

F O C U S

SAME CONCEPT



Faith Morse

By Faith Morse
OTLA Guardian

A group of lawyers is milling around the courtroom, even though it is 7:00 at night. We are at the William V. Deatherage American Inns of Court monthly CLE, and tonight we are watching a deliberative style focus group. We heard a brief presentation of a case by an experienced and capable plaintiff's attorney and defense attorney. Our jury of six has retired to the jury room to deliberate and as the break comes to a close, everyone stops and settles into a seat. An intense hush fills the room as we watch a live feed of the deliberations. Lawyers occasionally softly exclaim in surprise at what they hear from the jurors over the next two hours — quickly hushed by the people around them.

At the end of the deliberation, each

of the jurors is thanked, given a check, and sent home. The lawyers were not yet ready to leave, some lingering outside and talking about what they had just witnessed. I chatted with several over the phone over the next few weeks about focus groups, how they work and how they can be useful in a legal case. I do not know how many started using focus groups after the demonstration that night, but it was widely hailed as one of the best CLEs put on by our local group, which is renowned for having excellent CLEs.

I was unsurprised by this reaction from our local bar. Focus groups are one of my favorite things to do as a plaintiff's lawyer. I look forward to each one with excitement and anticipation. Focus groups enable you to see things about your case that you likely would have overlooked time and time again.

Many uses, many types

The thing about focus groups — they are so versatile. I have used them to help me decide whether to take a case. To pick out themes, to give me discovery requests, to uncover likely defense arguments, get feedback on exhibits, understand weaknesses in my case, uncover where I need more evidence, and what rules¹ apply to my case that will resonate with jurors. The list goes on. While the whole process may seem intimidating, I encourage you to try it. It

is far easier than you believe it will be, and the knowledge gained is invaluable. One of the beautiful things about focus groups is the incredible variety of ways that you can conduct them. From talking with a single person about your case over a cup of coffee, to using a jury consultant in a fancy building with one-way mirrors, the options and variations are nearly endless. I am going to cover some of the less formal, DIY focus groups that don't involve hiring expensive experts.

The micro-focus

If you are nervous about doing a focus group, think about the last time you talked to a friend or a loved one about one of your cases. The classic "Hey, what do you think about these facts..." as you prepare for trial, mediation or consider a new intake. This conversation is in essence a micro-focus group. You are seeking unbiased feedback on aspects of your case from an uninvolved third party. Sure it's informal and with someone you know and like, and who likely knows and likes you. Not the ideal candidate in the focus group world — but this is still someone outside the law who can give you a valuable perspective on your case (and if you didn't believe that was true, it seems unlikely you would be having this conversation with them in the first place).

This kind of micro-focus group is

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G R O U P S

DIFFERENT APPROACH



Marc Johnston

By Marc Johnston
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It's 6:00 pm on a Friday. The judge orders pizza for the jury. The jury wants to continue deliberating into the evening, rather than coming back on Monday. That gives me a sense of relief. I am sitting in the basement street level of the Clackamas County Courthouse promising not to judge myself on the result, be it good or bad. The faces of my trial team tell me we did a great job and should expect a similar result. It's the same affirmation I felt throughout most of the trial, and it matches my own assessment. But it's misguided.

If you try cases, you've been there. That pit in your stomach when the verdict fails to match your expectation. I set out to learn why, for this case and for every other case. In doing so, I made the

discovery that would make the difference.

The primary reason for disappointing verdicts is we trust ourselves, other lawyers, mentors and experts when understanding, preparing and delivering our case to the jury. Instead, we should trust focus groups and mock juries to help us understand what an actual jury will think of our case at trial. We rely too much on what got us this far: experience, intuition, mentors, CLEs and books. That works some of the time. But without the benefit of genuine juror impressions, reactions and decisions about our case prior to trial, we expose ourselves to case killing juror bias, misguided preparation and we are unable to truly and deeply see our case through the jury's eyes until after the verdict — and usually not then either. It leaves us partially blind. If we never discover, then we never know. I wanted to know, and that led me to focus groups.

Focus groups are incredible. When done right, they provide insight into your case that only a jury can provide. They can guide your discovery, show you all the ways your case can be won and lost, hone your strategy and provide an incomparable practice field all for less than \$1,000 for a three to four hour session. Focus groups provide a keen line of sight of what a jury will do with your case and how to modify your strategy, mindset and presentation accordingly for success

at trial.

