



## The “Why” and “How” of Focus Group Research

by Douglas L. Keene

### Why focus groups?

**P**ROPERLY CONDUCTED FOCUS GROUPS are extremely useful in getting reactions to a wide array of aspects of the case. While it is not prudent to expect that the “verdict” of a small group research project will be repeated at trial, it is very likely that the same values, hot buttons, and sensibilities that engage the research group will resonate in the jury room.

- What do jurors want in the way of persuasive evidence? Brainstorm with them about the evidence that they used to come to their conclusions, and what additional evidence they would need to change their minds.
- What will a jury think of the witnesses? Show brief tape excerpts from depositions and solicit feedback.
- What sorts of demonstrative evidence will be helpful in getting this story across? Devise a focus group to examine what you have in mind and offer suggestions.
- What themes and language resonate most effectively with jurors who hear this set of facts? Lay out the story and get the group to describe their associations, impressions and reactions to the situation.

### The premise

Focus group participants are ideally very savvy. You are not looking for opinions off the street. You are looking for people who will influence deliberations when the jury room door is closed. To engage them fully in the process, it is important to elevate their role from partisan to peacemaker. The moderator should tell them that they are there at the behest of *both sides* in a dispute that is headed for the courthouse. The litigants are blind to what real people think of the case, and it is [the moderator’s] hope that the collective wisdom of the focus group will offer both sides a basis for coming to a resolution of the dispute without the need for trial. Their impressions and conclusions will be extremely important in that process, and

will be provided to the lawyers to share with their clients in a lengthy report. It makes the participants key players in an important process.

It is far less productive to allow them to think that they are working in the interest of one side or the other. That stifles openness. And this premise must be maintained with complete fidelity from start to finish. Never tell them anything different, or they will feel betrayed. If you lied to them about that matter, they are free to lie to you about their confidentiality agreement. Plus, you have stolen their good feeling about trying to end the conflict.

### Constructing your presentation

When preparing for a focus group or a mock trial, the goal needs to be to test the strength of the opposition, more than to see what the range of damages is or whether you will “win” at the end of a three-week trial. This is small group research, and it should not be considered predictive of a full jury trial. As all trial lawyers know, trials rarely go as anticipated. Rulings on evidence, performances by key witnesses, the composition of the jury, and myriad other factors all offer uncertainty about what will happen in court, and cannot be precisely replicated in pretrial research. What is far more reliable, though, are the values, sensibilities and evidentiary requirements of jurors in their efforts to understand what underlies the dispute. If you know what jurors are likely to find most compelling about the case, and the social and personal values that are likely to drive decision making, you are in a position to modify your trial strategy to maximize those effects.

The smartest strategy in conducting pretrial research is to construct a presentation that gives the opposition the benefit of the doubt on all unknowns:

- Assume all evidentiary rulings go against you.
- Offer a greater percentage of the evidence and case theories favored by the opposition.

- If you have evidence or testimony that is devastating to the opposition's case (the elusive "smoking gun") hold it back and see if the case survives its absence. You might introduce it after the deliberations start as additional data for consideration.
- If deposition video clips are shown, make sure that the segments used for opposition witnesses are as flattering as possible, and hold back on the best parts for your own witnesses.

The principle is that you want to challenge your case as vigorously as possible, in the way that a battleship is taken out to test seaworthiness before it is sent into battle. See what additional resources are required to meet your objectives at trial. Learn where the case springs leaks, and if it sinks completely, find out in time to bolster the weak areas.

### **Different groups for different objectives: concept focus groups, structured focus groups and mock trials**

Concept focus groups resemble a brainstorming approach to developing themes for trial. This approach is akin to the discovery phase of trial preparation, and is most often used in that time frame of the case development. Concept focus group participants serve as community attitude consultants, responding to issues and facts of the case, telling us how to construct the story, and guiding us as to the most important avenues to explore in supplemental discovery or depositions. They tell us about biases that are going to show up at trial, and provide ideas for how to deal with them. When land mine issues are encountered, they let us know, and give invaluable help on areas for discovery that have been overlooked.

Structured focus groups involve a set presentation, usually of facts and arguments that are anticipated at the time of trial. Structured groups, like mock trials, are also helpful for the trial team in that to do them well requires thorough consideration of what the themes and strategies of the opposition will be. The length of the group sessions, as well as the size and number of groups to be run, are areas of flexibility. A thorough report of the groups examines the value and impact of each element of the presentation, as well as addressing specific questions and issues of concern about the cases.

Mock trials are a more formal and thorough approach to case testing than focus groups, but the goals are similar. Mock trials typically involve presentations of evidence and argument, witnesses (either through video tape or live using actors for the opposing witnesses as well as the actual witnesses from your side), formal use of demonstrative evidence, evaluation of the impact of opening statements, witnesses, evidence and closing argument. Feedback from the mock jurors usually takes the form of observing their deliberations and having them (individually and/or as a group) complete mock verdict forms. This can be supplemented with additional questionnaires

at points during the trial presentations, as well as additional written questions at the end of the event. Normally, mock trials do not have moderated deliberations. Mock trials offer a more formal structure, closer to the style of a mini trial or summary jury trial, but what they can lose in the process is the information gleaned from teasing out the meaningful elements of the presentations that comes from skilled moderation of the discussion. For cases that warrant a mock trial, the normal approach is to conduct preliminary focus groups about crucial aspects of the case.

