

Focus Groups: How to Realize the Benefits of Your Investment

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California Litigation

Volume 13, Number 1 – 2000

The new millennium will see an increase in the use of focus groups by both sides in a wider variety of litigation than ever before. As one experienced trial lawyer put it, "Going to trial without focus group research is like flying blind. It ought to be grounds for malpractice."

In the early days of pretrial research, which now dates back some twenty years, focus groups or mock trials were only conducted in high-profile criminal and big-ticket civil cases. Some trial lawyers still cling to the notion that learning how typical jurors will experience their case at trial is an investment worth making only in these limited circumstances.

Of course, not every case calls for a focus group. However, as trial practice moves into 2000 and beyond, plaintiff and defense counsel are more frequently conducting focus groups in cases that involve complex concepts, unusual or inflammatory issues, difficult facts, problematic witnesses, community notoriety, and/or a wide range of potential damages.

A properly conducted focus group can answer a number of important questions for lawyers and their clients: What are the strengths and weaknesses of our case? How, if at all, can we overcome the weaknesses? How credible are our key witnesses? How persuasive are our litigation graphics? What range of damages are jurors likely to award? Who are our best and worst jurors? Should we settle or go to trial?

Recently, a large corporation conducted a focus group after the first trial in what was to be a series of cases resulted in a hung jury, with just one juror's vote saving our client from a sizeable verdict. The focus group jurors' reaction to the case painted a dismal picture: They didn't understand the technical aspects of the case. The main expert witness was a "lousy teacher." The corporate representatives, with one notable exception, were described as "arrogant company men" who were more concerned about profit than public safety. The documents indicated the company had made a lot of mistakes.

Our clients took this feedback to heart. They hired a new expert witness who could connect with the jurors and teach the technical concepts in a manner the jurors could understand. They armed the new expert with simple, persuasive graphics and a juror-tested animation. The corporate representatives who got negative reviews underwent extensive witness preparation and learned how to handle themselves effectively on both direct and cross-examination. The one witness whom the mock jurors really liked took on an expanded role in the trial. When the second case was tried, the jurors reached a unanimous defense verdict.

The same week, another client conducted a four-hour "mini" focus group in a personal injury case designed to test the credibility of one key witness and to assess the range of damages jurors might award. As a result of the focus group, counsel decided to settle the case. The aims of these two focus groups, as well as their budgets, varied widely. However, the results were equally useful to the clients.

Given the information and insights a focus group can provide into your case, it is no wonder their use is proliferating. However, in order to get valid results from a focus group to help you fairly and reliably evaluate your case from a jury perspective and make every aspect of it as persuasive as possible, you need to:

Select a jury and trial consultant whom you respect and whose work you trust. Work with the consultant to help them develop an in-depth understanding of the substance and issues of your case. At a minimum, this involves the consultant reading key pleadings, such as the most recent amended complaint and summary judgment motions, and meeting with the attorneys to review the case and plan the focus group. The consultant's understanding of the case is critical to the recommendation and selection of the appropriate research methodology, which could range from a discrete four-hour focus group to an intensive two-day discussion group.

The choice of format will be based on a number of factors, including the complexity of the particular case, the number of issues that need to be studied, the number of witnesses who need to be tested, and the budget the client must work within. An experienced consultant will offer you a range of research options and then recommend the best one(s) for your particular case.

Once the research project has been defined, communicate frequently and clearly with your consultant about your needs, concerns and questions. But resist the temptation to tell the consultant how to conduct the focus group. You are paying for the consultant's experience and expertise and you need to trust the consultant and rely on his or her expertise.

Make sure your jury consultant uses sound recruiting methods to obtain mock jurors who mirror the actual jurors in the venue where the case will be tried. If a consultant places advertisements in the newspaper or uses an employment agency to recruit, beware. Mock jurors who self-select or are unemployed are generally not representative of the venue and, thus, the research may be seriously flawed even before the focus group takes place.

Don't buck the focus group format. Many lawyers want to try out their opening statement at the focus group, use witnesses to put on parts of the case, and then give a closing argument. In most instances, a focus group is not a mini-trial and cannot accommodate the lawyers' desire to turn it into one, while still giving jurors the information they need to deliberate the case on a sound basis.

While there is no standard focus group format, the methodology your trial consulting firm uses is the result of years of practice and refinement. If the format calls for a 10-minute argumentative statement of the case by both sides, followed by a 90-minute or half-day presentation of the plaintiff's case and the defense case, prepare yourself accordingly. The emphasis at a focus group is meeting the jurors', not the lawyers', needs. In order for the deliberations and feedback on the case to be meaningful, make sure you understand and follow the agreed-upon format exactly.

In our experience, some focus group formats are more effective than others. For example, some trial consultants prefer videotaped presentations by the lawyers to the jurors; others favor live presentations by the lawyers and allow the jurors to ask questions.

Given the compression of a week- or month-long trial into less than one day, a live presentation with questions is far preferable to ensure that jurors understand the case and can, therefore, deliberate on a sound basis. It's also difficult for jurors to concentrate on canned presentations. Most indications are that jurors' minds are elsewhere after twelve to fifteen minutes of video.

Put on the strongest case against your client that you possibly can. If you don't, you run the risk of what we call a false positive, getting a more positive reaction to your case from the mock jurors than you will get at trial with the full force of the other side's case before the jury.

The best way to avoid a false positive is for the senior litigator to argue against his or her own case. Let the second chair or, preferably, another partner of equal experience argue the case for your own client. Lawyers frequently resist doing this because they don't want to take the time to prepare the other side.

