



Why a Focus Group before Mediation Is Money Well Spent

By Jessica Hoffman, J.D., M.A.

You have a decent sized case (\$100,000 or more). Based on statistics, you have a good chance of settling the case before it ever gets to trial. If you're like most plaintiffs' attorneys, you see value in focus groups, but you only run one when a case is past mediation and is set for trial. After all, if a case is likely to settle in mediation, why spend extra money to run a focus group, right? Wrong. Going into mediation without full knowledge and preparation is just as harmful to your client and your settlement figure as is going to trial without that same knowledge and preparation. There is great value in using focus groups specifically for mediation.

Mediations are completely centered on what a jury will do, what they will think about certain pieces of evidence, and what they are likely to return as a verdict. Your settlement is entirely dependent on what the mediator, you, and the defense attorney predict jurors will do with the case. Your case will yield a larger settlement if you are able to show that jurors are more likely to side with you. It only makes sense to go into mediation with evidence of what jurors are likely to think and do. If you can show the mediator and the opposing counsel that jurors are on your side, show them video of layper-

sons from the venue deliberating about their case and arguing in your favor, you should be able to get much more out of a settlement figure than the focus group cost you. Instead of guessing, like the defense is doing, show the mediator that you know exactly what you are up against and that you have evidence to show that you are going to be able to overcome those obstacles. That information is priceless because it goes directly to the center of mediation.

When you run a focus group (and run it the correct way by recruiting correctly, presenting the case in a specific manner, and controlling for different variables like any good research), you learn about the problems in your case as well as the strengths. You learn how jurors will see the evidence, what they think is important, what they think is irrelevant, and how angry they get at the defendant. If you capture the focus group presentations and deliberations on video, and the results are generally favorable to you, you can use this to your advantage in mediation in any of the following ways:

(1) Edit the video of the deliberations to a 3-5 minute clip to hand over to the mediator as part of your confidential mediation statement. This will

show the mediator the strengths of your case as seen by real jurors, not just as seen by you. You are biased. The mediator expects you to put your best case forward, but if you can show that other laypersons fought for your client, you will make a strong first impression and give the mediator something to work with to convince opposing counsel to put more money on the table.

(2) Turn over portions of the deliberation video to opposing counsel to view at the mediation. Remember, anything said or presented in mediation is confidential. Seeing lay persons decide against you is much more disheartening than threats from opposing counsel that they believe jurors will side with their client. Further, you can provide copies of the scripts read to the jurors to show that you put on a very strong defense. If there were areas where jurors sided with the defense, point that out as a concession to show that you are not hiding anything, and then reinforce that overall, the jurors sided with your client. Aside from the focus group findings, the fact that you ran a focus group shows defense counsel that you are serious about the case. Defense counsel will often argue that focus groups are not valid and will seem to disregard your evidence. Wait until a cou-

ple days after mediation for the phone call and you will see the results. Sometimes, not often, defense counsel will ask to see the entire video. If they do, let them see it if a majority of the juror discussions were favorable to you. Otherwise, you can offer a report by the consultant that summarizes the findings.

(3) Have the trial consultant who ran the focus group present at the mediation. This allows the mediator to ask any questions regarding how the focus group was run and the validity of the research.

(4) Ask the consultant to write up a report summarizing findings which can be given to the mediator in the confidential mediation statement. You can authorize the mediator to share the findings with defense counsel or not.

(5) Ask the consultant to tape him/herself discussing findings of the

focus group. This can be a precursor to the clips of jurors deliberating or a video on its own to present to the mediator and/or defense counsel.

If the focus group showed more weaknesses than strengths in your case, do not feel like you have thrown away money. You needed to know that. Information about how weak your case is should be just as valuable to you (although a blow to the ego) as is information about its strengths. If they are problems you can fix, then you can walk into mediation knowing that you are willing to take this case to trial and you know to hold out for a larger settlement offer. If most of the problems are issues you cannot get around, then the knowledge that you must settle the case should be worth the expense of the focus group. The bad results can also help with client expectations if you have a client who needs a little control.

If you wait until after mediation to run a focus group, you lose a lot of leverage. While your case may settle at mediation, it could have settled for so much more had you run a focus group and used the results to leverage your case. Mediation is about what a jury will do. You need to walk in with evidence toward that effect, not just your best guess.

Jessica Hoffman a mediation/trial strategist and attorney at Huff & Leslie, LLP. Nationally renowned trial consultant David Ball, Ph.D., trained her and mentored her for three years. She specializes in helping attorneys shape their cases through strategy sessions, editing opening statements and closing arguments, aiding in jury selection and running focus groups and mock trials. You can reach her at jhoffman@huffandleslie.com or 303-232-3622.



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1445 market street • suite number 340 • denver colorado 80202
303 216 9488 telephone • 303 216 9489 facsimile • jesse@jessewitt.com