### **The form of the presentation**

In concept focus groups, the "presentation" is typically made by a very experienced trial consultant, sometimes with the assistance of one of the trial counsel to make sure the facts are immediately at hand when needed. Although it may look simple, it is actually the form of research that requires the most skill and experience. Many trial consultants do not conduct them at all. When it is done properly, however, the results can be remarkably productive.

The presentation is more like a brainstorming session with the jurors, telling them a bit about the story, and eliciting reactions from them about the facts, while also asking them what questions those facts prompt in them. The outline of facts and issues that are to be covered in the session is agreed upon with the trial team, and key documents and evidence are arranged ahead of time.

Over the course of the presentation, the scope is covered, although an energetic group often results in the order shifting somewhat. An experienced consultant will be able to get jurors to explain why their questions are meaningful to them, what they will do with answers in one direction or the other, the part the answers will play in their assessment of the case. The consultant can gauge which of those questions should be answered directly and which are better left unanswered at that point in the process. Skilled consultants are especially good at eliciting high levels of comment from jurors, and keeping the more talkative jurors from dominating the discussion too much.

In structured focus groups, the presentation options are very different. The first question is with regard to roles. The trial consultant in this case serves as a group host and moderator. He or she establishes with the group confidentiality issues and the value of their input, and sets the tone and agenda for the presentation.

When you conduct the focus group with an "adversarial" approach, more like what you would think of as being a mock trial, there are ways to structure it to get more useful results:

- First, have the trial consultant read a preliminary statement of facts not in dispute, and perhaps a brief statement of the positions of the parties. That takes the parts of the story

that are easy for the jurors to agree with out of the plaintiff's hands, and provides more balance to the presentation, both in terms of time and content. It also streamlines things.

- Second, have the attorney who knows the case best play the role of opposition counsel. They will know where the hot buttons are.
- Third, if you are going to show any demonstrative evidence, such as PowerPoint™ slides or graphics, make sure that there is balance in the plaintiff and defense presentations. If one side has a slick PowerPoint™ presentation and the other side is using a flip chart, the different presentation types can skew the results.
- Fourth, if there are going to be video clips from depositions, be cautious about whose voice is going to be heard on the tape, and whether the examining counsel sounds too interrogative. If the defense counsel is heard badgering his own client, the whole program can be seen as suspect by the jurors. The purpose of the clips is for jurors to get a feel for the likeability, credibility and personality of witnesses. That can take five to seven minutes. Select the clips to show the witness talking, and try to avoid long predicate speeches by counsel. If you want to have the jurors see the witness go through specific fact testimony, it generally takes more time, and time is often in short supply.

For structured focus groups, the presentations are done by trial counsel. One challenge that arises frequently, especially in small firms, is that only one attorney really knows the case. She is able to stand up and explain both sides of the case fluently. Unfortunately, in a focus group, there is no one that can play the part of the opposition with that level of fluency, unless a good deal of time is spent bringing them up to speed. Even then, the second counsel is often relying on notes, while the first counsel is relying on months or years of learning the facts. Jurors notice the difference, and they favor the more prepared counsel.

So what do you do? We suggest a creative modification for solo practitioners or those who do not have a second chair that is totally at ease with the case facts: the “mediator” approach. The mediator approach involves having the one attorney who knows the case thoroughly doing the presentation, but doing it as a third party neutral. They explain to the focus group that they have been asked by the parties to attempt to get feedback from real jurors about the merits of the case, in the hopes of coming to a resolution without the need for trial. The mediator offers an overview of facts not in dispute, and then offers the disputed positions of the parties.

What is very difficult for many trial lawyers is to take off the advocacy role and be neutral when that is called for, and be balanced in the characterizations of the case for both sides. If any imbalance in passion or argument is discerned by the jurors, it needs to be mildly in favor of the opposition. If there

are favorable facts or documents that are so damning of the opposition that they overwhelm the salience of other facts, hold them back until the end of the group, after the deliberations have largely taken place, so you can see how the case will fare in the event that the hot document is excluded. At the same time, if the explosive information favors the opposition, include it in your presentation unless its admissibility is highly questionable. The goal is not to “win” the focus group. The goal is to test the weaknesses of your case and discover strategies for dealing with them, and then assess the strengths.

### **Deliberate or moderate?**

When the presentation in a structured focus group is complete, you want to get the highest quality feedback from the jurors that you possibly can. It is the payoff for doing the exercise. So, how do you get it?

Deliberations in focus groups or mock trials can bring you to a consensus, or a near consensus, and give you an idea of how a deliberation might unfold. You provide a mock jury charge (with key questions and simplified instructions), and a presiding juror attempts to get people to discuss their views and their reasoning.