You can and should do your own focus groups — by yourself and with other lawyers. Focus groups are not the sole realm of the professional jury consultant. This is your realm! You will learn more and improve more rapidly by conducting focus groups on your own. It's also far cheaper than hiring a jury consultant.

My foray into focus groups began with taking the Keenan Trial Institute's course on focus groups. Over this two-day course, I conducted several focus groups with live participants from the community. I would highly recommend this course, as there is no better way to jump start your ability to conduct and interpret focus groups. The course takes you from no experience to being able to conduct live focus groups on your own. Since taking the course, I have conducted focus groups for 25 different cases, and educated myself further on best methods and practices.

Part 1 — the narrative focus group

There are dozens of different types of focus groups. The most frequently used and most important is the narrative focus group. It is designed to uncover the jury bias that will kill your case. The narrative focus group seeks to find out what a juror already thinks about the most basic elements of your case and shows you what

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something every lawyer does,² though usually without investing much thought or prep work. By taking this opportunity and refining it, you can make the experience far more valuable.

For example, when conducting any kind of focus group, you should not be looking to win your case. If your focus group thinks it is obvious you should win and no other alternative is possible, you have wasted an opportunity. I am certain a wily defense attorney on the other side can find something to talk about with the jury. If you haven't done your level best to communicate the best of those arguments to the focus group, the results are likely to be useless. If we could argue to the jury without a defense attorney, trial results would surely be different. However, that is not how the system works.

If you are taking the time to talk to someone about your case — not to brag

about it, but to seek advice and input — there is something in it that is causing you concern. That means what you need (even if you don't really want it) is quality feedback. To get it, you have to give your group all of the defense's best facts. Even if you weren't doing a focus group that is information you would need to handle your case well, anyway. The goal here is to get outside the echo chamber that is your own head and perspective, and start to hear what real people (not lawyer people, but more like jury people) think about your case.

The next size up

Once you are comfortable sharing the good, the bad and the ugly about your case with one person, you can now begin to have the conversation with three to four. You might recruit off Craigslist or find people on social media. You probably need to plan to meet up somewhere, whether that be your office, a quiet coffee shop or a back room at a restaurant.

The goal here is to get outside the echo chamber that is your own head and perspective, and start to hear what real people (not lawyer people, but more like jury people) think about your case.

You might start preparing some visual aids — PowerPoint slides, deposition quotes, photos, medical records, perhaps graphics or other demonstratives. You prepare a little more formally rather than have an off the cuff conversation. Maybe plan out questions and drill down to the issues you want to learn about so you can focus on those. Even something as simple as this has given me significant insights into cases. At this point, you have begun to dive into the world of formalized focus groups.

My favorite version

There are so many ways to run a focus group. My pre-COVID favorite way was to reserve a room at the library (*i.e.* a super cheap and totally neutral location) and bring in six people. (See Marc Johnson's article, page 23, for lots of practical tips on how to do this.) I always begin with a confidentiality agreement. First, it keeps people from posting about what they just did all over social media. Second, it emphasizes the importance of what we are doing.

Spend the first 10-15 minutes getting to know your jurors and helping them get to know each other. This step is particularly important — they are more likely to talk together and participate if they feel like they know each other. This normalizes talking together in the group so the whole thing feels less like public speaking and more like a conversation with friends. Make sure everyone participates in this part of the discussion. That participation is why I prefer a six

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person focus group. In a group of eight or more, it is too easy for someone to hide in the corner to simply say “I agree with Anne” and not give you their valuable insight. In a group of six, you can keep everyone engaged and talking. Also, this allows you to practice drawing information out of people like you do in *voir dire*. This is perhaps the closest to the real thing I have found to practicing that skill. By learning more about your focus group participants at the beginning, you can also begin to see what kinds of experiences and backgrounds you should look for while doing your jury selection should your case go to trial and how to frame your *voir dire* questions to get the jurors you want.

Then provide a brief five or so minute presentation of the plaintiff’s case and five minutes of the defense case. I have the focus group participants fill out a one page form with a few questions. Example questions include: What are the strongest points for the plaintiff? What are the best defense points in response? What more information do you want? And of course vice versa. Then have the group discuss. After 15-20 minutes of discussion, you can either move on to another case or present additional information about the case you are working on, and ask more questions.

One quick note before we move on: I do not tell the focus group what side I represent. I work hard to appear neutral. I do tell them that their insights and thoughts are going to be used to help real people attempt to resolve a real dispute.

