

The Focus Group For The Frugal

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Introduction

Wouldn't it be nice to be able to predict the outcome of your next jury trial before you even begin to present evidence? Wouldn't it be nice to actually hear a prospective jury deliberate on your case before you even stand up to give your opening statement? If you could hear the conversation your actual jury is going to have before you start the trial you would be able to structure the presentation of your argument and evidence in a way that is calculated to guide the jury to a more favorable result for your client.

This type of time travel, and perspective building is entirely possible with the use of a focus group. A focus group is a short version of a trial made to a group of people who give immediate feedback on their impressions of the facts presented¹. Focus groups provide information about how jury-eligible individuals are likely to respond to your case arguments, specific evidence and particular case facts².

Noelle Nelson, a Santa Monica Based trial consultant and author of "A Winning Case" (Prentice Hall 1991), gives the following definition of a focus group: "A focus group is a group of individuals who are brought together to give feedback on specific questions. Focus groups are held for any number of reasons and for varying lengths of time. They can accommodate all sorts of budgetary and time constraints."³

Any perception that focus groups are prohibitively expensive is false. It is very easy to complete a "Focus Group for the Frugal" for less than 500 dollars. Here's how it's done in its simplest form. Simply present the facts and evidence of your case to a group of people, and let them deliberate in your presence while being videotaped.

Here is an outline of the topics this article will be addressing:

1. Where To Find Your Focus Group Members?
2. How Many People Do You Need?
3. Get Background Information About Your Focus Group.
4. Give The Focus Group A Schedule.
5. How To Present The Evidence?
6. Do A Videotaped Direct and Cross-Examination of The Plaintiff.
7. Giving Your Focus Group The Law.
8. Give The Focus Group The Verdict Form You Hope To Actually Use At Trial.
9. How To Handle The Deliberations Phase?
10. Listening To The Deliberations.
11. Have Your Focus Group Sign A Confidentiality Agreement.
12. The Top Three Mistakes We May Make In A Focus Group.

1. Where To Find Your Focus Group Members?

The goal is to find at least 6 diverse, articulate people. Spending a lot of time trying to find focus group members that exactly match the demographics of your jury pool is not necessary. I ask the employment agency I use for 6 diverse people who are not afraid to talk, and can articulate their ideas in front of a group of people.

There are many ways to find your focus group. I have been using the Adecco employment agency in San Francisco, phone 415-434-3810. The cost for six people for five hours is about 490 dollars or 85 dollars a person for a 5-hour focus group. A sign in a church or an ad in the church news letter, "Wanted nine people for five hours on Sunday after church, pay is \$30's each, call....". Friends of co-workers, or actually having a trial consultant get the people for you are all fine. Go for the one that fits your budget.

2. How Many People Do You Need?

I have used as few as 5 and as many as 9 people. In my experience you will get a great deal of benefit with just five people and that will keep the cost down. The more people that are used the more likely the quiet people will get drowned out, and you end up just paying for a body. There is a point of diminishing return at about 8 people. Larger groups sometimes work themselves into a frenzy, with everyone talking at the same time.

Trial consultant Noelle C. Nelson, recommends a focus group of at least seven people. She also states it is important to use an odd number of people (7, 9, or 11). In her experience when an even number of people are used they tend to divide up into sides. Using an odd number of people keeps the group off balance and working.

Consider presenting your case to ten people then have the jury deliberate in two separate groups of five in a separate room. If each group comes to a difference verdict then put them all together and tell them to come to a joint verdict. Doing this may take away the snowball effect of one juror giving an emphatic opinion at the outset of the deliberations.

3. Get Background Information About Your Focus Group.

At the start of the focus group it is wise to have participants fill out a questionnaire including demographic items and questions about attitudes relating to issues in the particular case you are presenting. Make sure no one in your focus group is awaiting jury duty. This is especially true in sparsely populated areas. Later when you hand out your special verdict have a place for the participants name so that you may correlate their verdict form to their demographics on the questionnaire.

4. Give The Focus Group A Schedule.

The schedule should set forth the times for the various events that will be happening during the session. I believe it is important for the focus group to have a road map about what is in front of them in order to keep their attention.

Focus Group Schedule

12:00 -12:30 Introduction \ Questionnaire \ Confidentiality

12:30 - 1:00 Plaintiff's Opening Statement

1:00 - 1:30 Defendant's Opening Statement

1:30 - 1:45 Jury Break

1:45 - 2:15 Direct Examination of Plaintiff

2:15 - 2:45 Cross Examination of Plaintiff

2:45 - 3:00 Plaintiff's Summary

3:00 - 3:15 Defendant's Summary

3:15 -3:30 Jury Break

3:30 - 4:30 Jury Deliberations

4:30 - 5:00 Jury Deliberations with Attorneys Involved.

