

## BUSINESS LITIGATION

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### IN THIS ISSUE

*Jury focus groups are a great way to get valuable feedback on arguments and approaches to be taken at trial. However given the very significant costs, they are seldom utilized except in the highest exposure cases. This article provides tips on obtaining focus group feedback at a significantly reduced cost, so that they can be used in almost any case.*

### Jury Focus Groups Without Breaking the Bank: Alternatives to Jury Consultants

#### ABOUT THE AUTHOR



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#### ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. In addition, the Business Litigation committee has formed an IP subcommittee to intently focus on issues important to IP litigators. Among the committee's and subcommittee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars.

Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

You have a difficult case that will be coming up for trial soon. It involves a variety of difficult issues and the facts are a mixed bag. But you still think you have the better facts and arguments than the plaintiff. You have spoken with some of your partners about the case and gotten their feedback. But you think they might not be completely objective. You would like to hire a jury consultant to create and run a jury focus group to give you feedback from non-lawyers who will be more neutral and a better sounding board for your arguments. But you know that hiring jury consultants is expensive and the client will never agree to that type of expense because the exposure just doesn't justify it. What is a trial lawyer to do?

Fortunately there are less expensive alternatives that may not be as polished or as scientific as the work product of a jury consultant. But they can still give you valuable feedback on arguments, facts and approaches you are considering and help you identify trends in fact finders' thought processes. They can also provide you with a more objective view of the strength of your case – that much needed “reality check” on how defensible the case really is.

### **1. The Do-It-Yourself Jury Focus Group**

Anyone who has engaged jury consultants knows that there are certain common elements to the jury focus group process. The jury consultant arranges to locate and hire neutral individuals who are willing to serve on the mock jury. The lawyers hiring the jury consultant will prepare a presentation of information in some form - usually a mock closing argument with you presenting the defense position and another lawyer presenting the plaintiff's position. The mock jurors do not know who hired them. They

watch the presentation and then “deliberate” to decide liability and damages. This entire process may be videotaped and/or observed on a television monitor so the attorneys can watch the deliberations. Following that the “jurors” may be asked to respond to particular questions about their deliberations, give their views on particular alternative arguments, etc. In the hands of a professional jury consultant this process may include special rooms with closed circuit televisions, hand held devices that the jurors can manipulate to provide real-time feedback on particular arguments, slick questionnaires and other professionally crafted materials. Professional jury consultants utilize their training and experience to help select jurors, assist with developing the presentations, frame questions and interpret the results. But in a do-it-yourself focus group process, while you may not receive all of the benefits of the professional jury consultant, you still can realize many of the benefits at a much lower cost.

One of your first tasks is to decide on the type of program you will present, how long it will proceed, where it will take place and a date. Your mock jurors will need to know how much time they will be required to devote to the program, where they will need to travel and how much they will be paid. A typical program might require the mock jurors to listen to closing arguments, deliberate and then get debriefed over a period of three hours. If it is a reasonably convenient location, your office will be the best (and least expensive) place to hold the program. Think about holding it in the evening rather than during the work day. People will be more inclined to participate if they will not miss a day of work.

How much should you pay the mock jurors? The short answer is whatever it takes to make

it worth their while to participate. But it should not require a lot of money. If you schedule the program for no more than three hours, have it on a weeknight or a weekend at a convenient location, and if you describe what they will be doing in an interesting way, you will probably find many people willing to participate. Payments from \$50 to \$100 each should be sufficient. (Be sure to pay everyone the same amount no matter what their backgrounds. They may discuss their compensation among themselves and you don't want to introduce discord into the process with someone unhappy about receiving lower compensation than other participants).

Decide what types of people you would like to see on your jury. Generally you should look for a diverse mix because you want to get a read on how people with different backgrounds, occupations and experiences will respond to the facts and your arguments. This is the time to learn, and not exclude people that your common sense tells you will not be favorable to your position. Indeed, those are the most important people to have on your mock jury because you may learn ways they can be convinced to find for your side. Also consider the geographic region from which you will draw your jury at the trial. Can you seek mock jurors from parts of that same region? Are there particular professions that you would like to have represented on your mock jury? For example, it might be helpful to have an accountant on your jury if you have a business litigation case or a nurse in a personal injury case.

Finding the mock jurors can be accomplished in a number of ways. A newspaper advertisement can be used but another method is to prepare a written circular that you post in coffee shops and on bulletin boards in other

locations where it is likely to be seen by prospective jurors – particularly jurors that will give you a diverse mock jury. If you want a nurse, post in a coffee shop in a hospital cafeteria or near a hospital or medical center. For accountants post it in coffee shops near buildings where accountants work. Be sure not to advertise only in one type of neighborhood or you will get a lot of prospective jurors that are alike. You need to mix it up.

You will want to have prospective mock jurors call and be pre-screened so that you have information about them to help you decide which ones you want to select. Prepare a series of screening questions to ask them. The screening questions should seek only the information necessary for the initial selection process. You will be able to obtain additional information from the actual mock jurors selected when they appear for the focus group program.

