Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Voiceover:

You are the leader in the courtroom and you want the jury to be looking to you for the answers.

Voiceover:

When you figure out your theory, never deviate.

Voiceover:

You want the facts to be consistent, complete, and credible.

Voiceover:

The defense has no problem running out the clock. Delay is the friend of the defense.

Voiceover:

It's tough to grow a firm by trying to hold on and micromanage.

Voiceover:

You've got to front-load a simple structure for jurors to be able to hold onto.

Voiceover:

What types of creative things can we do as lawyers even though we don't have a trial setting?

Voiceover:

Whatever you've got to do to make it real, you've got to do to make it real, but the person who needs convincing is you.

Voiceover:

Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. Now here's your host, noteworthy author, sought-after speaker, and renowned trial lawyer Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation, I have trial consultant Jessica Brylo. Jessica, how are you doing today?

Jessica Brylo:

Good. How are you, Michael?

Michael Cowen:

I am doing great. Before we jump into all the wonderful stuff you're doing with focus groups, big data, consulting with lawyers on making their cases bigger and better, I want to give a shout-out to our sponsor, LawPods. LawPods is a great company, you just met with Rob from LawPods here when we were

getting ready, and they make life so easy. If you want to do a podcast, all you and I have to do is talk and they do all the editing, producing, cutting it up, making ads, posting on social, just a joy to work with. If you're thinking about doing a podcast, and I recommend that you do because they're a lot of fun, I do highly recommend LawPods. Jessica, you've been on the podcast before. You are a veteran. Welcome back.

Jessica Brylo:

Yeah, thank you. I'm glad to be back.

Michael Cowen:

For those who weren't with us back a year ago or those who don't remember an episode from 50 episodes ago, just give us a little bit of your background.

Jessica Brylo:

Right. Sure. I am a jury consultant. I do all plaintiffs work. I have a JD from Duke. I have a master's in psychology also from Duke. I did not intend to go into consulting. I thought I would do marketing for products, so I was going to get a joint MBA, and so I was going to do focus groups for products and market those. Then within the first semester, I learned about trial consulting. It was mentioned in one of my classes, and I was out in North Carolina where David Ball is so they mentioned his name and I had called him up out of the blue, which seems crazy now, but then I didn't know any different and didn't know who he was so I was brave enough to call and said I was interested in what he was doing and would he be willing to sit down with me. Lucky for me, he was willing and, even luckier for me, he took me under his wing and helped to train me. That was almost like... I don't want to say almost two decades ago, but it was almost two decades ago at this point. Since then, I've been doing my own work under my own name since 2008 and do all sorts of personal injury, med mal, wrongful death, trucking, everything plaintiff side other than if it's a contract type claim, and I do criminal defense work all around the nation.

Michael Cowen:

You're out of Colorado, but you do things nationwide.

Jessica Brylo:

Yeah, right, in Colorado, but I'll go where the case is.

Michael Cowen:

Yeah. We've been lucky enough to actually work together before.

Jessica Brylo:

Yes. I have been to Texas to see you.

Michael Cowen:

Yeah. We've been talking some offline about big data. That's the newest exciting thing to talk about, newest I guess frontier we have available to try to analyze our cases and make the best cases and the best decisions in cases. First of all, what is big data?

Jessica Brylo:

Yeah. I'll sort of give a dummy's version of this because when you talk to the Campbells, who run it, they can get into the weeds.I'm certainly not a data person where I'm running the data, but I think it's helpful to understand what it is and how it runs. Big data is what every company uses to track behavior. When you go to the grocery store and you buy something, they're tracking what you're buying. That's why you have a VIP card because they can attach it to your name. Or whenever you are searching things on Facebook, that's why when you search something on Google your Facebook ads start to change. They're tracking what you're looking for and what you're buying.

Jessica Brylo:

In a very, very smaller sense, that's what we're doing in litigation. We are taking larger samples of people, and the large sample is really important because in traditional focus groups what we can't do is draw real good conclusions. You can draw predictive conclusions to some degree if you were to run really big focus groups. If you ran four, five, six groups and you had 30 to 50 people, really 50 is kind of the minimum, you can start to find some markers on what types of people or what backgrounds are going to be predictive for the case, but for the most part that's not what we do in focus groups. We just don't have the numbers. We look at focus groups for other things like case framing, what arguments are going to be most useful and stick the best with jurors. You get to talk to the jurors, you get to interact with them, you get to find out what they think.

Jessica Brylo:

Big data is useful in a completely different way because now we have 300 jurors looking at a case, sometimes 4 and 500 jurors. When you have those big numbers, what you can start to do is to pull from that and find out prediction models, and that's what big data is based on is basing it on a prediction model so you can find out things like a win rate or what your likely outcome is going to be in terms of money.

Michael Cowen:

One thing I've seen... First of all, how does big data work? If you want to use big data on a case, I know you contact John or Alicia Campbell. I guess they're the ones that run a lot of it and they have... I think it's juryball.com is their website for this new project they have with Sean Claggett, but if you want to call, what would happen? How does the whole process work?

Jessica Brylo:

Yeah. When you first start with big data, there's a template and we'll send you a template if you work through me. If you're going to use a consultant on the case, it makes sense to work through the consultant, whether it's working with Sean or it's working with me. We both work very consistently and frequently with the Campbells. Whoever is working it with you will send you a template. You want to fill that out. It's all written. You're going to give a case overview, you're going to tell us who the parties are, you're going to tell us what the claims are, we need a verdict sheet, and then in sequential order and in the order that they want it you're going to give us what the case is about, going through all the plaintiffs arguments first, going through all the defense arguments, and within that you're inserting different documents, photos of the parties.