5. How To Present The Evidence?

Anyway you do it will yield huge results. I witnessed a very productive focus group where there was simply a plaintiff opening argument and a defense opening argument and then the group was told to go deliberate. Howard Varinsky a trial consultant from Oakland suggests “One attorney in the firm argues for the plaintiff or prosecution another for the defendant ...Each presentation should last about one hour and should consist of a conversational summary of the case and theory, including witnesses’ testimony.”⁴

Personally, I believe the process of direct and cross-examination is needed to paint a picture of the testimony in dispute. To take advantage of the benefits of direct and cross you may have your client testify by videotape, and have each attorney read from portions of deposition transcripts that favor their position, similar to what is done for an unavailable witness at trial.

Should the evidence be presented on videotape or live? Who doesn’t have a videotape camera and a VCR anymore? Taping your presentation is cheap, your secretary could press play and stop. Paul M. Lisnek, J.D., Ph.D. and trial consultant discusses this topic. “From a research perspective, videotape is preferred because several groups can be tested with a guarantee of control over the material. If conducted live, there could be a variation in the presentation among subsequent groups.”⁵ Personally, I believe the benefit of simply learning to verbally explain your case to a focus group in a live presentation is a great opportunity.

6. Do A Videotaped Direct and Cross-Examination of The Plaintiff.

The direct and cross of your client is a critical part of the exercise. I suggest using your client for maximum effect, plus it is great practice. Prior to the focus group have your associate or a contract attorney do a direct and cross-examination of the plaintiff on a videotape. That way the focus group does not recognize your voice on the video taped direct and cross-examination of the plaintiff. Further, since the plaintiff is on television and being questioned by another attorney you can tell the focus group that they are watching the actual plaintiff in the case without tipping the group off as to which side you represent.

7. Giving Your Focus Group The Law.

Keep it simple. In a negligence case the focus group certainly needs the instructions on causation, negligence, and both economic and non-economic damages. If your case is about a common carrier, give them the common carrier instruction. Actually hand them the instructions so they have a copy to follow along while you are reading the instruction out loud. Keep the instruction phase as simple as your case will allow.

8. Give The Focus Group The Verdict Form You Hope To Actually Use At Trial.

Time after time I have had problems with real jury’s interpretation of the special verdict. I am a believer in blowing up the special verdict in your closing argument in a real trial every time. The same holds true for a focus group. I believe in handing out a copy of the special verdict form to each member of your focus group. Tell them what each question means and how you want them to fill it out. Have your opposing counsel in the focus group do the same from the defense perspective. It is enlightening beyond belief to watch your focus group struggle through a special verdict form. If you think your special verdict

form is clear, understandable, and easy to read, just wait and see how your focus group interprets the special verdict form you hope to use at trial.

9. How To Handle The Deliberations Phase?

First instruct the focus group with some of the basic principles of jury deliberation from the BAJI 15 series. Tell them to pick a foreperson to lead the discussion and handle the voting. You may just make up what the vote has to be for them to reach a verdict on a particular question. It should be as close to a 9 to 3 ratio as possible in a civil case. Let them know you want them to deliberate on all the questions on the special verdict. For example, if they find no causation the case is over, but instruct them to continue through the special verdict anyway.

10. Listening To The Deliberations.

I used to believe that to do a focus group I would have to set up a sound and video system with one way glass to listen to the deliberations of the focus group, costing me a bunch of money. That is not true. Put the focus group in a circle, then you and opposing counsel may just sit off to the side, about 15 feet away. This works great. After conducting about 10 focus groups I do not believe that being in the room causes the focus group to be any less candid. I once believed that videotaping the deliberations would make the focus group nervous as well, which is false. Focus group members have no problem knowingly having their deliberations videotaped. Simply bring your video camera and turn it on.

11. Have Your Focus Group Sign A Confidentiality Agreement.

When I was putting together my first focus group I became nervous about creating nine witnesses to my client's admissions and or prior inconsistent statements. I suggest keeping the fact that you have had a focus group secret. You do not want the defense getting up at trial and saying to the jury, "the plaintiff had one of those fancy focus groups you heard about during the O.J. trial."

To protect against this type of potential danger, I typed up a simple confidentiality agreement, which indicated that for the purposes of the focus group each participant was an associate of my office and that everything they heard was a confidential, privileged communication. At the beginning I told the group that they would have to sign a confidentiality agreement, making sure no one objected on the spot. It was not until the end that I actually handed out the confidentiality agreement disclosing what side I was on and that everything they just heard was confidential.

Here is an example of a confidentiality agreement that was submitted by Kathleen Flynn Peterson as a part of her article, "Strategic Planning: Test-Driving Your Case Through Focus Groups", presented at ATLA's Case Workshop Program in Santa Fe, New Mexico in April 1998:

As a focus group juror, I understand and agree that any and all information including, but not limited to, oral, written, graphic, or physical evidence, relating to the case, is privileged information, and I shall not reveal or disclose such information to any person or entity without the express written permission of *this office*.

