



## The Cost and Value of Jury Focus Groups

Jury focus groups, including mock trials, can be controversial. Some folks think they're valuable, some think they're useless and others don't have strong opinions either way but think they're too expensive. A case can be made for each camp. Let's explore the cost issue because jury consultants are mighty shy about addressing it publicly.

There is also a perception among some lawyers that high cost jury research equals high quality and that low cost equals low quality. That's simply not true. Small can be good provided the consultant is experienced and the expectations are sound. But before we get into costs let me tell you about a small town in New Hampshire because it's a political metaphor for small focus groups.

Dixville Notch is a tiny hamlet nestled 1,800 feet high in the White Mountains of New Hampshire near the Canadian border. It has a quaint tradition that gets national attention every four years. The town opens its polling station at midnight of Election Day in the Balsam's Hotel. Every registered voter shows up (and has for about fifty years). If a neighbor is strapped to a gurney in the hospital, they bring him in.

Seconds after midnight they cast their votes; the first in the nation. The ballots are counted and the votes announced before 12:15 a.m. The citizens raise celebratory glasses and the national media reports the results. Dixville Notch then goes back to sleep comforted by its fifteen minutes of fame.

Some may grumble that this quadrennial ritual is as insignificant as the February 2nd vigil to see if Puxatawney Phil casts a shadow; that it means absolutely nothing and predicts less. I demur with regard to Dixville Notch. I agree with respect to Phil's shadow.

The Dixville Notch electorate has been surprisingly prescient. In 2012 Obama and Romney each got five votes, reflecting a reasonably close popular vote. In 2008 voters got it right again by supporting Obama over McCain. In 2004 Dixville Notch supported George W. Bush 19-7 over John Kerry, picking the winner but missing the closeness of the popular vote. In 2000 it supported Bush over Al Gore by 21-5, again picking the winner but missing the tightness of the vote. In 1996 Dixville Notch either lost its mind or broke out the whiskey before voting, as it chose Bob Dole over Clinton by a landslide (18-8).

That is how pollsters and statisticians stay in business. You don't have to be a polling expert to know that the Dixville Notch vote isn't predictive of anything. So why do we watch? Perhaps because we don't entirely trust our own reading of voters or jurors? It will come as no shock that a jury may view a witness or piece of evidence somewhat differently from a lawyer. It's all in the angle of observation,

in the same way as two readers may interpret a poem very differently because of their world views or life experiences.

Perhaps we're interested in the Dixville Notch electorate for the same reason we take exit polls – examining the voters' reasoning and feelings may reveal something important. It had been forty years since Dixville Notch voted for a Democratic presidential candidate. Why the tectonic change in 2008? Did it signify a transformation in the mood of the country? Was it anger at Bush, disgust at Palin, ambivalence about McCain, fear about the economy, hope in Obama or simply time for a change? I don't know but that's why political campaigns run focus groups – to understand the political currents and to craft effective campaign messages.

In the same way as we get political clues and ideas from chatting with nine or ten Dixville Notch voters, we can get ideas about legal cases by talking with nine or ten mock jurors. It's not a wide angle view. It's a peek through the keyhole but it can be revealing.

There are good and bad ways to interpret the feedback from mock jurors. A bad way is to view it as a crystal ball for forecasting verdicts or voting results. It's fool's gold to rely on mock trial verdicts as a basis for settling a case. You cannot expect that a one-day mock trial with two or three hours of evidence can predict a two week trial with fifty hours of evidence, especially when you don't know how the Court is going to rule on some key motions. That would be a first degree polling crime and would land you in jail. Of course, it's done all the time.

Let's examine the cost and value of focus groups through a case we worked on. That way we see cost in the context of the information value. To say that \$10,000 or \$50,000 is too expensive without relating it to a prospective benefit or value seems myopic. It could very well be that a \$50,000 mock trial proves dirt cheap while a \$10,000 focus group proves to be a waste of money.

My client was a small but fast growing city in North Carolina. The City encouraged business growth but was mindful of traffic problems. Traffic congestion had been the biggest citizen complaint for years. The government included a Mayor and a five member City Council. The Council had legislative and budgetary authority and gave final approval to all new development.

In 2004 the City sold a forty acre vacant lot to a developer with the understanding that he would build three hundred apartments. The lot had frontage on a parkway. The purchase contract included a preliminary site plan prepared by the developer that showed access to two public roads but not to the parkway. The Council saw this plan and supported it.

