

**WHERE'S THE SURPRISE?
FOR PRACTICE OR FOR KEEPS; FOCUS GROUPS COMPARED TO TRIAL**

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It was Will Rodgers who said: "Good judgment comes from experience- - -
a lot of that experience comes from bad judgment".

Why is it that so many trial lawyers conduct their one and only focus group with "real" jurors? At the end of a trial that we were sure we were going to win, we hear the foreperson read the verdict followed by that thunderous silence. In disbelief we scramble to our feet, leave the client sitting alone at the table and try to head off the jurors by racing to the front of the courtroom door. We think, "No one leaves until this is sorted out!" We try our best to debrief as many of the jurors as we can before they insist on pushing by. Whether it is a three-day trial or a three-week trial, each juror is aching to leave. The few isolated comments that we might hear from the couple of jurors willing to stay on is of no value for this lost case. The remedy is conducting focus groups. The focus group jurors are paid to give you their thoughtful opinions. Those

opinions transform into the building blocks for the case. Why take the chance on the unknown? Eliminate the surprises by conducting focus groups in advance of the trial. Focus groups should be for *practice*, not for *real*. The trial is for real, but by then there should be no surprises.

So why did this great case fail? Focus groups consistently find fault with plaintiff regardless of how faultless the plaintiff is. There is an abundance of data showing anti-plaintiff bias. Surveys of real jurors show that 8 of 10 jurors thought people were too quick to sue.¹ Jurors tend to rely on, "if I believe it, I will see it", rather than, "if I see it I will believe it". The focus group is intended to uncover and overcome those kinds of attitudes.

I. What is a Focus Group?

A "real" focus group is when the lawyer picks the jury, gives opening statement, presents plaintiff's witnesses, cross-examines defense witnesses, makes closing argument, and waits for the deliberation results. A focus group is a gathering of people who would tend to simulate an actual jury. Real jurors are selected from the voter

¹ Valerie P. Hans, *The Contested Role of Civil Jury in Business Litigation*, 79 *Judicature* 242, 244 (1996).

registration pool in the county or district in which cases are tried. The focus group process is designed to gather that same general cross-section for the "practice" focus group. Instead of racing for that door to head-off the foreperson, at the focus group session the attorney can calmly and systematically collect valuable information, including theme ideas, anchors and the case pitfalls. For a relatively small amount of time and expense, use the focus group to test the themes, case order and the delivery of witness testimony. Use it to critique the value of the experts' theories. The focus group panel will challenge the best facts of the case.

There are many variations of focus groups that can be used. The most widely used are "concept" focus group, "structured" focus group, and a "mini-mock trial" focus group. Focus group labels were developed over the last twenty years by researchers and lawyers.

II. Why Use Focus Groups?

The reasons to use focus groups at all are many. The principal reason is to uncover jurors' attitudes and their decision-making processes. If a juror's bias is revealed, there is still opportunity to level the field of play in the courtroom, changing the approach to a jury selection or witness preparation.

To highlight why the playing field tilt needs adjustment consider this. In March 2003, Robert Pear of the *New York Times* wrote for the National Desk a story entitled, "Bush Pushes Plan to Curb Medical Appeals". The article shows that in the last year, Medicare beneficiaries and the providers who treated them won more than half of the cases - - 39,796 of the 77,388 Medicare cases decided by administrative law judges. Under federal law, the judges are independent, impartial adjudicators who hold hearings and make decisions based on facts. The Bush administration is proposing both legislation and rules that would limit the judges' independence and could replace them in many cases. The plan is to throw out fairness. If this doesn't sound familiar, consider all of the media attention given to the "capping" of medical negligence cases. The "cap"

proposal is designed to limit damages of the "frivolous" medical negligence cases. It is labeled "tort reform", when the more appropriate title would be "insurance reform".

A primary benefit of focus groups is to uncover the most common biases. The jury is very likely to be suspicious of the plaintiff and the plaintiff's attorney. What is more, the defense bar has picked up on the propaganda put out by special interest groups, the insurance industry, corporate America and certain political groups, which in combination can be traced to this juror bias that is prevalent now. It is all too common that defendants' attorneys argue to the jury that: 1) plaintiff is a victim; 2) this is a "legal lottery"; 3) plaintiffs do not take personal responsibility for their actions.

Without directly saying the words, defense attorneys infer that the only ones benefiting from this system are attorneys for plaintiffs, that the jury system is out of control, and that the public is the major loser in the system. These are the kinds of messages that are often received from focus group participants.

Knowing the general public comes to court with these biases, it is imperative that the attorney first know how to identify them and, second, know how best to deal with them.

