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## **EFFECTIVE USE OF “DO IT YOURSELF” FOCUS GROUPS**

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### **I. WHAT IS A FOCUS GROUP?**

A focus group is a group of people, hopefully representative of potential jurors, assembled to hear issues, facts or arguments relating to a lawsuit and provide feedback that will assist us, as trial lawyers, in making appropriate decisions at trial and in discovery. A more formal definition from an internet dictionary describes a “focus group” as noun describing “A small group selected from a wider population and sampled, as by open discussion, for its members' opinions about or emotional response to a particular subject or area, used especially in market research or political analysis.”

Or perhaps this definition from the Small Business Encyclopedia is most helpful:

A focus group is a marketing research tool in which a small group of people (typically eight to ten individuals) engages in a roundtable discussion of selected topics of interest in an informal setting. The focus group discussion is typically directed by a moderator who guides the discussion in order to obtain the group's opinions about

or reactions to specific products or marketing-oriented issues, known as test concepts. While focus groups can provide marketing managers, product managers, and market researchers with a great deal of helpful information, their use as a research tool is limited in that it is difficult to measure the results objectively. In addition, the cost and logistical complexity of focus group research is frequently cited as a deterrent, especially for companies of smaller size. Nonetheless, many small businesses find focus groups to be useful means of staying close to consumers and their ever-changing attitudes and feelings. By providing qualitative information from well-defined target audiences, focus groups can aid businesses in decision making and in the development of marketing strategies and promotional campaigns.

Used properly, focus groups provide invaluable insight to trial lawyers. A well-executed focus group creates an environment wherein participants are encouraged to provide thoughtful candid meaningful thoughts about issues that will be important in both the preparation and trial phases of a case. Unlike written responses to surveys, which are good for collecting information about people's basic attributes and attitudes, a focus group allows us to develop an understanding of potential juror attitudes at a much deeper level as well as explore whether initially communicated attitudes are actually held by the participant.

## **II. WHY DO WE USE FOCUS GROUPS?**

The simple answer as to why we use focus groups is to get better results for our clients. We are not “social scientists” curious about the mind-set of the average man. We are, instead, trial lawyers who are curious about discovering the most likely reaction to facts and issues in our lawsuits and how best to present those facts and issues for the benefit of our clients’ causes. We are not alone in this idea, as most trial lawyers believe focus groups will help them present their case in a more persuasive and effective way at trial. For an excellent academic paper titled “Use of Focus Groups in Litigation Research” authored by Holmquist, Jenson, and Peterson, see Howard Nations’ web site at <http://www.howardnations.com/publications.html>. Focus groups are helpful because they can help us identify issues, identify good and bad characteristics of potential jurors, point out the weaknesses and strengths in our cases, and test evidence and trial themes. Used properly, the exercise of using a focus group will help us learn to present our cases most effectively. Used improperly, a focus group can give us false confidence about a bad case, or, even worse in some ways, discourage us from pursuing a good case.

Atlanta lawyer Don Keenan once said: “People always want to tell you why your case stinks.” That is absolutely true, and it is perhaps the basic reason to use focus groups – to identify the parts that stink so they can be “deodorized” as best we can given the applicable facts and law. Before going to trial, it is essential that we are aware of the weaknesses in our case. If presented properly to the right group of participants, the members of a focus group are always willing to tell you about your case problems – assuming they have not been poisoned by

knowing what you want to hear. Generally we do not use focus groups to identify the strengths of our cases, although sometimes we are surprised when the panel likes a part of the case that we had not really thought was important. Mostly, we use focus groups to identify our weaknesses and learn how to deal with those weaknesses most effectively. But we also commonly use focus groups to help us understand the kinds of jurors to avoid and seek as well as to test demonstrative evidence. A properly executed focus group helps us analyze our facts, discover how our own biases might get in the way of effective case presentation, and learn the best tools to use in our persuasion efforts.

The real value of a focus group is that it allows us to probe opinions. Most of us have had potential jurors claim, during voir dire, to be in favor of damages caps. But on inquiry, these same jurors will tell us that they really don't believe in caps for "that kind of case." Similarly, in focus groups we are able to get past the initial knee jerk reaction to discover the root opinions necessary for us to make good litigation decisions.