The developer claimed he always needed parkway access, that the other two access roads were insufficient for such a larger development and that the 2004 plan was only conceptual. He also said that the Mayor, who was a big supporter of the development, promised him that access. The Mayor's testimony was ambiguous. He denied he made any explicit promise but he acknowledged that he supported the development and the parkway access.

Two years later the developer submitted final plans. The City Planning Department approved the plans but the Council was furious because they included parkway access. The Council passed Ordinance 23 a month later to prohibit any further access roads to the parkway and made it

retroactive to cover this development. The developer claimed the ordinance killed the project and that he had invested \$3 million.

We were interested in five issues:

- 1) If parkway access was so important to the developer or was promised by the City, why didn't he put it in writing in the 2004 purchase agreement?
- 2) If the Mayor strongly supported the development and knew in 2004 that the developer wanted parkway access, would a jury view that as enough of a promise for detrimental reliance, even if he didn't directly promise anything to the developer?
- 3) How persuasive was the governance defense that the Council (not the Mayor) had final authority to approve the development?
- 4) What would jurors think of Ordinance 23, especially its retroactivity, and of the City Council's professed motivation - that citizens had loudly protested traffic problems on the parkway as a result of granting this additional access (the political defense)?
- 5) How would the jury view the Mayor and Councilmen as witnesses?

Our clients, the Mayor and City councilmen, had strong feelings about two of those issues. First, they thought it was critical evidence that nothing was in the 2004 purchase and sale agreement about parkway access. If access had been discussed or promised, the plaintiff would have demanded it be in writing. Second, the City Council also felt hoodwinked when they only learned of the parkway access two years later. The Mayor knew about it but the Council didn't and that symbolized an ongoing tension between the Mayor and the Council. Third, the Councilmen felt they were doing their jobs and protecting the interests of their constituents by denying parkway access and stopping further traffic congestion.

We ran a full-blown mock trial with two panels of jury-eligible residents to examine these issues. It included opening statements for both parties, videodeposition excerpts from four important witnesses and two jury deliberations. Some Councilmen attended.

We learned a lot. We learned that the governance and political defenses were weak, that the lack of a written agreement was strong, but not strong enough, and that the dominant theme, the trump card, was not even on our list – fairness. The developer had invested \$3 million in the project and nobody at the City told him to be careful because parkway access was a problem for the Council. A fat cat plutocrat was seen as a victim! That was a big surprise and a valuable insight.

How much did this mock trial cost? If you strip out our time for preparing the Mayor and Councilmen for their trial testimony, our fees for the mock trial (planning, managing, analysis and report) were about \$25,000 and the expenses were about \$12,000.

What if we had done a half-day focus group with eight or ten mock jurors to explore some of the key themes? I can hear howls of protest from some jury consultants. "Only eight jurors? That's statistical sampling malpractice!" Well, perhaps so, but we wouldn't have been trying to forecast

anything. It would have been a Dixville Notch discussion. We would have been looking for some guidance on the big case themes, and we may have unearthed the fairness issue – that the fat cat plaintiff could be seen as a victim.

What would the cost have been for such a half-day focus group? Expenses would have run about \$3,000-3,500. Our time may have run twenty-five to thirty hours (ten to twelve hours getting educated on the case, six or more hours for the focus group day and eight hours reviewing the jury discussion and developing ideas for trial). Our fees would probably have been about \$10,000. Total cost would have been \$13,000-14,000.

Let's come at this from another angle and assume our biggest concern was how one of the Councilmen would come across to the jury (or, to be a bit devious, how to persuade this stubborn Councilman to stop blocking settlement discussions). We could set up a witness focus group with eight representative jurors. We'd give the jurors a ten minute overview of the facts and then bring the Councilman into the room for a one-hour direct and cross examination. We'd moderate a conversation between him and the jurors. This "immersion" experience would have a powerful impact on the Councilman and perhaps change his thinking about how easy it was going to be to win. The total cost might be around \$10,000.

Finally, the use of online jury research has been rising. This is an attractive tool for tight budgets and large sample surveys. For example, we could have surveyed attitudes in the venire about the Council and Mayor and knowledge about their areas of authority. We might have discovered that most people believe the Mayor had the authority (perhaps because they disliked the Council), and if the Mayor openly supported the project, that would be enough to hold the City liable. We could then follow up with an online focus group to dig deeper with face to face discussion of the issues.

The cost of focus groups ranges with the size of the litigation problem. Focus groups can be affordable. The trick is scaling the focus group to the litigation goal and avoiding a one size fits all approach. Small groups can work. Hail to Dixville Notch!