

**Conducting Your Own Focus Groups to Discover Story,
Metaphor, “Rules” and the “Reptile”**

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Introduction:

Between 1998 and 2005 I worked for two highly successful trial law firms in Atlanta: Garland, Samuel & Loeb and Butler, Wooten. During that period of time I participated in several professionally – run focus groups. They were planned, produced and pored – over by jury consultants. They cost tens of thousands of dollars. And while I don’t doubt that the lead lawyers on the cases learned something from the focus groups and the experts who conducted them, in my practice, I have had few times when spending that kind of money for focus groups was justified.

When I opened my own law firm I bought David Ball’s book *How to Run Your Own Focus Groups* and was relieved that (at least David Ball thought) I could run my own. I found the book to be very helpful and began conducting my own. I used David’s forms, had another lawyer help me present one side of the case, then the other and let the “jury” deliberate. Often, my participants were office – mates, folks down the hall, or friends and family. The price was usually several large pizzas. I found I always learned something from the process: often that my “jurors” were focusing on something in the case I didn’t see as important, or that they were discounting something I thought was critical to the case.

But there were limitations to the process. On the negative side, I found out that many of my cases didn't turn out the way they turned out during the focus group. On the positive side, I found that the most valuable things I learned usually came not from the lengthy questionnaires that I adapted from Ball's book, but from casual conversations with the Focus Group (FG) members after their deliberations.

I have had the honor of being involved with Gerry Spence's Trial Lawyer's College in Dubois, Wyoming as an instructor for the past 11 years. One of the great benefits is the contact I have with creative and remarkably successful trial lawyers from all over the U.S. Several of them: Tom Metier in Colorado, Paul Luvera in Washington, Rex Parris and Jude Basile in California, and Don Keenan in Georgia and Jim Fitzgerald in Wyoming, believe that focus groups give them the information on how their jurors will process and think about their case (the jurors' "biases" and "frames"). They are doing incredibly creative things to learn the jurors' biases and frames so that they can, by the time of trial, present their case so that it communicates to the jurors in the juror's own "language" (within the biases and frames they have).

Put another way: if jurors are deciding our cases, why not determine ahead of time what is important to them (rather than what is important to us) so that we can present our case in a way that focuses on what our jurors need to hear from us to decide in our client's favor (and not what they don't).

Over the last several years as our firm has had success in serious injury and wrongful death cases at trial we have taken to scheduling focus groups roughly every month. We routinely from two (2) to (10) focus groups for a case. In fact we do not prepare a case for litigation, mediation or trial without first running focus groups on the case. In some instances, we run focus groups before conducting discovery.

However, the approach we now take to conducting Focus Groups is different. We rarely ever present "one side" vs. "the other" and let the FG deliberate. Instead we focus on: discovering the "Story" of the case; the "Metaphors" in the case; the "Rules" in the case¹; and the "Reptile" in the case².

¹ See, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, by Rick Friedman and Pat Malone. Great trial lawyers have probably been framing their case around rules violations for generations. I have never heard anyone articulate the reasons for doing so – and laying out a specific and simple method for doing so – the way Rick and Pat have done in their books. I keep a copy on my desk at all times.

² Meaning discovering those things that motivate jurors' unconscious instinct for safety/self-preservation. See, *Reptile: The Manual of the Plaintiff's Revolution*: Don Keenan, David Ball (and Research Team James Fitzgerald, Gary Johnson).

The point of this presentation is to hopefully inspire you to give you the benefit of what has worked for us (and what hasn't) over the past years of conducting focus groups and hopefully inspire you and give you the tools to conduct your own.

The Premise:

There are three conclusions I have come to that drive my use of focus groups.

First, that the following are important in presenting any case to a jury:

1. Story: Including "Scenes", "Hero", "Villain", and "Betrayal";
2. Metaphor;
3. "Rules";
4. "Reptile".

No matter how you find these in your client's case – whether through analysis, inspiration, or through work with a slew of trial consultants, you must find them.

Second, as lawyers, we over-complicate and get "lost" in our cases. We work countless hours, plan, prepare, analyze and, ultimately lose perspective. We also rely on other lawyers – perhaps our law partner or someone who has had a successful trial in a similar type of case, or even a trial consultant – to help us decide how to present our case. Some of these can help. But there seems to be a fundamental problem to this approach: if I am preparing my case to be decided by a jury, why would I trust a lawyer (myself or anyone else) to tell me what jurors "think" about my case? Instead, in our firm, we believe that Focus Groups help us hear from the "jurors" themselves, what is important to them.

Finally, no matter how skilled I am at Voir Dire and the use of my strikes I will not be able to strike all "bad" jurors from my panel. This means that there will be conservative jurors on my panel. There will be jurors with different backgrounds, political persuasions, genders, and life experiences. Since they all get an equal vote in the jury room, I better try to determine the best way to speak to all of them.

