Rules for the Effective, Powerful Use of Focus Groups

By Phillip H. Miller

There is good reason that lawyers grasp for focus groups to answer difficult questions in their cases. No matter how well we prepare a case to maximize our client's recovery, three things occur during discovery that gut or reduce the value of our cases. Whether it's a mediator, opposing counsel, focus group, or judge, someone points out (sometimes more than once) that jurors:

1. May not be as persuaded, angry, or sympathetic about our case as we expect;
2. Are likely to want proof that is not part of the evidence we have compiled and/or focused on during discovery; and
3. There are parts of the defendant's case that are more persuasive than we could have imagined, and/or although there may be a counter, we either don't really have it in place or it's not as effective as we need it to be.

These arguments inevitably diminish the recovery from any settlement.

There are 3 fairly complex, inter-related explanations for why we often miscalculate what jurors want to know, and they are all good reasons to consider the use of focus groups.

First, our judgment is negatively affected by "confirmation bias"[1] when we consider the possible evidence in a case and it's likely persuasive weight;

Second, we cannot readily put ourselves "in a jurors' shoes" to evaluate our case and understand how they may evaluate proof;

Third, we focus on "legal proof" and either ignore or never discover the proof that jurors need to win cases for plaintiffs in deliberations (juror proof). A frightening example: in a failure to diagnose breast cancer case, what is the juror proof that has nothing to do with our proof, but everything to do with the jury returning a verdict? Where was the husband? He's here asking for money, where was he when his wife's cancer was growing? Why didn't he insist on a second opinion? All of these items of juror proof may be answered in a case, but we may underestimate their importance to the jury being able to return a just verdict.

The underlying problem that causes these three phenomena is confirmation bias. We are all affected by it, regardless of education level, social standing, or world view. We all "hear what we want to hear". We see what we want (or expect) to see. When there is contradictory testimony or evidence in a case, our first response is to minimize it by assuming our witness, expert, or other evidence tends to have more persuasive weight. When we look at a photograph or document, we see what we want or need to see in it and minimize the rest. Often, we are simply blind to those other parts of the photo, document, testimony, or facts. *When dealing with emotionally charged issues or deeply entrenched beliefs, the effect of confirmation bias is at its strongest.* In other words, the deeper you are into the case – the stronger the effect of confirmation bias, and the more you need some other eyes on your case – focus groups.

Rule 1: Focus groups can add ambiguity to the case and suggest misleading answers to case critical issues. (You can fix this if you want to. Read on.)

Focus groups are not a panacea or a silver bullet for our cases. If you have a case with problems, doing focus groups will probably confirm those problems, and other problems you have not considered. Will they provide an answer to those problems? The way they are applied by most lawyers and law firms, rarely. The depth of feelings behind responses (and the extent to which you should rely on them) are difficult to gauge, but nonetheless lawyers make case critical decisions all the time based on a single focus group or the comments of a single juror.

In a focus group of 8-10 people over a 3 hour period, the average amount of time that any one person speaks is about 10-15 minutes, and that's about all of the issues discussed. Does 10-15 minutes really give us an idea of how actual jurors think about all the issues that are on the table? Do we know why they think or feel that way? Does the discussion tell us how an actual juror will approach the same issue? Is the information we receive reliable?

It's not that a single group provides useless information, but blind reliance on such information, especially from a single focus group and/or single focus group member is foolish. Secondly, lawyers have a problem applying the information to the case. It's easy to get information, the problem becomes applying that information in a useful and meaningful way to the case.

Focus groups can be used very effectively if:

a. you spend time analyzing what you have and what you need in advance of doing groups;
b. if you do multiple focus groups (think 5 or more per case);
c. if the focus groups are done early enough to allow you to adjust your discovery ; and
d. if you make some attempt to follow the "do's and don'ts" suggested here so your results are not (unintentionally)

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"garbage in – garbage out".

Rule 2: Before spending money on a focus group, consider the likely questions that focus group members will ask in your case, and that you should be using in your case preparation, discovery, and proof.

Here are the juror/focus group questions that you should be prepared to answer before you do most focus groups. One possible exception might be a pre-litigation focus group that is intended to be very exploratory, or a specialized group that is exploring a very narrow issue.

A. Why is this case important? Jurors want to think they are doing something important. They will look for meaning, a reason to send a message or make a change. What is the case about? Is it just about some lawyer and his client getting rich? I always ask my lawyer-client, finish this sentence: "This case is about..." I often get the wrong answer. In the end, this is also a question to ask the focus group participants. What do they think the case is about, why is this case important? This DOES NOT mean that you suggest that something in a case is important[2], you want to listen to see if they come to that conclusion on their own.

