

# Overcoming Juror Bias With Focus Groups

By DOUGLAS K. SHEFF



Today's jurors receive more information than any in history. Newspapers, television and the Internet are filled with spin and inaccuracy. Special interest groups promote views in the media in order to affect public opinion.

Unfortunately, the impartiality of the juror pool is affected as well.

Focus groups provide participants with invaluable strategies for dealing with juror bias. This is especially true in personal injury cases, where political spin, often inaccurate, has been directed recently.

Proper use of focus groups will not only eliminate bias, but will enhance your chances of a great result in these cases like never before.

## How They Work

A focus group is a mock jury, socio-economically matched with your jury pool, most likely to resemble the real thing. With little or no voir dire in Massachusetts, it is difficult to filter inappropriate partiality. Here, more than in any other state, focus groups are imperative for effective trial practice.

Since attorneys are often unable to ask probing questions of actual jurors, it is important to do so with a group likely to resemble a particular jury, to learn how biases can be neutralized and how public opinion can be utilized in your favor.

Focus groups have not caught on quickly in Massachusetts. I hear respected attorneys say, "I've been trying cases for years. I know how jurors think." I usually respond by asking them the following: "Are you a Jerry Springer fan? Nascar? Pro wrestling?"

Unless there's a positive response, I've made my point. Most jurors don't receive their information through the Wall Street Journal. You need to test your case with a group as close to your real jury as possible.

statistics are often available at the County Juror Commissioner's Office.

The primary purpose of conducting a focus group is to overcome juror bias. Your job is to learn how to avoid landmines (themes, strategies and terminology that resonate negatively).

At the same time, you'll discover winning themes. The phrase "it's the economy stupid" was not coined by some insider or Cabinet member from the Clinton administration. A volunteer homemaker recruited from a supermarket for a focus group came up with that one.

Focus groups help you to deal with the single most dangerous phenomenon in jury deliberations: filling in the "gaps." Jurors tend to fill in the "gaps" against you. And it's not always easy to locate them.

For example, we once focused a case involving a defective ladder. Although brand new, it simply collapsed under a store clerk's

## Personal Injury

resembles a kind of free association. Bits of information are provided to the group, a little at a time, until there's a reaction warranting more information. Questions move from the general to the specific.

For example, the group might be asked what they think about lawsuits in general, followed by questions about medical-malpractice cases, followed by questions about such cases involving claims of failure to diagnose. The questions are always open-ended and never imply a correct answer. What do they think about the parties involved? What are their views on the evidence you decide to present?

You can focus a theory of liability, a witness statement or a piece of physical evidence. It's up to you to select the concepts most likely to impact your case.

Frequently throughout the process we stop and ask: "With what you know so far, what evidence would you like to see in order to per-

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suade you that one side or the other should prevail?" The group will often provide invaluable information regarding the "gaps" in your case, hopefully with enough time to investigate or discover same. For that reason, concept groups should be done early.

tion of the case. This will make them feel a sense of efficacy. These are some of the measures you can take to maximize the productivity of the process.

A structured focus group is quite different than a concept group. Here you do use a trial format and usually focus on a part of the trial — the openings, direct and cross of a plaintiff, expert testimony, etc. This process tests style, presence, and, of course, the merits of your case.

Hopefully, these structured groups follow concept groups, so as to test your case once you have filled in the "gaps." Thereafter repetition becomes important. Each structured group adjusts to the group prior, until your case is as good as it gets.

A word of caution, however: Check your ego at the door. Structured groups do not work unless you present your adversary's case at least as well as your own. That's right. You need to lose, or come close, in order to acquire good and useful information.

Someone from your firm needs to do a good job presenting your adversary's case. If there's no debate, if there's a group that is unanimously in your favor, you've wasted your time and resources. More importantly, you may have lulled yourself into a sense

of confidence likely to endanger an otherwise winnable case. All valuable information comes out of conflict within the group.

Another word of warning: Just as in court, participants may know parties, opposing counsel, etc. You need to screen for these potential problems before the commencement of focus group activity. Let your facilitator do the screening. A failure to do so can cause a huge breach in security.

As previously mentioned, although one focus group could prove useful, there is tremendous value in repetition. First, it allows you to compensate based upon what you learn in prior groups. Second, a focus group is a "snapshot" in time. Don't forget that opinion can change as rapidly as the news cycle. For example, opinions regarding war with Iraq change drastically from week to week.

Our office recently conducted six focus groups on a single case, right up until trial.



corresponding budget, there are several methods of assembling a focus group, with varying degrees of reliability. The most reliable requires a statistical analysis of your county, and enough volunteers from which to select a truly representative group.

There are professional outfits available to assemble your focus group, though they can be expensive. If that's not an option, valuable

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that the clerk must have been overweighing. They even surmised that he had consumed a beer or two at lunch!

Unbelievable? Maybe, but that's what jurors do — fill in the gaps against you. Focus groups allow you to fill in the gaps before they do it for you (or to you).

### Types Of Focus Groups

There are two types of focus groups.

The "concept" focus group tests ideas, themes and attitudes. The concept group does not proceed in a trial format. Rather, it

ly on in your case.

The trick is to make the group feel comfortable about speaking out truthfully. For that reason, we always use a psychologist as a facilitator. Participants must understand that there is no desired answer. They should not know which side you represent (especially since you are paying them for their time, and they will attempt to please you instead of offering candid responses).

You should ask your facilitator to make it clear that the participants are an important part of a process that could lead to a resolu-

Only a series of groups can provide a most accurate read of juror mindset and trends.

Finally, don't reserve focus groups for big cases only. They're like CPR — some is better than none at all. I'd rather put a few office staff and family members together to elicit opinion and feedback on a small case than proceed the way we do all too frequently: blind.

With focus groups you have a unique opportunity to go into trial with your eyes wide open, and to optimize your opportunity to prevail.

**DMW**