

FREQUENTLY ASKED QUESTIONS – JURY RESEARCH

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1. Q. ***What is meant by the term “jury research”?***

- A. The term “jury research” refers to the use of social science to help assess likely jury outcomes and assist in developing effective trial strategy and tactics.

Most experienced trial lawyers consider jury research a necessary part of preparing any case of consequence for trial.

2. Q. ***Who typically conducts the research?***

- A. There are a number of firms around the country which conduct this research. Usually, the firm principals have a social science background and often advanced degrees in disciplines like Psychology and Sociology. Some jury research consultants have law degrees and actually have tried cases.

3. Q. ***What are the methods of research?***

- A. In one form or another, jury research is “opinion research”. Individual jury consultants and trial lawyers have different preferences for how to approach research for a given case. Sometimes, more than one mode of research may be used in preparing to try a case. The most common modes of research are telephone surveys, focus groups, and mock trials.

Telephone surveys typically involve calls to as many as 200 to 400 individuals who are told about the case and each party’s position; then questioned on their views during a session that lasts about 30 minutes.

Focus groups typically are comprised of 10 to 14 “mock jurors” who will listen to a moderator tell them about the case – presenting evidence both favorable and harmful to the party conducting the research; the mock jurors are free to interrupt and ask questions; are questioned on their views; and eventually deliberate outside the presence of the moderator.

Mock trials typically involve the presentation of arguments and sometimes evidence by lawyers – who in reality are representing the same client – setting forth the opposing claims and defences.

4. Q. ***What should the goal of the research be?***

- A. In the most basic sense, jury research is a reality check on the strength of your case. It is an opportunity to see how people who are similar to those likely to

appear on the jury react to your arguments, key evidence, and the fundamental equity of your position.

Beyond that, it is an opportunity to test themes, challenge assumptions, and possibly evaluate the credibility of witnesses. It also can be a good place to develop ideas for trial graphics and possibly test drafts of those graphics.

Research also can be an effective tool in educating clients about the how their dispute will be resolved and assist in valuing that dispute given the client's various interests affected by the lawsuit. Done properly, research can give a client valuable information to help assess whether to take a case to trial or resolve it through a settlement or guilty plea; and if the case is to be resolved pre-trial, at what price.

Finally, research should produce information useful in jury selection. Counsel should be able to learn whether mock jurors with certain characteristics or life experiences seem predisposed in favor of or — more importantly — against a position taken by the client or certain evidence that will likely be presented at trial. Of course, individuals who serve on juries enter a case with opinions formed from a lifetime of experiences and no two people are precisely alike. Yet, research can demonstrate certain patterns. And comments from mock jurors with certain specific experiences might provide a window into views that may be shared by others having had similar experiences.

5. Q. ***How do researchers ensure the research participants are representative of the people who will serve on the jury?***
 - A. The participants, called mock jurors (even when the exercise is a focus group), are selected from lists of people identified for product/opinion research. The researchers pre-screen them by telephone before the day of the exercise. And on the day of the exercise, additional screening occurs to ensure that there is no one who may compromise the confidentiality of the research or be likely to have a strong predisposition or prejudice that would interfere with the research.

6. Q. ***How are the results of the research reported?***
 - A. Usually, the researcher prepares a written report that sets forth results, conclusions, and recommendations based upon the data. That report is presented to the client and counsel. Typically, they meet with the researcher to discuss its contents. The true value of the research is derived from the give and take with the researcher.

7. Q. ***Is the research report subject to discovery or a government subpoena?***
 - A. If the process has been conducted properly, no. The researcher should be retained with an engagement letter that memorializes that the work is being done to assist counsel in rendering legal advice. Work product and attorney client privilege protections should, absent unusual circumstances, preclude the research from being discoverable or subject to a government subpoena.

8. Q. *What precludes the mock jurors who participate in the research from disclosing what they have learned and done?*

A. The mock jurors should sign a confidentiality agreement that clearly spells out their clear obligation not to disclose anything that they have learned in the process. Most jury researchers will tell you that they have not had problems with mock jurors violating these agreements – even when the research has involved high profile matters.

