

A focus group is typically composed of twelve individuals who are brought together for two to four hours to watch a short presentation of the case and discuss the various issues raised. It is a means of gathering information about the attitudes, beliefs and values of a specific audience. Some trial lawyers still doubt the value of focus groups. For those skeptics, here are a few things to consider.

Participating in athletics taught me life long lessons. For example, after being on the wrong end of a game, it was not unusual for a coach to address us and let us know that losing is an educational experience. As a child, that may have been true. As a lawyer, you do not need to suffer a loss to educate you on “what went wrong.” Talking with jurors after a verdict is reached can be a humbling experience. You learn that certain issues or pieces of evidence were important to the jurors, assumed by them, or more importantly, misunderstood by them. Typically, our reaction is something along the lines of “I wish I would have known.”

Practice and preparation can make perfect. Focus groups enable attorneys to see first hand how a *jury* perceived the issues of the case. In doing so, you learn by preparation... not by losing.

What is gained by the use of focus groups?

I. Focus groups assist attorneys in evaluating the value of cases

A focus group *can* help you settle a case. I am quite confident that every attorney has had a client that would not budge from a settlement figure that they arbitrarily set on their case. For some reason, they drew a line in the sand and indicated that they would never consider a settlement amount under (or over) that amount. It is amazing to see how quickly a client’s position changes after a focus group awards a sum much different than anticipated. A focus group can quickly open a client’s eyes as to the liability issues. You will also see how a focus group analyzes the non-economic and economic damages of the plaintiff.

Conversely, there are times when we as lawyers are intensely concerned about the difficulty of some legal issue or factual dispute involved in a case. As it turns out, the focus group that hears the case may think these issues are not nearly as significant. Under those circumstances, a modest settlement offer, which may have been somewhat tempting before the focus group, may then be rejected with a greater comfort level.

II. Focus groups serve as a means of practice and preparation

World class athletes practice for countless hours before every contest. I find it ironic that we as lawyers will take a case to verdict, a case often involving enormous sums of money, and not use similar levels of practice.

A focus group gives the attorney the opportunity to practice and prepare for their upcoming trial. It is a great time to experiment with a new argument. The attorney has the opportunity to look “jurors” in the eye and determine how the presentation of evidence and/or testimony will be received. Without a focus group, it may be too late.

III. Focus groups enable the attorney to determine if a jury’s attitudes and experiences will co-exist with the facts of a case

Focus groups furnish a valuable insight in cases that involve complex, controversial or disputed issues. Many of us encounter cases where the settlement with one of two parties is contemplated. However, such a settlement could lead to the “empty chair” defense for the remaining parties. A focus group is an excellent tool to determine whether or not the remaining parties will be able to shift all or some of the blame to the settling party.

One key to a successful focus group is the ability to have some type of direction or control over which issue you would like addressed. Many of us have been contacted in controversial or complex cases that we are not sure we want to handle. Some examples are sexual abuse cases or medical malpractice cases involving abortion. These are the types of cases that may waive “red flags” to the general population. The focus group provides an opportunity to obtain instant feedback. A fresh outlook obtained through a focus group, especially cases involving issues that you have not been associated with, can open your eyes and enable you to see and recognize more clearly the strengths, weaknesses and viability of such claims.

IV. Focus groups assist attorneys in deselecting potential jurors

Jury selection or “de-selection” is unquestionably one of the most crucial aspects of any trial. Its importance cannot be neglected. I believe the primary purpose of *voir dire* is to ferret out bias or root out prejudiced jurors. In today’s society, that is much easier said than done. We live in a society that is ever-changing; no institution is immune from attack or scrutiny. This has been especially true when the light has been cast upon our judicial system. The past twenty years represented a period where significant efforts were devoted to reforming the trial and justice system. Information was disseminated from various interest groups, including the media. Focus groups enable an attorney to listen to a number of issues that impact a juror’s thought process... even though there may not be any evidence to support their views. For example:

A. Insurance

No matter what happens during the course of a focus group or trial, at least one “juror” will invariably make a comment on insurance. On countless occasions, focus group members have commented that “the defendant is insured, don’t worry.” Most jurors are aware that there is insurance. That is good news from a plaintiff’s perspective.

The bad news is the flip side to that argument. Some jurors are concerned about the lawsuit resulting in higher insurance rates.

B. Lawyer Fees

Like it or not, lawyer fees play a part in the verdict. Jurors believe that lawyer fees are 1/3 of a judgment and will often figure that fee into the award.

C. Media

The impact of the O.J. Simpson trial, the McDonald's coffee verdict, Rodney King and other high profile cases cannot be understated. In the jury room these cases are being discussed. This information (or disinformation) has unquestionably influenced their attitudes about the civil justice system. The public watched the O.J. Simpson trial with intense interest. It endured the shocking aftermath of the Rodney King verdict. Potential jurors now have enriched views of what goes on in our courtrooms. It is crucial to a fair trial that a lawyer inquire into each juror's view, values and beliefs about what they have seen and heard in their affairs of life and how those views, values and beliefs will impact their ability to be fair and impartial.