### **III. HOW FOCUS GROUPS HELP US.**

**Evaluate the Facts from a Local Perspective.** Focus Group members help us evaluate the facts that are not in dispute as well as the facts that are hotly disputed. By using focus group participants who reside in the venue of our case, we are able to discover insights that are unique to people who live in the area. For example, in a case involving a car and a bicycle in an outlying county, being from Atlanta we did not initially think the major problem was the cyclist's decision to ride on a particular busy road. The focus group of people from the

area, on the other hand, very rapidly made it clear that only an idiot would ride on the road at issue and that our client's actions, not the driver's inattention, were going to be the focus of the jurors at trial.

**Evaluate the Facts from a Non-lawyer Perspective.** As lawyers we too often see the facts in the light of the governing law instead of how lay people will interpret these same facts. By using a focus group, we can eliminate this problem by getting the opinions of those whose judgment is not clouded by law school and a life behind a desk. For example, in a case involving a defective seat in a locomotive, we thought the best way to present the case was to emphasize the vigorous effort made by the plaintiff to adjust the defective seat before he was injured. The focus group, on the other hand, taught us that if the plaintiff worked on the seat for more than a few minutes he assumed the risk of his injury. In this particular case assumption of risk was not an available defense and thus not on our radar. Legally relevant or not, had we tried the case without focus group input we would have surely lost it.

**Determine the Most Effective Theme.** Most cases have several possible themes. At trial, however, we want to build our case around only the strongest themes. Focus group members will show us which theme will gain the most acceptance. Sometimes we can learn of a new theme or sub-theme from the focus group feedback. When testing themes, we do not tell the focus group about the theme we have in mind. Instead, using basic case facts we listen as the focus group members tell us about themes that resonate with them. Very often these are much better than the catchy themes we as lawyers think are so

clever.

**Test the Applicable Legal Theories and Issues.** Many times we think, “Assumption of the risk is not a problem in my case because the plaintiff has a legitimate reason for doing what he did.” Not so fast – better check that one out with non-lawyers who may or may not buy into our spin on the plaintiff’s conduct. On many occasions we have learned from our focus groups and discovered the best way to present our client’s conduct at trial. We have also been very successful in using focus groups to figure out how jurors will define certain legal terms that govern the case. Legal concepts such as “standard of care” or “proximate cause” are not always understood by lawyers. Therefore, getting an idea of how jurors might define and use these words is critical. For example, in one case the relevant statute used the term “unnecessary danger”. By learning from focus groups how this phrase was likely to be interpreted and defined, we were able to define it in a meaningful way early in our presentation and weave it throughout our presentation in a way we were confident would be readily accepted by the jury.

**Assess Juror Biases.** We know that all jurors have certain biases they bring into the courtroom. Focus groups help us determine whether there are any prevalent biases that jurors will have against our plaintiff or our case in general, or against the defendant and or the defendant’s case. Once we identify these biases, we can use figure out the best way to overcome them or sidestep the problem they create. For example, in a case involving a defective U Haul truck, we were able to discover that jurors were likely to believe that the trucks were

going to break down for lack of good service and use that in our case.

**Evaluate Trial Exhibits.** In our opinion, this is one of the most valuable uses of focus groups. Compelling demonstrative trial exhibits are critical to the success of a plaintiff's case, but developing those exhibits is a difficult exercise. Whether our trial exhibits were created by a professional or in-house, we must get some feedback on those exhibits before trial. We, who know the ins and outs of our case, may think a certain exhibit is clear, understandable, and devastating. It is certainly an eye opener when the focus group tells us that not only does the exhibit not make any sense but that it actually helps the other side's case. We use focus groups to test exhibits we have created as well as to get input on the kinds of exhibits that will likely assist our cause.