B. How can we know we aren't being scammed or defrauded by this evidence? Jurors are suspicious of the plaintiff's motives and evidence and will look for ulterior motive(s) for the claim. Every piece of evidence (testimony, photos, or otherwise) that can be minimized by a juror's suspicion is potentially problematic. Is there case critical proof in your case that is inherently suspicious? Is there some other way to prove those points? The discussion about the merits of the case that gets partially derailed because your evidence is "fishy" will not be helpful.

C. Has this happened before? Jurors like to have context for the case. This means they need to know the prior history of the defendant and plaintiff's conduct. Has the defendant done this before; has the plaintiff had problems before this; has the plaintiff ever been injured or made a claim before? Has the defendant doctor been sued before? Jurors believe that prior conduct is predictive of future conduct and always ask about it in focus groups.

D. Are there any rules or laws we can use to decide this case? Jurors like to know if there are any rules that apply. They also want to believe that what they are doing is fair. Rule violations are always good topics for focus groups, but if the rule suggested doesn't seem fair, rule violation may not be enough for a jury. The ideas of fairness discussed by focus groups often tend to favor defendants, e.g. "if it wasn't foreseeable should we hold the defendant liable, it was just an accident."

E. Is there a message that needs to be sent in this case? Jurors like to punish and effect change/send a message. Jurors don't naturally think about "compensation" or "making someone whole". They do think about and believe in punishing and sending a message. What are the admissible[3] bad facts that might motivate a jury to send a message? Two of them are anger and disgust. I ask jurors, "does anything anger you or disgust you about this case?" Those are the facts that cause jurors to want to send a message.

Rule 3: Rather than a general exploration of issues, test the strengths and weaknesses of your case, but that means having some written analysis of what you have and what the opposition has - before you focus.

You can generally anticipate many (perhaps not all) of the problems in any case, and you probably have answers or an idea about what the answers are likely to be. Do the answers work? Before you spend time and money on a focus group, analyze your case (and the defendants' case) in writing.

The following is a simple, but workable example of how to capture this information and plan what is important to prove; whether it will come from written, oral, and expert discovery; and provides a structure to identify any documents, photos, or exhibits that are required or part of the case. In actual application you might print this on legal or letter size paper, or you might have it laid out on large poster size paper.

Fact/Issue	How Proven	Exhibit	Defense Response	Our Counter	Evidentiary Issue(s)/Motions

I've incorporated a column here for "Defense Response". In addition to a frame, conclusion, fact or opinion that helps the defense, it should also include documents or other evidence that helps them.

The "Our Counter" box is the reminder that defense positions (even when considered trivial) cannot be ignored. What do our jurors say in response to those defense positions? What are we giving them that makes those positions irrelevant or immaterial?

Rule 4: To get valuable and reliable information, do multiple groups, provide balanced presentations, and check the list that follows.

Here is a laundry list that is instinctive among professional trial consultants that do dozens of focus groups every year, you should make these items second nature if you are doing your own groups:

They seek out and test key exhibits and photos for both sides.

They use balancing arguments or exhibits whenever a strong document or picture is introduced that favors one side, e.g. a document showing bad conduct must have some balancing ar-

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gument made.

They ask "Why?", a lot.

They assume the first response from a focus group member is not everything they know and they ask "What else?"

They recruit participants that will provide robust discussions and always include some jurors they anticipate will be strongly pro-defense, and some they believe will be more plaintiff oriented.

They favor multiple groups over longer exercises or bigger groups.

They moderate discussions to get as much information as possible from the group in the time that is available.

They ask focus group members with different positions to explain to one another what facts support their positions.

They promote "scaled" responses to key issues rather than "yes" or "no".

They keep focus group members actively involved and thinking throughout the process by doing things such as:

Asking someone to be an "Investigator" and describe what they would do to get to the bottom of what happened;

Asking someone to act as the attorney for the plaintiff or defendant and argue one or more points;

Asking them how they would describe the case to someone in just a few sentences, like at a cocktail party, water cooler, or in an elevator:

Asking them to fill in the blank on sentences (appropriately selected for the case) such as:

> The defendant should have/was wrong to;
> The plaintiff should have/was wrong to;
> The person I most want to hear from is;
> The evidence that was most important to me was;
> The victim in this case is because;
> The best thing about the plaintiff/defendant's case is;
> The worse thing about the plaintiff/defendant's case is;
> This never would have happened if;
> This would never happen to me because;
> The (landmine) doesn't make any difference because;

Tell them to pretend that the moderator is the plaintiff/defendant. What do they want to ask of the parties to the lawsuit?

Rule 5: Avoid the well known errors that could undermine your effort and the information you receive; they are easy to correct.

Professional trial consultants that do dozens of focus groups every year will constantly consider some or all of the following when designing focus group exercises for cases:

1. You cannot test every issue in a case in a single focus group. When you try to do so, the results are likely to be superficial and should not be depended on for case critical decisions. The answer? Do more groups with fewer issues;

2. Asking about damages - Asking for an amount of damages without a full, balanced discussion is useless at best, grossly misleading at worse. The numbers suggested in a focus group cannot be counted on as reflecting what a jury will do after days of trial, including days of observations of the parties and their counsel. Instead, ask them what facts would motivate them to give money, what would motivate them not to give money.