Given these conclusions, we use our focus group members to help us find Story, Metaphor, Rules and Reptiles and we use them to help us understand the different "frames" that people with different backgrounds (whether it be political, ethnic, gender, or anything else) may bring to deciding our client's case. We then try to make sure that we are speaking to all our jurors in a way that is important to them.

What follows is a brief description of some methods we use, with some specific case examples from actual focus groups we have run in our clients' cases.

GUIDING PRINCIPLES FOR FOCUS GROUPS:

The three (3) guiding principles that I have been taught re. focus groups are:

1. **Once we “frame” an issue, our mind is made up.** Psychologists and Neuroscientists agree that humans process information by running it (unconsciously) through past experience, belief and values. They call this a person's “*frame*” (think, “frame of reference”). Therefore, the stronger the person's experience with an issue (frame), the less you can impact their decision-making. After a while, they are “framed” and will not budge from their viewpoint no matter what fact you give them.

That's why a “serious” Georgia fan with years of pulling for the ‘Dogs and a “serious” Florida fan will “see” an umpire's call on the same play very differently. Even though football still follows the laws of physics, and the play happened only one way in space and time, the Georgia fan and the Florida fan will literally see the play differently because of their life experience and beliefs. In many instances, no matter what you do, you can't convince either fan that they're wrong – their “frame” is too strong.

Carrying this over to FG's, you need to screen FG members to learn whether anyone in the group has an intense life experience that will immediately “frame” their reaction to your case

2. **You can't un-ring a bell:** Psychologists and trial consultants tell us that jurors begin making up their minds within moments of hearing about our case. Accepting this premise as true, the same thing occurs with your focus groups. Therefore, you should assume that, once your FG jurors have heard even a little about the facts of your case, they are beginning to get “framed” on their opinion. It follows that if you want to test how a specific thing in your case impacts the jurors (a fact, a witness's appearance, a photograph, an exhibit, etc.), you must do so early in the focus group.

Put another way (and to use a well-known criminal trial as an example): if you want to test the FG reaction, say, to the “bloody glove” found at the scene of the crime, you better not wait until you have already told the FG about Mark Fuhrman using the “N” word. For some folks on the jury (the O.J. jury, for example), the existence of a white police officer who had used a racial slur may have “framed” them so that no other

evidence mattered. Your FG is now “tainted” by the “Fuhrman fact” and you will never be able to gauge their reaction just to the bloody glove.

Essentially, the longer the focus group goes on and the more they learn about the case, the less you can rely on their reaction to any key fact. Therefore, if you want to test the FG reaction to facts, you must try to isolate the fact and introduce your most important facts first. If your goal is to “test” a piece of evidence, you must be stingy with the information you provide the FG panel and gauge their reaction to each small piece.

3. **Human decision-making is emotional/ Humans don’t always know why they do what they do.** Emotional / creative though and rational though occupy two different sides of the brain. Therefore, although you can watch a FG member’s reaction to issues in your case, you should not trust their explanation of why they feel the way they do or react the way they do. To counter this, I try to watch the FG members’ reactions and set up ways to visualize how they “lean” to one side of an issue or another. Another tool is to set up ways to learn FG members’ “feelings” and try to keep them spontaneous and watch their reactions rather than asking them to explain why they decide one way or another. This is also why I like drawing, using collages, picking images when we look for “Story” and examine damage issues – drawing keeps FG members on their emotional /creative side of the brain.

Specific Focus Group Techniques:

SOCIOMETRY/ “20 QUESTIONS”:

Sociometry is simply a visual depiction of the relation of members to a group of each other. It allows you to “watch” FG member’s reactions to issues in your case and “gauge” how one group (women, or older jurors, for example) may react differently from another group (men, younger). This is one of my top FG tools.

If we had the members of this group line up from one end to the other based on:

- How far they had traveled to get to this seminar.
- How many years they had been practicing law.
- The size of their largest verdict.

You would begin to learn not only something about your group, you would begin to learn where you fall in relation to the group on these topics and begin to notice “groups” within the larger seminar group. Sociometry, then, is relational.

By using sociometry, you also get to watch and experience the FG member’s movement/ reaction to facts in your case, rather than try to analyze their reactions from written responses to questions in a form. Here’s the “high-tech” analogy you are familiar with:

CNN has 12 “regular American citizens” in a room to watch the State of the Union address. They have assembled Democrats, Republicans and Independents, men and women, old, young, etc. Each member of the group has a joystick. They are instructed to point “up” if they like what the President is saying or “down” if they don’t. Those of us watching from home watch different colored lines move across a screen in peaks (“like”) and valleys (“don’t like”) on a split – screen with the President giving the speech. The “talking heads” then try to discern what the up and down squiggly lines tell them about the group members’ reactions to the speech.

