

Proper Use of Focus Groups in Civil Litigation

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Focus groups are more important to civil litigation than you may think. Dr. Richard A. Krueger, describes focus groups as: “(1) people, (2) assembled in a series of groups, (3) possessing certain characteristics ..., (4) providing data, (5) of a qualitative nature, (6) in a focused discussion. “ Focus groups were designed for attorneys to test their case theories and strategies on a sample “jury.” The tests produce a meaningful method for the attorney to try his or her case. Some consultants suggest that focus groups do not determine a jury’s vote, but the information gathered can determine how the jury reacts to different information. While focus groups are extremely helpful in forming trial strategies, it is imperative that each attorney understand the concept and structure of focus groups.

This presentation is designed to introduce attorneys to the advantages of focus groups, and how focus groups can improve trial advocacy. This paper will discuss: (1) the purpose of a focus group, (2) the neutrality of recruitment in focus groups, (3) how focus groups are used, and (4) the cost of using focus group consultants.

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I. Purpose of a Focus Group

Focus groups originated nearly 80 years ago as an advertising tool. The groups would identify consumer attitudes toward the marketing of a particular product. The group allowed a test market for the marketers to save money and change any flaws with the product before placing that product on the market.

Legal focus groups are designed to allow attorneys to bounce the ideas of their case off a sample jury. This “sample” jury provides the attitude and feelings that a layperson would have about the case. Not only does a focus group allow a potential juror to respond to the evidence, theme, and exhibits of the case, the group also allows the attorney to see how the group will respond. A huge incentive for focus groups is to unravel any latent problems or glitches the case may be hiding. These problems may lead the attorney to settlement, or may simply be resolved by presenting the evidence of the case in a different way. In a brief period of time, it is important to present the strengths and weaknesses of both sides of the case. An attorney must be aware of any flaws the case may have.

Focus groups may be used in: (1) identifying issues, (2) developing a theme, (3) developing effective persuasive arguments, (4) designing voir dire questions, (5) determining the effectiveness of a witness, (6) analyzing damages, (7) determining how to combat defenses, and (8) testing demonstrative evidence. The underlying purpose of focus groups is to understand what makes sense from a presentation standpoint, and to formulate the concept and the structure of the case in an appealing way for the members of the group.

Focus groups allow attorneys to understand and develop the juror's colloquial language in order to formulate a smooth presentation when the actual trial begins. Understanding the jury can be a considerable benefit for an attorney. The focus group will allow the attorney to understand how the jury listens and retains certain information, and to determine what information they find the most persuasive. Discovering the thoughts and choices the jurors have will enable the attorney to see which kind of jurors are likely to benefit his or her side of the trial. When the attorney determines the type of juror he or she needs in the jury box, the attorney will also be able to develop sound voir dire questions in preparation to strike a juror for cause.

While an attorney will gain valuable knowledge in a focus group presentation, the knowledge will be useful for voir dire questioning, and opening and closing statements. Jury consulting firms suggest that there is less emphasis on jury selection today because the primary focus is on trial strategy and jury persuasion.

Ultimately, attorneys should greatly benefit in developing case themes, discovery, witness preparation, evaluating strengths and weaknesses of the case, determining damages, improving voir dire, tailoring the message, developing a social theme, creating empathy, inoculating against the defenses, and testing the skills of the advocate. To further increase the learning curve, the attorney should have observers take notes and provide their opinions. Even though the focus group session may be videotaped or recorded by a court

reporter, acquiring an outside observer's opinion can be valuable in understanding the group members thought processes.

II. Neutrality of Recruitment in Focus Groups

A focus group should not be held in the attorney's office. Any association with the attorney could sway the focus group, and the results would not be accurate. Recruiting group members can be accomplished through newspaper advertisements, notices in the community, an old jury list, marketing research company, or a database compiled by a consultant. While groups may be conducted through e-mail or a website, the results may not be as effective because the attorney will not be able to view the jurors' body language and attitude toward the attorney's case. An example of a focus group solicitation ad follows:

Jurors Wanted

To share their opinion in a mock jury trial on Saturday, August 10, 2006, from 9-5. The mock trial will be held at Embassy Suites, 108 Commerce Drive. The pay is \$100 per person with breakfast, lunch, and beverages provided. You must be a Montgomery County resident; 18 years or older; speak and understand English; and provide your own transportation. Dress comfortably/casually. Photo identification required. Please call 334-555-8888 before 7/26/06 if interested.

Focus group members are paid, and should be provided with refreshments and breaks. After members accept the invitation to participate, a confirmation letter should be sent, and the attorney should plan ahead in the event of no shows. To obtain the neutrality of the members of the focus group,

the attorney can be present at the meeting, but should never disclose which “side” of the case he is on. The meeting should be conducted by a facilitator that can obtain feedback among the members.