3. There is a price in both time and content when jurors are required to complete multiple questionnaires in lieu of live discussion. Deliberations are verbal, not written. Making jurors write constantly loses the possible juice from live discussion. – including themes, analogies and rebuttals.

4. You should not compel jurors to read a lot of information. It is difficult for people to absorb written information in a short time. If the content is includes technical terms or unfamiliar concepts that is doubly true.

5. You should avoid any disclosure that might allow them to conclude who you want to "win". This means, when economically possible, avoiding groups in your office, identifying yourself as a lawyer for the party, and in general doing things that give yourself away.

6. Once jurors have come to a conclusion about an issue, do not introduce "new proof" to see what might happen such as "What if there was evidence that….". Regardless of the importance of the proof, presentation late in the deliberation is more likely to result in jurors saying it didn't make any difference. Instead, do another group and introduce the fact/evidence before the jurors have come to a conclusion; then you can get a fair test of the impact of that evidence.

Rule 6: Focus groups can unsettle you and make it difficult to grasp the real and total content being provided. Video the groups and transcribe the discussions (and read the transcriptions).

Watching a focus group talk about your case can be emotionally draining. A single comment or discussion can be such a distraction that you may not be able to hear or see much else. When

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most focus groups are completed the lawyers involved have little idea what to do next, or even what was important. That will never happen if you follow a few simple steps, but first video the group and transcribe the discussion.

It is impossible to run a group yourself and take notes or remember much detail about the discussion. A video recording can capture more than any of us can remember, but realistically they are rarely reviewed by lawyers who do focus groups and have them recorded. It simply takes too much time to "re-listen".

An alternative and supplement to recording the discussion is to take notes (either yourself or by an "informed observer") of the following:

1. When a juror makes a defense oriented argument –
   a. Note what the argument is
   b. Note whether there is a plaintiff response (or that there are none)
   c. Note whether or not the plaintiff response is effective
   d. Note any analogies or life experiences used by the jurors to support their positions

2. When a juror makes a plaintiff oriented argument –
   a. Note what the argument is
   b. Note what the defendant responses are (or that there are none)
   c. Note whether or not the defendant response is effective–
   d. Note any analogies or life experiences used by the juror to support their positions

3. Whenever a juror uses an analogy "it's like …" make note of what they use.

4. When a juror summarizes what they think is going on – make note of their word choice.

5. When a juror consistently takes a pro-plaintiff or pro-defense stance, review the juror background information to see what about their background may be contributing to their positions on liability.

"Informed observers" can be someone from your office, but they need to be familiar with the facts of the case, the defenses that have been raised, and the points discussed above.

Rule 7: Recruit focus group participants that will provide robust discussions and insights that will make a difference in your case.

The average law firm using "do-it –yourself" focus groups spends little time working through who will be in their groups. The "do-it –yourself" law firm, or untrained "trial consultant" will select random demographically balanced groups at best. More often they are nothing more than "frequent flyer" volunteers from Craigslist or the classifieds. Whether the conversations are robust or provide powerful insights on a case is mostly a matter of luck. It's more likely that there will be some people who will say little unless prompted, and others you may have difficulty shutting up. For most cases, the recruitment should focus on those who scare you as jurors, including some that know enough about the subject to be dangerous, and others who are likely to look at things differently and provide just the right amount of disagreement. How do you find those people? The fair answer is that they are all around you, ready to be asked. Unfortunately that is not realistic for most law firms. The better answer is that you find and pay a reliable recruiter to find your focus group participants, and you give the recruiter detailed information about what you need for each group. If you do 5 focus groups, you may not have the same profile in any of them, or you may have exactly the same profile. It depends on the strategy you have chosen for your case.

CONCLUSION

We all need fresh eyes and ears on our cases. Without that, we are blind to the case as it really is. Focus groups can help solve that problem, but they can also encourage people to settle cases that should be tried, and try cases that should be settled. That makes them dangerous. Intelligent, planful, and repeated use of focus groups in a case can help you realize case outcomes beyond expectations. For more information about focus groups, including the use of screener, questionnaires, and discussion analysis see our new book:

Focus Groups – Hitting the Bulls Eye
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1. Confirmation bias is a principle that has been written about for more than a thousand years but it's application to lawsuits and how we see them was first popularized by attorneys David Wenner of Arizona and Greg Cusimano of Alabama as part of their research on jury bias.
2. Suggesting that something is important to a case is an example of "priming". It introduces bias about facts that may be interpreted differently due to your word choice.
3. Focus group results can be completely misleading if the group(s) are provided "evidence" that may not be part of the real case for evidentiary or other reasons. That kind of evidence should generally be left out of focus group presentations.