



Medical Malpractice Update

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The Use of Focus Groups and Mock Trials

We all know the sinking feeling in the pit of our stomachs when a set of facts fraught with question marks comes across our desk. A case that presents a situation so unique that no theme or strategy seems to provide cohesion. A case where a circumstance changes after most of discovery has been completed and fundamentally alters the litigation. Or just a unique case that makes identifying the inherent biases in the jury box seem impossible. In all of these situations, the use of focus groups and/or mock trials can provide you with vital information. It is worth noting that plaintiffs' attorneys across the country have been using focus groups and mock trials to develop their cases for years.

Take, for example, a case where a doctor has been accused of overprescribing narcotics and mood-altering medications in order to induce patients to coming to his office so that he may assault them—through both medical malpractice claims as well as intentional torts. That one sentence has implications for coverage, jury verdicts/settlements, defense strategy and juror attitudes that could all conflict. This will require insight into how potential jurors will handle information outside the normal realm of evidence presented in a medical malpractice case. In situations like these, the use of focus groups and mock trials provide valuable opportunities to gain insight into the minds of jurors.

What is the Difference Between a Focus Group and a Mock Trial?

Lawyers often use the terms “focus group” and “mock trial” interchangeably, but doing so shortchanges the benefits provided by each. A focus group is a panel or panels of individuals that as closely as possible resembles the makeup of your jury pool. Once assembled, the panel is asked general questions about the issues, themes, and specific factual circumstances in a particular case as well as their own conceptual biases that can affect your litigation. On the other hand, a mock trial is a group of individuals closely resembling the likely makeup of your jury pool that hears actual trial presentations regarding the evidence in your case and is asked to come to a decision regarding liability.

The primary difference is that a mock trial “jury” will actually weigh the evidence and determine liability, whereas a focus group provides information on the individuals' emotional and psychological reactions to elements of the case without considering them in the setting of jury deliberation. Many believe these definitions to differ only in semantics, but the role of each is markedly distinct, and the timing of when to use each avenue of research can make a significant difference in your ability to determine litigation strategy. Finally, the preparation and presentation required for each by the attorneys also solidifies the distinction between the two. Based on the circumstances of your particular case, one or both of these research avenues can provide valuable information about jurors that will radically improve your likelihood of a positive outcome for your client.

Exploration: Focus Groups Help Shape Themes and Discovery Strategy

Early in the case, either before or immediately after party depositions, a focus group to study unique factual issues and potential juror biases allows the defense team the ability to shape their future discovery and motion practice to better develop their own strategy with the potential jury pool in mind. The defense team can learn whether certain facts that will come out in discovery will inhibit the jury from hearing other evidence. More importantly, a focus group allows the defense to understand what biases and ingrained ideas jurors will bring into the jury box that will affect how they see the case. All of these things help the defense team identify obstacles—known or surprising—to achieving the best outcome for our clients.

For a focus group, attorneys need to present facts in a general way, without argument. The point is not to explore whether potential jurors would find liability, but rather to understand *how* they are evaluating these issues. The primary driver is to learn what issues or facts or elements matter more than others, and why they matter. Doing so allows you to tailor the litigation themes, develop more detailed demonstrative exhibits, develop a plan for witness preparation, and generally set your client and team up for success at trial.

Correlation: Mock Trials Aid in Honing Trial Presentation

A mock trial, usually most effectively done once a significant portion of expert discovery is underway or complete, allows the defense team the opportunity to observe how their chosen themes, witnesses, and strategies correlate to outcomes. Jurors are required to listen to and consider trial-ready openings, evidence, and closing arguments and then make liability determinations using real-world jury instructions and verdict forms from the jurisdiction to render verdicts. Observing not only how the evidence but also the arguments, exhibits, and stylistic demeanor of the attorneys affects jurors enables the defense to learn where jurors' biases are influencing their understanding of the evidence and whether those effects are likely to lead to a favorable outcome for our clients.

Many will ask if a mock trial can predict an outcome. The answer is a resounding question mark, and one much better left to the cited scientists who study juries all over the country. From the perspective of a litigator, a mock trial enables you to evaluate not only how jurors will consider the evidence but also how your own presentation will color the process. In so doing, you will gain a better understanding as to how potential juries will treat these issues. For this case certainly, but more importantly, for the next one.

Conclusion

Utilizing the correct research vehicle at various time frames allows litigators to identify and remedy problems with overall strategy as well as witness and trial presentation about which we simply would not know without these tools. Several companies all over the country provide these services, and you will need to speak with the professionals at these organizations to pinpoint the best option for your individual case as well as to discuss the important logistics and issues that concern all clients—cost, timing, efficacy, goals, etc. The more in depth the discussion you have with the provider, the more effective your research will be in providing vital information about your case. For many cases, the information gleaned using these tools can open our eyes and ensure that we are keeping our focus on our ultimate audience—the jury.



About the Authors

Dede K. Zupanci is a partner in the Edwardsville office of *HeplerBroom LLC*. Her practice focuses on the defense of medical malpractice actions, as well as other healthcare litigation. She is a 2002 graduate of Saint Louis University School of Law.

After receiving her law degree from DePaul University College of Law in 2009, **Whitney L. Burkett** began her career defending various types of personal injury litigation. Joining *HeplerBroom, LLC* in early 2022, she formerly worked as trial counsel for various excess insurers defending catastrophic injury claims in the areas of medical negligence, transportation, and products liability in various jurisdictions nationwide. She has honed her practice to focus primarily on the defense of medical negligence and long-term care actions on the primary level. Additionally, Ms. Burkett has utilized both mock trials and focus groups at various stages of litigation to tailor and define defense strategy.

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