ignore. In that case, you may have to shift tactics. A focus group can help you find a winnable case in which a particular flaw is irrelevant.

Mistake #5: Relying on the results of a single focus group. One focus group is a snapshot. It gives you a picture of one point in time with a limited group of people. If you bring in a different group of people, the discussion won't be the same. Using more than one focus group can give you a better picture of your case—to see if subsequent groups validate the first group's feedback or if they find entirely new issues. Also, no single focus group can address all the issues in a case. When you try to test everything at once, discussions and takeaways will be less robust than those from a group with a more focused presentation and discussion.

Mistake #6: Asking the focus group how much money. Don't assume that a focus group's answer to this question means anything. Dollars in focus groups are nonpredictive and their "awards" mean nothing. The first number suggested by a persuasive person is likely to drive the focus group's deliberation, and in a different group, it can be an entirely different discussion. It is important to discover what facts will drive damages discussions in deliberation, rather than how much a focus group thinks your case is worth. Ask the focus group: What fact or facts would cause you to award significant damages? What fact or facts would cause you to give less in damages? The answer to these questions is much more important than the number itself.

Focus groups are one of the most important tools we can use to help prepare our cases. Not using them is missing an opportunity. One of our favorite sayings is: "You don't want to know what 12 people think about your case on the first day of trial." Use focus groups early and often. Don't treat them like a last resort, assembled only when you realize a case won't be settled. If you really want to maximize your chances at a fair settlement or jury verdict, focus your case before discovery.

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