

Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Speaker 2:

You are the leader in the courtroom and you want the jury to be looking to you for the answers.

Speaker 3:

When you figure out your theory, never deviate.

Speaker 4:

You want the facts to be consistent, complete, incredible.

Speaker 5:

The defense has no problem running out the clock. Delay is the friend of the defense.

Speaker 6:

It's tough to grow a firm by trying to hold on and micromanage.

Speaker 7:

You've got to frontload a simple structure for jurors to be able to hold onto.

Speaker 8:

What types of creative things can we do as lawyers even though we don't have a trial setting?

Speaker 9:

Whatever you've got to do to make it real, you've got to do to make it real, but the person who needs convincing is you.

Voiceover:

Welcome to the award-winning podcast Trial Lawyer Nation, your source to win bigger verdicts, get more cases and manage your law firm. And now here's your host, noteworthy author, sought-after speaker and renowned trial lawyer Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation, I'm again joined by my partner Malorie Peacock. Malorie just got back from doing some focus groups in Peoria, Illinois, learned a lot as always and so we thought that we would share some of what we've learned about focus groups, why to do them, how to do them, what you get out of them, how to use what we get out of them. But before we can dig in, I always want to thank our sponsor, LawPods. LawPods produces this podcast for us. They make it so easy. All we have to do is sit here and talk. They set up all the production. They do all the editing. They do all our little snippets, so we can advertise it and try to get more people to listen. They make life real easy. So if you have a podcast or you want to start a podcast, I highly recommend LawPods. Malorie, how are you doing?

Malorie Peacock:

Good. I'm a little exhausted from traveling all the way up to Illinois and getting back late last night, but I'm super pumped about all the information that we learned from the focus groups which is always the case when you just finished a focus group.

Michael Cowen:

Yeah, I'm really looking forward to you debriefing me. We'll probably not debrief these actual groups on the air since it's a live active case. But let's just talk about ... I know some of our listeners have probably done a million focus groups, but some may not have done any. First of all, what is a focus group?

Malorie Peacock:

So a focus group is just gathering a group of people to test your case. It can be a small group, it can be one or two people, it can be a huge group, it can be hundreds of people. We've done them all kinds of ways. But it's a group of people that's not involved in the case, not lawyers, not your law firm that you present pieces of your case to or the whole case and see what they think about it, get some feedback, see what kind of questions they have, so that you can address any issues that you might have before you go to trial and it's too late.

Michael Cowen:

Why do we do focus groups?

Malorie Peacock:

Focus groups are so, so important, especially when you have a case that's a little more complicated, to understand what do ordinary people or people that might be on your jury, what do they think about your case. Sometimes you can get so wrapped up in the minutiae of your case or in some really technical details or you've learned the case so well that you think it's obvious to everybody else. So having that outside perspective is a way to get feedback to make sure you're not just buying your own bullshit, right?

Michael Cowen:

Yeah, exactly.

Malorie Peacock:

Simply put.

Michael Cowen:

We've actually had it go both ways. I remember you and I tried a case against a bus company a few years back and we got brought into the case four years into the litigation. So we jumped in, I think, right before the expert deadline. We were able to find an expert and go try the case a few months later, but we didn't think we had the best liability case until we did a focus group.

Malorie Peacock:

Yeah, yeah, we were really on the fence about the case and it was a small focus group. That one was a small one. We were only able to get a couple of people because we sort of did it at the last minute to try to help us prepare the presentation of the case for trial. It was later on in the litigation after discovery had closed. It was more about, "How are we going to present this in a way that makes sense to the jury?"

And we had been wanting to really settle that case before that focus group because we were worried about it. And with the focus group, they changed our mind about it and then gave us some ideas for the presentation of the case.

Michael Cowen:

Yeah, I was embarrassed. I made the client sign off saying that she was turning down \$125,000 settlement offer against our advice and we thought we were probably going to lose the case. And then she was adamant she wanted her trial and we said, "Well, we better do a focus group, at least test our theories." And because we had more than one angle we could have ...

Malorie Peacock:

Right.

Michael Cowen:

... gone in and we saw that one angle just resonated so strongly in the eight ... I think we had eight or 10 people. I don't think it was that small, but they were just so strong about it. Then when we went into trial, we didn't even talk settle anymore. They wanted to start talking to us during the trial. We said, "No, we got this," and we got a nice verdict on that case. And I think it helped get us past some fears we had. No, usually, it's the other thing, the other way around. Usually, we think we have a great case and then we find out all the problems in the focus group, but it can happen both ways. So let me ask you, is there more than one type of focus group? I know that there's in-person, there's virtual, but as far as I'm thinking concept versus testing the case and adversarial, what are the kind of types of focus groups that you've done?

Malorie Peacock:

There are so many different ways that you can test a case. I don't necessarily like to put them into those little boxes only because there's so many different variations of it that you can do, just depending on where you're at in the case, what your goals are and why you're doing it. So I would say I'll give you some categories of focus groups, but I wouldn't get so married to the categories of focus groups. What's more important is that you think about, "What is the purpose of this group? What do I need to get out of them? What is my goal?" and write that down and then do that. Do whatever is necessary to meet that goal.