**Evaluate Damages.** With a focus group, we can review all aspects of the plaintiff's damages and see which elements resonate and which do not. We may learn that certain jurors find certain elements of damages most important, while other jurors prefer to focus on different elements of damages. We do not think that a focus group has much value in assessing the quantum of damages. However, they can help us identify which elements of damages have the most relevant value. For example, which is more damaging to the plaintiff: the loss of a finger or a scar on the face. This will help us determine the order of presentation of damages as well as the emphasis in our arguments.

We can also try out different ways to argue damages and see how the focus group responds. For example we can compare a per diem damages argument with a lump sum request.

**Prepare for Trial.** The more often we present the facts of our case and our argument before trial, the better we will present the case at trial. As we get used to telling the story to focus group we learn what is important, what needs detail, and what can be summarized. Similarly, the more often we think through our opponent's case, the better we be able to respond to it at trial. A focus group gives us the opportunity to present our case, or parts of it, to a live audience and to respond to our opponent's case.

**Leverage in Settlement Negotiations.** After conducting a focus group, we can tell our opponent that the focus group found clear liability on the part of the defendant (despite our slanting the evidence against the plaintiff), and that the group found the plaintiff's damages evidence compelling. We do not like to use the focus group verdict award as leverage because we do not find focus group verdict amounts to be particularly reliable. We simply tell our opponent, "All of the mock jurors awarded an amount in excess of \$500,000."

After we disclose our use of a focus group, we ask the defense lawyer if he has conducted a focus group, and if so, how his focus group decided issues of liability and damages. Defendants and insurance companies rarely spend the time or money on focus groups. If we are the only one who has done a focus group, our credibility and settlement leverage increases.

**Get Control of Our Client.** When our client has unrealistic expectations about his case, focus group results can give the client a cold, hard reality check. Not only will focus group research help our client understand the true value of his case, it will also help your client make better decisions about settlement. We



share the focus group information with the client who thinks he is sure to win by showing video excerpts of focus group members who are hostile to his case and likely to find for the defendant.

#### **IV. WHEN DO WE DO A FOCUS GROUP?**

We believe we should conduct a focus group early enough in the case so that we can use what we learn to make our case stronger. Because we usually do “do it ourself” focus groups, we can afford to do several as the case progresses. Too many trial lawyers wait until a few weeks before trial to do a focus group. By this time, however, discovery has long closed and the pre-trial order has been submitted. It is probably too late to develop a particular theme through deposition testimony of the opponent’s witnesses, identify a new expert witness, or create a sophisticated trial exhibit. By conducting the focus group much earlier, like in the early to middle of discovery, we can react to what we learn and develop evidence and themes in the remaining months of discovery.

#### **V. HOW DO WE CONDUCT A FOCUS GROUP?**

**Pay A Professional.** Many professional trial consultants will assemble a focus group for us, help us present our case to the group, provide feedback, and analyze the results. This is expensive. There is no question that professionals do a better job on a single group than we do. But the real problem is the “single group” that is used. Just like juries, we never know what any particular focus group will do. Therefore, we think that in many cases we are better off with several groups than we are with just one.

Keep in mind, the results of the focus group are only as good as the

consultant. An experienced and talented trial consultant can be well worth every dollar he charges; sometimes, unfortunately, we end up wishing we had done the focus group ourselves and find that we end up doing that anyway. Check with others for a recommendation before paying someone thousands of dollars to do a focus group.

**Do It Yourself.** This is easier than it sounds. Here is how our firm does it:

1. We decide we want to test our case with a focus group.
2. We call a temporary staffing company and ask them to assemble 7-9 people to hear about a lawsuit and answer questions. We want the participants to match the demographics of the trial venue, which typically involves some diversity of age, gender, and race. We ask for people who do not know each other. We insure that they are registered voters. And we seek people who we assume will be hard jurors for our case.
3. The minimum amount of time to hire temporary personnel from an agency is four (4) hours. In this amount of time, we can often get two cases tested, but usually we spend most of the time on a single case and perhaps just test an exhibit from another case.
4. Arrange for a conference room at a hotel in the area of the trial (Hampton Inn, Holiday Inn, etc.). Reserve the conference room for four hours, say from 1:00 p.m. to 5:00 p.m. We insure that the room is comfortable and arrange it in a horseshoe so everyone can see each other.

