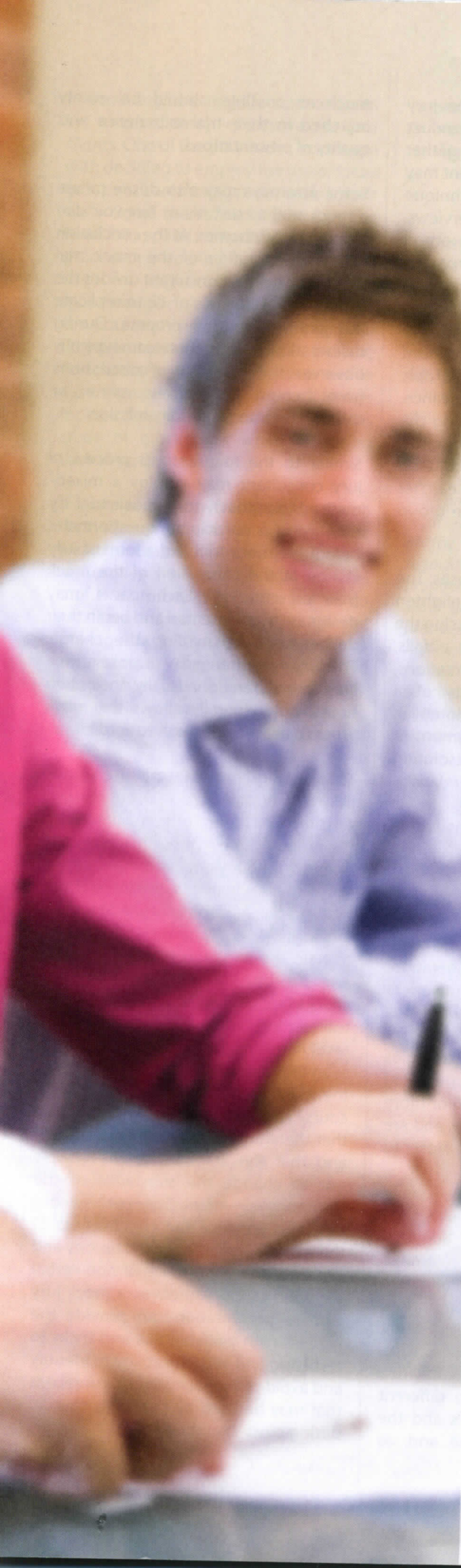


# Through the Looking Glass:

Focusing on Focus Groups  
and Mock Juries

*By S. Kristine Farmer, MS, RP, PHR*





The litigation process is an iterative one. We draft, finalize, and file our original or responsive pleadings and then begin the often arduous task of progressing through the discovery process, revising our litigation strategies along the way. The facts may evolve and change, potentially for the good or for the not-so-good, requiring us to adapt, adjust, and fine-tune our tactics accordingly. It requires the evaluation of the relevance of documents and their impact on the case, as well as the perceived credibility of the witnesses, both ours and our opponents, in order to access the strengths and weaknesses of our case. All along this litigation path, we keep a keen eye toward the likelihood of success from the perspective of our future jury. But our ability to accomplish such a feat can be compared to the reading of tea leaves or gazing into an often cloudy crystal ball.

To aid us in our attempts to predict the future and our likelihood of success at trial, our litigation teams often employ the use of pretrial or litigation research in the form of focus groups and mock trials. I tend to distinguish focus groups from mock trials in this way: using focus groups to test theories, strategies, ideas, and impressions about the overall case or specific issues in the case, on the one hand, while employing mock trials to present evidence from both sides in an adversarial fashion to simulate a jury trial.

Most commonly, the litigation team will engage a jury consultant who works either with their own market research group or contracts with one to recruit participants for the focus group or mock juries. Of importance is a mention about the selection of a qualified jury consultant. The jury consultant should be balanced in his or her approach to the process and should keep the discussions focused on the key questions. The jury consultant should not reveal for which side of the case he or she is a consultant and should remain neutral, impartial, and unbiased during the entire process.

A mock trial or mock jury is derived from the focus groups often used in market and social sciences research. A focus group is defined as "a carefully planned series of discussions designed to obtain perceptions on a defined area of interest in a permissive, non-threatening environment" (Krueger and Casey, 2000, p. 5). By employing the use of a mock jury or focus group, litigators can gain insight into how people think or feel about the case, a theme, a person, or an idea.

Many litigators use both approaches by first engaging focus groups for early case assessment and development of trial strategies and then later empaneling a mock jury to test the weight of the evidence, the credibility of witnesses, and the effectiveness of direct and cross-examination. As with any strategic method, there are pros and cons to both types of litigation research. First, let us look at the logistics of engaging focus groups and then discuss the process of conducting a mock trial.

**Focus Groups.** There are many incentives to utilizing focus groups. By definition, focus groups employ a small sample size, typically 12 to 24 participants, and may only last a few hours. The approach



for conducting a focus study will vary depending on the jury consultant and type of case, but generally follows this format:

First, the participants are asked to complete a participant questionnaire, which is designed by the jury consultant alongside the litigation team. It seeks to learn from the participants general demographic information (such as gender, age, county of residence, religious, ethnic, educational and employment backgrounds, marital status, number of children, household income, participation in civic clubs, societies, or professional associations, and household income, to name a few) as well as questions prepared with the goal of gathering specific information based on the type of matter being litigated.