But there's some broad categories. There's a concept focus group, which is what it sounds like is testing the concept of your case. So this is more appropriate in a case that's maybe more complicated or there's a conceptual issue that you're wondering, "Is the jury really going to get where I'm going here?" So a regular auto case concept focus groups aren't going to give you a ton of information because juries already have experience with them and they already understand it. But a concept group and a product liability case is so critical because you need to understand people's experiences with the product, with the ideas surrounding why it's defective or how it could be defective and whether they understand even the jury instructions.

So concept focus groups are way more useful when you have some really complicated issue. You can also use a concept focus group to test evidence. So do, "Is a testimony persuasive? Is a witness going to come off well? What do people think about this particular witness? Is this illustration or diagram that I've created convincing? Is it confusing? Is this animation showing what I think it shows?" So those are also concept focus groups, but they're evidentiary concepts. So they're a little bit different than just testing legal concepts in the case. And then the next level is not all the way adversarial, but it's actually

presenting the case. So you may not do a full mock trial, but you're presenting both sides of the case, arguments on both sides.

The best way to do those is to get two lawyers involved. One plays the role of the plaintiff, one plays the role of the defendant and makes the arguments that each side would make and then see what the focus group thinks about it. And then there's an even higher level of adversarial, which is a true mock trial where you're going to present not just arguments but some of the evidence that a real jury might hear. So maybe you'll play some deposition clips. Maybe you'll show some of the actual documents that you might use or the illustrations that you've created along with the argument itself. So it's more like a mock trial.

Those we typically do closer in time to the case because the purpose of the mock trial focus group is not so much to find out what discovery to get, how to work up the case. It's more about, "How about this information? What's the most persuasive way to present it and what argument on the other side is going to be very persuasive to the jury?" that you have to address in advance.

Michael Cowen:

Yeah, and I've seen it both ways on the adversarial, whether or not you have two lawyers, one arguing each side or whether you have one neutral person presenting, "This side says this. This side says that." When I've talked to Artemis Malekpour or David Ball and they said, "Well it's important just to have one person argue both sides and someone's going to be able to do it from a neutral frame because that way you don't have the personality effects or differences in skill level, the advocates being a confounding factor." But I've also found that there's something about the competitive drive between lawyers, even when you're playing, you want to win and I think you reach a little deeper when you're competing with each other.

And I also think that there's also a rehearsal factor. In cases where we've done a lot of adversarial focus groups and I've done presentations, I'm really ready to give my opening because I've said something, watched or been at least briefed on because I have trouble watching them and we'll talk about that later, people not get what I said and learning how to refine it and say it more clearly and actually be understood and persuasive. I think that maybe I get slightly less accurate data, but I become a better advocate. So it's a mix because I think there's also, I don't know if it'd be a true focus group, but some things we do closer to trials give our opening and get out of the way and see what people thought, "Did they understand us? Were they persuaded?" Do a practice voir dire and then, "What do they think about us? What do they think about the case? Did we go too far, looking for cause strikes that now we look like we have a horrible case or are there a lot of bad people left on that we didn't identify?" It's just an interesting ... It's a million different things you can do.

I do want to go and turn back towards the beginning. So I think when you have ... I used to think I can't do a folks group the very beginning because I don't have enough information. And I remember you and I had one, it was an oil field explosion, bad burn case and we were setting it up ourselves and we were in a county where we didn't know a lot of people. I think we tried direct mail. I think I bought a mailing list of voters in the county or something that we mailed to. And we only had three people show up.

Malorie Peacock:

Right.

Michael Cowen:

We had only done some very, very basic written discovery. We hadn't taken a deposition yet. And it is one of the most valuable focus groups we ever did because one thing I found out about is that

everybody in that community either has worked in the oil field, they know someone who's worked in the oil field, they know basic concepts, they knew what things were called. And I also learned that I didn't and I learned very quickly that, one, I didn't understand the case and they actually understood the issues better than I did. But two, I was going to have to get some visuals really quickly in that case because the oil field people were going to be able to play word games with me and say I didn't name things properly and I didn't use the right jargon.

And so what we did on that case, we had a scale, 3D-printed model of the scene showing where everything was. So I can just say, "What is this? What is that?" and make the witnesses name it and use their jargon and it totally saved the case and it's our biggest recovery we've ever had at the firm. And I think that those three people who showed up at that focus group were the impetus of that huge recovery we got, because yeah, it wasn't a valid test to the case, but that's not what it was supposed to be. We knew these are issues that resonate at least with these three people, but they educated me. And then we did a lot more focus groups later on to really test and hone in on the case.