Jessica Brylo:

We're trying to bring it a little bit to life for jurors because what they're going to do is read. I think that's one thing that's important for people to understand and to know about big data studies is that's how

they're getting the information. You're not logging on to watch people deliberate and talk, you are getting data back. We're giving it to big data, the Campbells, whoever else you're using, and what they're doing with the information that you send them is that they're going to then add certain things to it. They're going to recruit usually around 300 jurors and they will read through whatever we have set up for them to read through and then they're going to answer questions. Some of those questions are comprehension questions to make sure there aren't weird people on there that are just robots or aren't scrolling through and not completing it and some of them are case-specific questions to get their feedback.

Jessica Brylo:

What you end up with at the end is a data report that has percentages and numbers, and it also has some open-ended questions for a couple, "Why did you vote the way you did? Tell me the biggest reason you did." You'll get an Excel spreadsheet with those written answers, but I think one of the confusing things for people is understanding you're not talking to the jurors, you're not seeing those jurors. It is a written report. It's just really big numbers of written reports.

Michael Cowen:

First of all, I guess one thing you can do with this is a split test, like you can say, "If I ask for 10 million, 20 million, 100 million, does that affect my chance of winning and does that affect the ultimate number I'm going to get?"

Jessica Brylo:

Right. Usually what you want to do is pick three anchors. If you're doing big data, you're usually using it for a larger value case. That's not always the case, but often you're using it to find out, "What is the case worth? What do I need to ask for?" Because what we're trying to find out is what is the right ask that will therefore get you the biggest verdict. It's not so much that if I ask for 100 million I'm going to get 100 million, but if I ask for 100 million there's a nine out of 10 chance that I'm going to end up at 80 million. We're looking for a bell curve. We're really looking to get three different damage anchors and see where we fall off the cliff. We kind of want to push yours too far so that we know, "Okay, well, we have to back it up a little bit, but this is how far we can go."

Jessica Brylo:

What you'll see is let's say you test 50 million, 75 million, and 100 million. It might be that at 75 million, you're going to end up with a $70 million verdict. If you ask for 50 million, you're going to end up with a $30 million verdict. If you ask for 100 million, you've gone too far, you've pissed off the jurors, and they're going to go down to 40 million, so what we're looking for is, "What's the likely recovery based on what you ask and how does that affect your win rate?" Because what you'll see is that as you change what you ask for, it doesn't just change what you get, it changes your percentages of winning even on liability, which is hard concept for people to understand. We're not changing what we're telling them in the script, the script is exactly the same, but we're running the same script through three different damages asks. You might win 90% on one and 70% on the other just by changing your number, and so what we want to do is to test those.

Jessica Brylo:

Now, sometimes you test three numbers and you don't see a cliff. Well, then you may need to add a fourth group to go higher to find out where that number is. That's how you find out what your ask

should be. You'll also find out a juror profile from it. One of the benefits of having all these numbers of people is we can sometimes find out demographic indicators. Sometimes things like what TV shows they watch or people that they admire that are indicative of how they'll vote on liability and/or damages. By asking a lot of questions up front... If you work with me, I add questions to what the Campbells have. They have their own database of questions that they'll ask at the front end, and I will think through, "What do I think the jury selection's going to look like? What questions am I going to want to ask at jury selection?"

Jessica Brylo:

I'll add those questions in so that way we know, "Do we need to ask this question because is it helpful or not?" You might ask a question and it has no predictive value on their liability or damages. Well, then we'll need to ask it and spend our time, whereas something else might be really predictive and so we'll get those back. Now, sometimes it's really surprising things. It's not always conservatives versus liberals. In fact, it's usually not. It's usually weird things like I had a case where if somebody regularly watched the NFL, they were 44 or 47% more likely to vote on liability in our favor. How would you ever know that and why? I have no idea why, but that's a really big percentage so we had to ask that in jury selection because it was going to make a difference.

Michael Cowen:

Yeah. Don't think for a second that when you're suing these multibillion-dollar companies that already use big data in their own marketing and product development thing, that they're not doing this on the other end.

Jessica Brylo:

Yeah. 100%.

Michael Cowen:

When you have that really weird off the wall question the defense is asking at jury selection, "Why in the world would they ask that?" It's probably because they did a big data project

Jessica Brylo:

Yeah. It's helpful to do these early on enough to see what comes back because I like to have a jury questionnaire when we're running big data if at all possible because some of the questions are a little awkward to ask in open court. Asking people their favorite show might be okay, but you can't just ask, "What's your favorite show?" You have to do it within the confines of what data asked. If they gave them a checklist of 20 shows, we need to give them at least some of those and the ones that are predictive because we need to pick out that checklist. How do you ask that in voir dire without looking awkward at doing it? It's possible to do it and we've done it, but it's preferable if we can stick something like that in a questionnaire where it doesn't look so weird and then get that information back and start scoring already.

Michael Cowen:

Yeah. What's the turnaround time between deciding to do it and getting the information back? I'm sure it takes a little time to recruit people and run the data.

Jessica Brylo:

Yeah. The data running is actually fairly fast. It depends on how backed up they are, but I would say... I tell people 10 days to two weeks. I think I'm on the outlier of that, actually. I try to underpromise and overdeliver. Some of that work has been done ahead of time if they're working with me. We've already done a lot of edits on the scripts. If you're going direct to the Campbells, then there's going to be time going back and forth on edits and them asking you to do a lot of things that we will have already covered together, so I think mine will run through faster than if you're just going direct to them.

