

## CURRENT TRENDS AND IDEAS ABOUT FOCUS GROUPS OR, WHY SHOULD I DO THEM ANYWAYS?

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### What are Focus Groups?

Before a new toothpaste is put on the market, before a new car is rolled out, before a studio releases a major new movie, companies conduct pre-market research and discovery.

How?

Companies run focus groups.

A focus group is a form of research in which a group of people are asked about their perceptions, opinions, beliefs and attitudes towards a product, service, concept, advertisement, idea, or package.

Questions are asked in an interactive group setting where participants are free to talk and express their attitudes and opinions about the product being presented.

The focus group is conducted by a trained moderator who in a seemingly unstructured and natural way draws out the participant's views on the aspects of the product being focused.

The moderator is not just looking for what is good about a product. What is more important is what is wrong with a product.

Legal trial consultants have adopted and adapted this process to conduct pre-suit and pre-trial research and discovery.

### Why do a legal focus group?

***You don't want to know what a jury thinks about your case for the first time when they are reading out the verdict.***

If the first reason is not enough, we can give you more.

1. Spotting the Landmines Early

Committing to doing a focus group itself forces the lawyer to learn the case not just from the plaintiff's side but also from the perspective of the defence.

The "landmines" in your case are the good points the defence will make. They are the facts, if believed, that will cause you to lose your case. You need to be thinking about the "landmines" early on to diffuse them. Knowing the landmines is your taking off point to arranging your collateral witnesses and experts and prepare you for the type of information you are going to need to present to the defence to answer their objections to your claim.

## 2. Organize don't agonize

We are all guilty of this, starting to prepare for our trial too late. The consequence is an adjournment, ill considered settlement, or worse, being unprepared for trial. You can lie awake at night listing out all the tasks that need to be done in your head or give yourself a goal post by preparing for a focus group.

The best time to do a focus group is as early as you can. On a complicated liability case consider doing a focus group before you file the pleadings. How many times have you two years after the fact felt like you have missed naming a potential defendant?

It is a huge advantage to do a focus group before you complete the discovery of the defendant. A focus group will tell you what your jury wants to know and why it's important to them to know the answer.

The point is, do the focus group while you still have time to get the experts and evidence you need to win.

## 3. Juror proof not lawyer proof

Finally, as lawyers we often believe that certain issues are important, when in fact they are not. There is "lawyer proof" and then there is "juror proof." Lawyers often overlook issues that we think are unimportant or that we don't even think of, or put undue emphasis on what we think is important, "lawyer proof", as opposed to what is important to the jury, "juror proof."

Use focus groups to identify what is and is not important to the jurors who will hear the case.

Use focus groups to identify new ideas, good ideas and bad ideas in the approach of the case.

Use focus groups to establish the theme or themes of the case.

Use focus groups to help identify what we can and will use as exhibits in trial or what jurors think of our witnesses and experts.

A classic example:

We conducted a focus group on a nursing home case. The resident of the nursing home was there because of a broken hip. The resident developed severe pressure sores and ultimately died. It was alleged that the nurses and aides at the home were not assessing and turning the resident appropriately. The resident's daughter, the plaintiff in the case, was with her constantly at the nursing home. Many insights were learned through the focus group but two stand out.

1. A strong argument was made against the daughter for not assessing her mother for pressure sores. Now obviously, the daughter was not a nurse and she was not her mother's nurse, yet there were people in the focus group who were very critical of the daughter for, in effect, not performing the services that the daughter had hired the nursing home to do. In fact, there were jurors who felt the daughter should have turned her mother to inspect for sores even though her mother was there for a broken hip. Until trial we had not thought about this issue. As we saw it there was no legal "duty of care" for our "client" to turn the "resident."

2. The focus group gave us a legal theme for the claim. After much deliberation, one man in the focus group said: "*just because the daughter was constantly there, didn't mean she was entitled to a lesser level of care.*" The other focus group members gravitated to this theme because it summed up in rhythmical way the essence of why they felt the nursing home bared responsibility for the death of the resident.

### What Are the Different Types of Focus Groups?

There are many different types of focus groups that can be utilized. They include concept groups, structured groups, split groups and summary/mock trials. Regardless of which is used, these types of groups provide analysis of the facts and the case, allow us as lawyers to test for and discover bias and allow us to practice various types of persuasion.