Different biases are identified based upon the types of cases presented. For example, the preconceptions that would surface in a civil rights case would be different from those emerging in a truck-car collision case. The biases are different when children are involved and in cases where the injuries in a low impact auto crash are "soft tissue".

Because of the many potential variables in juror attitudes, it is vital to initiate focus group cases in advance of trial. The reasons are: 1) to identify the anti-plaintiff biases; 2) to identify the case themes; 3) to determine the order of the presentation of the case (witness order, experts, adverse witnesses); and 4) to select the optimal jury panel by "deselection".

Although trial lawyers cannot be likened to the persecution that African Americans have suffered through the last two hundred and fifty years, consider the quote from W.E.B. DuBois from the opening essay of "*The Souls of Black Folk*", published in 1903:

"It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity."

Knowing that attitudes of the jury pool are generally filled with tort reformers, anti-plaintiff biases and victim paranoia, focus groups act as a filter to help recognize those jurors carrying these attitudes.

III. What Does a Focus Group Cost and how is it Organized?

There are many of ways to put together a focus group. An ad in the local newspaper can be run inexpensively to solicit the group.

CONSUMER RESEARCH PEOPLE NEEDED 2 1/2 HOURS DURING THE EVENING. May 22, 2003. \$75.00. CALL MONDAY - FRIDAY, 9-5; 312-346-0045.

From those who call in, select a diverse group for a given date and time. The process is time consuming. It may be helpful to have a dedicated phone line to receive these calls and an individual who would be trained to both screen them and coordinate the focus group setting.

It is almost impossible in a structured focus group to be the narrator and to present both the plaintiff and the defense side. It is far better to have a neutral moderator--someone other than the plaintiff's lawyer - - to present the case. The attorney for plaintiff should be able to present the best set of facts for the defense. In

any focus group you can also test short-videotaped edits of key witnesses (from depositions), such as the plaintiff, the defendant, or the experts. Videotape the entire focus group for later evaluation. All of this can be handled, though at a much greater cost, by media companies that can organize the focus group.

It can be more cost efficient to organize and run focus groups on your own. A rented hotel conference room, or your own or another lawyer's office conference room can be an effective setting. Make sure that the participants are compensated in line with the advertisement. Tell the focus group that you are conducting jury research. Tell them the facts they are about to hear are from a real case. When I do focus groups, I also prepare written questionnaires and jury verdict forms tailored to the type of focus group assembled and to the case being presented. Be sure you receive signed confidentiality agreements from each member, which also grants permission to videotape the session.

You should be prepared to serve food to the participants if the focus group is after work. Make sure the setting is in a well-known place with easy and safe access. Have each focus group juror sign in.

IV. Concept Focus Group.

The concept focus group is composed of six to ten participants. The idea is to have the facilitator, narrator or moderator, leak out facts slowly. The facilitator engages the group in discussion of what the case might be about after offering each new fact. It is important to be neutral. Deliver the unpacked case facts in chronological order and in a non-persuasive fashion. The facilitator gives very little information before asking the participants to comment. The concept focus group is designed to collect perceptions. Most often, the concept focus group will fill in facts. "Filler" is a term to describe facts that the participants will accept as true; as if they heard them, even if they didn't. The facilitator should debrief the group at the end of the session. It is never a good idea to offer all of the facts at the end of the session to persuade the group in one direction or another. It is much more important to extract potential problems in the case than it is to win them over. The facilitator can be a consultant or a lawyer handling the case. Do not tell the jurors which side you represent.

V. **Structured Focus Group.**

A structured focus group is usually presented to a group of six to twenty-one focus group jurors. The group can be divided into two or three separate deliberation sessions, depending on the number of participants. The idea is for the moderator to give a very brief, neutral set of facts representing both sides in no more than two to three minutes. Then the plaintiff's case should be presented by someone other than the plaintiff's attorney in a concise, general fact pattern, lasting no longer than five to eight minutes. After that, the defense lawyer (the plaintiff's attorney) presents the defense side of the case in five to eight minutes. Even though cases can be fact rich, the best results come from the focus group when the facts given are more general than specific. The presentation by the plaintiff and defendant attorneys is a combination of opening and closing statements. At the conclusion of these presentations, the facilitator gives each group a questionnaire tailored to the case and a set of limited "jury" instructions to complete during their deliberation. The focus group is then divided into two or three closed room groups. Each group of six to eight will deliberate with each other with no

participation from the facilitator. As in the concept group, the proceedings are videotaped. At the end of deliberation, the groups converge for a debriefing discussion.