Michael Cowen:

Yeah. I really wish that I had discovered this earlier and that I could use it on every case. Unfortunately, it does have a cost. My last trial, I really wish... Picking the right ask, how do you pick the right number, I mean, it's so hard, and if you don't ask for... A lot of us just don't ask for enough because we don't have the courage and then we leave money on the table, but then sometimes you ask for... I've had trials where we ask for too much and you feel it like you're there, you have this energy, you feel on liability they're with you, they're with you, you go through what the people went through, they're with you, with you, and then you give a number and you just feel like you've lost them. I mean, just... You try to bring them back, but you're not going to bring them back to that number and then you can't change the number, you lose all credibility. So knowing that in advance is so valuable, but unfortunately you can't do it in every case because some cases just don't have the budget for it and you have to find other things like traditional focus groups or whatever that we're not having to pay 300 jurors to work with you. Now that we have big data, does that mean we don't have to do focus groups anymore?

Jessica Brylo:

No. I would say they're just completely different things, and that's why you need to know what tools you have in your tool kit so that you know how to use them. Also to your point of doing things on a budget, there is now what I would call mini data, which they call Fred. That is up and running where you can upload your own thing, you get 75 jurors instead of 300, you get to ask a lot less information, but you do get some of the same information. You'll get a range of what your win rate's going to be, a percentage chance of winning, but you're not getting three anchors. You're getting one ask. It's good for preliminary things or cases where you really just have no idea what this is worth, you need some information early on in the case, and those of you can run for cheaper.

Michael Cowen:

We've done focus groups before on whether to take a case and there's one I remember. I've spent way too much money on this case and I ended up giving it up. It was a paraplegia case. I went and met the eight-year-old boy in the hospital who didn't understand he was paralyzed and didn't know why he wasn't allowed out of bed to run around with other kids so my heart was broken, so I did everything. I mean, we hired experts, I hired Artemis that works with David Ball to come in and do a focus group, and then once we got all the medical records there were lots of things in the medical records about the kid having the seatbelt behind his back. I mean, it was in 120-something times. It wasn't just like one stray reference. We did a focus group and it was not a case that we could build a theory around the seatbelt being defective when it's worn behind the kid's back. It really, really sucked. It really sucked, but at least we knew before.

Michael Cowen:

Now, another lawyer took the case and it eventually resolved for a very, for the injury, small amount of money. I actually waived all my expenses because I wanted the poor kid in a wheelchair to get some

money, but I probably should have done that focus group before I hired all the experts. But it's hard because you have to evaluate the case too, but we sometimes run them early. I guess you could do that with big data too. Maybe it's even more predictive. I mean, you've got a factual scenario. I can think of one case right now. I don't want to go the details because it's one that we're looking at like, "Okay, someone was killed and it could be a case against somebody, but I could also see under the facts a jury not liking the case. Should I take it or not? I mean, do I want spend two years and $250,000 on this case or not?" I think it kind of makes sense to invest the money upfront before you go invest all the money later. I know we've done that with focus groups, but I guess with Fred you could do that too with the big data and not have to spend as much.

Jessica Brylo:

Yeah. Exactly. I think that's the purpose of Fred. It's not supposed to overtake big data. It certainly is not the same as big data. I don't want people to confuse the two. I don't want them to think that you can run Fred and say, "Oh, I did big data. I know what my case is worth. I know my win rate." No, because the jurors are not recruited from your venue, they're not recruited to match your demographics, you're not asking three anchor points, you're not getting 300 jurors, but it is a super helpful tool for early on, like you said, to figure out, "Are you going to take a case? Is it even worth it? What are the big things that jurors are hung up on?" You go through and you input your own questions, and so I think there's going to be a way on there, I'm going to be talking with Campbells in the next day or so, to bring me in to help you with that, to get a good run-through for the script and figure out what questions you want to even ask and upload onto there, but it will be much cheaper than big data.

Michael Cowen:

What scares me about it if you don't have a consultant like you working on it is a lot of times we believe our own BS and we don't fully think through all the arguments the other side's going to make where if you work with the Campbells or you work with you, you get forced to kind of switch hats and think, "Okay, what are all the things they're going to argue?" So that you can present both sides and get something accurate. I'm a little worried that sometimes with something like that if someone's doing it themselves, how do they avoid that?

Jessica Brylo:

Yes. That's my concern too. When Alicia brought Fred to me, I immediately said, "Let's have a way for me to review things for people for just a couple thousand more than what they would otherwise pay, and that way at least somebody's eyes are on it. If it needs more work then they can reach back out to me." But otherwise, Fred, you don't get the Campbells on Fred. You are uploading it yourself and running it. Having worked on so many of these scripts and editing them, I know what that looks like and so don't throw away the money by not doing it right. Make sure that you're doing it right and then do it and get something useful out of it.

Michael Cowen:

Yeah. They say in computer programming, "Garbage in, garbage out." If you don't put good information to run through the data program, you don't get good data, and that's my big concern. I think I'm pretty good at... I think really and truly I'd have trouble believing it, but if right before trial you said, "Okay, now switch sides." I think I could make all the arguments the other side would make because I've had to anticipate them, play them in my head, figure out how to rebut them. I just worry that if you've not done

that on a big case, I don't think I would trust myself without a second set of eyes that was not emotionally and financially invested in the case.

Jessica Brylo:

Yeah. Some of it's not even that. Even if you're thinking about it correctly, there's parts of it where if you're uploading your own questions to figure out... You're putting in the facts of, "What do you want yours to rank as the most important to them or what things do you want feedback on?" It's hard to know what those things are to ask or when you're doing big data and you're giving them voir dire questions, I have very different voir dire questions than what somebody else might have submitted. I think even on those ends, it's helpful to have somebody and it usually doesn't cost much more. When I work with the Campbells on big data, I'm just taking over some of the work that they would otherwise do, editing the scripts up front, so it's pretty much the same cost to have me involved unless I'm...

