

# Use of Focus Groups in Preparing for and Presenting Plaintiff's Case at Trial

by

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The trial of an employment discrimination case is the culmination of a long series of events — from the filing of an EEOC charge and complaint, through discovery and dispositive motions, to pretrial motions in limine — each of which has in one way or another expanded or narrowed the scope of the facts that the jury will consider at trial. Since a decreasing and today very small percentage of civil cases actually go to trial, and since trial preparation and trial are very expensive undertakings, it is all the more critical today that employment discrimination practitioners be especially well prepared for trials when they do occur.<sup>2</sup>

Several years ago, while beginning to prepare for a trial, I attended a NELA presentation on the use of focus groups in trial preparation. I was intrigued by the idea that plaintiffs' attorneys preparing for a trial could create a confidential forum in which they could present their case to a panel of disinterested individuals whom they had chosen from the same population that would supply the jurors to the jury pool in their upcoming case. These "jurors" would hear trial-like presentations from both sides, including a defense presented by a plaintiff's lawyer doing his or her best to rebut the plaintiff's case, and then conduct their deliberations while being observed on a closed circuit television by plaintiff's counsel.

Like most advocates, I had become completely persuaded by the plaintiff's case that I was preparing to present to a real jury. Having litigated the case for years, survived more than one motion for summary judgment, and invested hundreds of thousands of dollars in attorney time and costs, my colleagues and I were absolutely convinced that a jury could see the case only one way, and that was that the plaintiff was right, the defendant was wrong, and there were no two ways about it.

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<sup>2</sup> In the U.S. District Court for the District of Columbia, the percentage of civil cases that parties litigated through trial decreased from 2.7% in 1996 to 1.6% in 2001. See District of Columbia Circuit Reports (1998; 2000; 2002). The comparable statistics for the D.C. Superior Court show a decrease from 3.4% in 1999 to 1.87% in 2003. See District of Columbia Courts, 2003 Annual Report, at 79 (2004); see generally H.V. Sanborn, "The Vanishing Trial," ABA J., Oct. 2002, at 24.

At the same time, I wanted to do everything possible to maximize the chance for winning a major victory in the case, and the NELA presentation on the use of focus groups convinced me that we should look into the focus group idea in the few weeks we had remaining before trial, even if that meant losing some of the rapidly diminishing hours that remained for trial preparation in the conventional sense. After reading some how-to literature about putting together a focus group in-house, we quickly concluded that we lacked the necessary expertise, and hired a jury consultant – Carolyn Koch of Jury Solutions – to assemble and run the focus group “trial.”

After winning that case before a jury several years ago, my firm has used jury consultants and focus groups in nearly every case we have taken to trial since then, and have found them to be an invaluable resource for achieving the best results at trial. These focus groups, assembled and run by a skilled consultant and composed of “jurors” who bear an incredibly close resemblance to the jurors who have ended actually hearing our case in the courtroom, have repeatedly provided us with an independent, objective and sometimes sobering assessment of the merits of our case, and have given us critical guidance for how best to present our evidence at trial.<sup>3</sup> In essence, the trial consultant and focus group can provide a fresh set of eyes that can help the attorneys — who have been too closely bound up in their case for too long — view the case from the perspective of lay jurors who have no prior exposure to the plaintiff, the defendant, their counsel or the facts.

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<sup>3</sup> See C.S. Clark, “Savvy Jury Selection: Lessons from the Experts,” Washington Lawyer (Jan. 2001); S.L. Yarbrough, “The Jury Consultant — Friend of Foe of Justice,” 54 SMU L. Rev. 1885 (2001).

A trial consultant will usually assemble a focus group or mock jury, who meet in a large room where the attorneys, including a mock defense counsel, present synopses of their evidence, both testamentary and documentary. The mock jurors do not know which side has hired them to hear the case, and thus has no reason to be biased towards one side or the other. After hearing the presentations, which the attorneys make with all the seriousness that they would invoke at trial, the focus group participants are given jury instructions and are asked to determine liability, and if appropriate, to award damages. At various stages in this process, both before and after their deliberations, the jurors provide the consultant or the attorneys with their candid oral and written feedback.<sup>4</sup> The trial consultant will provide her feedback as well, not only on the mock deliberations of the “jurors,” but also on the attorneys’ opening statements, examination of witnesses and closings. The attorneys and consultant view the jury deliberations by closed-circuit television or through one-way mirrors, allowing them a unique perspective into the jury’s decision-making process.<sup>5</sup>