#### *Concept Focus Groups*

In a concept group, the focus group is read a neutral statement containing facts and not conclusions. The key to a successful concept group is the neutral statement. A biased or conclusory neutral statement can point the focus group in the wrong direction, rather than letting them find their own way. Remember, facts, not conclusions.

This type of focus group unpackages the case in a fact-neutral, non-persuasive and often chronological way. Sessions last generally 3-4 hours from start to finish, including deliberations. We generally start ours at 6 PM so that we can include working people in the groups, and end at 10 PM. If it is done during the day, we usually start at 9 or 10 and conclude at 1 or 2 PM. We often do two in a day.

After the facilitator presents the neutral statement, the group members are asked what they think. We often request them to complete a short form, asking what they think about each side of the case, and what 2 or 3 things they would like to know at that stage. What we want to do is get them talking amongst themselves and learn their perceptions and the facts they will use as filler, meaning facts that they will accept as if they heard them, even if they did not. Get them talking amongst themselves and you will learn much about your case, its strengths and landmines.

A great question is “What else would you like/want to know?” This allows you to discover and focus in on the facts that the participants think are important. These facts are often different than what we as lawyers think are important and generally are very instructive.

Continue unpacking the case, one fact at a time. Chronological is good, but not essential. By doing this, we can discover the significance, or insignificance, of the various facts. This also allows us to discover information about case themes and terminology, as well as graphics, we may use at trial.

A concept focus group is like making a fine soup. If we taste the stock broth, we may say the soup is bland and not worthy of serving. If we only taste the finished version, we can only express an opinion as to whether the finished product is good or bad, without any idea as to which ingredients did or didn't make it that way. Only by tasting it after each ingredient is added can we say what impact or effect that particular ingredient has on the soup. Tasting soup only after it is completed allows us to learn the result, not the reason for the result. As any good chef, and trial lawyer, knows, the reason is often more important than the result.

### *Structured Focus Groups*

Structured focus groups are as they are named. They are more structured and less free-flowing than concept groups. In these types of groups, lawyers make presentations of both sides of the case. Most commonly, this would be a combination opening and closing argument, focusing on whatever issue or issues that may be important. After both sides make their presentations, the “jurors” are given a set of abbreviated instructions and they then deliberate. We prefer to do a moderated deliberation, where we moderate the discussion, rather than letting them deliberate on their own. This makes sure that everyone talks, one or two people don't dominate the discussion and they discussion doesn't go places it need not go. If they reach a conclusion, fine, but what is important is the reasons for why they believe the way they do.

Structured groups are useful as particular issues can be focuses, with both sides of the issue being represented and presented. The issue could be the credibility of an expert or other witness, the parties, certain exhibits, damages or themes.

This type of focus group, as well as the concept group, allows us to test our strengths and

weaknesses in a neutral setting, which in turn allows us to reframe the case, depending on the information we receive. In one case that we recently focused, based on the feedback we received, we reframed the case to place the original focus on the care and support given by the daughter, rather than the conduct of the defendant.

### *Mini-Mock Trials*

This is a more formal and thorough approach than focus groups and generally last a day or two. In this setting, there is a presentation of evidence and argument by witnesses and lawyers. The witnesses may be live or by video, so as to gage their effectiveness. Formal evidence is presented and graphics are test driven.

Mini-Mock trials allow for the evaluation of the impact of opening statements, witnesses, evidence, and closing argument. Basically, this is a condensed version of the trial. It is suggested that a mini-mock trial be held only at the end of case preparation and after either the concept of structured focus group is conducted. This is because the mini-mock trial should be conducted as the attorney expects the case to be presented at trial.

## What Do We Expect to Accomplish by Use of Focus Groups?

### *Themes and Strategies for Trial*

Lawyers and trial consultants have studied individuals, groups, and social psychology as it applies to jury behavior for years. Focus groups can assist in designing effective themes, as listening to the participants' thoughts allows us to develop effective ones that will resonate with the jury.

### *Discovery*

One of the most important things we discover is what is important to the finders of fact. We can tailor our discovery to find out the answers to these things.

### *Voir dire*

Focus groups can help prepare for an effective voir dire. For example, an effective voir dire can be linked with an effective and engaging opening statement, as well as witness strategies, use of demonstrative evidence and a closing argument that mobilize juries to take action.

In addition, an effective voir dire strategy can increase the number of strikes for cause, identify venire members who are likely to be unsupportive of your client's case and keep the spotlight off those jurors likely to be sympathetic to our case.