But I just wanted to mention that on a big case where you have the budget for it or if you're going into a new area that you haven't done before. You can do a medical negligence case. What do people think about doctors and this type of theory that you have? A misdiagnosis case is different than leaving an object in somebody case. And so how much are they going to give the benefit of the doubt to the doctor on a misdiagnosis case? What's the feel in that area? And then the biggest thing is what do they want to know. Find out what people want to know and then you go try to shore that up in discovery. What other- Even like on a blown stop sign case, sometimes there was speculation like, "Well, was our driver on the cellphone? Was our driver late for something?" and all kinds of stuff that because we had those questions asked in the focus group and even like, "Was the stop sign in the right place? Were there other crashes? Did the DOT not put the stop sign there right?" And by anticipating that, we were able to then go to the discovery to eliminate those questions to show that those are not excuses for what happened. So I think those concept groups are super valuable if you have a case that has the budget for it. And then of course, getting in, I think the adversarial, they help you ... I think they give you confidence or fear depending on how they're coming out, but they give you ...

Malorie Peacock:

Right.

Michael Cowen:

... some idea of how people view your case and I think there's the good practice effect that we're able to go practice talking to people, practice talking about the case in a way that it's going to be well received. I do want to ask you another question though. Are focus groups predictive? Can you say, "Well, I won 10 million in this focus group, so that's what a jury's going to do"?

Malorie Peacock:

Never. Never seen one that's predictive. We've done some even with hundreds of people and still I'm not confident that they're predictive because you never know who's going to show up to jury duty, the day of jury duty and there's no way to anticipate what the makeup of your jury will be, who they will be, what their life experiences are. And so you can't rely on that. The other issue that you have in a focus group is whether you're fairly and accurately presenting the other side, okay?

Michael Cowen:

Yeah.

Malorie Peacock:

So you do your best to try to think of, "What would this particular defense attorney present as their case at trial? How will they argue it?" but until you see what they're going to argue and how they argue it there, there's no way to predict that unless they're involved, but of course, they would never be involved in our focus group. But there's so many variables that an amount of money is not predictive. What issues people find and are concerned about, I think that is predictive. So there's a person on the focus group that's really hung up on whether or not it was rainy that day. That's an easy question for you to answer in the presentation of your case and it's good that because you might have a jury member that is back there in the jury room saying, "I just can't decide because I didn't know if it was raining." So that, the issue part I think is predictive of what people will find issues with, but the number is no, never. There's too many variables.

Michael Cowen:

Yeah, and also there's a magic that happens during a trial. Now sometimes it happens ...

Malorie Peacock:

Right.

Michael Cowen:

... for us and sometimes it happens to us, but just connection with the juror, how a witness is impeached. The rulings of the judge makes you think you're going to win or lose certain evidentiary rulings and then the judge does something unexpected. Sometimes no matter how good your case law is, the trial judge disagrees with you and you have a different ruling. And so when you're doing the focus group, you have to make some assumptions about what's coming in, what's coming out. We often test the worst case like, "If all the bad stuff comes in, this is what's going to happen." and if it's a big enough case and we have the budget, test it both ways, okay?

And we know we had one with a client who was undocumented. We were 95% sure that the judge would keep that out, but we ran it both ways because we knew that it was an incendiary issue and we found that with some, not all jurors, it was a huge weight dragging down the value of the case or just certain people that would not give a large amount of money to someone who was undocumented. And now we know that came in, we'd have to try to identify and strike those people in jury selection, but we also knew that we really needed to fight the issue because the law is that it's not relevant. The case in Texas, the law's pretty good on that issue.

So it's just one of those things that we have to do. I think you can also test medical bills. There's a big, I don't even know it's a controversy anymore, but there's a big question in cases, "Do you present your past medical bills or not? Are they an anchor that's going to anchor down or not?" And the other big thing is if you're in a jurisdiction that lets the defense present testimony, let's say your doctor charged \$100 for something, but there's evidence that that doctor takes \$15 from health insurance, \$10 from Medicare, \$8 from Medicaid for the same procedure, but wants \$100 when it's in litigation. Does that stink come over to the rest of your case and drag down the rest of your damages so that you'd be better off just dropping them?

I know we just nonsuited medicals in a case we had set for trial in two weeks and our medical bills were 300 something thousand. But we decided based on our research that the stink that that fight puts on the rest of the case and we think we have a multimillion-dollar case, why are we worried about 300,000? And why give the defense all those things to poke holes at us and try to make us look bad? Instead we

want to talk about how bad the crash was, how bad the company was and the horrible effects the treatment he's going to be the rest of his life, etcetera.

Malorie Peacock:

Right. And testing issues you're scared of is really, really critical. I would say the timing of when you decide to test these issues is really important. Like I said before, identifying what your real goals are for focus groups is so critical because that will affect how you present them. So if the goal is to build your confidence for opening and to practice your opening, then you don't need to present the defense's opening and that's not the purpose of the focus group. The purpose is for you to practice, get comfortable, get comfortable with your hand movements. You're getting feedback, not about necessarily the content of the case, but whether you're being understood, whether you're speaking too quickly, whether your gestures, you're too chaotic.

So you're asking different questions of the focus group to get the feedback because what you don't want is a week before trial you're practicing your opening, and suddenly, this focus group is telling you how terrible your case is. That's not helpful to anybody. What do you do at that point, right?

Michael Cowen:

Right.