9. Q. *Should the research be conducted in the same venue as the trial?*

A. It depends. If the trial is to occur in a highly populated, metropolitan venue, it is probably acceptable to conduct the research there. The likelihood of a mock juror being called to serve on the jury or come into contact with a trial juror is highly remote. Moreover, mock jurors tend to take their responsibility seriously and will respect their pledge to keep everything they learn and do confidential. If the case is to be tried in a more rural, less populated venue, it may be preferable to do the research elsewhere — in a venue that is similar, but remote from, the more limited jury pool from which those who will decide the case will be selected.

10. Q. *Can the client or counsel watch the research?*

A. Yes. The research is usually done in a facility with two-way mirrors and counsel for the client can watch and, as appropriate, make a suggestion through having a note carried in to the researcher or sending an email via blackberry.

11. Q. *Is the research recorded?*

A. Usually the researcher will video-record the session unless requested not to do so. The recording allows the researcher to review aspects of the exercise in preparing the report.

The recording can also be useful in communicating the strengths or weaknesses of the case to client representatives who may not be present. Viewing mock juror deliberations has caused more than one corporate executive to reevaluate their view of a case.

12. Q. *When should the research be done?*

A. This depends on the budget and the time available before trial. Conducting a somewhat simple focus group session can be useful at the outset of the case if counsel believes it is the type of matter not likely to be resolved with a motion to dismiss. This can inform the thinking about what may be important in discovery. This early case research is not done often but it can be a valuable tool in the right matter.

As a case progresses and it appears that trial is a realistic possibility, it is a good idea to do the research early enough in the case so that there is time to meaningfully digest the research and factor it into trial strategy and the settlement or plea negotiations. This usually means at least 90 to 120 days before a trial

date, but often it is better to do earlier. That said, data gleaned from research can be useful even if done right before trial. It is not uncommon for a phrase or analogy offered up by a mock juror to find its way into counsel's opening statement or summation.

13. Q. *Is testimony ever presented as part of the research exercise?*

- A. Yes. It is common in either the focus group or mock jury formats to play excerpts of videotape depositions. In rare instances, counsel might even conduct a direct and cross-examination of a witness live. The benefit is that the mock jurors can comment on the credibility of the witness. This feedback also can be used to demonstrate to a witness the weakness in his or her communication style and serve as a tool for improvement.

14. Q. *How is the law governing the case incorporated into the research?*

- A. Usually, at the deliberation stage, the researcher reads the instructions to the mock jurors which follow along the lines of those they would receive from the court at trial. Sometimes, one or more actual instructions to be given at trial will be provided as part of research instructions.

15. Q. *How do you decide what points are covered in the research?*

- A. Counsel works with the researcher to develop the script. Who has the strongest hand in its development will depend on the researcher and the lawyer. The survey or script should flesh out the key issue in the case and allow time for substantial discussion by the mock jurors. Typically, a script will go through many revisions before the researcher, counsel, and the client are satisfied that it will provide the best opportunity to yield useful information.

16. Q. *How do you ensure that you are able to capture the true opinions of the mock jurors?*

- A. Of course, with a telephone survey, the researcher will be speaking with the participant one-on-one and have the opportunity to probe and follow up.

With either a focus group or a mock jury, the script should allow for breaks during the presentation during which a moderated discussion occurs. You are missing a great opportunity to hear contemporaneous reaction on key points if all you do is make a presentation and allow the mock jurors to vote, or deliberate and vote.

Some researchers use electronic monitoring systems that allow the mock jurors to record their reactions to evidence or arguments real time, as it is presented to them.

Usually mock jurors are asked to vote or respond to questions in a questionnaire several times during the research to gauge their reactions to what they are learning.

Ultimately, the mock jurors in a focus group or mock trial are asked to deliberate and render a verdict. Up until that point in time, the discussion among the mock jurors is usually moderated by the researcher. But there can be a value in allowing the mock jurors to deliberate on their own for some period of time to see how opposing arguments are played out in an atmosphere that should provide greater candor than when the researcher is present.