5. We put name “tents” in front of all the participants.
6. We make everyone complete a demographics questionnaire (attached) and a confidentiality agreement (also attached).
7. Everyone has a pad and pen.
8. We tell everyone that if they do not participate by sharing their opinions, they will not get paid. We also advise them that at some point during the day we might find it necessary to reduce the group size. This allows us to send the “crazy” participant home without too much disruption.
9. WE DO NOT TELL THE GROUP WHO WE REPRESENT.  
INSTEAD, WE USUALLY ADVISE THEM THAT WE HAVE BEEN RETAINED BY BOTH SIDES TO TEST ISSUES TO HELP THEM SETTLE THE CASE.
10. We decide, beforehand, what our goal is: to analyze facts, to test themes, to test a particular witness’s credibility, to test exhibits, etc.
11. We decide beforehand the protocol we will follow. Sometimes we just throw out facts, one fact at a time, and ask for responses. On other occasions we treat it like a mock trial with “clopenings” for the defense and plaintiff to see how the group likes the respective sides of the case. Usually we ask for the participants to write down their initial reactions on the pad. This enables us to see what their first thoughts are to a particular concept or fact before they hear the opinions of the other participants. About ten basic questions is all

that can be covered. We like to use these questions in most cases:

“What are your first impressions of what you just heard?” This is followed up by two questions such as "what else" or "how so" or "say more" to make sure we get the entire opinion. “Why?” is usually not a good question as it causes people to be defensive about their position. One of the best questions to ask in a case where we are presenting case facts to get general impressions about the case to have the participants complete the following sentence: "that would not have happened to me because . . . "

12. Don't hesitate to expel a crazy participant to protect the value of the day. Just thank them and send them home.
13. Never argue with a participant or express disapproval with what they say. The focus group is not the place to educate the public about the dangers of tort reform or the need for personal responsibility by doctors.
14. We set up a microphone and video camera to record the proceedings.
15. We take frequent breaks.
16. We answer questions about evidence the same way a judge would.
17. We often repeat the same program with another focus group – especially for case critical issues.

In four hours, we can usually focus group parts of two (2) cases. If we spend all four hours on the same case, we will get tired participants and

redundant feedback. We find the jurors are mentally sharper when you start a new case after awhile. This is also a cost savings. A four-hour focus group with 8 jurors at a hotel conference room will cost about \$1,000-\$1,500. Dividing this expense between two cases makes each focus group pretty cost effective.

**Internet Focus Groups.** Several companies offer online focus groups or web-based mock trials. We pull together a 5-30 minute summary of our case, record our case using a toll free number or submit the case in writing, and e-mail the exhibits to the company. If we desire, we can customize the questions for the jurors, or we can let the company prepare the questions. We can specify the State and the number of jurors we want for our case. Then, the company submits our case to the jurors and compiles the results. We can access and view the results online and print out the responses.

The advantage of Internet focus groups is similar to that for the “do it yourself” exercise discussed above: we prepare our case and submit it to the mock jury, not a professional. When we record our argument, it is one more opportunity to sharpen our delivery in preparation for trial. Also, with Internet focus groups we do not have the logistical responsibility of arranging the focus group; the company does this for us. Another advantage here is that we do not have to spend four hours with the mock jurors; we simply submit our case and wait for the responses. The turnaround time is quick, usually less than 48 hours. The cost is variable, from \$600-800 on the low end to over \$2,500 on the high end. The cost also varies with the number of participants and exhibits used.

The disadvantage to Internet focus groups is that we have no way to

follow up with jurors or conduct any interactive discussion about how they viewed certain parts of the case. In this sense, they are very much like surveys instead of focus groups. Once we get the results online, that is all we get. We have to hope that our jurors paid attention, took the exercise seriously, and provided meaningful feedback.

## **VI. CONCLUSION**

The use of focus groups does not have to be expensive or intimidating. A day with a focus group is not a trial. It is merely a day when people who are not lawyers tell us about issues from their perspective. How we use this information determines whether the day was worth the investment or not.