

Using Focus Groups to Overcome the 800 Pound Gorilla(s) in Medical Malpractice Cases

For those who practice in the world of medical malpractice, we can all agree that one of the most challenging aspects of handling these cases is negative attribution from jurors. Generally, negative attribution comes in two forms in the eyes of jurors: 1) “This could never happen to me,” or 2) “I would have made different choices than the plaintiff made, such as getting a second opinion.” This 800-pound gorilla, or more likely gorillas, is often times (and in my opinion, the majority of the time) the reason why we take it on the chin at times on our side of the “V”. So, what do we do about it? Focus groups!

Identifying Negative Attribution in Our Cases

The first obvious step is to identify what the negative attribution is in your case. There is only one way to do this – focus groups. The easiest is a narrative focus group.¹ A narrative focus group is simply a recitation of the facts in a non-adversarial manner. Often times, my firm will create a simple timeline of events (again, this must be completely neutral), followed by a group discussion. So, if the care at issue is short, we simply recite the facts and then carry out a guided discussion. If the care at issue is long, my firm creates an actual timeline (usually though power point), so that the focus group does not get bogged down in the facts, and then discuss. We have found that, generally, it takes an hour to an hour and a half to get through the process. In other words, in a three-hour focus group, we can run two narrative focus groups.

Most early narrative focus groups will lead to the focus group telling us that our case is terrible and why. In other words, the negative attribution jumps out and kills the case. But this is what we want – this allows us to know the target. Once we know what the negative attribution is in the case, we can begin to defeat it through framing. However, this is one word of caution – do not run one narrative focus group and think you identified all the negative attribution in your case. You must carry out multiple narrative focus groups in order to find out all areas of negative attribution. If you shortcut this step, you do so at your own peril.

Defeating Negative Attribution Through Framing and Testing in Focus Groups

Once you figured out all of the negative attribution in your case, it is time to figure out a way to frame your case to overcome it. The best way to do so is to focus on the defendant’s conduct. My favorite way to do so is to frame my case/my opening using the “David Ball’ opening template.” See, *Damages 3* by David Ball. Hence, I frame the case in the following order: 1) rules; 2) defendant’s conduct; 3) “why we are here;” and 4) undermining. In the undermining section, in addition to any issues you are aware of, you attack the negative attribution in your

¹ If you are of the school of attorneys asking “why do we need focus groups? The legendary attorneys of the past never focus grouped a case,” STOP! The “old timers” would try 10-15 malpractice cases a year. In other words, the actual juries served as their focus groups. Those days do not exist anymore. Instead, your mind has been poisoned through law school and only focus groups can set you straight!

case head on. This is not as easy as one might think. Often times, this process takes days. But if you do it right, you will be rewarded.

Once you feel comfortable with your case framing, you go back to the focus group. This time, your focus group is much more formal – you carry out what’s called a structured focus group. This is where each side gives a 20 to 30 minute “clopening,” where aspects of opening and closing are combined. After each presentation, a neutral moderator comes in to guide the discussion and deliberation. A few words of advice when carrying this out: 1) for the plaintiff’s clopening, try your actual opening for the first three-fourths of the presentation (if you are using the Ball opening, through the undermining section); and 2) the same presenter should do both sides. In other words, you should not have an attorney “represent” the plaintiff and another handle the defense side of things. This is the best way to avoid “presenter bias.”

During the guided discussion, the moderator will determine what the most important facts were, what questions the focus group still has, the anger level of the focus group, and their ultimate “verdict.” This discussion will let you know if you have properly framed your case or if you still have more work to do. The angrier you can get the focus group about what occurred, the better.

Defendants in medical malpractice cases start with the upper hand. They have the advantage of negative attribution, and, often times, do not have to do anything to bring it to the forefront. The only way we can overcome this is through identifying what the negative attribution is, properly framing our case, and then undermining it properly. For more information on Focus Groups, I would suggest reading “Focus Groups – Hitting the Bull’s-Eye” by Miller & Sceptur, as well as buying the The Keenan Law Firm Ultimate Focus Group package.