Recently, a lawyer who insisted on presenting his own case, leaving the opposition to a young partner, lived to regret it. He got a fairly positive read from the focus group but a substantial verdict against his client at trial. In this instance, in addition to the consultant's protests before the focus group, he got direct feedback from the mock jurors who, when asked at the end of the focus group what he could do to make his case stronger, told the senior litigator, "next time, take the other side in the focus group. You were so much better than the younger lawyer, you might have skewed the results."

Hold the focus group at the right time. If you conduct the research too soon, for example, before discovery is completed and the witnesses deposed, you won't be able to represent the opposing case with enough accuracy and force to avoid getting a false positive on your case. If you conduct the focus group too close to trial, you will be so busy that the focus group will not get the preparation that it deserves and you will

not have enough time to incorporate the focus group feedback into your trial strategy. Generally speaking, three to six weeks before trial is the opportune time to conduct a focus group.

Too often litigators call their trial consultants barely in time to conduct a focus group before trial. Ideally, however, you will call the consultant well before it is time to plan and conduct a focus group. This allows the consultant to be involved in the case in a number of other ways that can increase its overall persuasiveness to the jury. For example, the consultant can assist you in assessing community sentiment towards your client, defining and developing litigation graphics, preparing witnesses for their depositions, selecting expert witnesses, and/or the development of case themes. Of course, not all of these services are needed in all cases, or even in most cases, but analyzing those needs early on can be quite important to the overall persuasiveness of your case.

Limit the issues you are going to test at the focus group to a reasonable number. For example, at a one-day focus group with two and a half hours for deliberations, you can test three or four allegations and ask six or seven verdict questions. If you try to cram ten verdict questions into this time frame, you won't get through all of them or you will get truncated, unreliable deliberations on them. If you really need to test seven allegations with fifteen verdict questions, then your client will need to authorize a two-day focus group. Generally, however, you can work with your consultant to limit the scope of the research to a reasonable number of questions.

It is tempting to busy litigators to delegate to an associate or paralegal the task of drafting the verdict questions and jury instructions for the focus group. Too often this individual was not present at the focus group planning meeting and has no idea of the limitations of the format. A recent example: An unguided associate drafted 27 verdict questions and 61 pages of jury instructions for a one-day focus group. It then took several hours of work for the consultant and the associate to edit the questions and instructions. If you are delegating to an associate or paralegal who has not been an integral part of the planning process, ask them to talk with the consultant before they begin drafting. Better yet, take the time to draft the verdict questions yourself.

Don't kill every tree in the forest when you prepare your exhibit books. Most focus group formats call for each juror to receive an evidence book that contains relevant documents that the lawyers are going to refer to during their presentations. Ideally, you want to limit the number of exhibits to a maximum of 25 to 30 to be used by both sides, or one three-inch, tabbed binder. It is best to include the entire document, especially if it is a contract. Excerpts make jurors uncomfortable and cause them to speculate whether you left out something that could be damaging to one side or the other.

If you are testing witnesses at the focus group, either live or on video, make sure the cross-examinations are realistic. Employ all the tricks and traps that seasoned cross-examiners use to throw witnesses off balance and discredit them with the jurors. Far too often, lawyers lob softballs to their witnesses instead of playing hardball. To get a thorough, accurate read on a witnesses' credibility, he or she needs to be subjected to the dynamics of a tough, relentless and realistic cross-examination.

Don't try to put on every aspect of your case in full detail in 90 minutes or even half a day. Obviously, it can't be done. It is best to organize your material in story form, so it is easy to follow. As you make each of your major points, tell the jurors what the critical witness testimony will be, what important statements have been made in the depositions you are relying on, and show them what the key documents say. Read relevant paragraphs aloud. Show the jurors the most important statements on overheads or a computer presentation system. Point out inconsistencies, contradictions and omissions.

You will be amazed at how quickly and thoroughly most of the jurors understand your case. In fact, once you have done two or more focus groups, you will come to truly appreciate jurors' main complaint about trials--"they last way, way too long because lawyers think we are stupid and they have to repeat everything ten times." Some focus group formats allow jurors to ask questions on the theory that some important information is bound to be left out when a three-week trial is compressed into a 90-minute presentation. Answering the jurors' questions not only lets you clear up any confusion they have about the basics of the case, it also lets you hear first hand some of the concerns jurors have about your case.

If you are testing damages at the focus group, leave yourself enough time to make a full presentation on the specifics of the damages. And, other than punitive damages, tell the jurors the amount your client wants in damages and why. If you represent the defendant, tell the jurors you don't believe any damages are due the plaintiff; however, if they disagree with you and find liability, tell them what amount would be reasonable to award. Damages deliberations, whether in a focus group or at trial, are a compromise process that works best when parameters are established by both sides.

If you are asking for future wage losses, summarize your expert's testimony and give the jurors a simple chart in their evidence books that sets forth the steps in the expert's analysis and the relevant amounts. If you are seeking emotional distress damages, give concrete details about how the plaintiff's life has changed, what she used to be able to do that she can't do anymore, and summarize any treatment by mental health professionals and/or medications she is taking. Without this level of detail, jurors are uncomfortable and often unwilling to make these kinds of awards.

When the focus group is over, don't wait for a written report to get feedback from your trial consultant about what he or she observed. While statistical analyses will have to wait for the report, it is extremely worthwhile to sit down with the consultant for an hour before you leave the focus group site and make a list of everyone's key observations for extended discussion later on.

If you and your consultant have worked together effectively to conduct a valid focus group, you will know it because you will feel as though you have learned so much more about your case than you ever expected to, and you will have a list of concrete steps to take before trial to improve the persuasiveness of your case.

In summary, in order for your focus group to provide reliable information and creative insights that contribute to a winning trial strategy, it is essential that it be carefully planned and properly executed.