

INTRODUCTION

Jury Focus Groups have historically been used to help lawyers prepare for trial—a dress rehearsal, if you will. But with the increased emphasis on settlement, particularly through alternative dispute resolution (or ADR), more and more attorneys are using focus groups to guide them in settlement decisions.

WHAT ARE FOCUS GROUPS?

“Focus Group” is an umbrella term for a continuum of processes ranging from informal concept groups (designed to help parties develop themes and legal theories) to formal trial simulations (often called mock trials). The most commonly-used type of focus group is one where information about a case is presented to a group of “jurors,” who then deliberate and render a “verdict.”

HOW ARE FOCUS GROUPS CONDUCTED?

An outside consultant is usually retained to assist in planning and conducting the focus group. Together, the attorney and the consultant discuss the case, select a date and location, agree upon the type of jury to be recruited, and determine the most effective manner of presentation.

The location varies depending on availability. A private courtroom is preferred (there are several in the New Orleans area). But hotel and law firm conference rooms are often as effective. Critical to the success of any focus group is jury selection. To ensure reliability, the trial consultant speaks with litigators and trial judges in the venue where the case is pending in order to determine the profile of actual juries. Jurors are usually registered voters who reside in the venue.

Additionally, three demographics are usually considered when selecting a representative jury: race, gender, and age. The number of jurors recruited will vary depending on the venue. For example, if the case is pending in state court, then a twelve-person jury is recruited. On occasion, the consultant will recruit two juries, who will hear the same

presentation, but who will deliberate separately and render independent verdicts.

The manner of presentation is case specific. Some cases allow for summary presentations by all parties (a combination opening/closing with exhibits). Summary focus groups usually last three to four hours and are often conducted on a weeknight. Other cases require the testimony of witnesses (e.g., a particularly sympathetic plaintiff). Witnesses may be called live or by edited video. When available, using actual witnesses is preferred. However, recruiting a law partner or an associate to play the role of a witness is permissible (particularly with experts or physicians). Trial simulations usually require a full day and are often conducted on a Saturday. Regardless of the format, all relevant parties must be “represented” at the focus group. Customarily, a partner or associate handles the opponent’s presentation.

Regardless of the manner of presentation, the jurors are “charged,” after which they deliberate and render a verdict. Following their decision, jurors return to the courtroom where they are debriefed by the consultant. The deliberation and feedback sessions are often videotaped (usually with hidden cameras) for later review by the attorney and the client.

HOW CAN FOCUS GROUPS GUIDE SETTLEMENT DECISIONS?

An informal poll of mediators suggests that several types of cases are less likely to settle at mediation. One is where liability is hotly contested (e.g., conflicting witness statements over how an accident occurred). The other is where quantum is difficult to evaluate (e.g., extensive burns, brain injury, punitive damages).

In the contested liability case, each party’s risk analysis is based largely on emotion. Looking at the same facts, each party’s “gut” suggests a very different outcome. Neither side can point to any quasi-scientific data, or even other cases, to support their position. Their view seems to be based on their wished-for outcome.

In the difficult quantum case, each side struggles to project a likely range of jury verdicts. Often, neither side can find a case with similar damages. And if there are reported cases with similar facts, the awards are so wide-ranging that they provide little guidance.

One useful tool for assisting one—or both—sides in these types of cases is a focus group. Conducted properly, focus groups are fairly reliable in predicting how the actual jury may feel about liability and/or damages. Sometimes the mock verdicts confirm an attorney’s gut. But often they do not. The benefit of a focus group is that it offers a more objective evaluation of liability and quantum. Those attorneys who regularly conduct focus groups often repeat the process on a case in order to increase the reliability of the focus group’s findings. With guidance from the focus group, the attorney is better able to evaluate liability and/or quantum, and the client is better able to make a more informed decision on the appropriate settlement value.

CONCLUSION

Although trials make the newspaper, the reality is that most cases settle. Deciding how much to pay—or accept—in settlement has to date been largely an art form. Conducting a focus group on a difficult-to-evaluate case can bring some “science” to your settlement decisions.

ABOUT THE AUTHOR

A full-time neutral since 1993, Tom Foutz offers jury focus groups and mock trials, conducts mediations and arbitrations, serves as a court-appointed special master, and umpires insurance disputes. For more information, contact Mr. Foutz at TomFoutzADR@aol.com.