In the virtual world

I was very skeptical that online focus groups would be a valuable substitute for the in-person version. I have now observed five or six, and believe they are useful and can be done well. I think they require more planning and preparation. Not only do you need to do everything required for an in-person focus group, but you also must make sure each person in your group can use the technology and

platform you are using, check that your own tech works well and you know how to run a meeting on the platform. For showing visuals, you have to be prepared that some people will be using their cell phones and small text is likely to be useless. (Yet another reason to get rid of those wordy PowerPoint slides.)

Sound quality is an issue, so you need to invest in a quality headset or speakers. Be prepared for technical difficulties and have a plan for what to do if things stop working. You also can’t just hand people a check as they walk out the door, so you’ll need to be prepared for some form of electronic payment — likely Venmo, Paypal or something similar.

Focus groups are imminently doable by any attorney. They will get better and easier every time you do them, and if you’re interested in CLEs to teach you how to do them better, such programs are readily available. Focus groups have become a fundamental part of my practice. I expect they will continue to be

even as COVID-19 changes so many ways we function — perhaps even more so as we navigate these uncharted waters.

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¹ If you have not yet read Rick Friedman’s “Rules of the Road,” that book is in the top three you should read as a plaintiff’s lawyer. My other top two are “Damages III” by David Ball and “12 Heroes, 1 Voice” by Carl Bettinger. If you’re only going to read three quality books (or just need a place to start), these are my top three.

² Since you’re not getting ethics credit for reading this, I won’t take the time to talk about confidentiality, not sharing personally identifying information and otherwise reminding you of your ethical obligations to keep client data safe and confidential. But that is definitely something be aware of and actively protect.

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is on the jurors' minds from the beginning. Throw away any ideas about presenting an opening statement or advocating to the narrative focus group — do not try to persuade anyone. The narrative focus group is basic and neutral. Take the following example of a neutral introductory statement for a disputed liability car crash case that I am preparing for trial. I slowly read the below neutral statement to the participants two times at the beginning of the narrative focus group before asking questions:

Thirteenth Avenue is a one-way street running south. Clay Street is a one-way street heading west. It's January 19, 2017. It's around 10:30 p.m. It's dark. Jimmy is driving his F-350 pickup truck south on 13th Avenue, approaching the intersection of 13th and Clay. Suzanne is driving her Jeep Cherokee west on Clay Street, approaching the intersection of 13th and Clay. Both vehicles are approaching the intersection at the same time. They enter the intersection and crash into each other. Both drivers claim they had the green light. There are no eyewitnesses. Suzanne states she had just turned off 12th Avenue onto Clay Street, and, as she approached the intersection of Clay and 13th, she slowed for the red light, which then turned green. She states she then proceeded into the intersection

where Jimmy's vehicle hit the front passenger side of her Cherokee. Jimmy states, as he approached the intersection, he had a green light, and, as he proceeded into the intersection, Suzanne's Cherokee hit the rear quarter panel of his driver side, as he was almost through the intersection.

I write and rewrite this statement many times to ensure it is fair and neutral to both sides. The facts should sound bland and be as simple as possible. After reading this neutral statement to the focus group, I ask the following questions, usually in the following order:

1. What is this case about?
2. What do you think happened?
3. What caused the collision?
4. What more do you want to know?
5. Please take out a piece of paper...and if you think anyone is at fault, and I'm not saying anyone is, but if you think anyone is at fault, write the name and the percentage of fault. If you find that anyone or multiple people are at fault, then the total percentage must add up to 100%. If you believe no one is at fault, then write that. Write your name on the paper.
6. What did you write down? What are the top two reasons why? (I ask this individually to each focus group participant in front of the group. Then I collect the papers).

At this point, the focus group does not have enough information to render

a verdict. But I am not asking the participants to render a verdict — I am trying to find out what they already believe about this neutral, factual situation. I want to know where their minds naturally go, what they already believe and what prejudice they might hold against a plaintiff from the most basic of facts. This information will help guide discovery, frame my case and help me craft an opening statement that addresses everything the jury wants to know. I expect several focus group members to tell me they don't know who is at fault yet or they need more information. I ask them "Why?" and push for gut reactions, while noting the reasons they don't yet know who is at fault. I then transition to searching for what information the focus group needs to determine fault.

My absolute favorite question is "What more do you want to know?" I follow that up with "Why?" or "Why would that matter?" The answers to these questions tell you what a jury already thinks about a factual situation, and what investigative points they will want to hear discussed during trial. Often, these are the seemingly irrelevant factors that should play no part in the verdict. But, because they matter to the jury, they are relevant. The focus group will tell you which of these seemingly irrelevant factors you need to address at trial.