It is my understanding that the information exchanged here is the attorneys' work product. Furthermore, if after this focus group is completed and I learn the identity of any of the principals in the actual case, I further agree not to discuss the case with my fellow surrogate

jurors, arbitrators, attorneys, witnesses, parties, or any other person or entity without the express written permission of *this office*.

If I should be called to serve in this case as a juror, I agree to immediately inform the judge that I have knowledge of this case and therefore cannot sit on this case as a juror.

I recognize that this is not a legally binding proceeding, but I also recognize that it is most important to the parties and the attorneys. Therefore, I promise to give true and accurate responses, to the best of my ability, to the questions put before me.

12. The Top Three Mistakes We May Make In A Focus Group.

Here are three mistakes to avoid. Noelle C. Nelson the Santa Monica based trial consultant mentioned above provided the first two common pitfalls.

1. Not preparing the opposing side of the case to its full extent. A presentation that only gives the focus group the good news, without a full throttle dose of the bad news is a waste of time. If anything over prepare the defense side of the case so you don't miss out on any of the bad news. Noelle Nelson notes in her article, "Jury studies show that the opinions of mock juries are of value only when the jurors have the opportunity to hear both sides."⁶
2. During the debriefing phase, put your ego aside, and do not argue with the focus group. The best approach during the debriefing phase, when the focus group is telling you what they think, is first to listen and second to ask the focus group why they feel the way they do.
3. Do not tip off your focus group about who hired them. In the past I had the opinion that if you had the focus group in our own office that the focus group members would some how be tipped off about which side I actually represented. I have found this to be untrue. It is perfectly acceptable to conduct a focus group in your own law office conference room. In my experience jurors have no clue about who I represent until I tell them after the deliberations are over.

The Benefits of A Focus Group

My first focus group was an eye opening experience. The nervous, giddy feeling I felt when I began to listen to the focus group deliberate was something I will never forget. I was literally listening to a jury's thoughts about my case before my case even started. The idea of ever trying a superior court case again without a focus group now seems crazy. Spending \$500 dollars and five hours of your time doing a focus group is of great benefit before you risk your valuable time and money in trial.

A further benefit is with the client who is being unreasonable about settlement. The focus group is a great way to give an unreasonable client a good dose of reality. Put on a focus group, making sure that your client is cross - examined by a competent associate. If your hunch about the case is correct, the focus group's findings will give your client a better appreciation for any recommendation you may make about settlement.

Let me leave you with a true "focus group moment" described by Howard Varinsky in his article entitled, Try Out Your Case on a Focus Group, in the March 1988 edition of the California Lawyer. Mr. Varinsky describes a product liability case:

....The attorney had planned to argue that the manufacturer was liable because the machine had neither an emergency shutoff switch nor a red warning light to indicate the machine was on. In the attorney's opinion, the fact that the manufacturer's instruction manual gave no information on potential hazards or safety precautions was of little significance.

Members of the focus group saw things differently. After hearing the lawyers presentation, 11 of the 12 participants did not think the manufacturer should be held liable for the lack of an emergency switch or a red indicator light. They reasoned that an emergency switch was unnecessary because the regular switch was within easy reach. Moreover, they thought the machine created sufficient noise and movement to give notice to any reasonably alert person that it was running. Unlike the lawyer, all but one of the focus group members believed the most persuasive argument for the manufacturer's liability was the lack of safety information in the instruction booklet.

We conducted a second focus group a week later. Ten of the 12 members of that group also felt the lack of safety information was the most persuasive issue. In light of these reactions, the lawyer emphasized at trial that the manufacturer's instruction manual did not include safety information. The result was a verdict for the plaintiff.⁷

Good luck with your next focus group.

¹ Twiggs, Howard: Do-it-yourself focus groups: big benefits, modest cost. *Trial*, volume 30, number 9, Sept. 1994, p42.

² Lisner, Paul: Focus group adds certainty to a world that's uncertain. (Verdicts & Settlements) *The Los Angeles Daily Journal*, volume 107, number 145, July 29, 1994.

³ Nelson, Noelle: Trial Run Mock Trial Focus Groups Aren't Just For Large Cases Anymore. (Verdicts & Settlements) *The Los Angeles Daily Journal*, volume 109, July 26, 1996.

⁴ Varinsky, Howard: Try Out Your Case on a Focus Group: The group's reaction tells a lawyer how a real jury is likely to respond. *California Lawyer*, volume 8, number 2, March 1988, page 47.

⁵ Lisnek, Paul: Focus Group Adds Certainty To A World that's Uncertain. (Verdicts & Settlements) *The Los Angeles Daily Journal*, volume 107, number 145, July 29, 1994.

⁶ Nelson, Noelle, *supra*.

⁷ Varinsky, Howard, *supra*.