Malorie Peacock:

You don't want to do things that are not helpful or destroy your confidence right before trial either. So the timing of everything is really, really important and it's so, so critical that you identify, "Why am I really doing this? What do I want out of this?" and make sure that you're asking the questions of the group that will get you information that's useful to you and not get you information that's not useful. That's a really good example of doing the focus group of your opening and then them saying about how terrible your case is. That's too late for that, right?

Michael Cowen:

Yeah. I think another thing that's a ... Well, I have a question. Do you think that it's okay to do them yourself as far as doing the presentation if it's just going to be one person presenting, say we're not going to have one lawyer on each side, or do you think it's important to get someone neutral because it's so hard to take the person out of being an advocate for their own case?

Malorie Peacock:

That's a tough question. I think it's really person-specific, whether they're able to be neutral and whether they're able to appear neutral. I do a lot of focus groups myself as the moderator. In my own cases, I am the moderator of the focus group. I think because I'm hyper-aware of the fact that I don't want them to know that I represent the plaintiff, I overweight the defense in those focus groups. I argue for the defense a little bit more, but that's the goal of those focus groups, is those kind of focus groups I'm trying to figure out, "What are the defense arguments that are persuasive to them? What are the things that I need to address? What are additional pieces of information that we might need to go get?"

So it's okay if I'm overweighting the defense in those kind of cases, but you have to be conscious and you have to do it. You can't argue with the focus group. You have to let them say sometimes what sounds like something ridiculous in order to get good information. But there are a lot of people and you have to be honest with who you are as a person cannot do it, that they just cannot listen to people tell them that

their case is bad. And if that's you, then you need to get someone more neutral to present your focus group. Because if you're just going to argue with focus group, you're not going to get any useful information.

Michael Cowen:

Yeah, I agree. I've done my own and I think I have the self-awareness where I'm able to be neutral or even ... I've had a lot of times when we've asked them out just out of curiosity, "Who do you think put this on as paying you?" and they usually think it's the defense thinking, "Well, only a big company would spend the money do this." They don't think the employers would spend the money and the time to do these kind of things, which is funny because I think we do more of the other side.

Malorie Peacock:

Yeah, I think so.

Michael Cowen:

But it's taken me time to get there, and when you have a real emotional attachment to your case, this is your first big case or this is like a case you really, really need to win and that's just your personality. You're just a bulldog streetfighter and you can't help but argue your case, then you're not the right person to do it. And I think if the case is big enough, I think there's a real value to hiring a professional. But I think if it's not big enough, find a friend. Have your friend do your cases, you do your friend's cases, trade out. You learn every time you do one, even it's on someone else's case.

When you talk to some of the professionals, they're like saying, "You must do this, you must do that. It's got to be the same county or the exact same demographics and you have to worry about how the ... Make sure that your group looks like your jury and make sure you do all this stuff perfectly and you have someone neutral giving both sides," and there's a million things you have to do where you don't have accurate data and I found it's better to have some data still useful because they're not predictive anyway than to try to have a perfect social science experiment.

Malorie Peacock:

I completely agree. Just the example that you gave at the beginning of this podcast of the three people that showed up in a tiny county in Texas that we were unfamiliar with, that was one of the most useful focus groups, but that was not an accurate demographic of ...

Michael Cowen:

Right.

Malorie Peacock:

... the county and three people is predictive of nothing out of all the people in the county, but the information that we got was so useful and so helpful to the case that still invaluable to even just get those three people.

Michael Cowen:

I agree. So when is it you think you should use a professional and when is it you think you can do it yourself and just what the parameters of that are?

Malorie Peacock:

Yeah, so I think I'll just say it, professionals are expensive. So you cannot use a professional if your case doesn't have the value to spare for it. So you're just going to have to figure out a way to do it yourself or to get a friend to help you do it or another colleague of some of kind that will do it for free or you trade off or you give them a couple of eggs. Those are very valuable these days and then they do the focus group for you. I don't know. But the value of the case has to be there for you to hire a professional, they're very expensive. I have found that professionals are really helpful for more adversarial groups. They're able to lead the discussion a little bit better than I find them for concept focus groups.

It doesn't mean I don't hire professionals for concept focus groups and I still find them useful, but if I could only hire a professional for one focus group in the whole case, I would choose an adversarial one rather than a concept focus group. Because a concept focus group is more of a discussion about what kinds of things might come out in the case and the only person who knows that is you, right? It's hard to get a professional all the way up to speed in order to answer the random questions that the group might have and get them going down the right path, right? If they're going down a path that's just useless to you, the professional may or may not know that and doesn't know to steer it the other way.

So I would say if you had to pick one, I would say an adversarial group because the professional will have heard the adversarial presentations, you'll be part of it and then they can lead the discussion appropriately after that.

Michael Cowen:

Okay, well, let's say we have one where we're going to do it ourselves, how do we find the focus group members?

Malorie Peacock:

We've done it different ways. Like you said, we've done direct mail. I think that was the least effective ...

Michael Cowen:

I agree.