Jessica Brylo:

Sometimes I dig in and I read a ton of depos or I read a lot of stuff because I really want to have a good feel for that case and pull more stuff in and then that's different, but if I'm doing sort of just a read through and reading a few documents and motions and things, you're going to pay pretty much the same price and now you've got a consultant on board to help you with data once you're done, which Campbells advocate for. I mean, that's why they also work with Sean because they want somebody on there helping with the data and then taking it into jury selection, taking it into the case, figuring out, "What do we do with it now?" You don't want to just pay for it and then let it sit on your desk, so how do you interpret it and what do you do?

Michael Cowen:

Yeah. I mean, I've tried more than 125 cases and I still like to work with consultants whenever the case can afford it, and there's a couple of reasons. One, just because I want that other set of eyes, I want that other mind that's going to think of things that I don't, but the other is they hold me accountable. Y'all give me deadlines way in advance, you make me do stuff way in advance, think about things way in advance. I'll intend on doing it, but then I get busy and then trial's picking up and then you do your best and you get through and it usually works, but it's so much better when someone's made you have your opening statement written 60 days in advance and rehearsing it 20 times and doing the practice and running the data. It just makes such a big difference, and so for me it's partially the advice y'all give me, but it's also partially it's like y'all keep me in line.

Jessica Brylo:

Yeah, yeah. Yeah, I often hear it's the prep that's even as valuable as the results in focus groups and big data. The prep is half of it.

Michael Cowen:

Frankly, I was wondering about that because most of the cases where we hire consultants and we do all this work, most of them don't go to trial. I mean, most of them resolve for a lot of money. I remember a little part of me was saying, "Well, the other side has no... We've created all these visuals they haven't seen yet, we've done all this work, they don't know what it was. Did we really get anything from doing it?" But then I said, "Yeah, there's no way we would've got this much money had we not had the confidence, had we not asked the right questions, poked at the things that... They see what we're doing, they figure it out and it scares them."

Michael Cowen:

Also, having the confidence to walk away from fairly large sums of money knowing that the case is worth more is not easy. I mean, someone offers you... I had one case that was actually referred by an insurance defense firm and we got an $11 million offer and they were going nuts like, "What do you mean you're not going to take it?" I said, "No, the case is... They will pay us more money. You have to say no and you have to pretend like you don't care. You have to pretend like, 'I want to try this case. Please stop offering me money. I want to try this case.'" It just... The constant phone calls and stuff I was getting... I'm not saying that it's easy for me to turn down $11 million, but it was the right thing to do. It settled later for a lot more money, but I do think that even if the case doesn't end up going to trial there's still great value added when you do this.

Jessica Brylo:

Yeah. I mean, whether it's focus groups or big data or both, you need to know going into mediation what the holes are in the case, what the value is. I mean, and yes, it costs money and you might feel like, "Man, I didn't need to do that because we never actually ended up at trial." But you did need to do it because you didn't know the value of it or the strengths of it until you did that, and so by spending... I don't want to say a little bit of money because it's not a little bit of money, but by spending a fair amount of money you're going to get back tons on the backend. If they increase the value of your case by running big data by $40 million because you just didn't know what number to ask for, was that worth paying for it to figure out what that would cost? I mean, 100 times over that's worth paying for, or to find out what you would've lost. If it's a really losing case, if your win rate is 30, 40% and you thought this was a fantastic case and you're going to go in there and spend all this money on experts and try it, don't. Now you know that's the case you need to try to settle or if you can't, then at least you know what you're walking into.

Michael Cowen:

Yeah. Or if you have 5 million on the table and you find out you're probably going to get three if you try it.

Jessica Brylo:

Right. Yeah.

Michael Cowen:

I've had a case where we're doing... Now, they were focus groups and not predictive, but consistently the numbers we were getting were less than the offer on the table.

Jessica Brylo:

And just knowing what your issues are. If it's a... Like you said with the seatbelt, if that's a no-go issue then you need to know that now no matter what amount of money you put into it. You need to know that because if you go through it thinking, "Man, the liability's just really good and this is... I can overcome this." Well, maybe. Maybe not. I'd want to know that ahead of time.

Michael Cowen:

Or sometimes things that shouldn't be relevant, but... A client's immigration status is something big in my part of the country. We have a lot of clients that aren't documented. In a lot of the jury polls, that's a

huge problem and so usually you can keep it out, but you can find out you can run it both... We've done it where we've run it both ways and then so we know like, "If we win this motion to exclude this evidence, our case is worth this. Unfortunately, if we don't we have a real danger of getting a lower verdict because we have some jurors who..." I don't think it's right and hopefully you can get them out in jury selection, but if a juror thought, "Well, that person shouldn't even be here. How can they take advantage of the system and get money?" That's deadly to your case, and it's not... I can be judgmental all I want, but if they're there you got to know it.

Jessica Brylo:

You want to do that both in focus groups and big data. You want to run both with and without because... What big data will do is they'll run the three... Let's say you think it's probably coming in, it's currently coming in, so you'll run the three anchor points with it in. Then you'll take your best anchor point and they'll run one extra group without, so you can see at that damages ask, "Did I do better or worse with that information in or out?" It doesn't cost a whole lot more because they're not running three more groups, they're running one more group so you can test some A/B scenarios with those damages anchors.

Michael Cowen:

That's so important like I said when you're... Because a lot of times, both sides have a story they want to tell and then you have your pre-trial motions, and then sometimes both sides don't get to tell all their story and then you might need to reevaluate.

Jessica Brylo:

Right.

Michael Cowen:

Let's talk about focus groups then because focus groups are still important. What are some good times to do focus groups?

