

Uses of Focus Groups in Litigation Research

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Although focus groups have wide application to an attorney's practice, it seems many attorneys lack familiarity with focus groups and their uses. People who know of them often think of the marketing field, where they are widely used for services ranging from taste testing to testing a new packaging design. Yet just what purpose they serve remains a little uncertain to most attorneys. A definition from an academic marketing researcher, Dr. Richard A. Krueger, describes them in terms of six characteristics: "(1) people, (2) assembled in a series of groups, (3) possess[ing] certain characteristics, ... (4) provide data (5) of a qualitative nature (6) in a focused discussion."¹ A broader definition given by a professional marketing researcher, Dr. Jane Templeton, describes a focus group as "a small, temporary community, formed for the purpose of the collaborative enterprise of discovery."² This definition, loosely construed, describes a jury quite well.³ The focus groups we describe can also be referred to as "simulated juries," whether they are convened to sit as a jury for a mock trial or for an informal discussion group.

The use of focus groups evolved out of changes in social science research that, until the 1930s, had employed individual interviewing for research.⁴ Social scientists became concerned about the validity of data taken by one person, from one person, using closed-ended questions.⁵ As a result, social scientists and psychologists began using "non-directive interviewing" employing open-ended questions that allow people to elaborate and explain themselves instead.⁶ When researchers started interviewing groups of people rather than just individuals using open-ended questions, focus groups came into being. During World War II, they were used in studies of motivation and morale in the military.⁷ After World War II, researchers began using motivation research for marketing.⁸

Focus groups provide attorneys and consultants with qualitative information, like insight into how people think, talk, and feel about specific topics.⁹ Focus groups have their limitations: focus groups do not predict how individuals on a jury might "vote."¹⁰ (The enormous number of

¹ Richard A. Krueger, *Focus Groups: A Practical Guide for Applied Research* (2nd ed. 1994), Sage Publications, p. 16.

² Jane Farley Templeton, *The Focus Group: A Strategic Guide to Organizing, Conducting and Analyzing the Focus Group Interview* at 4 (Rev. ed. 1994)

³ The focus groups we describe can also be referred to as "simulated juries," whether they are convened to sit as a jury for a mock trial or for an informal discussion group. See, Wayne Weiten and Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 *Law and Human Behavior* 71, 72 (1979)(defining simulated juries as groups asked to act, explicitly or implicitly, as a jury.)

⁴ Krueger, *supra*, p. 7.

⁵ *Id.*(citing Rice, Stuart A. (Ed.) *Methods in Social Science* (1931) University of Chicago Press.)

⁶ *Id.*

⁷ *Id.*

⁸ Templeton, *supra*. at 2 (quoting Wells, William G., *Group Interviewing* in Robert Ferber, *Handbook of Marketing Research* (1974).)

⁹ R. M. Bray and N. L. Kerr, *Use of the Simulation Method in the Study of Juror Behavior: Some Methodological Considerations*, 3 *Law and Human Behavior* 107, 119 (1979)(commenting that one advantage of simulated juries is that you can obtain real information that you cannot obtain from jurors.)

¹⁰ See, e.g., Vladimir J. Konecni and Ebbe B. Ebbesen, *External Validity of Research in Law and Psychology*, 3 *Law and Human Behavior* 39 (1979) (predictions by study participants of criminal defendants' bail amount and sentencing did not correlate with actual outcomes); Weiten and Diamond, *supra* at 71, 72 (noting that study participants know that their decision will not affect anybody, whereas jurors are "acutely aware" that their decision will affect a real person)(quoting C. Stephan, *Sex and Prejudice in Jury Simulation*, 88 *Journal of Psychology*, 307, 311 (1974)); Geoffrey P. Kramer and Norbert L. Kerr, *Laboratory Simulation and Bias in the Study of Juror*

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participants required to have an accurate sample is not feasible, in terms of cost or time, for most litigants.)¹¹ Likewise, they cannot tell you how widely an attitude or opinion is held in the venire.¹² You cannot rely them on to establish an accurate monetary value for your case; as great a temptation it is to ask, attorneys should not pin their hopes on the damage awards given by focus participants.¹³ They cannot replace quantitative, or statistically reliable, research—they are intended for developing qualitative information instead.