17. Q. *What are some of the most common mistakes that impair the quality of the research?*

- A. Failing to ignore the weaknesses in a case is probably the most serious mistake that can be made. The research is a laboratory in which client and counsel can experiment. It can provide the ultimate reality check. You should confront the problems of your case here and work on the strategy and tactics for overcoming them. Sometimes researchers will posit alternative theories or alternative pieces of evidence and gauge reactions to each.

Another mistake is trying to fit too much into the research. To be effective, you must edit. And you must keep in mind the limits of a day-long or half-day-long exercise, allowing sufficient time for the discussion that produces the most useful information.

Finally, it is a serious mistake to not take full advantage of the diversity within the group of mock jurors. Often, the focus group or mock trial presentation is made to a larger group, say 36 or 42 mock jurors, and then that group is split in two for deliberations. The most effective deliberations are those that include strong personalities advocating for each side. Who those individuals are will become evident in the discussions leading up to deliberations. The debate between them allows for fuller exploration of the issues.

18. Q. *Is there research that can be done after the jury is selected?*

- A. Some lawyers like to use “shadow juries” comprised of people who are intended to mirror, to some extent, the individuals who are seated on the actual jury. The shadow jurors are not told which side has hired them and they are questioned each day – usually with a written survey – about their views on the evidence presented in court that day.

Shadow juries may be useful in some cases, but there can be a tendency to overvalue the opinions they provide at the risk of focusing attention on the actual jurors who will decide the case. If the case is long enough, the shadow jurors frequently figure out which side has hired them and then their opinions become far less valuable.

Sometimes a shadow jury hearing an opening statement can provide useful feedback on the basic themes set forth by counsel.

19. Q. *Is it necessary, or at least preferable, that the researcher work primarily in the venue in which the case will be tried?*

- A. Experienced trial lawyers are split on this question. Unquestionably, the most important factor should be that the researcher is competent and understands the key aspects of the case and what is sought to be accomplished through the research.

At its most basic level, jury research is social science and one need not be familiar with the peculiarities of a particular venue from which jurors will be drawn to understand their opinions and what those opinions mean when asked about certain information. As with all professions, some people are better at this than others and a trial lawyer who has had success with a particular researcher in the past may prefer to work with that researcher regardless of where the trial will take place.

On the other hand, in certain parts of the country – particularly outside major metropolitan areas – there may be a value in working with someone who is more deeply steeped in local knowledge, often derived from years of experience of doing research in the venue.

In the end, whoever does the research must account for the nature of the venue and the types of jurors it produces for the research to be effective.

20. Q. *What does it cost?*

- A. The cost of the research varies based on what you are doing, who is doing it, and where it is being done. Some of the common variables include the cost of a facility at which a focus group or mock trial may be conducted, the fee paid to mock jurors for a day or half-day or their time, the number of mock jurors used in a focus group or mock trial, whether the researcher is traveling, the nature of the report prepared following the research, and the local “market” for jury research services. As would be expected, costs tend to be higher in major metropolitan areas.

That said, one can expect to pay in the range of \$40,000 - \$80,000 for a thorough, 30-minute telephone survey of 300-400 participants followed by a detailed written report.

A typical recorded focus group conducted in a half-day with 20 to 24 mock jurors, who are then split into two panels for a presentation with moderated discussion and deliberation, followed by a detailed written report, will cost between \$40,000 and \$85,000.

A recorded full-day mock jury with simultaneous juror response measurement, with 36 to 42 mock jurors who are divided into two monitored groups for deliberation, followed by a detailed written report, can cost from \$50,000 to \$100,000 or more.

Of course, there are always ways to do things for less. If a client has an extremely limited budget, counsel certainly can conduct research on their own, simply enlisting people from the community to come for a focus group or mock trial –

hopefully held somewhere that does not give away who is doing the research. Of course, this type of exercise lacks the benefit of the insights of professionals whose job is researching opinions of potential jurors on issues likely to be present in your case. The exercise – even if conducted without the benefit of a professional researcher – should still provide a greater understanding of those issues and how they may be decided.