Jessica Brylo:

Yeah. I think of focus groups more as macro and I think a big data more as micro, and maybe that's just how my head works, but one is qualitative and one is quantitative and so you need both. It's not that big data won't give you some of that. They will give you, "These are the top issues that jurors found and these are the issues that are really moving the dial in terms of damages and liability." So you'll get some, but it's not the same as having a room full of people that you can talk to, that you can watch the process, that you can see them change each other's minds. You really still have to hear them talk. You can't hear people talk out of a text box on Excel. It's not the same thing.

Jessica Brylo:

If you're going to do both, which not every case can do both, but let's say you have the budget to do both, I prefer to do the focus groups first because they will give you the case framing. In a focus group, you're trying not your worst case, but you're not trying your best case. You're dumbing it down a little bit and you're giving the defense the best possible scenario because what we want to find are the holes. We want to lose the focus groups to find out, "Where are the holes in the case and how can I revamp this to make it better?" Once you've done that and you figure that, "Okay, now I have the right framing for the case, this is what I really want to run with." Now we want to take that framework and test it in big data

because in big data, we want best case for us and best case for the defense. We have to find out what our best case is before we can do that.

Jessica Brylo:

The focus groups help with that and to understand the arguments, and then the big data will help with the things such as win rate, the ask, and then honing in on with that framework, "What are the most important points to the jurors? What things are moving the dial for the defense, what things are moving the dial for us, and where do I need to focus on my voir dire and everything else?" Now let's say you have a case and you don't have the budget for both, you have to decide one or the other. I'd say if you don't have a budget to do both, you probably want to do focus groups. I'd say there's a few times when big data might still be useful. If you need to find out is this a winnable case, then I think big data is helpful, although you still can get some of that from your focus groups. I think if you have a major issue that you need to find out in or out, is this going to kill the case or be better, then you might run big data instead of focus groups, but on the smaller to more moderate cases I would say you're still probably running the focus groups.

Voiceover:

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Michael Cowen:

I really love early focus groups too because you really find out, "Okay, what do I need to do to develop this case and make it a case that's a winning case?" Then you can actually go focus on your discovery efforts both through the formal discovery process and frankly just through getting out there and finding information outside of the discovery process that you can use to build your case, and then you can go back and test it either through focus groups or big data. Once you've built the case, then you can test it again to see, "Okay, now I've gathered what I think is a winning case based on my initial focus groups. Is this working?"

Jessica Brylo:

Right. And focus groups give you other things like terminology that jurors use. If you hear jurors talking in a certain way constantly throughout the focus group, you might use that within your depositions so that you've got clips that jurors are going to latch onto because it's their words now. You're not really going to get that from big data. I mean, you can read through the 300 comments and try to figure out which words and put it into AI, but that's not the same as jurors talking for three hours. You're not going to get the same volume of words from them, so I think they're really useful early on and they're really useful just for once you're trying to figure out the right framework or test an opening or... Focus groups are for so many different things. Whether you're testing exhibits, whether you're testing your opening, whether you're testing your jury selection and testing your voir dire, you still need a lot of focus groups.

Michael Cowen:

Yeah. If you do one where they actually deliberate and they talk to each other, the arguments that you saw work, like when you had one juror that started against you and one that was with you and the one that was with you persuaded, well, that's probably a pretty good argument.

Jessica Brylo:

Right. We do questionnaires in focus groups and you'll see all the time where somebody's questionnaire does not align with what they end up with through the deliberation process. In big data, the deliberation process is accounted for just because there's so many numbers of people that you can kind of tell once you get a majority of jurors, they say around 72 and over, you've got the majority so they're probably going to win over the minority in that jury room, but you're not going to hear those arguments that make things sway one way versus the other whereas in focus groups, you're listening to that entire discussion.

Michael Cowen:

Yeah. I've seen one strong person make a difference in a focus group. I remember we did a split test once and one group said zero and the other group said 30 million.

Jessica Brylo:

Yeah. I feel like that happens every time. That's why they're not predictive on the damages, but...

Michael Cowen:

Yeah. Yeah. I remember my boss at the time was, "Well, we know the case is worth between zero and 30 million. This was really useful today." In mine, it's like, "Well, I know we got a shot now, you know?"

Jessica Brylo:

Yeah. That's where take your best arguments from that and then run a big data because clearly if you're between zero and 30 million, we need to hone that in a little bit more. You have to know where you're going to land and what you need to ask for. Maybe it's even more than that because who knows what you've asked for in the focus group, right?

Michael Cowen:

Yeah.

Jessica Brylo:

If you asked for 50 and you ended up at 30, maybe you're supposed to ask for 150. How do we know?

Michael Cowen:

Yeah. I had one where I'd asked for 30, but someone misheard me, said, "No, no, he asked for 300." They, "300? That's ridiculous." And they came up with 50.

Jessica Brylo:

Yes. Yes. You were supposed to ask for 300. There you go.

Michael Cowen:

Mm-hmm. It's a crazy thing we do. We think we have so much more control than we really do.

Jessica Brylo:

Yeah. I think the most surprising part is just understanding that you're asked... I mean, everyone thinks the facts are what win the case. This is not changing any facts. That's the craziest part about big data and I think so hard for people to understand is that the chances of you winning and the amount that you win depends on the number that comes out of your mouth.

Michael Cowen:

It is crazy.

Jessica Brylo:

It's crazy.

Michael Cowen:

Without big data or at least maybe focus groups but I think really big data, it's hard to know what that number should be.

Jessica Brylo:

Yeah. I never know from focus groups. I know if I go into a focus group and I ask for 100 million and nobody's balking at it, then I'm probably fine and need to go higher, but I have no idea how much higher or where I'm going to actually land. I mean, it doesn't really give you that amount of information.