Despite the limitations of focus groups, they do provide valuable and reliable information.¹⁴ The kind of qualitative information developed depends in part on the format of the focus group interview, the information provided, and the kinds of questions asked or not asked during the focus group.¹⁵ Time does not permit an elaborate discussion of all aspects of potential results from focus group interviewing, let alone an exhaustive discussion of the merits of the uses we describe. Therefore, we will briefly introduce some of the many potential—and interrelated—uses for focus groups. You will find that focus groups yield a vast amount of information that can be of help to you.

Determine If a Change of Venue Is Appropriate

Use focus groups to determine whether people in your venue have biases such that a change of venue is appropriate, particularly if a large survey is infeasible.¹⁶ If your client is a member of a minority group in a community that is generally hostile to that group, you need to know early if people cannot view the facts objectively. You have the same problem if the case has received a great deal of publicity; again focus groups can help inform you. A caveat: Consider and research carefully the potential for your adversary to discover this information when you move for a change of venue.

Select Your Jury With Greater Confidence

We and many of our colleagues use information obtained in focus groups to assist jury selection.¹⁷ You will find focus groups especially helpful in identifying strategic questions for voir dire, particularly if you are permitted to converse with members of the venire in your jurisdiction.¹⁸ Such questions may be directly related to the events in your case or may relate indirectly to personal characteristics and experiences that seemed to have an impact on focus

Behavior, 13 *Law and Human Behavior* 89, 99 (1989)(stating that simulated results “should not be automatically or carelessly generalized to actual juror/jury behavior.”)

¹¹ Shari Seidman Diamond, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 *DePaul Law Rev.* 301 (1998)(noting that the sample size of 1,021 people was large enough to prove statistically significant.)

¹² See Konecni, *supra*, Weiten, *supra*, and Kramer *supra*. Eric Oliver aptly said a jury is likely constituted of 6 or 12 exceptions to the rules generalized from “the whole herd” of people. Eric Oliver, *False Alarm: Can Trial Consultants Ruin Juries?* 18 *Trial Diplomacy Journal* 13, 15 (1995).

¹³ This is particularly misleading, probably because they know their decision has no real impact as noted by Weiten, *supra*.

¹⁴ See, e.g., Bray and Kerr *supra* (“even highly artificial simulations are not inherently distorting and may actually inform us on relations of real significance...”). See also, G. Bermant, et al., *The Logic of Simulation in Jury Research*, 1 *Criminal Justice and Behavior*, 224 (1974)(finding that the less “realistic” the group, the greater the accuracy in predicting outcomes.)

¹⁵ Jeffrey T. Frederick, Ph.D., *The Psychology of The American Jury*, 306-307 (1987). We do not distinguish here between a focus group and a “mock trial,” as the latter is simply a more structured form of jury simulation.

¹⁶ Scott R. Tinsdale and Dennis H. Nagao, *An Assessment of the Potential Utility of “Scientific Jury Selection”: A “Thought Experiment” Approach*, 37 *Organizational Behavior and Human Decision Processes* 409 (1986).

¹⁷ See, Valerie Shea and Caroline Robbins, *Jury Consultant Article*, *Trial Advocate Quarterly*, Oct. 1995, 24 at 27.

¹⁸ Dr. Jo-Ellan Dimitrius reportedly “relied on voir dire questionnaires and formal and informal surveys” to guide her clients in jury selection in the infamous O.J. Simpson criminal trial. Davis, Marc and Davis, Kevin, “Star rising for Simpson jury consultant: social science and luck Helped Jo-Ellan Dimitrius choose sympathetic panel.” *ABA Journal*, Dec 1995 81 p14(1).

group participants' decisions.¹⁹ You might ask questions that reveal attitudes that suggest you want to strike a prospective juror from the venire or, conversely, that you would consider him or her an asset.²⁰ Questions might relate to anticipated weaknesses in your case that, when reframed, appear less damaging. If courts limit voir dire somewhat in your jurisdiction, focus groups can still give you clues as to how people of particular persuasions respond to typical questions.