Examples include:

- "I would like to know if the traffic lights were broken."
- "Was either driver on pain medication, because a lot of people are these days?"
- "Were there cameras on the nearby buildings?"
- "I would like to know whether their tires were bald or had good traction."
- "Was one of the trucks lifted (raised off its wheels)?"

How many times have you heard a lawyer complain about a seemingly crazy post-verdict fact or idea the jury relied on to sway the verdict toward the defense? A good narrative focus group



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should be able to snuff out most of these silent killers. Asking “what more do you want to know, and why?” during the focus group will help you uncover these silent and legally irrelevant facts, which can kill your case if you don’t discuss them at trial. If you never address these questions that are on the jury’s mind during trial, you will leave the jury to speculate during deliberations.

I encountered one such example in a focus group I conducted for my client who was side-swiped by a semi-truck as the semi entered I-5 from an on-ramp. The trucking company blamed my client for merging directly in front of the semi. As I read the neutral statement of the case to the focus group, I included the fact that leading up to the crash my client recalled a red Corvette directly in front of the semi-truck on the on-ramp. It was a background fact that had nothing to do with the crash. But as I asked the focus group to apportion liability, more than half put 10% fault on the red Corvette, and two of those participants put 20% fault on the red Corvette. Several participants held tight to this belief throughout the focus group. Following the focus group, we changed “red Corvette” to “car” in our trial story, and eventually removed reference to it entirely. The very idea of a red Corvette connoted danger in the participant’s minds.

Other great questions to ask in the narrative focus group include:

- Was this preventable?
- Who could have prevented it?
- How could it have been prevented?
- When could it have been prevented?
- For those who think it could not have been prevented, why not?
- Could this happen again? If so, why? If not, why not?

I can almost guarantee you that each focus group will give you ways the harm could have been prevented that you have not yet considered, and which the defense attorney will not be considering either. This is a great advantage.

Part 2 — drilling down

The case involving Jimmy and Suzanne was a challenging “he said, she said” red light, green light case. Some people said not to take it. To complicate matters, both cars spun substantially at impact, crashed into each other again, and each party told a very different story about where the initial collision point occurred between the vehicles and where it occurred in the intersection. I knew that crash reconstruction would play a part at trial, but I wanted to see what the focus group thought happened by just looking at the pictures, before an expert explained it with science and engineering. I wanted to understand what the jury’s gut reaction would be at trial.)

The second part of my narrative focus group went like this:

Please help us figure out how and where this impact occurred on the vehicles, and where it happened in the intersection by looking at and evaluating the photos. Suzanne states she was hit in the passenger side front, almost edge to edge with Jimmy’s vehicle (using hands and car models to demonstrate). Jimmy states he was almost through the intersection, when he was hit on the back driver’s side quarter panel. Jimmy’s vehicle came to rest like this (showing with models). A power box was knocked over and possibly a sign. Suzanne’s vehicle came to rest on the street, facing south, next to the curb, in the right lane. (showing with models). I will read this again as many times as you need. I am passing out the photos. Please look at them and help us figure out what happened.

They start asking me questions, and all I say is “I don’t know,” or “I don’t know, does that matter? Why does that matter?” I don’t answer questions because that tells me nothing. But the question itself tells me what they find important, what they want to know or how a picture or piece of evidence might not be as in-

trinsically persuasive as I thought. What tells me something is the question itself, and why it could make a difference to the focus group.

During this process, the focus group is an investigative team. The team members discuss the case with each other. The crosstalk starts to get good. I watch closely and allow it to unfold. I do not rush this process or seek to control it because I might miss something. How do they debate with each other? How certain are they about the dent to the back-quarter panel? What are these photos saying to the middle age conservative participants? Do I even need words at trial to explain the photos, or do the photos speak for themselves? Are they abandoning their initial impressions following the neutral statement? Why? I apply pressure by doing nothing but silently watching and perhaps making notes. I am careful to avoid taking notes in a way that reflects which side I support. When the time is right, I transition to a pre-devised set of questions:

1. What do you think happened? Why?
2. What kind of impact do you think occurred? Why?
3. Where do you think it occurred in the intersection? Why?
4. Why do you think that? Any doubts?
5. What else do you want to know? Why would that matter to you?
6. Please take out a piece of paper...and if you think anyone is at fault, and I’m not saying anyone is, but if you think anyone is at fault, write the name and the percentage of fault. If you find that anyone or multiple people are at fault, then the total percentage must add up to 100%. If you believe no one is at fault, then write that.
7. What did you write down, and what are the top two reasons why? (I ask this individually to each focus group participant in front of the group and collect the papers).