Michael Cowen:

When we were talking before, you mentioned mock trials. Do people do mock trials anymore?

Jessica Brylo:

I do mock trials. I don't know if... I feel like when attorneys do focus groups, they do a lot more of what I would call a concept focus group where you're either just... Well, I guess people do a little bit of a mini mock, but mostly discussing facts, "Here's some evidence. What do you think of this? Talk about it as we go." I do those too more early on. Then I think as you get closer to trial, you really want to do more of a mock or at least a mini mock. To me, what that means is that you are letting jurors deliberate whether you're splitting them up in groups, you're running them back to back. How much information you give varies. In a mini mock, it might be only 45 minutes per side, whereas a full mock might be two to three hours, sometimes a day, per side and give them a lot of information, then let them go at it by themselves.

Michael Cowen:

I think there's some real value if you can logistically do it of having your client actually testify and be cross-examined, having your defendant... I'm sorry, your expert. I mean, the problem is you're not going to have the real defense people there. You'd have to have someone pretending to be them, but I think that there is some real value to... Maybe you just do a video of your client if you want to even it out. I don't know exactly how you do it, but I think having our experts... Sometimes they're so freaking cocky. Having them get cross-examined and then being able to coach them and go over video... I don't do it, but

I need to. It's one of my... We built a courtroom. That's one of my next phases of my personal development is I want to start doing more of that.

Jessica Brylo:

I would say you're sort of mixing two different uses of a focus group. If you're doing a mock trial or a traditional focus group, I would have recorded video of the client. Often we don't have that, so I tell the clients to do a mock, you just get on Zoom and you do a mock direct and cross, and then we can show that to the jurors. I don't like having live parties there because things go off the handle, but if you can record your experts I think that's great too and then show that, but I also do things where if we're doing client prep or like a mock voir dire and then you can bring your client in at the end, sometimes it's really helpful to do a mock direct and cross of a client or an expert in front of a group of jurors and then have them answer questions you want answered and then have them ask the witness questions too and form a bond with them and have them answer. For plaintiffs who are really skittish on the stand or don't know how to connect, that can really help them to sort of connect to people and learn how to do that, and you'll be surprised at what questions come out and what answers come out. You might learn things you need to ask that you had no idea were important in the direct.

Michael Cowen:

I've had it help two ways. One is when you meet the client that's really nervous that needs to learn how to testify, but the other is when you just have a client that's doing something that's really off-putting and thinking that it's going to work for them and they're going to be the lawyer and they're outsmart everyone, and letting them go wild like, "Hey, say your piece." I'm going to win this case. I'm going to convince them "say your piece" and then let them watch the deliberation and see how much that's not working, and then you go, "Okay, that didn't work, dude. Let's restrategize. Let's see if we can find a way that will work for you."

Jessica Brylo:

Yeah. I think you use focus groups sometimes for client control. Sometimes it's not even necessarily to help you on the case. Sometimes it's because you know that they should sell the case for whatever's being offered and they're refusing to do it, and so you need to do a focus group to bring them back down to earth. Those run differently than a focus group where you're trying to find the hole, so you have to know what your purpose is before you then design the study because if you design it one way but your purpose is contradictory to that, you're not going to get out of it what you're expecting.

Michael Cowen:

Although I did one once to try to convince a client that I was right and they were wrong, and it turns out I was wrong and we tried the case and got a great verdict so I was very, very thrilled to be wrong.

Jessica Brylo:

Yeah, there you go. That's right. You tested it, so you weren't entirely wrong [inaudible 00:34:23].

Michael Cowen:

Well, I was probably... My hypothesis was wrong, but when we tested it the focus group jury agreed with the real jury.

Jessica Brylo:

That's good.

Michael Cowen:

I think it's always better if you can have an outside consultant come in that's not emotionally and financially invested in the case and also just has experience doing focus groups, but to facilitate it, to help make sure you ask the right things, to help make sure you have the right tone and facial expressions and reactions when the jurors are talking, but not every case justifies that expense or doesn't... Maybe you want to do 20 focus groups or 10 focus groups and you can afford to have a consultant do two of them, but you still want to do... I think imperfect data's better than no data. What are some of the things people could do if they want to do their own focus group?

Jessica Brylo:

One of the biggest hurdles that I see is the recruit. I know nobody wants to spend money on a good recruit, and there are ways to do it yourself. It takes a lot of elbow grease to do that, but you need to get either past juror lists and start building a database, you need to post in multiple different places and have people from churches versus grocery stores versus online, all different walks of life coming into your database, and you don't want to reuse people, that's one of the big things that I see is reusing the same people, unless there's a purpose to doing that, but usually you don't want to do that. A lot of people just call Robert Half Legal and get some temp agency people in there and run it. That is not your jury.

Jessica Brylo:

I know you feel like Craigslist or Robert Half is really easy. Don't do it. It's not going to be representative. If you want to do it, you can contact me for my recruiter. I don't mark up their costs. They will get people in the right way and you can just use them yourself. If you want to use them and not use me, that's entirely fine, I've sent several people to them, or you need to start building a database slowly. You can send out mailers. In the old days when I had first started, we'd send out letters and we'd send out 500 letters and we'd wait weeks for people to call in and then we'd fill in slots from other places or we'd go pound the streets. I had one focus group where people didn't show and we pounded the streets to go get people to come in. You need to have all walks of life coming in, so if your recruit is bad, your results are going to be skewed.

Michael Cowen:

At one point, Facebook was good because you can do... We have a page that has a name that's not our firm name. It's got... In case any non-lawyer listens I don't want to say the name of the page because I don't want it associated with our firm, but there is a page that's some kind of research project name on the page. It does have no... You can't tell whose page it is, and that page can place ads and we can pick the demographics, we can pick the county. When everybody was on Facebook, it was great, but now that there is an... I don't know if it's 40, 35, 45, there is an age at which people don't use Facebook anymore below which they don't use Facebook. They use... I don't know what they use because I'm old-

Jessica Brylo:

Yeah. They're all over the place.