Malorie Peacock:

... way to get people. We've got people on Facebook. Some people get people through temp agencies. Some people hire ... There's these focus group companies that just recruit people. They're recruiting companies that just recruit people for different businesses and organizations that you can hire to get people. I think the best success that we've actually had I think is through Facebook. If you just set up a company and do targeted advertising for a specific county and do it that way, I think that's the best result, especially the best bang for your buck.

When you hire some of these recruiting companies, the problem that you end up having is that people that show up for these focus groups have participated in focus groups before. That's how they find these people. They're their list of people that they can call and sometimes that taints their perspective a little bit.

Michael Cowen:

And the recruiting companies are more expensive. Sometimes that's the best way to do it just because you don't get a good enough response. And to be clear on the Facebook, don't do your law firm or your personal ...

Malorie Peacock:

Right.

Michael Cowen:

... page and put an ad up because you do not want the focus group members to know who is hiring them. You want to at least create the illusion that it's a neutral study or that, "We're not going to tell you who it is," because there's always the fear that they will try to please the people paying them or not want to hurt your feelings because they know what side you're on. Sometimes we even say, "We're hired by someone to go study this for them. We're not representing anybody. We just got hired to find out what people think." So Facebook, what we've done, I think we have a Facebook page called Jury Research Project or something like that, which is not ... You cannot tell that it's related to our law firm and then we just got a cellphone that is just not listed in our name and that's where people can call.

So we have a Gmail email address that's not traceable to our law firm. We have a cellphone that's not traceable to our law firm and that's what we use to contact the Face ... Again because if you're calling to set up and it says Cowen-Rodriguez-Peacock on the caller ID, then it's pretty clear who's calling and they'll figure ... People, they'll google and figure out who's calling them and why. Same for don't do it at your law firm conference room. If you have maybe a conference room in your building that's not related to you and you don't have your name at the top of the building, maybe you can do it there. But I think we do most of ours in hotel room conference rooms or other conference centers.

We even run a courthouse once. They let us use it on a Saturday, but that's a little harder to do. But I do think having a neutral location is also important. How about the venue? Do you have to do the focus group in the same county where the lawsuit is pending?

Malorie Peacock:

Yes and no. So if you're doing a concept group, actually any group really now that I'm thinking it through, any group ideally it would be in the county where the lawsuit is pending. Sometimes that's not possible and reasons that it might not be possible are just logistics. It's super hard to get to or it's inconvenient. More often, it's that it's such a small county you don't want to taint the jury pool, which is a possibility and you don't want to do 10 focus groups in your county and those are all the people that would show up for jury duty and then you don't have any jurors, so you don't want to do that. But especially if it's a rural county, you can often go one or two counties over and get a good picture of what that area thinks, which is all that you really want as long as the county has similar demographics and similar experiences.

So what you don't want to do is go from a county that's all oil field to a couple counties over that's farming work or something like that. They might have a different perspective on your case because they're farmers and these people are oil field workers, depending on what your case is. So you do have to not just think about demographics, but what is the makeup of the county, what is the economy of the county. If you have a case that involves ... There's a highway in Texas, they call it Death Highway because it's so dangerous. All these truckers go constantly speeding on it. I think the speed limit gets up to 80 miles per hour. It's just super dangerous. Lots of people die on that highway. Testing in a county that has Death Highway in it where your crash occurred is so important because if you go a couple counties over, they don't even have a highway in that county. You're not going to get the same feedback that you would in Death County Highway, right?

Michael Cowen:

Right.

Malorie Peacock:

Or Death Highway County. So you don't have to do it in that county, but you need to be very mindful of finding a county that's similar.

Voiceover:

Each year, the law firm of Cowen-Rodriguez-Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death or catastrophic injuries and would like to partner with our firm, please contact us by calling (210) 941-1301 to discuss the case in detail and see where we can add value in a partnership. And now back to the show.

Michael Cowen:

Yeah, when you're in county with hundreds of thousands of people, it's not a big deal, but we sometimes have cases where we're in a county of 14,000 people and not only do you have to worry about some of your focus group members showing up to jury duty, but also people talk in small towns.

Malorie Peacock:

Right.

Michael Cowen:

They talk everywhere, but it's just more likely to get around and taint your jury pool and the last thing you want is to get up for trial and then you can't get a fair jury because you've tainted your jury pool and then now you're going to get transferred to another county and you're going to start the litigation. Basically, you're going to wait another year or two and you don't want to do that to yourself and to your client.

Malorie Peacock:

Right.

Michael Cowen:

I just want to also make one aside. When we started doing this, everybody was on Facebook. Now my son who's 17, neither he nor any of his friends have a Facebook account and they don't want to be on the same social media platform as their parents. I don't blame them. When I was 17, I wouldn't want my parents to see everything I was doing and communicating with my friends. I think because of the age of the people that show up for jury duty, I think Facebook is still pretty useful to get something that's pretty similar to what we'd get in the jury pool.

But I think as the years go by, we're going to see this Facebook versus other platform divide and we're going to have to crack the code. Facebook is so easy because you can do a Facebook ads just directed at people over 18 years of age in a particular city or county and it's cheap. So the ability to target your ads on Facebook is super cheap to recruit your jurors. We need to figure out when we get more younger jurors as the 20 somethings are no longer using Facebook and that becomes a bigger and bigger share of our jury pool, I think we're going to have to find another way to reach them.