As the focus group participants discuss the case with each other, answer my

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questions and eventually allocate fault, the pictures and the model cars are on the table. They point to the pictures, circle damage marks on the vehicles, and slam the cars together to show how and where they believe the impact occurred. The focus group turns me into an expert on exactly how and where this crash happened in the intersection, and that the defendant was mistaken as to both. Most importantly, I know what the jury will believe by looking at the pictures, and I know to embrace this and never go against it. I also know which seeming trivial facts are important to address and then rule out during opening statements and plaintiff's case. I also have enough information to meaningfully help the crash reconstruction. I know the jury will be leaning toward my client's version of events before either party testifies or puts its credibility in play. I know how to frame the liability portion of my case.

Part 3 — go deeper

Get creative with the third part of the narrative focus group in a way that searches for answers to the big issues in your case. I like to surprise the focus group and have the plaintiff come in and tell a part of his or her story for 10 to 15 minutes. I ask soft and neutral direct exam style questions, revealing who the plaintiff is and what happened in the injury-causing event (not damages). After that, I let the focus group question the plaintiff, which reveals what they really want to know and how they feel. Another strategic tactic I employed at the end of the red-light, green-light focus group was to play back-to-back segments of the plaintiff's and the defendant's depositions. This allowed me to watch the focus group judge credibility, plausibility and find holes in each side's story. It allowed me to watch how the deposition testimony changed the group participants' perception of fault from their initial determination following the

You are your own jury consultant here, watching the focus group unfold the same way the jury will at trial.

neutral statement of the case. Seeing their opinions change allowed me to drill deeper and find out why they changed, which showed me which facts made the difference in the case. This is where the gold is.

During the testimony, I neither comment nor nonverbally reveal my feelings about the testimony. I don't want to sway any participant's opinions. I closely watch faces for scoffs or disgust. If there is disgust toward a portion of the defendant's testimony, I mark that clip for trial. If the disgust is toward the plaintiff, I mark that part of the testimony, explore

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it with the focus group and adjust my approach to the plaintiff's testimony accordingly. You are your own jury consultant here, watching the focus group unfold the same way the jury will at trial.

Stay neutral

If you strive to win your focus group (trying to get the focus group on your client's side) you risk losing at trial. You want a critical focus group that can freely speak its mind without fear of disappointing you. Only then can you learn all the ways you can lose your case. You hold a focus group to discover what you do not know, not to reinforce what you already believe.

The purpose of conducting a focus group is to get accurate information about what a jury will think of your case. Anything less than complete neutrality leads to inaccurate information—and inaccurate information is worse than no information because your case is thereafter guided by false information. While conducting the focus group, your words, eyes, face, expressions, questions and the time you devote to each side's points must never give away whether you are for the plaintiff or the defendant. If you do, the focus group will give you the information you want to hear, not what you need to hear. Especially if the participants like you.

Please don't think this is easy. Most people cannot do this without practice and coaching.

It is not in your nature to stay consciously and unconsciously neutral with everything you say and do. You are a warrior with a competitive desire to win this case for your client whom you personally care about. It is in your nature to advocate for the plaintiff. But unless you have the discipline to stay incredibly neutral with the presentation of the neutral statement and throughout the focus group, your results will be flawed to the point they become unreliable. You must therefore approach your focus

group without a desire to hear anything specific.

During the focus group, be more like a scientist who doesn't need funding, and who is studying for the sake of studying without the desire to accomplish a specific result. Be like the Buddhist monk, who sits calmly in the face of shouting, violence or condemnation. Be like the boulder in the river that has not moved in 30,000 years, and rests without judgment or goal. Have no opinion — but facilitate, observe and record. Neutrality is paramount.

Neutrality is also accomplished administratively. I run focus groups through my website oregonfocusgroups.com. That way, jurors do not know me or my firm until the focus group is over. This can also be accomplished by using an employment agency to staff your focus group. The focus group never knows this is my case. If the focus group likes you and knows this is your case, the participants will tell you what you want to hear, not what you need to hear.

Summary

Learning to do focus groups is comparable to taking up a new adventure sport — like whitewater rafting. Once you get past the idea that you will be solely responsible for navigating the whitewater, you dive in and take on the process. Once you have committed to conducting your own focus groups, the hardest part is over, and you get better with every focus group you watch, attend or conduct yourself. The journey is fascinating, and it will make you a far better trial lawyer.

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