THE JURY BOX

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I recently co-hosted the New England Regional meeting of the American Society of Trial Consultants at Focus Pointe in Boston. The session was very well attended, with participants specializing in forensic psychology, handwriting analysis, demonstrative evidence, and more. Look for a summary and photos in an upcoming issue of Massachusetts Lawyers Weekly.

In this issue, I discuss one of the staples of trial consulting: focus groups. I review various uses for focus groups and how best to design them, in light of their value and limitations.

– Edward P. Schwartz

There are two main types of legal focus groups: exploratory and targeted. Both types can be very valuable and the advantage of one type over the other depends on where a litigator is in case development and what kinds of strategic issues are in play.

Focus groups, if designed correctly, can be useful for preparing for depositions, mediation, arbitration and trial. When it comes to legal focus groups, one size definitely does **not** fit all. The beauty of the focus group format is its flexibility. I always design a focus group in consultation with the litigator, so that the study provides answers to her specific questions. A focus group involves a moderator and a panel of subjects. Beyond that, the format is really open to what we can dream up together.

Streaming Consciousness

Occasionally, a lawyer will handle a unique case, whose contours don't really resemble anything she has worked on before. The case might present novel issues or be so complicated as to make it hard to anticipate how it will be viewed by a jury.

As I have discussed in earlier issues of THE JURY BOX, jurors are natural storytellers. They seek a coherent, consistent, satisfying version of the events in dispute. As such, when presenting a case to a jury, a lawyer must have a good story to tell. This requires the identification of a couple of compelling themes. In an unusual or particularly complicated case, theme identification can be difficult.

An exploratory focus group is an excellent tool for thematic development. I often design such focus groups as brainstorming sessions. The idea is to give the "jurors" a basic summary of the facts of the case, perhaps supplemented by a few key exhibits and snip-its of testimony. We then allow the focus group members to discuss the case, facilitated by the moderator. As questions emerge, we can spoon feed the jurors additional information and see how it affects their thinking about the case. The key is to allow the respondents to drive the discussion and observe which issues they latch onto first and which ones persist as important throughout the discussion.

This kind of focus group does not have much predictive value, but it is critical to identifying what kinds of arguments are likely to resonate with a jury. Given that all jurors enter court with strong predispositions, an ideal litigation strategy is one that reinforces what the jurors already believe. A good lawyer will use the jurors' attitudes to her own advantage. A brainstorming focus group session can help identify those attitudes.

All the world's a stage.

Many cases hinge on the testimony of one or two key witnesses. It is critical to know how such a witness will perform in front of a jury and to maximize the effectiveness of her performance. The best way to accomplish this is through practice testimony in front of a focus group.

I recommend videotaping a direct and cross examination of the witness in question. This has several advantages over a live presentation. First, if the lawyer knows after a few minutes that the witness is bombing, she can offer some advice and start over. There is no reason to spend the full price of a focus group on something that is a disaster from the get-go. Second, people are often unaware of how they appear to others or the impression that they make. It often helps in convincing a witness to change her style to be able to show her where she went wrong. Third, if I am concerned that a particular panel's reaction might be atypical, it is a straightforward matter to convene a new panel and show the tape to them. More observations lead to greater confidence, but only if everyone sees the same testimony. Finally, if it turns out that only a small section of a witness's testimony rubs the panel the wrong way (possibly as little as the choice of a single word), it is possible to splice in a new version of the offending section and see if that solves the problem.

Start strong… finish smooth

Research shows that jurors often form strong opinions about a case very early in the trial process. As such, it is critical to craft your opening argument for maximum impact. Always remember that jurors are storytellers – your opening statement helps them write the first chapter of their story.

A litigator's opening statement is one of the very few things at trial over which she has complete control. As such, there is no excuse for not getting it just right. A focus group can help a lawyer identify the proper tone for her opening and which

points to hit hard. An opening statement can be tested alone or against a hypothetical opening for the other side. A good strategy is to ask a focus group to evaluate your opening argument and then present them with an opposing one and ask them to reassess. Again, a videotaped presentation is a good idea for many of the reasons listed above for sessions focusing on witness testimony.