I don't have the answer for it yet. I just want to spot the issue because at some point we're going to overweight our ... If we keep doing it the same way in five, 10 years, we're going to be overweighting

towards over older jurors and not have enough younger jurors on. And younger people do show up for jury duty too.

Malorie Peacock:

They do and I think they have a different perspective that's important for you to know, "What is their perspective?" But I agree it is an issue and Instagram and TikTok, they're less targeted if you want to do ads on them, YouTube. You don't have to fill out all of that location, age information to get on those platforms like you do with Facebook.

Michael Cowen:

Yeah, and we may need to start going to companies like Adderall or other companies that can target ads on websites and stuff and not just in social media ads, but right now Facebook's working fine, but at some point in time we're probably going to have to readdress our recruiting strategy and just like everything else in life. The one thing also I wanted to just go back to recruiting that I've seen people do that I think really does give you a bad sample is going to get people that are on unemployment. And you get that sometimes with the temp agencies, but definitely when people just got it from ...

In Texas, we have the Texas Workforce Commission. So you can go put an ad out for people on unemployment who want to make some extra money and it's all going to be people who got fired recently or laid off recently. And that really does give a different perspective. They're at a different point in life and I've found that those have been wildly inaccurate as opposed to our more traditional. You want to get a lot of people that have jobs because those tend to be a lot of your jury pool. So let's say we've got one, we've either hired a professional, we've done it ourselves, and then at some point, they're going to go, they're going to talk, they're going to deliberate, either they deliberate without us if it's an adversarial or we've had the conversation with them. How do we get the information from what they say into a useful form that we can remember and do something with it?

Malorie Peacock:

It's always a challenge there's because you don't want to lead the focus group so much that they just realize what you're doing and give you the answer you want, right? So we've done it a bunch of different ways. So this last one, I think we had a hybrid of me taking notes with what they were saying and questions that they had to answer on a piece of paper and give reasons. So I have questionnaires that I collected, but I also have a bunch of notes just from the things that they deliberated about and the things that they found persuasive and the things that were important to them that they just said. So you just have to sit there and watch them talk and take notes.

And then what I did is I just diluted it down into the purpose of it was to make sure that we're getting information, this last one, information we need in discovery. So I diluted it into, "Here are the things that I found we need to go get in discovery because the focus group is really curious about them." So I just did a memo right afterwards to make sure that we had it. Now some people record focus groups like on tape or video. I don't think you have to do that. I don't find it necessarily useful because who goes back and watches eight hours' worth of focus group deliberations? I wouldn't. So I don't know that that's helpful. If you're the type of person that can't sit through the focus group and take notes, then you have to record it because how else would you get information?

So yeah, you could do a mix of questionnaires, but really the questionnaires don't give you the information you really need. If you just give them a verdict for, but it's a yes or no answer, the deliberation part is the part that you care about and the part that gives you the meat of the information. The yes or no, it is not typically super relevant.

Michael Cowen:

There can be some advantages to videoing them, and one, you can go back and watch. You are much more Zen than I am on this, is that you can watch a focus group deliberate. I cannot. I can be in there when people are going, when there's questions of ... "When we get out of the room, let's let them deliberate without us there." Sometimes we'll have a live video feed and we're recording it. And I know it's really interesting, but they usually get to the right place at the end, but people come up with all these crazy things and it just drives me nuts. And they said, "Well, no one ever told us X," and like, "I said X five times," and it just drives me crazy. And I can watch it once I know where they ended up, I can't watch it while they're doing it.

It's a personality defect I have. I know I need to grow up and get past it, but I'm not and I'm 52, I may not grow up and get past it. And so for me, like I said, I need someone else in there that I trust or I need someone to videotape it and I may or may not watch it later. The other thing, and it's a little risky because you don't want to end up making your focus group deliberations discoverable, but if you end up with some really good zingers that could scare the hell out of the defense, playing them in a mediation or showing them to an adjuster, a defense lawyer sometimes creates a real fear that gets more money on your case.

Now they'll always say, "Well, I wasn't there. If I was presenting the case, it would've been different." I'm sure you get all this defensive stuff, but it still scares them. When they hear someone say something horrible about their company, it still scares them or say something about, "How many millions of dollars your client deserves?" it still scares them. And just the fact you do focus group research scares the other side because they know you're working on your case and you're getting ready for trial. But sometimes, like I said, we've been in cases where you want to get the case done, your client wants to get it settled and those little clips sometimes are the difference. It pushes that adjuster over to putting that last money on the table and getting it done.

But again, there's always the risk that focus groups are totally privileged, it's work product, but there's always the risk that you start showing it to people, then all of a sudden things become discoverable.

Malorie Peacock:

Right, right.