The drawbacks to this approach, in our view, are several. First, the jury, just like at trial, can be dominated by one or two people that drive quick decisions and suppress meaningful discussion. Second, the discussion is the most useful part of the process. That is where you learn why they feel as they do, what they might require in testimony or evidence to persuade them differently, and what parts of the case they liked and disliked the most. Their final decision is rarely based on the full scope of trial testimony, so the value of watching them deliberate is somewhat questionable.

Moderator-led discussions take a different path. The same juror questions are submitted, and completed by jurors individually. The discussion is guided to make sure that everyone is heard from, that no one dominates the discussion unreasonably, and that all of the key issues are covered as needed. If there is a gross misunderstanding of some part of the attorney presentations (which indicates the need to do things differently at trial to avoid repeating the confusion), the moderator is able to clarify the error before it derails the whole process. The moderator is able to remind the jury of some piece of evidence or theme that one side or the other thinks is key, and ask them whether they thought it was significant or not, and why. And finally, the moderator can provide additional facts about the case that the jurors have not yet been told. While all of this can be done in a deliberation-style group, it takes much more time, and time is what you have the least of.

### **Logistics**

Careful adherence to some key planning issues can make the case more effective. One rule of thumb is that while the most

expensive focus groups are not necessarily more useful than a mid range group, the cheapest ones are definitely less useful. When you factor in how much time you are going to spend on the case to do research, consider the hours of your time, your staff time, and the benefit you hope to attain. Make sure that your decision making is consistent with your goals.

- *Recruiting.* You want participants who resemble the jurors in the venue on a bad luck day for your case. When you look at the group, or see profiles of their attitudes and life circumstances, they need to be realistic. You do not find them in employment agencies (those jurors are generally much more liberal, have negative attitudes toward corporations, and are plaintiff-oriented). You do not find them by putting an ad in the classified section of the newspaper (for many of the same reasons). You do not want participants who have been in mock trials or litigation focus groups before, because you don't know what they were told, what their experience was like, and whether they have some appreciation that the premise may not be true. And most of all, real jurors are not professional jurors. There are some people in major cities who make a significant amount of money going from focus group to mock trial and back again.

Plaintiffs want focus group jurors who are mildly more conservative than the venue, and who will offer some resistance to their views. We skew the recruit very slightly in favor of people with a bit more education, because we want to know what the decision makers in the jury are going to think of the case. Remember, this is primarily a test of the problems in your case, not a pre-race victory lap. We use professional recruiters, and provide them with a detailed "screener" which forces them to find people of proper socio-economic, ethnic, employment and demographic diversity. It costs more, but it gives you a much greater likelihood of getting the kind of cross-section you need.

- *Paying participants.* Pay the jurors well. You will have jurors in the venire who have household incomes of over \$100,000 per year. If you want to know what these people (who tend to have more influence in deliberations) think of the case, they don't read classified ads for part-time temporary work, and they won't come in for \$25 and a hot lunch. For a four to five hour group, we typically pay jurors \$120-\$200, depending on the venue. Full day groups are between \$150-\$300 for eight to nine hours. Metropolitan areas in the northeast and west tend to demand higher participant fees.

- *Time.* There is never enough. If you are planning a five-hour group, you need to plan presentations that last no longer than two to two and a quarter hours, including all introductory remarks, evidence and argument. A four-hour group cuts presentation time back to less than 90 minutes. If you run longer than that, it ends up both overwhelming the jurors, and cutting badly into the payoff time (getting feedback). For a full day group, the total time for presentation can run as long as three and a half hours.
- *Report.* Most consultants distill the results of the group into a report. Do you want one? What you see in front of you as the group discusses the case is far too fleeting. You will miss a great deal, even if you are taking copious notes. You might take the video tape home, and a pile of questionnaires, but you are very busy and will not be able to spend the amount of time looking at it that you always intended. Plus, the questionnaires simply are too overwhelming to make productive sense out of without a system for analyzing them.

Most consultants write reports that do that work for you. It can be time consuming (thus, potentially expensive), but it covers key information that can turn a good exercise into an invaluable tool. Some consultants write brief summaries, while others don't include much direct analysis of juror comments and just provide impressions of key themes and issues. Others write comprehensive reports that lay out key features of bias, evidence, juror comments, the reasoning behind their ultimate conclusions, where the jurors got most confused or distracted, evidence they found most persuasive, and trial themes and strategies. Ask the consultant if you can see a redacted copy of an old report to get a feel for what kind of analysis you might expect.

Focus groups are not indulgences. They are increasingly becoming standard preparation for trial practice in significant cases. If you want a basis for recommending a settlement strategy to a client, a focus group (while not predictive of trial outcome) can be a good place to start. If you need to know whether a land mine in the case can be dealt with effectively, or how to maximize the impact of evidence, argument and story sequencing, this is your best way of knowing how confident you can be going to trial. ●

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