From the candidates that respond to your advertisements select the people you would like to have on your mock jury and invite them to attend. When they arrive have them fill out a "jury questionnaire" that you prepare to obtain more background information about them. The information requested can be similar to what you would obtain on the jury questionnaire used by your court -- it can request voir dire-type questions that you might ask in an actual trial, or it can request other information that you believe will be helpful to you in understanding the personalities and backgrounds of the mock jurors. This can be useful when paired with the responses of the mock jurors during the deliberation process because it may help to associate certain backgrounds and/or personality types with particular views.

For the mock jury program itself, you will need a conference room to give the presentations and for the deliberations to take place. Have a videographer available or just set up your own video camera to record the presentations and the deliberations. You will also want to watch the deliberation process so you will need a camera in the room that can also broadcast to a monitor in a different room where you will sit to observe the deliberation process and take notes. Be sure to record that process as well. Let the mock jurors know that their deliberations are being watched and recorded so there are no breach of privacy issues.

Someone should greet the mock jurors, explain the schedule of events and the purpose of the program, without telling them who you represent. (You might make them believe that both sides are participating in the program and they are being hired by both plaintiff and defendant to give a case evaluation.) After the introductory remarks have the “jurors” complete the questionnaires. Then the “closing arguments” or other presentation materials can be given. After the presentations end you should have them deliberate. Formal jury instructions are not needed but it is a good idea to give them some guidance on how they should approach the deliberation process before they begin so they do not waste a lot of time on procedure. Giving them at least some guidance on applicable law may also facilitate the deliberation process. You might also consider giving them a verdict form similar to what you might use in the actual trial. Be sure to watch them deliberate from a different room using the television monitor and take notes on their comments while the process is proceeding. Remember that the final verdict they reach (if they have time to reach a verdict) may not be as important as the

comments they make in reaching their verdict.

After they complete their deliberations (or run out of time in that phase of the program), plan to do a debriefing and ask them about their deliberations and the comments they made. This is an extremely important part of the process so allow plenty of time for this debriefing. This is the time when you can ask for explanations of comments they made, test alternative arguments or present additional facts to get their reactions. This feedback can be invaluable to understanding what motivated them to find in a certain way, how their experiences and backgrounds may have influenced their decision-making, and what arguments and facts were critical to them. Also solicit their thoughts on how to improve your presentation and make your position more persuasive.

Some attorney input and time will be needed for planning a do-it-yourself jury focus group program, but a lot of the actual work in implementing the program can be performed by paralegals or even administrative staff to reduce costs. Most of the attorney time will be taken up preparing and presenting the closing arguments themselves and debriefing the mock jurors. But this is time well-spent because it can reduce actual trial preparation costs following the jury focus group.

## **2. The Office Focus Group**

The Do-It-Yourself Jury Focus Group will likely be far less expensive than using a jury consultant. But it will still entail enough expense in identifying and hiring the mock jurors and in videotaping/monitoring the deliberations, that you are not likely to use it on most of your cases. Yet there is another alternative that can provide you with useful information and feedback which is so

inexpensive that you can afford to employ it with almost any case. It will not be as neutral or as scientific as more formal (and expensive) jury focus group methodologies, but you will be able to test arguments and facts on real people who are not lawyers to get their views and ideas.

The Office Focus Group is similar to the Do-It-Yourself Jury Focus Group, except that instead of hiring a group of mock jurors to receive your “closing arguments” you present them to employees in your office followed by a debriefing rather than a mock deliberation. There is little expense to obtain these “jurors.” You can arrange for the presentation to take place at lunchtime in a large conference room and invite all of the attorneys, paralegals, secretaries and other administrative staff to have lunch and watch the “closing arguments” (presented by you and another attorney presenting the plaintiff’s position). Although these “mock jurors” will not be completely neutral or as diverse as what you can obtain in a more traditional jury focus group, in this type of program you can have many more people see the presentation and this may provide a greater number of perspectives. Moreover, you are likely to get greater geographic diversity in your audience, particularly if you are in a larger firm, because the employees in your office may

reside in a larger geographic region than the independent mock jurors that could conveniently get to your office to participate in a focus group.

You also will not get to observe “jury deliberations” in this type of program because you will go immediately to the debriefing process after the presentations. But this type of debriefing process will be a hybrid process -- the employees in your office will offer their views on liability and damages generally as well as answering pointed questions that you ask them during the debriefing. So you should receive much of the same type of information as would be provided through a deliberation process.

Because an Office Focus Group can be organized quickly with minimal advance planning and with minimal expense, it can be used frequently and even for lower exposure cases. Although it is not a perfect process, you still are likely to receive useful feedback that will help you with your case evaluation and with your trial strategy and preparation.

By using the Do-It-Yourself Jury Focus Group or the Office Focus Group, you can gain valuable information about your case as you prepare for your trial, while saving your client significant expense.

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