Michael Cowen:

Also I would not videotape like the client or other witnesses testify in a mock trial-type thing because that might become considered a witness statement that might become discoverable and now all of a sudden maybe you're teaching them how to testify and you're using the earlier versions where they just weren't as articulate or they were tripping up and then we never would tell someone to say something wasn't true, but sometimes the way people is confusing or just showing the practice you beat the crap out of them on cross to let them know what it's like and then the defense can play you cross-examining your own client at trial because ... And so I think you look at your case law and your jurisdiction before videoing any kind of witnesses testifying, but I don't think there's any real danger of the focus group itself become discoverable, although I could see some judge somewhere that doesn't care what the law is and if you show it to other side, they get to see the rest of it. And then so just know your judge and know your restriction before you do that.

Malorie Peacock:

Yeah, for sure. I would definitely make sure even if you videotape it that you at least have some form for a questionnaire. Even if it's a concept focus group and you're not sure how it's going to go or what

questions you might want them to answer, you can have just a blank form where they answer that just says, "Question one," and then they just answer. Whatever you decide question one is just make sure you keep track of what the question is. But it doesn't have to be formal and you don't have to come up with all the questions in advance to have a questionnaire, but to walk out with paperwork and data is so important to making sure that you get everything that you need from the focus group, if that makes sense.

Michael Cowen:

Yeah. The other thing I learned when we started, we got this from working with consultants, they would have a question and they would first have everyone write their answers before they start any kind of discussion. And then sometimes they would do the discussion or write it again to see if the discussion changed the answers, but one thing I learned there is there are people that just aren't really comfortable in speaking up in a large group, but they still have opinions, and yeah, those people aren't necessarily going to be your leaders on the jury, but they're still going to have thoughts and opinions and you still need to persuade them. And you end up sometimes only getting information from two or three really strong personalities and the other people may silently disagree with them, because if they're not deliberating to a vote, you don't really know it.

And so it's really important to give them the opportunity to put what they think in writing as well as orally because some people are more likely to give you more one way or more likely to give you more of the other way and you want to get as much information as you can.

Malorie Peacock:

So speaking of getting information, focus groups, I just want people to know this, focus groups can be eight hours, they can also be an hour. It depends on what your goal is. I just want to keep reminding you guys that you don't have to fill time just to fill time. You need to have a goal for the focus group, what information are you trying to get and then get that information and move on with your life. You don't need to drag it out. I do find that when people start saying, "Oh, I have this group for another two hours. Let me just do a totally different case and present." That second case, you're not going to get any good information because the focus group is going to have figured out who you are, what you're doing it. You're just not going to get good information on that second case.

So to throw random stuff in there, I would suggest against it, unless you absolutely have to for some reason. I would say get a new group, set up a different day, set up a different time, so that people can move on from whatever it was that you were talking about before. And in fact, we even do totally different groups for different issues in a case. So if I'm testing whether or not I should present medical bills in a case, if that's what my goal is, if that's what I need to find out, that's what I'm presenting to that group. I'm not also talking about my corporate negligence theory in that same group at that same time because it's too confusing and you're going to get mixed data and it's not going to be data that helps you because the jury's so confused or the focus group's so confused about, "Wait, what are you even asking me to do here?"

So think about that too, is isolate your issue for the group and present that. Don't muddy the water with a bunch of different stuff all at once, so you're not going to get good feedback.

Michael Cowen:

There's another advantage to doing focus groups that I'm almost embarrassed to admit is true, but when we have to prepare for a focus group, it means you have to block off time, review the file, think of the best arguments to show that both sides could have, the best visuals or evidence you can present for both

sides. And it really makes you learn your case better at an earlier time in your case than you may otherwise do it. So the stuff that you're just coming to you right before trial or right before beg deposition, you're learning earlier or thinking about earlier, actually get you to follow up on things. Maybe you go back and look at your notes when you took a depo, and I've gotten like my three stars, "Follow up on this," and then I get back to the office and someone starts talking to me and then two months later I've forgotten to look at my notes and follow up on that.

We're trying to get better at that, but I think that's another advantage between focus groups. Like I said, it's embarrassing to admit this. We shouldn't be so perfect that we're just ultra-disciplined and after every depo we're having a debrief and followup. But the fact is sometimes you get busy and when you take time off to work on one of your better cases, it does really help get you ready. And again, when you go to trial and you've done focus groups, especially when you've done ones where you've spoken yourself, you know what the issues are, you know people are going to understand you, you know the arguments you make you're going to resonate. You know it's not a guarantee, but it just really ups your confidence level when you're going in there and I think that makes a huge difference too.

Malorie Peacock:

I would also say for the purposes of confidence, it's important that if what you're testing is yourself, so if you're testing your opening or your voir dire or the way cross-examine a witness that you have someone else do the debrief with the focus group and then give you the information separately. Because what you don't want the focus group to do is totally destroy your confidence. And there's always, well, I don't know why, there's always one just asshole in the group that's just going to be rude for the sake of being rude and you don't need to hear it, right? You don't need to hear that they hate the color of your hair or, "Why do you dress like that?" That's not helpful and it's not information that's useful to the presentation of the case or anything like that.

So if you have that one person saying stuff like that to you directly, it almost in your mind will invalidate the rest of what everybody has to say because you feel defensive. So if what you're testing ...