Some of us have worked with trial consultants who use the same technology to track perceptions in focus groups they run. This technique, using sociometry, gets you to the same place without the technology. Put another way it allows you to watch the movement of your group and watch for trends “up” or “down” on issues in your case.

One way to do it:

The point of this exercise is to identify facts that “move” jurors powerfully – either “for” or “against” your client’s case:

1. Start by identifying a key issue in your case.
2. By getting the FG member’s “questions” you are learning what assumptions they are coming to – assumptions based on very little information.
3. You will then identify the “top” questions – the most common questions posed by your jurors.

4. You can then choose how to answer the juror's questions. Only you know what questions they have asked. Therefore the lawyer can choose the priority of "answers" (facts) he gives the jurors.
5. In response to each answer/fact, the jurors have to move.
6. Watch for large, profound, "group" movements in either direction. These are the most powerful facts in your case. Watch for places where there is little movement in response to a fact you thought was critical. (You need to know this too).

* A note on the sequence of the exercises you present to a FG: After answering lots of "questions" (feeding the jurors facts one at a time) your jurors will have most, if not all of the critical facts in the case). Remembering the "you can't un-ring a bell", you will not be able to isolate juror's reactions to any specific fact, witness, etc. after doing this exercise. If you want to isolate juror's reactions to anything else during the same FG (an exhibit, a witness' videotaped deposition, etc.) you will need to do it before doing the "20 questions" exercise.

STORY - DISCOVERING THE STORY OF THE CASE:

EVERYTHING IN LIFE IS A STORY. Everything. We are born – which is a story – and we die, the end of that story and perhaps the beginning of another. Our life in between was a story, a book, in fact, every day a page of the story. The question is whether anyone would want to read that book. More to the point, would we want anyone to read it?

Gerry Spence, Win Your Case.

The experts tell us "the native mode of human cognition is the narrative". In other words, although many people are capable of purely logical thinking, for most of us, the most natural way to understand the world around us is in terms of stories. From childhood we absorb countless stories, some generic, some specific to certain situations, such that by adulthood we carry around in our heads a number of basic, stock stories. These stock stories are so well known in psychology, they have a special name: "*scripts*".

There are several ways I work on discovering the Story of my client's case. One of the ways is by using re-enactment and methods taught at the Trial Lawyer's College. Another way is that I have the members of the FG help me.

Another note about timing and sequence: this is something I do at the conclusion of the focus group. This is because I want the FG to be aware of as many of the facts in the case as possible. I don't want to selectively leave anything out, or focus on anything because of my own bias.

One way to do it:

The key is to get the FG members into using their "right brain" – reacting creatively and emotionally. We have found that having FG members draw or collage works well.

Once the FG members know enough of the facts of your case, some of the techniques/direction we give the jurors are:

1. **Movie Poster**: Imagine that you are the Director of a Movie being released next month. You need for the movie poster to convey, in one image, what the movie is "about". If you only have one image you can put on the poster, what is the image? Draw it? (Stick figures are "ok"). Then have them draw "the second choice" and "third choice". Look for patterns among FG members. How do most FG members see the "story" of your client's case? Do men and women see the story differently? Old, young, etc.?
2. **Children's Book**: Same exercise but Children's books often have titles. They are also good to simplify a complex case into a basic story. Direct the FG members to design the cover and title of a children's book that conveys the central message of the story they have just heard. (They can design a book that tells your client's story, the Defense story, and the "true story" of the case.
3. **Damages Collage**: Our firm handles catastrophic personal injury cases. Therefore I am always interested in how my jurors will see my client's injuries. One technique we use is to discover the "story" and the "images" associated with my client's life since the Defendant's recklessness. My friend, Rex Parris has enough laptops and printers in his office for his FG members to search image databases for images that "tell the story of the client's life with his/her injuries". He has also conducted two-day FG's where the FG members go home at night, surf images on the web, and return to the office to be debriefed about their images. We take a simpler approach borrowed from Don Keenan: we provide magazines, paper, scissors and glue-sticks and have the FG members create a collage that tells the "story" of the client's life since the injury. We look for patterns in the FG responses and choose the images most powerful to the FG to use in our case.

METAPHOR:

A Dream Deferred.

What happens to a dream deferred?

Does it dry up
like a raisin in the sun?
Or fester like a sore--
And then run?
Does it stink like rotten meat?
Or crust and sugar over--
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?

Langston Hughes.

The lawyer who wins the metaphor, wins the case.

Rex Parris.