Then, the litigation team makes a presentation(s) to the focus group depending on its desired goal. Meaning, participants of a focus group serve as potential jurors to provide feedback to presented evidence or themes or to exhibits or demonstrative aids as well as express their feelings and attitudes toward testifying witnesses, experts, and the examining litigators. From identifying potential pitfalls and issues, to theme development, to evaluation of persuasive arguments and beyond, focus groups provide litigators with the ability to formulate or reformulate their litigation strategies and approaches.

Afterwards, the jury consultant will often utilize a mixed-methods approach to gather data from the focus group. The first is a short questionnaire, which is prepared with the assistance of the litigation team. Answers to this questionnaire provide the jury consultant and the litigation team with vital feedback. Some of the questions I have seen employed are, "In your own words, explain why you think this lawsuit has not already been resolved?" "What three words would you use to describe [witness/client/opposing party] as you perceive him or her at this point?" "Was there anything that you heard in today's presentation that made you angry?" "Please list five facts that most influenced your overall impression of the case." "What facts or issues do you feel confused about or uncertain of?" and "What important questions remain unanswered in your mind?"

The second approach is for the jury consultant to ask questions or conduct interviews of the focus group to gather additional data. The jury consultant may employ a group interview technique or may conduct individual interviews. Most often, the group interview method is used. This group interview approach is designed to promote interaction among the participants that likely will lead to a better understanding of their views and opinions of the case. The jury consultant serves as the moderator based on a topic guide or questions prepared in advance. By encouraging interaction among the group, we can glean valuable insights. This session may be videotaped and the jury consultant or another researcher often will take notes during the group interview.

Focus groups also serve other uses. The results of the study can serve to enlighten your client or your trial team by using the groups' feedback to point out pitfalls, highlight unrealistic expectations, or underscore the uncertainty of a favorable verdict or outcome. Moreover, focus groups can induce settlement or enhance alternative dispute resolution as well as plan a litigation public relations strategy if your case is one of high profile or involves well-known persons within your community.

**Mock Trials.** A mock trial is often designed to assess the probable outcome of trial, determine the prospective course of juror deliberation, provide feedback and receptiveness of case themes, reactions to witnesses and testimony, and provide preliminary insight into juror profiles and strategies for voir dire. Mock trials often employ a larger sample size, usually 36 or more participants, may last a full day, and are often, but not always, engaged closer to the actual time of trial.

Typically, the mock trial is akin to a mini-jury trial, where the litigation team prepares an opening statement, conducts direct and cross-examination of key witnesses and uses important exhibits and demonstrative aids, plays deposition excerpt video clips, and presents closing arguments in a balanced fashion. Often two different attorneys argue the plaintiff's and the defendant's side of the case and, as

much as possible, should be evenly matched in their trial experience and quality of presentation.

Some attorneys may also desire to use a mock trial to test his or her voir dire strategies and themes. At the conclusion of the presentation of the mock trial evidence, the jury consultant divides the mock jury into panels of 12 to replicate the jury deliberation process. During deliberation, the litigation team typically observes the mock juries' discussions from behind a one-way mirror or through remote video transmission.

Similar to the focus group process, a jury consultant may employ a mixed-methods approach to a mock trial by employing a participant questionnaire before the mock trial and a form of jury charge at the conclusion of the mock trial presentation. Each panel may designate a jury foreman and begin their deliberations by reading the charge. The jury consultant may impose a time limit for deliberation, usually one or two hours, but generally allows the mock juries to proceed through to verdict.

Then, the jury consultant may use a group interview approach to seek out answers to prepared questions to determine the mock juries' thoughts, feelings, opinions, and insights into the case, the key witnesses, exhibits, demonstratives, trial graphics, deposition video clips, and arguments of counsel. It also serves to help the litigation team prepare lay and expert witnesses for direct and cross-examination. By simulating the trial setting, witnesses can experience testifying and are subject to cross-examination before a jury, helping them to understand the process. Of course, witnesses should be cautioned that the ultimate goal is to tell the truth and that the litigation team's goal is not to change the substance of the testimony or encourage perjury, but rather to enhance the effectiveness of the witness and his or her testimony and highlight the importance of non-verbal communication. Moreover, a mock jury witness presentation can provide the witness with valuable tips and tricks to testifying and with the ability to identify and avoid potential traps and curveballs that may be used by opposing counsel during cross-examination.



In summary, the litigation process can be extraordinarily expensive for our clients. One of the downsides associated with deciding to employ the use of focus groups or conducting mock trials is their costs. Some clients' budgets require the funds be applied instead to the discovery process or preparing for trial rather than used for litigation research. But the more complicated a case, the greater the potential need for employing these litigation research methods. As a result, and because of their effectiveness in case evaluation, many litigators always include the costs of conducting a focus study or mock trials when preparing their litigation budgets.

The use of these two litigation research methods combines art with science. The litigation teams' desire to provide the highest level of quality legal services is of the utmost importance but to do so also requires peering through the looking glass. By turning the focus inward and looking at the case from the perspective of the focus group or mock jury, the litigation team may be able to utilize science rather than tea leaves or

crystal balls to effectively evaluate trial strategy, witness credibility, and the overall strengths and weaknesses of the case.

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*National Leadership Award by NFPA in 2009. Kristine is an adjunct instructor for Pulaski Technical College in Little Rock, Arkansas, where she teaches a number of paralegal courses, including paralegal trial practice and computer support.*

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