Some researchers have criticized the use of pure demographic data in selecting jurors.²¹ Nevertheless, such data can be highly predictive when developed by qualified researchers.²² You do want to avoid relying on stereotypes when selecting jurors, but do not confuse demographic traits with stereotypes. You will find demographic data particularly helpful in jurisdictions where courts limit voir dire to a few questions about whether prospective jurors know the parties or the attorneys, whether they work in a particular industry, whether they can remain impartial, etc.²³

Together, the two techniques prove even more instructive. Interviewing focus groups members chosen with sophisticated selection criteria for qualitative, attitudinal characteristics can supplement traditional demographic survey research by reinforcing consistencies predicted and by giving the attorney clues as to why some members of a demographic group tend to conform or deviate from the predicted norm. When used in conjunction with focus group research, demographic data gives the attorney a wealth of information he or she can draw on for everything from jury selection to closing argument.

Develop a Unifying Theme

Although the concept of theme constitutes a fundamental aspect of writing, lawyers occasionally overlook the significance of its use in preparing for trial. Trial attorneys tell a story in multimedia format²⁴ and the opening, direct examination of each witness, redirect after cross, and closing correspond to book chapters. You want to choose a compelling theme (or themes) that will underpin the testimony of your witnesses, anchoring a diverse group of witnesses to a common message. Jim Perdue explained that "a good theme is simple, unique and easily understood as embracing the central facts and providing motivation for an adequate award"²⁵ Focus groups help you identify themes that resonate with people in your community.

Develop "Catch Phrases"

Develop your opening statement and closing argument based on ideas generated in focus groups. Focus groups are fertile ground for memorable "sound-bites." (The famous "if it doesn't fit, you must acquit" phrase in the O.J. Simpson criminal case reportedly came from a focus group.) Such phrases concisely and unforgettably sum up, metaphorically or literally, the theme you develop. They can also serve solely to sow seeds of doubt and skepticism.

Learn the Language Used By "Real" People

Focus group discussions reveal the way people like your jurors talk about issues. In trial, you want to speak to the jurors in the language they usually use; you will communicate the meaning

¹⁹ Roy Lachman, *AI, Decision Science, and Psychological Theory in Decisions About People: A Case Study in Jury Selection*, 19 *AI Magazine* 111 (1999); Diamond, *supra*.

²⁰ Lachman, *supra* and Diamond, *supra*.

²¹ See, e.g., Michael Higgins, *Ask and ye shall predict; good questions beat stereotypes when choosing jurors*. 84 *ABA Journal*, 16 (1998).

²² Howard Varinsky, a noted consultant, estimates that they can predict individual's verdicts 80-90% of the time. Higgins, *supra*, at 16, 17. Proponents of demographic research point out that the research is objective, in contrast to questions that people often respond to untruthfully because they do not recognize their biases.

²³ Art Patterson of FTI Consultants pointed out that sometimes the only information available about an individual is demographic information. Higgins, *supra*.

²⁴ Gerry Spence, *Let Me Tell You a Story*, *Trial*, February 1995, 74.

²⁵ Jim M. Perdue, *Who Will Speak for the Victim?*, 6 (1989)

you intend much more effectively. If you paraphrase you risk having your audience misinterpret your message.

Discern Trends in Differences of Opinion

Focus groups will help you determine how different socioeconomic or cultural groups view your case. People draw from their experiences when forming opinions and some groups have shared experiences that influence their viewpoint. Does your case involve issues that will likely divide people along those lines? Although individuals may vary, you may want to play it safe and assume that someone on the jury will share those feelings. Conducting homogeneous focus groups with different demographic groups is helpful in identifying and developing themes or different ways of talking about issues that will unify members of different groups. You can also draw upon those shared experiences when conducting voir dire to try to identify those whose beliefs may be prejudicial.