### *Witness Preparation*

We can use focus groups to teach and develop effective communication skills. For example, focus groups teach us how to use language that conveys the testimony clearly and accurately, how witnesses can maintain their composure in an unfamiliar and stressful setting, how to stay on point and how to credibly integrate the over-arching case themes into the testimony. Most importantly, is the witness believable and credible?

### *Evaluate Strengths and Weaknesses*

This is an invaluable function of focus groups. We often think we know our strengths and weaknesses but focus groups do just that, they focus us on the strengths and weaknesses of our case. Many times, we have blinders on, and we are oblivious to bias. We can easily lose sight of the big picture and what is important once we have committed, physically and emotionally, to the case. Focus groups can provide a fresh and different perspective with what we think are our strengths and weaknesses in the case.

## So, Why Don't Lawyers Do Focus Groups?

Here are the top 10 reasons lawyers don't do focus groups.

1. ***I HAVE ALL THE PROOF I NEED***

As said above, there is lawyer proof and there is jury proof, and the lawyer proof that you need to get to the jury and the proof that the jury needs to find in your favor are often very different. If you do not know the difference between jury proof and lawyer proof, you will miss critical evidence and testimony in your case. Whatever those holes are in your proof that you have not learned and discussed at trial will be filled in by your real jury. This is called the filling defect. You won't like the answers the jury fills in for you at trial. The only way to learn what that jury proof is is to talk to a focus group. Or 2. Or 3.

2. ***FOCUS GROUPS ARE TOO EXPENSIVE***

Lawyers say they cannot afford to run focus groups. You spend money on experts, exhibits and on other aspects of the case, but you won't spend money on what is likely the most critical information gathering project you can do, regarding the presentation, framing and sequencing, and ultimately, the success of your case. Focus groups can be much more cost effective than you think. If you have a small case, consider working with several other attorneys with similar cases and share the expenses. Consultants often are willing to work on a partial or total contingent fee, which is a cost on the file, not a fee split. This minimizes the up front cost of the focus groups. If you consider a cost benefit analysis, focus groups are one of the best investments you can make.

3. ***I KNOW HOW TO TALK TO A JURY***

We all went to law school and learned how to think like lawyers. Unfortunately, your typical juror does not think, or talk, like you do. Your words must resonate with the jury and be remembered. Your analogies must be something that the jury can relate to. Your themes must make sense. You must be understandable. Will the jury remember, and understand, "preponderance of the evidence?" Not likely. But will they understand, and remember, that your burden of proof is that the evidence be "more likely than not?" Or that your damages are the "harms" and "losses" suffered by your client? Well those phrases didn't come from lawyers; they came from focus groups. We often use "legalese" or have other technical terms associated with the case. We have found that juries are tuned out to this language and that will have an effect on your case. You must find the themes and catch phrases that the jury will remember and the ones that will hit home with their own experiences and beliefs. "It's not what you say, it's what people hear."

Frank Luntz is a Republican consultant. He was instrumental in developing the Contract with America that Newt Gingrich made famous. He has written a book,

Words That Work, which is essential reading for any lawyer. He came up with “gaming” instead of “gambling,” “death tax” instead of “estate tax.”

His key point is simple: It’s not what you say, it’s what people hear. And focus groups tell us what they hear, and remember, and believe.

By the way, one of the greatest themes ever came from a focus group. Johnnie Cochran didn’t come up with “If it doesn’t fit, you must acquit.” It came from a focus group.

#### **4. *I HAVE BEEN DOING THIS FOR YEARS***

You have also been driving a car for years but you wouldn’t buy one without test driving it or having a mechanic check it out. The focus group is the “test drive” or the “mechanic” for your case. Every case has landmines, things that will blow up your case. The focus group participants let you know what those landmines are. And more importantly, they can tell you the fixes to them. Your client has one day in court and you have one chance to present the best case for them. Wouldn’t it be better if you test drive it first? Aren’t we best at things when we have the chance to practice? A focus group lets you experiment with your presentation sequence, your analogies, your themes, your sequencing, and see if your exhibits say what you want them to. Focus groups let you “dry run” your case. Focus groups give you the chance to lose without a real jury so that you can find your landmines and fix them before they come to light in the jury room. Wouldn’t you rather hear about a problem with your case while you still have the chance to fix it?