Michael Cowen:

... but I could ask my son. But yeah, so you can't necessarily target as well.

Jessica Brylo:

I agree.

Michael Cowen:

We still use it because it's easy, but it's not as effective.

Jessica Brylo:

You have to supplement it. Yeah.

Michael Cowen:

We get a bunch of jurors in their 40s and 50s.

Jessica Brylo:

Right, and then you need to find the younger ones. I mean, you have to go on TikTok and things, which I don't know how those work either, or you can go to youth groups, so you could start posting at youth groups and find people that way. You might have to do it sort of more old-fashioned ways, but I think it's also important what you said, that people don't know who you are. That's one of the other hurdles is people come in and they say, "Oh, I'm going to host it in my office and here's a pen with my logo on it and here's a pad of paper to take notes with my logo on it." These jurors know that it's you putting on the study and they're going to be kind to you because people are generally kind in person and then behind your back they will not be, so you don't want to have them know who's putting on the study and who's hosting it. If you're going to call people, you have to use a blocked number, you have to use a different number that's just set up for that.

Michael Cowen:

We bought a special burner phone or whatever you call it just for that that doesn't have our name on it, that they call that number and [inaudible 00:38:03] voicemail for whatever research project and then the person who answers it has to remember to say... It's just one of those things.

Jessica Brylo:

Exactly. Then I think you have to be conscious of when you're creating scripts and giving the presentation that it's not too one-sided, and sometimes it's not even the length of the presentation, although often that's the case. When I'm reviewing presentations, it's like, "Here's 40 pages for the plaintiff and then here's my five pages for the defense." You can't do that. I know plaintiff has to cover some of the initial grounds so it's okay for it to be a little bit longer because they have to set the scene of what happened and defense doesn't have to do that, but it has to be fairly even and not just on length, but also even on your tone. I've had people where the presentations were fairly evenly matched lengthwise, but as soon as they get up to present for the defense their tone changes or when you're reviewing scripts, it will say... On the plaintiff stuff, everything says, "This and this and this happened." Then you get to defense and they say, "The defense alleges."

Michael Cowen:

Yeah.

Jessica Brylo:

You have to be really careful that you're not giving things away in those ways when you're drafting it.

Michael Cowen:

Or even arguing. I remember we had a marketing guy who also said he could do focus groups, and he planted one of his... I think it was his daughter into the group. They started going one way, she would argue the other to try to... It's like, "What the heck are you doing? I mean, it's like totally skewing everything." You have some weird stuff, but I think the other thing is how you react when the jurors ask questions or make comments. Do you start arguing your case, do you... To me, when we talk to them afterwards and they think that the other side hired them, I think we did our job right.

Jessica Brylo:

Yes. You always want to ask, "Who do you think hired this?" Or on big data, they ask who sponsored the study just to make sure that it is even at the end. Usually people... When I'm doing a focus group, I talk to them at the end, I say, "Well, what do you think?" Usually it's split or they say some academic institution or they don't really know, but I think you have to be really careful about how you're putting that on so that that doesn't slip. Even just the number of witnesses and exhibits you put on. Obviously you have all your own exhibits and so that's really hard, but you have to then either withhold a lot of yours or make up some for them sometimes. Or when jurors submit questions, often I'll see attorneys that'll answer the question very plaintiff-oriented. You have to answer questions as the plaintiff would say X and the defendant would say Y, and that way they get the balanced response to everything.

Michael Cowen:

Yeah, it's tough. I mean, you have to really kind of separate your role as an advocate from your role as the focus group person, and that's almost... If you're at a firm... Now, sometimes you're solo or you're one or two lawyers and you just have to do it yourself. She got too busy to do it. Mallory at our firm would do focus groups for other lawyer's cases. She's so good at it, and she's actually good at doing her own too. She just has a way to give a neutral tone, but now she's got too many big cases to work on and doesn't have time to do that, but if you can even find a friend like, "I will moderate yours and you moderate mine." Because it is so hard when you've been working on this case, especially when you've put your heart and sweat in there, you've borrowed a bunch of money that you can't afford to lose, and then you start getting a bunch of crap and you're sitting on your case and you want to go defend it, you want to try to turn them around because you're having this emotional reaction, which destroys the whole point. Then they're going to say what you want to hear to not hurt your feelings. It's just so hard to have that detachment when it's your case.

Jessica Brylo:

Yeah. I would say in probably eight out of 10 focus groups or mock trials that I do, whether it's online or in person, I'm getting texts or I'm getting chat boxes from the attorneys. As soon as a juror says something that is against their case, they're sending me the correction to that fact, "Tell them this, tell them that." It's so hard to sit back, and I'll write back and say, "I'm going to let them correct it themselves. I'm going to let it go because we need to see this. We need to see where it goes. Does it gain traction? You want to know that." Now, if they're so far off base, if they're discussing things and they have the wrong law to even apply to it, well, you know weren't clear on the law. That tells you something, but you're not going to let them go for three hours not understanding, so there are times when you want to interfere, but for the most part you want to let things go.

Michael Cowen:

Yeah. I cannot watch them myself anymore. I can be in there when we're doing the presentations. I do not watch the deliberations until I know the result. Once I know... Because even when they rule in your favor, there's all this goofy shit people say [inaudible 00:42:24] say, "Well, they never said this." Like, "I said it five times." It just drives me nuts. They usually get to the right place because as a group the right person heard it and they'll get there, but I can't stand to listen to it unless I know the result. Now, if I know the result, win or lose, then I can be detached and listen to it.