D. Local attitudes of the venue

It is imperative to consider the local attitudes and values of your venire as they relate to the fact pattern or issues in your case. In Chicago, we unequivocally have a melting pot of individuals. There are several different cultures, nationalities and races mixing together that have inevitably influenced the values, beliefs and attitudes of many potential jurors. The background of the potential jury should include *any* areas of potential bias or prejudice to *your* client's case. It is only through preparation that the lawyer will understand and appreciate this information. Attitudes vary from county to county. These different attitudes should be considered and your focus group must reflect and explore these issues. Therefore, it is imperative that the focus group is done in the county in which the case will be tried.

V. Focus groups are excellent opportunities to develop or experiment with different themes

It is elementary trial advocacy that any case should have a theme. Unfortunately, many cases lack a theme. A jury should know and understand your theme. Good themes live within your case. They are not plucked from the air and laid over your evidence. Some examples of themes are "goals," "control," "choices," "personal responsibility," "prevention," and "effort." President Clinton's presidential campaign successfully advanced his theme of "building a bridge to the future."

Focus groups have shown that individuals can identify with and have empathy for corporate personnel who may have simply made an error in judgment despite their best efforts. Therefore, in a product liability action, you may wish to develop a different

theme before trial. Using documents that you have obtained through discovery or other means, you may determine that the corporate personnel saw problems and presented management or upper personnel with various solutions. If management chose not to do something in order to increase company profiles, it is management, not the lower level personnel that were the evil wrongdoers. Management made a choice, however, the plaintiff was the victim. The theme? Profits over safety.

When you find the right theme, you will know it. The jury will know it. Your case comes together. It becomes clear that you are right and the other parties are wrong. Focus groups give you the opportunity to develop your theme and observe the reactions that jurors have to the evidence you intend to elicit and produce in support of your case.

VI. Focus groups elicit reactions... both negative and positive

In our daily lives, it is not difficult to get reactions. How many times a day do you hear the question, “what did you think of the game last night?” Inevitably, you will receive a reaction. You need to know a juror’s reactions *prior* to the trial... not after a trial. It is a sickening feeling to talk with jurors after a case and learn that they did not believe your client because a specific fact was not developed. If you would have known this fact prior to the trial, you may have won. In other words, you did not know what “buttons needed to be pushed” for these potential jurors.

Here are some thoughts that were elicited during focus groups that demonstrate the values and beliefs that potential jurors have on different cases:

1. The driver had a choice...
2. The doctor should have ...
3. Why didn't he contact a specialist...
4. It would have been easy to just wait for traffic...
5. People must be...
6. The patient could have ...
7. The company knew...

Listen to the members of the focus group. People in focus groups ask questions that must be answered at a trial. To have the foresight to know the questions that jurors will have and to answer them throughout your case gives you power. It gives you control. It increases the probability of advocating your client’s rights. Going back to our formative years, I think we would all agree it would be much easier taking tests if we knew the questions ahead of time. Knowing what questions a juror will be asking makes

it easier to take this “test.” Focus groups enable you to answer their questions prior to trial.

VII. Is a focus group discoverable?

I believe the short answer is no. There is no direct law on this subject. Other jurisdictions indirectly give us guidance. For example, the Third Circuit Court held that documentation representing defense counsel’s mental impressions and legal opinions as to how evidence and documents relating to issues and defense in a case fell under attorney-work product and was entitled to protection from discovery. *Sporck v. Peil*, 759 F. 2d 312 93d Cir. 1985). In *Sporck*, counsel for defendants had had prepared the defendant for his week-long deposition by showing him selected documents that had been compiled in a folder and transported to him prior to his deposition. The selected documents represented counsel’s legal opinions as to the evidence relevant both to the allegations in the case and the possible legal defenses. During the deposition, closing counsel asked the deponent “Mr. Sporck, in preparation for this deposition, did you have an occasion to examine any documents?” Counsel for Sporck refused to identify the documents arguing that the selected group of documents was attorney-work product protected from discovery by Federal Rule of Civil Procedure 26(b)(3). Upon motion, the judge held that counsel was to identify all documents relied upon and that although the selected group of documents constituted attorney work product, it was not “opinion” work product entitled to absolute protection.

The Third Circuit held that the trial court should not have ordered the identification of the documents selected by counsel. The identification of the documents as a group would reveal defense counsel’s selection process, and thus his mental impressions. The court went on to note:

We believe that the selection and compilation of documents by counsel in this case in preparation for pre-trial discovery falls within the highly-protected category of opinion work product.