#### **5. *THE CASE WILL PROBABLY SETTLE***

Let’s face it, most cases settle. And attorneys often believe that they don’t need to conduct focus groups because the case will settle. But doing focus groups two weeks before trial is probably two weeks too late. It is equally as important to learn about your case to prepare for settlement conferences as it is for trial. It is imperative to learn the catch phrases that jurors use to describe your case so that you can incorporate them into your deposition questions. And how about learning what a jury really thinks of the opposing side’s case and explaining that at a settlement conference. You will always have the upper hand when you really understand what a jury thinks of the entire case.

#### **6. *I HAD A PROFESSIONAL PREPARE MY EXHIBITS***

Studies show that lawyers spend hundreds of hours working on a case to get it prepared for trial, writing and practicing an opening statement, crafting the killer cross-examination. Yet lawyers often spend little time thinking about and creating the exhibits we use to explain the case, or, even worse, we delegate the task to someone who does not know the case well. Focus groups can describe what they

want to see and they can critique exhibits with a “fresh eye.” Focus groups will always help tweak the exhibits you have started so that they are the best they can be and send the right message to the jury.

**7. *I ALREADY HAVE THE “SMOKING GUN” DISCOVERY***

Too often, we have heard focus group participants ask for specific testimony or documents that they believe they need to determine the case or award significant damages and the lawyers don’t have it. Why? Because they waited until discovery was closed before running a focus group. In any significant case, focus groups should be conducted while there is still time to send out discovery requests or lock in deposition testimony. Focus groups conducted during the pretrial phase provide the opportunity to send discovery requests to the opposing side, obtain the documents and information that is important to the jury’s decision and ask the right questions at depositions.

**8. *I KNOW MY CASE BETTER THAN ANYONE***

Except maybe the opposing counsel, because they are running focus groups. The fact is, you don’t know what you don’t know. During recent focus groups, the lawyer told us that he learned more about his case in the two focus groups we ran than he had with his experts during the entire pretrial phase. Focus group participants say some amazing things and every time, it is a surprise to find out what they think. Issues that we think are important or will be easily handled at trial may not be so clear to the focus group. Discussions of things we think are irrelevant (alcohol usage, or lack of, involving a car crash case is one example) often are raised within minutes of the focus group deliberations. Questions or assumptions about routine documents like a police report are not so routine to focus group members. Much of the pretrial phase is spent trying to obtain and learn the information in possession of the other side. Interrogatories are sent, depositions are taken, documents are reviewed and analyzed. Why would we then fail to conduct focus groups and allow the other side to be the only one with the knowledge. To create a level playing field, you must learn what the other side knows, and the other side knows to run focus groups.

**9. *THAT EVIDENCE WILL NEVER COME IN***

Maybe, and may not. But sometimes you find out you want it in so you can explain it to the jury, as opposed to having the jury make up an answer you don’t like. In a recent case, the lawyer wanted to exclude facts concerning why the client was in prison. It was evidence that clearly could be kept out. But we found out that the “juror” reasons for him being in jail were a lot worse than the real reasons. When the focus group was presented with the real reasons, they were less

harsh on the plaintiff. In fact, some felt sorry for him. You need to know how to handle these issues and the other points that you think will never come into evidence but the jury wants to know about it. Questions left unanswered are problems for you.

## **10. *I HAVE AN EXPERT FOR THAT***

Lawyers think that experts are the “silver bullet” for all their problems. “What about this landmine? Don’t worry, I have an expert for that, I have it covered.” Research shows that experts often cancel each other out or simply aren’t believed, based on various factors, including amount of compensation and frequency of testifying. (See Cooper, J. & Neuhaus, I.M., The “Hired Gun” Effect,” Law and Human Behavior, 24(2), 2000). Jurors don’t know which expert to believe, so they don’t believe either of them. Experts get you past summary judgment, facts get you verdicts. Use focus groups to find out which facts you need to arm your jurors with to carry your fight during deliberations.

### ***CONCLUSION***

The bottom line is that focus groups should be run so that you know the best way to present your case to the people that really matter the most, the jury. Focus groups should be run before discovery is started and before structuring your trial presentation. That way you will know who they want to hear from, what they want to see and what the “juror” proof is. Only then are you ready win in today’s climate.

### **Final Thoughts**

1. Present Strong Opposition
2. Don’t have your client at the focus group
2. Test Key Documents and graphics
4. Don’t disclose which side you are on
5. Confront Biggest Problems
6. Video Tape All Discussions
7. Listen, Listen, Listen

### **AND THE MOST IMPORTANT THING IN A FOCUS GROUP:**

- Prepare the other side so well that you LOSE

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