

Introduction

In the 1970s and '80s, attorneys in expensive, "high stakes" litigation began using "mock" and "shadow" juries. A "mock jury" was a private jury, randomly chosen from the general population. In a conference room of a first rate hotel or such other independent setting, two or more attorneys from the same law firm would present an abbreviated version of both sides of a case. Mock jurors would then deliberate outside the immediate presence of the attorneys, while being viewed (with their consent) either through a one way mirror or on videotape. The mock jury would deliberate to a verdict. By this means, the attorneys would have the benefit of the mock juror's discussions and would also have its recommendations on value. The cost of a mock jury ranged from \$5,000 to \$50,000 or more (in 1970s dollars).

"Shadow juries" were groups of individuals randomly selected and anonymously paid by one side to watch an actual trial, as surrogates for the real jurors. If the real jurors were excused, such as for an offer of proof or legal argument, the shadow jurors would be ushered from the gallery. But unlike the real jurors, the shadow jurors would be asked to talk about the case at every opportunity. And when they did, their handlers would immediately report back to the trial attorneys what the shadow jurors were saying: what information they wanted, what they considered important and unimportant, and what they thought of the incoming evidence. In those by-gone days when jurors could not ask questions, the views of shadow jurors were the next best thing to having a peek into the minds of the actual jurors. The cost of a shadow jury depended on length of the actual trial, and could be very expensive because shadow jurors expected to be paid full value for their lost wages. (Unemployed people might be an inexpensive alternative, but they would likely not represent a true cross-section of the community and so could not be considered a reliable indicator of what the actual jurors might be thinking.)

Focus Groups

Today "mock juries" and "shadow juries" have been largely replaced by the more flexible "focus group." (This moniker is borrowed from the wiley advertising executives on Madison Avenue, who for years have used focus groups to determine what consumers need or want, what they like, and what motivates them to buy.) A focus group can be any combination of a few or even quite a few individuals who are willing to listen to part or all of a case and then give feedback on certain issues and even on the whole case. Any attorney who has asked a spouse or barber or janitor or taxi driver about a case has taken a step toward a focus group. But unlike an individual's response to an issue or a case, the focus group enlarges the input and provides expanded insights into how a real jury is likely to react to certain issues in the case, and can even provide some meaningful

insight on how a real jury might determine liability and damages. Most important, a focus group can inspire an attorney on what issues to emphasize, what issues to avoid, and how to present the evidence in its best possible light.

Focus groups may not have the complete predictive power of mock juries or of shadow juries, but they still are well worth the expense, which can often be less than \$500 for 12 individuals to meet with an attorney and staff for three hours during an evening or on a Saturday. Unfortunately, some attorneys cling to old traditions when using focus groups, and thereby either needlessly increase the cost or limit the use of focus groups to only catastrophic cases. Some of the needless old notions include the following:

1. Never divulge to the focus group which side has requested the study.
2. Never conduct the focus group at an attorney's office.
3. Never be in the room while the focus group is deliberating.
4. Always be sure that the case is presented by two different attorneys, each representing only one side of the case.

While I am not suggesting that the traditional wisdom is wrong, I do believe that it is often unpragmatic. I have conducted focus groups in a variety of circumstances, and have come to the conclusion that if participants are encouraged to express their true feelings, and are gathered from varied backgrounds and experiences, individuals will express themselves – often very vigorously – regardless of the setting, or who has requested the study, and whether an attorney is in the room or the proceedings are being videotaped. (I do recommend, of course, that the client herself not be present, since most jurors would be reluctant to express a negative feeling in the direct presence of the client, and the whole experience, abrupt and wide open, would likely be very hard on the client.)

In several recent focus group studies, I have used the conference room of my own office, and have presented the case to groups composed of between nine and twelve individuals, selected by my staff with a view to obtaining a wide background of experience. (In one case tobacco use was a potentially important issue, so we made sure we had both smokers and non-smokers in the focus group.) We typically begin a focus group session on a weeknight at 7:00 p.m., so that the participants have had time to get home from work, have dinner, and then come to the office. We promise they will be done by 10:00 p.m. will be paid \$10.00 per hour. We provide light refreshments midway during the evening.

We have each participant sign a confidentiality agreement and have previously obtained our client's permission to disclose necessary information. I typically explain up front who I represent and tell the participants that I want their honest feedback and their unrestrained reaction to evidence and issues that I anticipate will be important at trial. I then spend about half an hour setting forth plaintiff's claims, then an equal amount of time describing defendant's defenses. I then offer a brief plaintiff rebuttal. I give jurors several of the same key jury instructions they would receive in an actual trial.

I then ask participants how they would decide the case. Invariably, they will ask additional questions regarding facts and occasionally even the law. The first epiphany is realizing what information the participants feel they need in order to decide the case. I sometimes discover that despite all my previous preparations, I have overlooked the investigation of some facts.

As participants gain confidence in their knowledge of the facts and law, they will begin to discuss with each other how they would decide the case. They soon move from deferential discussion to wide-open debate, sometimes with elevated voices and passion. As I listen, I gain critical insights as to how the real jurors are likely to decide the same issues - - at the very least I know what the debating points on both sides of the issues are likely to be. I provide a verdict form to channel discussion into areas of fault, comparative fault, percentages of fault, and damages.

The participants often have become so involved that they want to keep discussing the case even after 10:00 p.m. A number of participants have remarked on leaving how fascinating and enjoyable the evening was, and how interesting our work is. More than a few have asked to be invited to another focus group.

A focus group can be conducted any time, even before filing a lawsuit, so long as the attorney has sufficient facts on both sides of an issue to present balanced questions. Usually the best time for a focus group is about six weeks before trial. By this time discovery is generally complete, the attorney has a pretty good handle on the facts and critical exhibits, and the defense positions are generally quite well known. I have found focus groups to be such an overwhelmingly positive experience that I intend to use them often on cases having unusual facts and major damages. By using focus groups I gain fresh insights into the strengths and weaknesses of my case, and have an expanded objective basis for refining every aspect of trial preparation from voir dire to closing arguments. It has been said that a jury has a collective I.Q. of 1200. While no one can exactly quantify the helpful I.Q. of a focus group, it can definitely be said that using a focus group expands an attorney's own sometimes narrow litigation-biased views of the case.