The court, citing the District Court of Delaware, went on to note:

In selecting and ordering a few documents out of thousands, counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product. *Sporck*, 759 F. 2d at 315.

In *Brown & Root USA v. Moore*, 731 S.W. 2d 137, 140 (Tex. App. Houston 1987), the court noted that the work product exception has been held to protect from disclosure specific documents, reports, communication, memorandum, mental impressions, conclusions, opinions or theories prepared or assembled in actual anticipation of litigation.

In *Southern Pacific Transportation Company v. Banales*, 773 S.W. 2d 693 (Court of Appeals of Texas, 1989), the court noted that “[an attorney’s legal strategy is the] type of information [which] is accorded absolute protection because our adversarial system has a serious interest in maintaining the privacy of an attorney’s thought process.” The court further stated:

We also believe that a videotape of this nature could easily contain information which could be classified as work products. It was incumbent upon the trial court to examine the contents of the video to discern whether it contained strategy, evaluation of the strengths and weaknesses of the case or mental impressions that *would* be protected. Likewise, the trial court should view the videotape to determine whether it contained information tending to mold the witness’ testimony, which would not be worthy of protection. *Southern Pacific Transportation Co.*, 773 S.W. 2d at 694 (emphasis added).

A common focus group scenario occurs when a trial consultant is retained to assist trial counsel with case theory development and/or case presentation issues. The trial consultant and counsel meets with the attorney and often prepares a written report for counsel summarizing the work and containing suggestions for “winning” the case. Is it discoverable? I believe the answer is no.

On its face, the consultant’s report meets the three requirements of Fed. R. Civ. P. 26 (b)(3) necessary to constitute work product:

It is documentary. It is prepared in anticipation of litigation (or trial) and it is prepared by a party’s retained consultant. More importantly, the attorney’s discussion of case theory and consultant’s suggestions should qualify for the higher protection afforded an attorney’s mental impressions.

If the trial consultant speaks with the client, I do not believe that the client’s statements about the case facts are discoverable. The consultant is a “representative of the lawyer” under the law. The communications by the client to the consultant are protected by the attorney-client privilege. On the other hand, if the consultant discusses the case with a non-party witness, the report may stand on different footing. To the extent the retained consultant is developing case facts for the attorney, it could be argued that the consultant is serving as no more than an investigator. Arguably, this is no more protected than any other factual work product. Under those limited facts, the adversary may be entitled to the discovery of this material upon the requisite showing of undue hardship and substantial need.

Trial lawyers are notorious for trying out arguments in pending cases on others, including family members, co-workers or even casual acquaintances. Imbedded within the focus group deliberations are the presentations and arguments of counsel. Certainly, an adversary watching the videotape of the deliberations would have little difficulty, inferring the contentions offered on both sides of the controversy. Therefore, this material is opinion work product and the deliberations should be so classified as well,

thus entitling them to heightened degree of protection afforded other attorney-work product. *See, e.g., In re: Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) (opinion work product enjoys a nearly absolute immunity and can be discovered only in vary *rare* and extraordinary circumstances).

A different scenario takes place when a “juror” in a focus group voluntarily contacts opposing counsel with respect to this matter. How do you stop a juror from revealing their recollections about the mock trial/focus group? To the extent that an adversary seeks to compel disclosure by subpoena and by deposition, for example, a strong argument can be made that the juror possesses no facts properly discoverable under law. Similarly, Illinois Supreme Court Rule 201 (b)(3) specifically prohibits the theories, mental impressions or litigation plans of the party’s attorney. A research juror’s recollection of a focus group does not constitute part of the factual fabric of the case nor it is apparent how such material could be “reasonably calculated to lead to the discovery of admissible evidence.” Arguably, this fundamental limitation on the scope of discovery should fully protect a mock juror from involuntary disclosure of a study. It should be noted that a professional trial consultant will typically require each participant to execute an agreement promising to keep confidential aspects of the study. Therefore, in theory and in practice, this juror will never be discovered nor be allowed to talk about the focus group results.

Therefore, based on the aforesaid rationale, I am of the opinion that focus groups are not discoverable and that they are protected by the work product doctrine. Typically, the presentation by the attorneys depict their theories of the case. Similarly, for the same reasons, the videotape deliberations of the jury should not be discoverable.

Conclusion

Focus groups are an invaluable tool. Focus groups permit attorneys to discovery important and profitable information. They allow attorneys to create, test and/or evaluate themes prior to trial. More importantly, focus groups enable attorneys to thoroughly understand community attitudes or the way potential jurors will view certain issues in a case. Examining the results from the discussions and conclusions of each focus group will offer a wealth of information.

One word of caution to attorneys is that focus groups are not the Utopia in the trial of a case. One reason we have all been successful in the courtroom is because of our instincts in understanding the reactions of individuals. Rely on your instincts in the trial of your case. Do not set aside your own experience as a lawyer in making decisions about a trial.