Discover Latent Biases, Expectations and Assumptions

Focus group discussions also reveal preexisting biases that people have. These may range from prejudices about certain ethnic groups, expectations about the character or conduct of people in certain professions²⁶, to hostility regarding the legal system or a particular law. Other opinions surface as well, such as differing views of personal accountability and the accountability of varying levels of management in business or related settings.²⁷ You may discover opinion trends that differentiate groups, e.g., a shift from accepting and requiring personal responsibility to blaming other individuals or entities, a trend many of you have seen in the “Generation X” age group. Similarly, you may discover that people’s assumptions of “the way things are” based on past experience interfere with their ability to hear and understand the facts.²⁸

Discover, Assess and Explore the Weaknesses in Your Case

The focus group discussion often reveals critical weaknesses you did not or could not see beforehand.²⁹ Sometimes lay people will reject a factual element of a case that you consider crucial. For example, the attorney and client may firmly believe that the defendant’s conduct was intentional but the facts, viewed by outsiders, do not support that allegation. In some cases, such a discovery may cause you to consider settling the case before trial. The focus group format allows you to probe the reasons for participants’ negative reactions to parts of your case and develop alternative viewpoints or discover relevant facts that cause participants to feel differently. You can, again, use this information to help you in voir dire.

Discover, Assess and Explore the Strengths of Your Case

Conversely, focus groups also reveal the strengths of your case.³⁰ When you identify the facts and arguments that people find most convincing, you can build a strong case on those facts.³¹ You might find it unnecessary to include everything that you or your client thinks significant; some details may lack relevance or importance in the eyes of jurors. You can use focus groups to assess whether weaker facts are still so very persuasive to a small group of people that they should be included. People interpret evidence differently and jurors can come to a consensus for very different reasons, even reaching their conclusions on the basis of entirely different facts. However, when you include every fact and argument possible, you risk confusing jurors and

²⁶ See, e.g., Louis Genevie, *Hidden biases among jurors in accounting malpractice cases*, The CPA Journal, Mar 1995, Volume: 65, Issue: 3 (Jurors have high expectations of accountants and the profession.)

²⁷ *Id.*

²⁸ Brian H. Bornstein, Ph.D. and Michelle Rajka, *Extra-legal Factors and Product Liability: The Influence of Mock Jurors’ Demographic Characteristics and Intuitions About the Cause of an Injury*, 12 Behavioral Sciences and the Law, 127, 129 fn. 2 (1994).

²⁹ Frederick, *supra* at 306.

³⁰ *Id.*

³¹ See, e.g., Galen, Michele, *The Best Jurors Money Can Pick*, Business Week, Issue: 3270 Jun 15, 1992.

diluting the impact of your strong evidence. In a series of focus groups, you can better determine what to use and what not to.

Find Out What Information Gaps Exist

You can learn in focus groups what questions jurors will have so you answer all of them at trial—since jurors cannot usually ask you questions.³² At times, the questions lay people ask will surprise you. Their questions will show whether you have adequately explained your facts and theories and where clarification or additional education is needed. They can reveal misinterpretations of evidence and facts that never would have occurred to you but could be exceedingly damaging to your case. You may find that they supply facts based on their own assumptions, also potentially damaging, when you omit certain details; this is called a filling defect. Testing your evidence with a focus group will help you locate and fill those gaps preemptively.

Witness the Deliberation Process

Focus groups reveal a great deal about the group dynamics at work in a jury.³³ Simply watching focus group members interact gives valuable insight to the deliberative process undertaken by jurors. Seeing the debate and consensus building of people who are often very different from one another can be extremely instructive, even encouraging. You can adopt for trial the arguments used by focus group members to convince and rally others.

Determine Whether Jury Nullification Is a Danger

In focus groups, you can find out if your case involves issues that would cause jurors to actually disregard jury instructions as to one or more elements of your case. In one case, we determined that many members of the community strongly resented government regulation, so they refused to consider holding the defendant in a wrongful death case to a higher standard of conduct than the minimum required by federal regulations. They simply refused to consider the evidence of negligent conduct and rejected the related jury instruction because of the strength of their political beliefs.

Determine How to Simplify Complex Issues

Focus groups give you the opportunity to learn how to deliver complex information and concepts to jurors in a way that is easily understood. Focus group members will alert you to the need to establish the “basics” of concepts that are not as familiar to others as they have become to you. This is especially important in cases involving highly technical issues.