We spend a lot of time trying to find the “metaphor” in the case. If I had to explain metaphor I would use the Langston Hughes poem. Another way to think of metaphor is the intersection of “Frame” and “Story”. What I mean is that a metaphor is a simple figure of speech used to explain something that is similar, but more complicated. If it impacts the listener, it does so because it reminds them of something they have experienced in their life (i.e. something from their life “story”).

In this poem, Hughes explains the different ways a dream that is put off can impact us. What does this have to do with trial lawyers? Here’s the question: what does Hughes analogy/metaphor do for those of you who have put off something you dreamed about doing? Does it resonate with you? Does it remind you of your dream? Maybe you had forgotten about that thing you had once wanted to do, but have delayed. Does remembering your dream (your “deferred” dream) impact you emotionally? Doesn’t it make this issue (a deferred dream) personal to you – important to you? Isn’t this what we want with our juries – to be impacted, to relate, and to react powerfully in response to our client’s case?

If you believe this is what you want, then you need to find the metaphor. If you want to find the “jury’s” metaphor, why not let the FG do it for you?

One way to do this:

Again, this is largely a creative/emotional “right brain” exercise. What you want to learn is “what does my client’s case remind you of in your life”?

Liability:

Chiropractors are like

Driving without your glasses on is like ...

Damages:

Suffering a stroke is like ...

RSD/CRPS is like ...

“RULES” AND “REPTILE”:

I imagine most of you are familiar with Rick Friedman and Patrick Malone’s Rules of the Road and Don Keenan and David Ball’s Reptile. (If you’re not, stop what you are doing, leave the seminar and go buy them, sit down, and read them.)

If you are familiar with them, nothing I suggest here modifies the approach that Rick and Pat present in “Rules of the Road” or the central ideas in “Reptile”. I simply like to use my FG to help craft “common sense” rules that will trigger the Jurors self-preservation and safety instincts and to “test” the Rules I’ve developed during the course of the case to narrow my rules list down before trial. I also like to use the FG to help me find the “Reptile” in the case.

One way to do this: “The Safety Manual”

One approach we take is to incorporate some of what I believe Don Keenan and David Ball are getting at in “Reptile”, and to tap in on the left brain of the jurors / is to have the FG create a “Safety Manual” with “Always” and “Must” Rules. We have had tremendous success getting FG members to tell us what rules they believe would have prevented the recklessness that led to my client being injured. In a case involving chiropractic malpractice resulting in a bilateral dissection and stroke, we were disappointed to learn that all of our FG members

trusted chiropractors. However, they did believe there were “Rules” that all “good” chiropractors must follow to avoid the injury like the one to my client.

3 Practical Pointers for Focus Groups:

1. Do them: When in doubt on an issue, do a focus group. Also, keep them small, simple and inexpensive. One of the benefits of doing smaller, less expensive groups is that I find that I am not as pressured to have a 100% success rate on everything we try in the group.
2. The FG is more like your jury than you are: You will not seat a jury of lawyers. So, don't let lawyers decide all the key communication issues in your case (Story, Metaphor, “Rules”, “Reptiles”). Let the FG decide these for you (or, at least, provide you with a couple of ideas). If you follow Rick Friedman's “Rules of the Road”, why can't the FG decide, at least, the common-sense universal rules for the case? And story: how do the FG members see the scenes of the story? Who is the hero? The villain? And what scene best tells the story of the case? The FG can give you all of these.
3. Trust what “jumps out” at you, write it down, and make a plan: I recognize there are two main problems I encounter with conducting focus groups for myself. First, I'm not a trained psychologist or trial consultant. Therefore I try to keep it simple. I only look for what is obvious – patterns, movement in the group as a whole or sub-groups (old, young, etc.) – what “jumps out” at me. Second, since I don't use extensive questionnaires, the information I learn from the group (if I'm not careful) leaves as soon as the group leaves.

The best approach I've found to capture what I learn from the FG is to immediately follow the FG with a “debrief” and to immediately follow the debrief with a plan of action. (So, we've learned a,b,c. Now what? Does it lead to Rules-based Requests for Admissions? Does it lead to a different focus or frame in the way the story of the case is presented? If I follow these steps I find that I capture as much as a non-psychologist/non trial consultant can.

CONCLUSION:

Jurors in our cases aren't likely to be lawyers. They are more likely to be "regular" people. By spending time learning how regular people view our client's case and learning what they find important in the case we are better able to speak to our jurors in a language and with a focus and framework that they understand and care about. We find that when jurors care about our client's case, then they are more likely to take action in a significant way. Focus Groups allow us to find out what our jurors care about.

If you would like our office to send you some of the outlines for FGs we have done in actual cases, our FG forms and checklists, email me at nelson@tyronelaw.com and we will get them to you.