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# IDENTIFYING BIASES, TESTING THEORIES, AND EVALUATING CASES.

By Leigh Latherow



*“The one place where a man ought to get a square deal is in a courtroom . . . but people have a way of carrying out resentments right into a jury box.”*

- ATTICUS FINCH

**A**tticus Finch knew what all trial lawyers know. Jurors have biases. Jurors view evidence in light of their own experiences, their own disappointments, and their own motives. While trial lawyers are always hopeful for a square deal in the courtroom, sometimes jurors get cases wrong.

As litigators, it is important to understand jurors' biases and preconceived notions. Understanding what evidence or arguments may or may not be persuasive can save time, resources, and can shape the case's direction. Being able to identify potential jurors'

reactions to witnesses, evidence, and theories before presenting them to an actual jury is invaluable. It is instructive to know what evidence will be compelling, what trial theories are persuasive, and what misconceptions of your client's business or situation will cause the jury to focus on extraneous issues. If a red herring can be identified before opening statement, then you can exploit it at trial or develop your proof to minimize or eliminate that potential trial strategy of your opponent to maximize your chances of success. Knowing how our clients and witnesses are perceived in the community and how other parties are perceived can also avoid costly mistakes at trial.

In some cases, *voir dire* may not be adequate to

flesh out biases. The formality of the courtroom—whether it is the judge sitting on the bench in a black robe or the presence of an armed court security officer overseeing the proceedings—does not lend itself to self-disclosure of biases or even complete honesty in juror responses. *Voir dire* should not be the first time to test case theories or obtain jurors' reaction to evidence. Likewise, using hypotheticals with friends and family to test case theories is not likely to elicit the type of feedback that accurately reflects a cross-representation of the community. What if we could present our cases to people who look and sound like the jury panel who will decide the case?

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### Using Focus Groups Before Trial

Focus groups provide such a mechanism, because they are comprised of people who are from the same community, have the same experiences, and hold the same biases as the actual impaneled jury. Focus groups provide a practice run to evaluate what works and what does not work, to test case theories, and to explore the presentation of evidence. “Every day, all across America, small groups of strangers gather in nondescript rooms. Under the guidance of professional moderators, these strangers ‘focus’ their feelings on paper plates, vodka advertisements, movie endings, and political sound bites” (Baker, Peter C., *Focus Groups and the Culture of Consultation*, available at [www.psmag.com/magazine/breaking-down-the-meaning-of-focus-groups](http://www.psmag.com/magazine/breaking-down-the-meaning-of-focus-groups), Dec. 13, 2017). Just as focus groups are used on Madison Avenue to test and tweak products, attorneys are also using focus groups in much the same way to test and tweak case strategies.

Variations of focus group methodology are limitless. Most focus groups utilize a moderator to guide the process. One can tailor a group to a narrow issue, focus it on particular themes, evaluate a piece of evidence or presentation style, or explore the breadth of the entire case. At one extreme, a single issue or piece of evidence may be presented for evaluation. On the other hand, a full mock trial may be conducted. Most likely, though, using a procedure somewhere in the middle provides the most cost-effective and constructive means to obtain the most valuable information. One mid-level option is a summary presentation in which attorneys present persuasive statements interspersed with deposition video transcripts and demonstrative evidence. The focus group may be large enough to split into several groups that are each given jury instructions to answer and then questioned about the case’s strengths and weaknesses of the evidence.

Another fairly extensive option, which is less than a full trial, is to empanel sequential and separate focus groups. The attorneys present arguments and evidence to the first

group. The panelists’ reactions are evaluated after the presentation. Using that feedback, the presentation is modified for the second panel. This allows the attorneys to test themes, develop strategies, and modify their presentations and theories in real time. A summary presentation may be made by the panelists for the first presentations which allows the attorneys to observe and listen to the panelists’ reactions. Then, the attorneys make their final presentation by using the insight gathered from the prior panelists’ feedback.

The two focus group options described above utilize panelists who observe and hear the presentations in person. The advantage of these methods includes seeing the panelists discuss the evidence with one another, observing body language, and gauging the atmosphere in person. There is considerable value in observing jurors advocate for one position or another and listening to what is important to them when trying to convince other panelists of one position or another. Attorneys can develop trial themes and strategies during this observation and feedback portion of the panel process. The panel can also identify demographics of jurors who reveal community or personal biases based upon their life experiences. These unintentional, but impactful, biases can influence a jury to a far greater extent than the trial lawyer, evidence, and witnesses.

Many other methods are also available for impaneling a focus group. For instance, video conferencing may be used to assemble the panelists, which offers the added benefit of convenience since the panelists are able to participate from their computers. The attorneys are provided with on-screen demographic information for each panelist while the panelist is speaking. A disadvantage, however, is the loss of a group dynamic experienced from in person and peer-to-peer evaluation. This loss of influence or peer pressure that otherwise exists in the jury room during actual deliberations

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potentially skews results.

Some strategists recommend empaneling focus groups early in the case to allow themes to develop and be used while the case progresses, especially during depositions. Disadvantages to this approach, however, include that evidence may not be fully developed, new parties may be added at a later date, or other parties may interject new themes that change the dynamics of the case so that the benefit of the early focus group is lost. On the other hand, a risk of waiting too late to conduct a focus group is the inability to develop strategies adequately during discovery or wasting resources by having pursued parties or themes that were not persuasive to the focus group. Identification of the right time to employ a focus group is case specific and within the discretion of the lawyer and client.

#### **Considerations for Focus Groups**

- An attorney should consider the following in order to make the most beneficial use of the focus group experience:
- Do not allow the focus group to know which side has empaneled the focus group, because this

information risks potential bias one way or another.

- Conduct the focus group in a neutral facility, such as a hotel or conference room.
- Select a cross-representative of the jury pool in age, gender, socio-economic status, and biases. Ideally, the facilitator will pull members from the trial venue or a representative nearby community.
- Fully present both sides of the argument. Presenting your client's side of the case exceedingly well, while only marginally presenting the other side, can obviously lead to a skewed verdict and provide less information about how to deal with the other sides' strengths.
- Obtain a written report from the focus group leader. The report may include the leader's evaluation of the proceedings, but at a minimum, it should include the questions asked of the panelists and a report of the panelists' responses.
- Allow your client to observe the proceedings. The client's participation allows you to present your client with the good, the bad, and the

ugly and allows the client to observe firsthand the jury's reactions.

Focus groups cannot change the evidence, make your client likable, or guarantee victory. However, they are an effective tool to improve the effectiveness of your trial presentation and strategy. Atticus Finch had an innocent client, but he had a jury filled with jurors who could not or would not overlook their prejudices and biases. Using a focus group was not likely an option for Atticus, and he did not need one to know the likely outcome of his case. But, we are not all Atticus Finch.



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