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Sharing Focus Group Results

Friday, Feb 29, 2008 --- A graduate of Boston College Law School, Attorney Jeff Bagnell of Westport, Connecticut recently conducted two focus groups with my trial consulting company, Jury Solutions LLC.

Jeff has been rated among the top 5% of attorneys practicing in Connecticut for the last three years, and he represents corporate and individual clients in trials and appeals relating to federal and state civil rights laws and business disputes.

In the two cases in question, he made the strategic decision to provide opposing counsel and the judge with excerpts from the mock trial jury deliberations during settlement conferences.

Attorney Bagnell discussed the following points with me shortly after attending an ALI-ABA seminar in Washington, D.C. on mitigation issues in employment litigation where he was only one of a few attorneys present that had ever used a focus group, let alone share his results with the other side.

The tactical decision to share information: When asked why he decided to share this confidential information, Jeff explained that it was during the fourth settlement conference in which he shared his results. His goal, of course, was to prompt a fair settlement in light of the case's egregious set of facts.

It was a Family and Medical Leave Act (FMLA) retaliation case in federal court where the plaintiff had been terminated two days after heart surgery. The judge had been working very hard for a long time to bring both sides together, to no avail.

During this 4th conference, Jeff arrived with audio visual equipment and a DVD, showing 15 minutes of the mock jury deliberations to show the judge and the other side. At the very least, he believed that corporate counsel would view the information with keen interest.

Out of the mouths of jurors: In the clip, one of the mock jurors emphatically described the defendant's decision to terminate the plaintiff as an "incredible blunder" which might have even killed the plaintiff due to her heart condition and recent surgery.

When asked to describe outrageousness on a scale from 1 to 10, this mock juror rated it an "11." The video camera recording the deliberations panned around the room and captured the other jurors nodding in agreement.

For corporate counsel and their insurance representative, seeing the mock

jurors on video discuss the case "live" clearly packed a much greater wallop than just having the lawyers argue the case back and forth, which had already been done countless times.

The end result was a settlement approaching seven figures which, in plaintiff's counsel's view, was greatly facilitated by the focus group and his decision to share the results.

Overcoming a higher burden of proof: Attorney Bagnell's success with the FMLA case prompted him to conduct another focus group in a Title IX case involving a sexual assault on a 28 year old college student on her first day of class.

Under the Supreme Court's Title IX jurisprudence, the plaintiff had to prove that the defendant educational institution exhibited "deliberate indifference" to her rights, a much higher burden of proof than is normally required in a civil case. Again, Jeff decided to share the mock jury results during the third settlement conference.

Using your opponent's "star" witness for leverage: As a trial consultant, I always encourage my clients to videotape their opponent's testimony during the deposition. Some lawyers have expressed reluctance to do this for tactical reasons.

In my view, having the video arms the lawyer with the ability to test out how well or how poorly jurors will view witnesses, which is a critical aspect of winning or losing a case.

In Jeff's case, he wisely videotaped the deposition of defendant's key witness, a female professor whose testimony about earlier incidents of sexual harassment was so critical.

The defendant apparently thought this professor's credibility would not only outweigh the plaintiff's, but that it would refute plaintiff's assertion that the university demonstrated "deliberate indifference." Not so.

The mock jurors found this professor's testimony and overall demeanor to be less than credible. For example, during the focus group, when mock jurors had the opportunity to give written feedback on this testimony, they described the professor as: "unsure, forgetful, detached, lying, evasive, shifty, not truthful, confused, embarrassed, uncomfortable, hiding something, not admitting what she knows, dishonest, trying to cover her actions, liar, and concerned for saving self."

Plaintiff's counsel, by presenting the testimony on video, was able to accurately present this witness's weaknesses to the judge. After the judge saw the witness testimony, she viewed excerpts of the mock jury deliberations, which she later showed to defense counsel in her chambers.

Helping your opponent envision what a real jury might do: The plaintiff had

already obtained a spoliation ruling against the university and an adverse inference jury charge for its destruction of electronic evidence.

The defendant was aware that this put them in a difficult position but again, they apparently continued to believe that they could prevail anyway.

The turning point for the defendant occurred as soon as they saw on video how negatively mock jurors reacted to their deletion of emails and other documents.

On that video, a few mock jurors said that any doubt that they had about the case was completely eliminated by the defendant's destruction of records. That case settled on extremely favorable terms, which was a terrific coup in light of the plaintiff's high burden of proof and lack of economic damages.

Overcoming your blind spots in the case: As an experienced trial attorney, Jeff had previously relied on informal feedback on his cases before deciding to do professional focus groups in these two cases.

When asked how he – as an attorney in the trenches – viewed the exercise, he explained that it wasn't just the results that were valuable; it was the entire exercise starting with the task of having to present both sides of the case objectively, something that is difficult to do when you obviously believe your case is meritorious.

Arguing each side is important, he said, because after years of trying to help your client obtain a just outcome, both sides can overlook weaknesses and become too close to the case.

Jeff experienced what most attorneys experience when conducting a focus group: He was amazed to see how disinterested people viewed the issues in the case.

He was particularly amazed to see how they can identify critically important details that the lawyers – who have been living with the case sometimes for years – hadn't seen. It comes down to simple math: The life experience and intelligence of twelve or sixteen or twenty people as opposed to one or two will always yield helpful insights that would otherwise have remained hidden.

The collective common sense of focus group jurors – when a project is done right – will always reveal the truth about one's case.

Communicating with the court and your opponent: When asked how the focus group helped him with the judge, Attorney Bagnell said that "a lawyer who spends the time and money that a focus group requires usually won't walk away without trying the case or getting a fair settlement.

It also shows the judge that you have looked at the issues in depth from all perspectives." Jeff felt that "judges appreciate it because they can see you are trying to be objective and that you are not adopting a see-no-evil

approach.

The easiest way to show objective support for your position is to point to how 12 impartial people reacted to the facts. Focus groups also help you convey a credible settlement position: Instead of appearing that you are valuing the case based on your own opinion of liability and damages, you are presenting a case value based on what disinterested people believe is appropriate.

Jeff also felt that, aside from settlement concerns, the process makes lawyers better prepared to actually try the case. There aren't that many civil trials anymore and the focus group force you to get on your feet, present both sides, develop inferences from the evidence, and anticipate objections to testimony and exhibits." Jeff concluded, "It's a method of preparation that is just superior to making your case on paper."

Following the ALI-ABA conference, Jeff was surprised that more attorneys aren't using focus groups, let alone sharing the results to maximize recovery. Perhaps the barrier is misperceptions about cost.

Lawyers often mistakenly perceive that the costs of focus group research are prohibitive when the opposite is true: Focus groups allow attorneys to get the full value of their case if they are plaintiffs, or avoid a costly overpayment or underestimation of case value if they are the defendant.

For Attorney Bagnell, his overall investment for two focus groups was .025 % of the entire value of both settlements. Once the misperception about cost is removed, the only barrier left is whether or not attorneys really want to learn objective insights about their case, or if they prefer to go forward with blinders on.

--By Carolyn S. Koch, Jury Solutions LLC

Carolyn S. Koch, J.D., is a trial consultant and the principal of Jury Solutions LLC, in Fairfax, Va. An attorney admitted to the Connecticut and D.C. Bars, she has over fifteen years of experience with jury research techniques such as mock trials, focus groups and attitude surveys. She uses these tools to assist trial attorneys in both civil and criminal cases, all over the country. Her work has helped plaintiff's employment lawyers achieve some of the highest verdicts in New Jersey state history.