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Using Jury Research to Prepare for Nursing Home Litigation

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Introduction:

Nursing home litigation is on the rise. Demographic shifts and large verdicts suggests that this trend will accelerate over the next decade. In the past two years alone, jurors have rendered three of the nation's largest verdicts, ranging from \$87 to \$250 million. In addition to huge verdicts, claims of patient abuse and neglect have become prominent in local and national media. The substantial awards and media attention contribute to the belief among plaintiff attorneys that nursing home litigation presents a notable financial opportunity.

Attorneys who defend nursing homes are very aware of the fact that they confront a jury pool that places high standards on nursing homes and assisted living facilities. The trial attorney's concern is whether jurors believe instances of neglect and abuse are isolated and infrequent or represent a widespread problem. Jurors must be shown and persuaded that nursing home administrators are doing all they can to protect patients.

Despite the daunting jury pool, senior housing executives and in-house attorneys realize that at some point, they will have to take a case to trial when settlement demands become unreasonable or the claims too numerous. Given this climate, is there anything nursing homes can do to improve their position? Fortunately, yes. There are many lessons being learned today from jury research regarding preparing and trying cases involving claims of neglect and abuse by nursing homes.

Selecting Your Optimal Juror:

Juror attitudes and beliefs about nursing homes will affect the way they judge the evidence, witnesses, and arguments presented by both sides. In order to overcome negative preconceptions toward nursing homes and the biases jurors bring to trial, it is essential to discover these key attitudes. Uncovering these attitudes is accomplished through the utilization of jury techniques such as community surveys, focus groups, and



mock trials. Jim Moore, a senior housing and healthcare consultant from Fort Worth, has conducted over 700 focus groups with senior consumers and adult children over age 45. His research points to the growing pressures that adult children face when they consider placing a relative in a nursing home. Predictive attitudes he has identified include guilt over placing someone in a “home” as well as economic concerns as to how they will afford the care. In the hands of a skilled plaintiff attorney, these anxieties can and will be utilized against nursing homes to win substantial verdicts.

Avoiding “Dangerous” Jurors:

For many people with no personal experience with nursing homes, yet who hold negative attitudes about them, it is important to determine how strongly they hold these beliefs. If their world view contains either or both of the following biases, they are very likely to be problem jurors for the defense:

- ▶ Society does not value the elderly.
- ▶ Corporations care only about profit.

Ultimately, persons with these attitudes believe that profit comes before patient care.

The Anxious Juror:

Our jury research has found that jurors who are anxious about the care their relatives might receive in a nursing home are more likely to be plaintiff-oriented. Anxiety affects jurors’ abilities to think logically about a case. Further, anxious jurors are more likely to think the worst about the conduct and motives of the people who manage facilities.

When selecting a jury in a case involving a senior living facility, it is fairly easy to ask jurors how much they worry about their family members getting proper care. Since a large portion of the jury pool will admit to concern or worry, however, it is important to consider other approaches for identifying those jurors who are most anxious. Our jury research has shown that one acid test for identifying anxious jurors is to determine if they refuse to accept a fact that should reduce their anxiety. Jurors who have high levels of anxiety about the care received in nursing homes will be less willing to accept the idea that the conditions in nursing homes are improving or that the regulations for nursing homes have become more stringent. For example, if jurors are told that certain types of problems have decreased or that the number of citations for rule-breaking had declined, the anxious juror would still show skepticism about the quality of care given.



Another identifier of anxiety is juror behavior. For example, in vehicle accident cases, one behavioral clue attorneys and consultants use is to find out who has a driver's license yet chooses not to drive. Similarly, in nursing home litigation, anxious behaviors might include how often a juror with fairly healthy parents calls them, checks their medication, or contacts their doctors.

Problems can arise in attempting to identify anxious jurors. The atmosphere in the courtroom can be intimidating and many jurors are hesitant to speak. When asked questions in open court, jurors tend to be tight-lipped. This process is further complicated when judges pressure the attorneys to conclude the jury selection process quickly. A juror questionnaire, where jurors write out their answers, has been used in many areas of civil litigation. To be sure, nursing home litigation is one area where questionnaires have proven helpful in enabling jurors to reveal their true feelings.

Other Key Attitudes:

There are a number of other key attitudes that need to be discovered in jury selection. Although many of these views are very critical of the nursing home industry, they need to be asked of prospective jurors during jury selection. It is better to discover and remove people with these views than to have them as leaders for the plaintiff in the jury room.

Key Attitudes To Be Discovered:

- ▶ Nursing home administrators are not doing all they can to take care of their residents.
- ▶ Whenever possible, nursing home administrators will cut corners in resident care.
- ▶ Government regulators of nursing homes are not strict enough.
- ▶ Government regulations for nursing homes are not being enforced as much as they should be.
- ▶ The staff of nursing homes is not adequately trained.
- ▶ Conditions in nursing homes seem to be getting worse.
- ▶ Nursing homes are more interested in getting money from residents than in delivering quality care.
- ▶ Nursing home administrators cannot be trusted to do what they say they will do for their residents.



Using Focus Groups and Mock Trials:

As part of their case preparation, attorneys who defend nursing homes are increasingly using mock trial research to evaluate their cases and determine the most effective way to present. To prevail at trial, defendants need persuasive themes that can explain to jurors the defense's view of the case.

Focus groups are often used in a more creative way to explore general issues and develop possible case themes. Mock trials, which usually last one day, are typically used to evaluate the following:

- ▶ Which issues/facts are most troublesome to jurors?
- ▶ How are key witnesses perceived?
- ▶ Is the testimony of expert witnesses understood?
- ▶ Is the demonstrative evidence compelling?
- ▶ How much do jurors value the case?
- ▶ Are certain language or metaphor effective?
- ▶ How do jurors rate attorney performance?

The use of mock trials also can highlight issues that may have otherwise been overlooked. Indeed, jurors often surprise attorneys with the issues they discuss during deliberations. Attorneys watching these deliberations regularly comment that, "They are not supposed to be discussing that."

Mock trials are typically conducted with the assistance of trial consultants. In preparation for a mock trial, the consultant reviews case documents and meets with the trial team to develop themes and arguments to be tested. The consultants then select a mock jury representative of potential jurors; that is, a jury similar to the trial venue's demographic characteristics of gender, age, employment status, occupation, education, marital status, and ethnicity. Certain categories of persons are excluded from participating, including those working for the parties involved, those with experience with the case issues, and those currently summoned for jury duty. To eliminate the risk of disclosure, those working for the media or in the legal field also are typically rejected as mock trial participants. Because confidentiality is of the utmost importance, all mock jurors must sign a confidentiality agreement.



Conclusion:

In conclusion, defendants face a jury pool with many negative views about nursing homes. Attorneys and consultants must work together to minimize the risks associated with litigation. Jury research can assist in identifying challenges and in developing persuasive case themes to respond positively to juror concerns.