VI. Mini-Mock Trial.

The mini-mock trial may last longer than the structured focus group, but it is similar. In the mini-mock trial there may be an opening statement by the plaintiff's representative followed by a brief description of the testimony of witnesses, the showing of photographs and exhibits. This is followed by presentation of the defendant's case. Trial exhibits should be tested in any focus group session. Each side has about fifteen minutes to present evidence, exhibits, and a summary of testimony. The group size is larger than the other focus groups. It is ideal to have as many as twenty-four focus group participants. To get the most out of this group, divide them up into two or three panels of equal size to deliberate. For the best results, use all three types of focus groups before trial.

VII. Whether to Hire Consultants.

If focus groups are done in-house, consultants are very valuable in analyzing the videotape of the proceedings, as well as the completed questionnaires, participant

notes and verdict forms. Consultants, who are also experienced trial lawyers, evaluate the participants' responses. It is more cost efficient to have the consultants review the focus group data and present their feedback than it is to have them organize and run the focus group.

VIII. Focus Group Data/Results.

As the focus group participants relate the story the way they understand it, themes will become apparent. The sequencing of the story can be formed. The "bad stuff" is identified. Juror attitudes are revealed.

In a concept focus group ask the group what is the next most important fact they need to know. If the fact is not clearly known and assuming that discovery is still open, more discovery can fill in fact holes before the trial.

If videotaped testimony of witnesses is available, the focus group participants will very often give their opinions as to whether the person is credible, presents herself well, is likeable and is understood. The focus group may ask about a witness's testimony that has not been interviewed or ask for a particular view in a photograph that is not available. If time allows, these issues can be re-examined.

IX. How to Use Focus Group Studies in Jury Selection.

It is almost impossible to try a case without spending a great deal of time preparing for jury selection. Test voir dire questions on the focus group participants. If these questions raise biases from the group, they may be just as useful at trial. Eliminate those questions that fall flat.

The focus group will oftentimes emphasize the facts that inoculate the defendant's best arguments against liability and damages. Do the focus group participants scrutinize the defendant's conduct more than the plaintiffs?

One of the key challenges in jury selection is identifying the "stuff happens" juror. This is the juror who focuses on plaintiff's conduct or circumstances rather than defendant's bad acts. When questioning this type of juror look for: 1) The inconsistency between verbal and non-verbal communications. 2) Beware if the juror says, "I need more information". 3) Is the juror emotionally guarded? 4) Does the juror believe it is inappropriate to bring a death claim for someone other than the breadwinner of the family? 5) Does the juror require a greater level of proof than the law requires? 6) Has the juror suffered a recent loss?

Personal responsibility is also a key element in jury selection. You may test these questions at a focus group. 1) "Mrs. Jones, (potential juror) do you feel that during the course of this trial the plaintiff must deal with the issues of personal responsibility and accountability?" 2) "How many of you expect Paul (plaintiff) to be held accountable and responsible for his choices?" 3) "How many of you expect Paul to explain how he has been personally responsible and accountable for his choices?" 4) "How many of you feel doctors should be personally responsible for following the rules of their profession and be accountable when they break the rules?" 5) "How many of you feel that patients bring too many frivolous claims against doctors?" 6) "How many of you feel that doctors sometimes raise frivolous defenses to patient claims?" 7) "Is there anyone who feels that no matter what a physician does, no matter what the result, whether it is death or serious injury, that a physician should never be held personally responsible?"

The other area that should be covered in jury selection is the idea that the plaintiff is a victim. Defense will try to focus the attention on the plaintiff as being a victim, which is usually considered distasteful to most jurors. These questions may be

tried out in a focus group: 1) "Do you feel that doctors are victimized by the jury system?" 2) "Do you feel, Ms. Smith, that it is unfair to require a manufacturer to incur more expense in developing a product to protect the public from harm?" 3) "Do you believe that lawsuits create higher prices for consumers for products and services?" 4) "Ms. Smith, do you believe that the public is deprived of products and services because lawsuits make it too expensive to produce?" 5) "We will be asking for between 2 and 5 million dollars in damages in this case. Is there anyone who feels that they could never consider awarding that amount no matter what the evidence was?" 6) "Do you think a physician should be required to keep up-to-date with medical literature?" 7) "Have you or any family member ever filed or considered filing a medical negligence claim?" 8) "What kinds of questions would you want answered to try to place a value on a human life?"

There are an unlimited number of jury questions that can be tested in a focus group setting. Ask open-ended, life experience related questions like, "How do you feel about . . .?"

CONCLUSION

Conducting focus groups in practice undoubtedly leads to much better trial results. The results of the focus group give rise to new areas of strengths and weaknesses that may not have been revealed before. Preparing for and using focus groups forces the lawyer to prepare for trial. Utilizing focus groups takes much of the surprise out of trying cases. Why jump into trial, when focus groups allow you to first practice the case several times without risk?

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