Help Prepare Expert Witnesses

Use focus groups to help expert witnesses understand the knowledge (or lack thereof) that lay people have of their fields. An expert who works with “real” people can observe the thought processes lay people go through when grappling with the expert’s testimony and can better tailor his or her testimony to the needs of the jury.³⁴ You can use focus groups to test various ways that the expert can present complex information, and use them to determine who among several experts communicates a given topic most effectively.³⁵ As a result, you can better prepare the witness for actual trial.

Help You Prepare Lay Witnesses

Lay witnesses generally have no experience in deposition or in court. Not only do they find the environment intimidating, they need to understand that the rules of communication differ from those we use in everyday communication. Every word, every gesture, every inflection has

³² Walter F. Abbott, *Surrogate Juries*, §5.01(d)(3) p. 183 (1990).

³³ Frederick, *supra* at 306.

³⁴ *Id.* at 307.

³⁵ William S. Bailey, *Expert Witnesses in the Sound-Bite Era; Keeping Jurors’ Attention*, *Trial*, Feb. 1993, 65.

meaning. Focus groups can help you understand and avoid misinterpretations of your client's testimony.³⁶

Focus groups can also serve to enable you to assess the way witnesses (including your own clients) are perceived.³⁷ They can help the lay witnesses themselves as well. In some cases, we have used them to modify the self-presentation style a witness has—**not** the content of his or her testimony, but the external nonverbal cues he or she gives. This can be useful with witnesses whose outward appearance and demeanor contradicts, in the eyes of others, his or her self-perception. If you consider using a focus group for this purpose, carefully consider the costs and benefits to the individual and, if you do, you and the consultant must delicately moderate the discussion to avoid wounding the witness. You want a qualitative feedback tool, not a club to bludgeon the witness into conformity.

It is imperative that you and the witness understand that the goal is to communicate the truth and you are not in any way seeking to change the substance of his or her testimony. You are not asking the witness to commit perjury nor telling him or her what to say.

Develop Your Trial Strategy

Focus group data will assist in planning your trial strategy.³⁸ The information you obtain about the strengths and weaknesses of your case helps you to highlight compelling issues and arguments in trial. Use focus groups as a testing ground for determining the best order of presentation of evidence and witnesses.

Develop and Improve Demonstrative Exhibits

Visual exhibits are very important because they clarify and reinforce the evidence jurors hear so they can remember it better.³⁹ Ask focus group members what demonstrative aids, such as time lines, photographs, video recordings, computer simulations, and text enlargements they need to help them understand, piece together and remember the evidence. You can determine what aids are essential, what are ineffective and what may be superfluous. You may find that you need some “hard copy” aids, from jury books to regular poster board exhibits, to supplement the viewing of exhibits stored on CD-roms and viewed via television-style monitors. You can also improve the clarity and quality of demonstrative evidence you have prepared and test the best order for and timing of their presentation, i.e., in opening, when the witness is testifying, and/or at closing.

Prepare for Trial

You can use focus groups as a way of preparing for trial while obtaining instant feedback. You can practice your voir dire questions, your opening statement and closing argument, the way you physically handle exhibits or multimedia presentations, and any other details that concern you.

Improve Your Own Presentation

Although this requires real receptivity and a thick skin, focus groups can be very helpful in assessing your own presentation. Use focus groups to obtain feedback about extra-legal components of your presentation: what do they like; what bothers them; can you be heard and understood; does your intonation communicate what you want it to; does your clothing distract jurors or subtly detract from your case?

³⁶ Aaron Abbott and Adam Davis, *Pre-Trial Assessments Make Witness Testimony Pay Off*, Risk Management, Jun. 1989, 36.

³⁷ V. Hale Starr and Mark McCormick, *Jury Selection* 731 (1993)(referencing the “credibility study”).

³⁸ Donald E. Vinson, *The shadow jury: an experiment in litigation science*, 68 ABA Journal, Oct 1242-1246 (1982).

³⁹ Donald E. Vinson, *Jury Persuasion: Psychological Strategies and Trial Techniques* 185 (1993).