The feedback provided by the trial consultant and the lay participants can help the attorneys in any number of ways, from sharpening the focus of their opening and closing arguments, deciding which witnesses to present and which documentary exhibits to emphasize, to deciding, often most importantly, to de-emphasize or omit entirely lines of witness questioning that they had for months or years believed to be central to their case. Even the process of preparing for the focus group is very informative: since the attorneys who retain the trial consultant need to prepare a summary of the opposing side’s case to present to the mock jury, they are forced, however reluctantly, to look squarely at the weaknesses in their own case, an introspective exercise that ends up being extremely valuable when it comes to preparing the plaintiff and the plaintiff’s witnesses for cross-examination.

Not surprisingly, the mock jury that Carolyn Koch assembled to sit for our “air-tight” case several years ago was able to identify several important problems with the case that we were simply unable to see from our advocates’ perspective. And believe me: analyzing and addressing those problems at the focus group was a lot easier than it would have been to discover and deal with them for the first time before a jury. The feedback we received from the mock jury allowed us to refine our theory of the case, to hone the themes we would put forward at trial, and to make better decisions about which witnesses to call or not call, and what evidence to

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<sup>4</sup>In cases in which we conducted videotaped depositions, we also showed these to the mock jury so that they could evaluate and comment on the demeanor and credibility of the defendant and other defense witnesses. As a result of feedback we received in one case – the jurors simply couldn’t stand the alleged discriminating official – we chose to call this would-be defense witness in our case in chief, and won the case. We also prepared a taped direct examination of the plaintiff which we played for the mock jury to receive feedback about the plaintiff’s demeanor and credibility.

<sup>5</sup> See Carolyn S. Koch, “Improving the Odds: Using Mock Trials to Hone Strategies,” 24 The Trial Lawyer 116 (2001).

emphasize or to leave out altogether. This last point – about what to leave out – is very important for us as attorneys. We have all had the experience of spending months or years learning a case backwards and forwards, only to find ourselves explaining certain very complicated aspects of the case to a jury that is looking back at us with gazes that range from bored to downright blank. If using focus groups had taught my firm anything at all, it is that it is very hard for the lawyers who have spent years in a case to easily and intuitively grasp what the jury is likely to care about and not care about. The mock jury is one of the best tools available for helping you to simplify and streamline your presentation of a case.

Some trial consultants now provide “Internet juries,” – laypersons who review the evidence from their home computers and vote electronically.<sup>6</sup> We haven’t used these for obvious reasons. While these services may be cheaper than in-person focus groups, I think it’s pretty certain that you get what you pay for, as the attorneys lose the ability to judge the jurors’ non-verbal reactions to the evidence.<sup>7</sup> Similarly, an Internet jury cannot simulate the interaction that occurs when six to twelve individuals are brought together and forced to reach a common conclusion, and thus has to fall somewhat short of the results obtainable from a live, in-person focus group.

Unlike many categories of expert witnesses, there is no accreditation agency, licensing body, or other professional standard-bearer for the field of jury and trial consultants. The field has spawned a trade association called the “American Society of Trial Consultants” (<http://www.astcweb.org>), but this group appears to have no formal professional prerequisites for membership, as evidenced by some of the entries in its online directory, which includes students who are still enrolled in college programs. For this reason, attorneys need to proceed with care in selecting a trial consultant, and should take the time to investigate prospective candidates and to speak with their former clients.

In most cases, attorneys should retain a trial consultant after the judge has ruled on the defendant’s motion for summary judgment, and when it appears highly unlikely that the opposing party will settle before trial,<sup>8</sup> but be careful to allow sufficient lead time – a week or two if possible – before the start of trial so as to allow time to run the focus group, benefit from the experience, and use it in final trial preparations. When chosen carefully and allowed to put on a well-designed focus group, the jury or trial consultant can be the best pre-trial investment a plaintiff’s attorney can make.

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<sup>6</sup> See R. Gordon, “Trial Research in the Age of Technology,” *Trial*, June 2000, at 64.

<sup>7</sup> See Yarbrough, *supra* at 1897-99 (discussing limitations of Internet focus groups).

<sup>8</sup>The results of the focus group, if it returns a verdict for the plaintiff, can even be useful in persuading the defendant to settle a case on the eve of trial. While this is always a delicate time for settlement discussions, it cannot hurt, if those discussions are underway, to point out to defense counsel that a well-designed focus group just the day before had handed down a whopping verdict against his client.