An ideal focus group consists of 8 to 10 participants. The attorneys can attend their focus group meetings, but attorneys should give serious thought as to whether they can present their case in a neutral manner. If you fear you cannot, an outside facilitator or trial consultant is a good idea. A facilitator’s duties include: (1) preparing a list of participants, (2) assisting with the presentations of both sides, (3) preparing an agenda, (4) requesting cash from the accounting department to pay the jurors, and (5) providing maps to the facility for role players and witnesses. A facilitator is also in charge of communicating with the focus group members and facilitating a discussion about their thoughts and feelings toward the case. I would personally suggest attorney participation and a facilitator.

III. How Focus Groups are Used

Most consultants suggest that focus groups should be used earlier in case preparation, rather than later. At first glance, this may not make sense to you. But, forming a focus group early can signal what should happen with the case—discovery, settlement posture, etc. Preparing for the next step can save a client money. If a client is set on a settlement offer or demand, a focus group may allow the client to see what could happen during a trial.

There are three potential focus group format options. The first option is the concept focus group. A concept focus group is issues-oriented, informal, less time-consuming, and quickly sets out the strengths and weaknesses of a case. With this format, the group members can ask questions and talk about what issues they have with the case. The concept group should only last about two hours, and the facilitator should present information in a fact neutral, chronological, and non-persuasive way. The notion of a concept focus group is to present the group with an idea and then take their reactions and perceptions to determine what they will use as filler. Filler is what the group uses to describe facts that they will accept as if they heard them, when they actually did not.

The second option is a summary trial. A summary trial is brief, no more than a 10 or 15 minute summary of each side's evidence, and the process is more formal than the concept format. Also called a structured focus group, this group does not allow members to discuss matters as freely as they would in a concept structure group. The structured group allows an attorney (or facilitator/consultant) to give a combination of the opening and closing statements for the plaintiff and defendant, and then the group members receive limited instructions and an opportunity to deliberate. The facilitator then discusses the group's verdict.

Last is the mock trial, which is a mini-jury trial. If an attorney needs superb results, he or she can include voir dire, an opening statement, play video deposition clips, and test exhibits. Mock trials usually last a great deal longer than structured focus groups. The mock-trial has the added benefit of allowing

the attorney to secure the attitudes, impressions, and deliberations of the group. A mock-trial is more beneficial if used toward the end of case preparation, after utilizing the information gained from the concept and structured focus groups.

IV. The Cost of Using Focus Group Consultants

Focus group fees vary by consulting firms. Fees often include: “(1) advertising for participants, (2) time spent pre-screening and selecting potential applicants, (3) rental of conference rooms, (4) fees to the participants, (5) expenses related to videotaping the procedure, and (6) consultant’s fees.” For example, a New York jury consulting team is likely to charge \$30,000 for focus groups, \$60,000 for a mock jury trial, \$100,000 for a shadow jury, and \$125,000 for a sophisticated electronic presentation. The financial restraints and the lawyer’s needs decide the functions of the focus group.

Although hiring a jury consultant can be beneficial in focus group discussion, a consultant is not necessary. An attorney can work diligently with his or her staff to achieve the group’s main purpose—identifying the issues that help or hurt the attorney’s case. If the focus group is conducted properly, then the outcome will be time and money well spent. However, there are several steps to follow to prevent squandering away a client’s money.

The first way to lose big money is to let the focus group determine which side the attorney represents. When this happens, the group will only make statements they think the attorney wants to hear, and they will not divulge their true feelings. Second, the attorney must present a balanced case in order to get

an honest response. Third, the attorney should make sure to present the positive and negative aspects of his or her case, as well as the positive and negative aspects of the defendant's case. The test group needs to hear the story in its entirety. Fourth, an attorney should focus on the issues of the case and not his or her ego. Fifth, prepare, prepare, prepare. Sixth, an attorney should tape the focus group discussion in order to review the tapes later with the client or jury consultant. A focus group will give honest responses if the camera is placed on a tripod with no operator. And last, an attorney should not foolishly believe that a focus group can predict the outcome of his or her case. The focus group does not have all of the real evidence that a jury will, so the focus group should be used to teach the attorney about the case.

V. Conclusion

Focus groups are beneficial tools that can teach attorneys how to modify their case and get ready for trial. They provide relatively new and productive ways for attorneys to learn and understand the psychology and communication required to present their case to a jury. When conducted properly, focus groups will present flaws in a case while there is still ample time to correct those flaws.

Sources include:

Gregory Cusimano.

Jill Peterson Holmquist, J.D., Richard Jenson and Martin Q. Peterson, Ph.D, Uses of Focus Groups in Litigation Research (last visited July 24, 2006) <www.howardnations.com/focusgroups.focusgroups1.html.>

William P. Lightfoot, Thirty-Five Uses of Focus Groups for Effective Trial Advocacy. Advocacy Track: How to Focus Your Case Cost Effectively. 1 Ann.2005 ATLA-CLE 103 (2005).

Kathleen Flynn Peterson, Focus Groups: The Key to a Successful Result. Advocacy Track: Psychology of Persuasion. 1 Ann. ATLA-CLE 189 (2003).

Leonard Post, Splashy trials keep jury consultants busy. The National Law Journal. March 29, 2004

Martha K. Wivell. Test Driving Your Case Using Focus Groups.