Jessica Brylo:

It's a good way to do it.

Michael Cowen:

But I have to have someone else do that for me. I just... It's who I am.

Jessica Brylo:

Yeah. I remember being at Duke and I had a professor, Neil Vidmar, and he did the Arizona Jury Project videos where they... That was the only time in 1996 they put video cameras in actual juror deliberation rooms, so we were testing... Not we, I was not part of it, but they were testing how mock trials would compare to real trials, did people act differently when they knew that it was a mock or not? They found that they didn't, but you got to see... There were all these tapes of people deliberating. I had keys to his office because he would let me go in at night and watch these tapes, and I remember being so frustrated and wanting to throw things at the TV and I'm like, "Why are you saying this? Where did you get this from? It's nonsensical." They weave their way around as a group and they get to usually a pretty good result and their results always make sense. Whether it's the one you want or not, you can see where they're coming from, but man, the process to get there is sometimes a little bit frustrating.

Michael Cowen:

I mean, I've had juries deliberate two or three days. I mean, who knows what crazy crap they're going through that someone who was napping through half the trial came up with and they all have to get back to the right place? But as a group, they usually get there. That's the thing. When does it make sense to try to do your own and when does it make sense to bring you or someone else in to help?

Jessica Brylo:

I think there's a continuum on that. Obviously when you have a case that's worth $100,000, you're probably doing it your own. If you want to contact me, I have a guide on how to do it on your own. It's free. You can message me, you can call me, you can email me. I'm sure Michael will give you my information.

Michael Cowen:

If you say your email now, we'll put it in the show notes.

Jessica Brylo:

Sure. It's jessica@trialdynamics.net. Contact me for that and I'm happy to share it with you no strings attached. But I think that when it's smaller, you need to learn... Honestly, you need to learn how to do them no matter what because on the big cases, yes, you're probably going to hire a consultant, whether

it's me or anybody else, but you're going to probably run 10 of these and so you're not going to hire a consultant for all 10. You're going to want to test smaller things on your own, so you still need to know how to do them. I feel like when you can make more money on what you're finding out than what you're spending, that's when it's worth hiring somebody, whether that's for big data or that's for a focus group.

Jessica Brylo:

If you feel like, "This is something where even if I run the focus group, I'm not really going to know what to do with it. The case is so complex. There's all these issues. I don't really know how to structure it. I don't know how to try it. I don't..." That's when you really need somebody in there to help you with it and then it will pay off. Now, if you come to me with a $50,000 case, I'm going to tell you we should probably just talk about it for two hours over the phone instead of doing that, but there are ways to work with consultants, at least I do it this way, I don't know if everybody does it, where you can contact me and if you want me to just help you write the script but you go try the focus group, I'm happy to do that. If you want to run the focus group and send me the video and have me look at the video to help propel you forward, what do you do with this information, I'm happy to do that too. You can piecemeal it on those cases that are kind of in between.

Michael Cowen:

If people want to learn more from you or just to meet you, I think you're going to be at TOU in Las Vegas.

Jessica Brylo:

I am.

Michael Cowen:

What are you talking about?

Jessica Brylo:

I'm going to have three different lectures. I'm going to talk about focus groups and how to do them. We'll go into the nitty-gritty of every piece of it, the recruiting, the questionnaires, choosing what type of focus group, all of those kinds of details we're going to talk about, and then I'm going to talk with Alicia Campbell. I believe she's one of the two Campbells that's going to be there, and she and I will do a talk about big data and focus groups and how they intertwine. Then I'm going to do a talk about case framing where I'll talk about once you get all that information, how do you use that to frame your case? What makes for a good frame versus an ineffective frame and how does that matter in the decision-making of the jurors?

Jessica Brylo:

Then I'll be doing a workshop on case framing, so if you have a case and you want to come talk to me, this is like free consulting basically. I mean, I know they charge something for the workshops, but it's minimal. You'd be in there with about eight other people and you'd send me your information ahead of time. I can read through it, and then we come to the workshop and we spend some time working on your specific case to help frame it right or give suggestions on what else you need to do or what things you might need to make the case stronger.

Michael Cowen:

Yeah. I'm going to to be there too. I'm going to do a full big rig master class. I'm going to do a full day of just doing a deep dive of how to maximize trucking cases and how to build a trucking practice and a little bit of how to build a winning mindset and a mindset that lets you actually enjoy the practice of law. Then I'm speaking a couple times. I'm speaking once, so I'm going to bring a medical doctor with me and we're going to talk about the theory of how to put on a medical direct examination and then give a demonstration kind of step-by-step, "This is what we're planning on doing. Now let's do it." Then Q&A if you wanted to ask why we did something or think maybe we didn't do it. I mean, I remember last time I did a demonstration opening someone asked like, "Why didn't you do this?" I said, "Because I forgot it. I did it at trial, but I forgot it right now because I don't have notes with me and I didn't rehearse as much because I've been speaking for six hours and my [inaudible 00:47:29]."

Jessica Brylo:

Yeah.

Michael Cowen:

"But thank you for bringing it up. I should have done that and it was in my outline." But sometimes at trial, you do leave something out.

Michael Cowen:

Well, Jessica, thank you for coming on. If you don't mind staying on for a little longer, there's something I want to talk to you about personally on a case.

Jessica Brylo:

Sure.

Michael Cowen:

I highly recommend if you have a case you want to get some advice on and doing focus groups, picking a jury, putting your case together, I've worked with Jessica. She's great to work with. Thank you, Jessica.

Jessica Brylo:

Thank you.

Michael Cowen:

Thank you all for listening to Trial Lawyer Nation.

Michael Cowen:

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