Research is mixed on the efficacy of closing arguments. Jurors will have made up their minds in most cases by the time lawyers get a chance to make their closing remarks. That said, we do know that people tend to remember more easily things that they have heard more recently. As such, your closing argument is an opportunity to make sure that jurors remember the facts that are key to your case. A focus group can be an effective way to test how well your closing argument contributes to the recall and comprehension of important case facts.

1000 Words... but are they the right ones?

In even the simplest of litigation, juror comprehension can be a problem. In complex litigation, like class action suits, intellectual property cases, and certain medical malpractice cases, the difference between winning and losing might boil down to whether you can successfully explain to the jury what's going on. I have discussed in earlier issues how critical I think exhibits are to maximizing juror understanding. I typically see two errors in exhibit preparation.

First, some lawyers don't think visual exhibits are very important. They are confident in their own ability (and those of their experts) to explain things verbally to a jury. Most ordinary people do not learn well this way. Memory is often linked to visual cues, like what something looks like on a page or in a photograph. (I can still remember what the list of U.S. presidents looked like in my 9th grade civics book and that the second page began with William Harding.)

The second mistake that I see is an assumption that a beautiful exhibit is an effective exhibit. Effectiveness depends on the exhibit's clarity, organization and simplicity, *as well as an expert witness's ability to teach from it*. If you are going to spend $10,000 or more on a fancy animation, you should test its effectiveness on a focus group, to make sure that no pre-trial modifications are necessary. One interesting exercise is to see how much respondents can figure out from the exhibit alone, to help the lawyer and expert identify those factors that require detailed explanation.

Once bitten, twice shy...

Sometimes a focus group goes beautifully. The jurors' responses confirm the lawyer's intuition about how to proceed. Most of the time, however, the litigation team learns about ways to improve its case. That's kind of the whole point. Should the process end here?

If the focus group responses point to obvious fixes, one session may be sufficient. More likely, the first focus group identifies questions to be addressed. I recommend an iterative strategy. If the first focus group reveals your opening argument to be too heavy handed, craft a new one with a subtler approach, *but be sure to test this one, too*. You want to converge on the ideal trial strategy and such convergence may require multiple testing of the same issue until you get it right.

In the News

"I'm serving 5 to 10 and then I have jury duty."

Last year, following the acquittal one defendant accused of killing 10-year-old Trina Persad, here in Massachusetts, we learned that as many as five of the jurors had undisclosed criminal records. The other defendant had to be retried, after the judge declared a mistrial. Well, it's happened again. Another prominent Massachusetts case was clouded by the revelation that several of the jurors had criminal records that they declined to reveal on *voir dire*.

The problem is not limited to the Bay State. The racketeering trial of former Illinois Governor, George Ryan, was delayed and complicated by the revelation that at least a couple of the jurors had lied about their criminal records. Both jurors had been arrested but had failed to admit so on their juror questionnaires. One, Evelyn Ezell, had apparently become disruptive and belligerent during deliberations, causing several other jurors to report her behavior to the judge. Judge Rebecca Pallmeyer seemed relieved to be able to dismiss at least Ezell, but she admitted that seating alternates at that time, rather than declaring a mistrial, would expose her to possible reversal on appeal. In rejecting the defense motion for a mistrial, Judge Pallmeyer declared, "I am not afraid to be reversed." Ryan and his codefendant were convicted shortly thereafter.

As if this weren't bad enough, shortly before the verdict was delivered, it was revealed that the jury forewoman, Sonja Chambers, had also lied on her juror questionnaire – about her involvement in past court cases. Judge Pallmeyer denied the defense motion for a mistrial and accepted the verdict from the jury that included Chambers. Assuming that the revelation of Chambers' dishonesty came after the jury had settled on a verdict, any inquiry into the matter is governed by Federal Rule of Evidence 606 (b), which prohibits jurors from testifying about their deliberations for the purposes of impeaching a verdict. So, the defense will be able to show that she lied, but they will have a difficult time proving that it prejudiced the defendants.

As I wrote in the January, 2006 issue of THE JURY BOX, such dishonesty during jury selection is inevitable unless the judge permits private, individualized *voir dire*. Supplemental juror questionnaires elicit more honesty than group *voir dire* in open court, but jurors will be most forthcoming if they are asked questions directly by the judge in private.

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