Interview Real Jurors

Use the focus group format for interviewing actual jurors, whether they served for a case similar to yours or actually served in your case. They will tell you what impressed them, what annoyed or distracted them. It can help you recognize pitfalls that you overlooked and learn what you do that is effective and what you do that is less effective. Often jurors comment about the opposing attorney's style, which provides you additional insight.

Enlighten Your Client

Occasionally, focus groups serve, intentionally or unintentionally, to convince your own clients of their unrealistic expectations and lead to a change in attitude. Such expectations include excessive confidence in the effect of a witness's testimony, their "right" to an award of damages for a particularly weak element of their case, expectations of an astronomical verdict, and unjustified certainty of a favorable verdict. Sometimes the results convince your client of the need to settle. In these situations, the focus group becomes a subtle tool for controlling your client.

Induce Settlement

You can use focus groups for the sole purpose of developing persuasive settlement brochures to encourage your opponent that settling is in his or her best interest. Settlement brochures need not be limited to paper; a videotape, developed with the aid of focused interviews, that tells your client's story in the same compelling way that you will tell it in trial can be very effective.

Enhance Alternative Dispute Resolution Proceedings

Use a focus group in alternative methods of dispute resolution in lieu of a jury or a single trier of fact. Focus groups can be used in mediation to help the parties view their case realistically and come to a rational settlement. Often convened as "mock juries," focus groups can be used as summary juries in arbitrations and mini-trials.⁴⁰

Use Focus Groups To Plan Your Litigation Public Relations Strategy

When you have a high profile case, using a focus group drawn from the community before or during trial can help you decide how you will handle and influence the public discussion of your case.⁴¹ The knowledge you gain will be useful in future cases as well, before, during and after trial or settlement.

Use Focus Groups As a Marketing Tool

Use focus groups to determine the best way for you to market your services to a community. Interview people about what they like and do not like in the various forms of advertisements to which they are exposed. Find out what types of information and presentation styles that your audience will view favorably so when they need your services, they think of you.

A Note about "Shadow" Juries

Some consultants use a focus group as a "shadow jury" that observes actual trial proceedings and then meets to discuss the day's events.⁴² We do not use this method ourselves, having found that a focus group cannot replace the unique individuals on a jury or the dynamics of those individuals working together. The danger, as with asking for verdicts, is that you will rely too heavily on such a group and not on the nonverbal responses the jurors are giving. This use has

⁴⁰ John P. Mello, Jr. *McTrials*, CFO, Mar 1998 Volume 14, Issue 3.

⁴¹ Andrea Ford, *D.A.'s Office Hired 'Focus Group' in Simpson Case; Acquittal Favored; Courts: Phoenix group made decision based on what they knew at the time.* Sep. 2, 1994, The Los Angeles Times Home Edition, Metro Section.

⁴² Donald E. Vinson, *Shadow Juries: Monitoring Jurors' Reactions*, Trial, Sep. 1983, 75 at 78.

drawn criticism from some who see it as a potential breach of professional ethics, so you would be wise to research the subject in your own jurisdiction before using one.⁴³

A Word of Caution

Focus group research is legitimately a part of your work product but, in some cases, courts have determined that such work product is discoverable. Your work product is particularly vulnerable when you have conducted any witness preparation in the focus group context. Take care to ensure that you understand the legal parameters of work product protection, the ethical obligations you have and the practical safeguards you need to employ to avoid compelled disclosure.

As you now know, focus group interviewing can be used for a variety of purposes that will benefit you. Multiple focus groups are especially helpful as they give you a better sense of the facts, technical explanations and themes that will persuade your jury. Using them early in the process can help you avoid unnecessary expense and effort and will assist you in getting ready for trial. In any focus group, the key is to let go of your own preconceptions and listen to what “real” people have to say. If you do, you will gain confidence and skill in communicating with your jury.

⁴³ See, e.g., Reese Erlich, *Shadow of a verdict; hired to mimic a sitting jury panel, shadow juries work at the fringe of ethical practice*, 11 California Lawyer 36 (1991).