Michael Cowen:

Right.

Malorie Peacock:

... is something personal to you and the speaker, make sure you have someone else debriefing and then giving you the information in a neutral way that's helpful, right? You're going to have someone that says something ugly about you if you're doing this. Just it is what it is and that's not helpful. So you don't need to hear it, just write it off, throw it away and let that person present the stuff that you can actually change. So whether you're speaking too fast, whether your hand gestures are too wild, whether the way that you said the rule was confusing, things that you can change, but the color of your hair isn't helpful.

Michael Cowen:

Yeah, and I agree and I just also think it's asking too much of them. You have the one a-hole, but you also have nine nice people that you said something they didn't like, but then, "Oh, no, you did a good job."

Malorie Peacock:

True, yes.

Michael Cowen:

That's how a lot of people are. They're nice and nice is great as a person to person ...

Malorie Peacock:

Right.

Michael Cowen:

... but nice doesn't help you get ready for trial and neither does asshole. I remember early in my career I had one. I was overworked and I just wore some old shoes to do a focus group. I wasn't thinking it was ... They're never shoes I wear to trial and the guy had to do the focus groups for me. He was a local guy. He didn't really know what he was doing. The first 10 minutes was going on about my shoes and talking about, "Well, they hated your shoes." "I would never have worn these shoes to trial. We're here about the issue of the case. Why are you talking about my shoes?"

Malorie Peacock:

Right.

Michael Cowen:

But if I had been in there, I would've really gotten defensive, "Well, I wouldn't have worn these to trial and this and that," and it would've been totally ... Well, I guess it's been 27 years and it still bothers me. So not that I was embarrassed, just that we wasted time talking about shoes that I was never going to wear to trial, but I've also learned now. I've got to dress. It was a good lesson. If I want to do a focus group, I need to dress similar to how I dress in trial, so that I'm not creating another distraction.

Malorie Peacock:

Yeah. Something else to think about is when you are just ... I'm just getting into just general tips for focus groups, but another general tip is if you're doing an adversarial focus group and you're having two different lawyers present, you need to make sure that the lawyers presenting are not going to be distracting to the jury. So there can't be a huge difference in skill level between the two lawyers because if so, you're not going to get good information, or if there is a huge difference in skill level, make sure that the more skilled lawyer is doing the defense presentation. Because what you want is, I think any person that does focus groups will say, "What you want is to lose the focus group. You want to lose because that gives you the most information."

Michael Cowen:

Right.

Malorie Peacock:

But if you have the lawyer with less skill or less experience doing the defense presentation, you might be winning just because they're not as skilled or articulate or whatever the issue is. So just be careful when you're having two people present because there could be a real difference and there could even be a difference, not in skill level, but in likability that you didn't realize and that could come out too. And we've seen that happen where just for whatever reason, the jury just was really turned off by someone. They just didn't like him. And it's good for that person to know going forward for their case presentation,

but it makes any information you gather not as helpful because they're tainted by just not liking the lawyer.

Michael Cowen:

We've even done it where we switched. We did one in the morning and then ... Frankly, I had an ego thing I thought was because I didn't like the way the other lawyer at the firm had done the presentation. I thought I would've done it better. And so I get all in a huff and I switched, "We're going to switch places. I'm going to do the other side. You're going to do this side." And I don't remember who did plaintiff, who the defendant, and then we switched and then we had the exact same result in the afternoon. So, one, I guess maybe I'm not a better lawyer than that other lawyer at the firm, but the other thing is it showed it was the issue, not the person, because I was so worried it was the person, not the issue or not really the person ...

Malorie Peacock:

Presentation.

Michael Cowen:

... or the sequencing and arguments used during the presentation we're different than what I would've done. So we switched it out and it didn't make a difference. And so then we had better confidence on what was going to happen in the case. So now you go back, let's say you do a focus group early, you find out all the things the juries want to know, the potential juries want to know, the questions they have, your potential landmines. What do you do with that information?

Malorie Peacock:

So you got to use it, right? It depends on what you're trying to do for the focus group. So if the goal of the focus group was to find out what information you still need to discover to do a full presentation of the case, well then you need to go back and start drafting some discovery requests, start subpoenaing witnesses, start getting the testimony that the focus group wanted. And you shouldn't take for granted that what the focus group wants is stupid. So sometimes they want stuff that's dumb, that doesn't have anything to do with the case, that may or may not even be admissible, but what you don't want is anybody in the jury to feel like, "God, if I only had this one ridiculous piece of information, I could've decided the case in your favor, but I didn't have it." And you shouldn't discount anything that they want.

I've had focus groups where people say, the case is about a rear-end collision and they say, "Well, what I really want is to know where the plaintiff was going that day." "Who cares? What does that matter? They were stopped at a stop sign and they got rear-ended. Why do we care about where the plaintiff is going?" It doesn't matter to you, but it mattered to them for some reason. And the answer is... They were going to pick up a case of water at HEB." "Okay, great." You could say it in part of your presentation, it's not even a big deal, but it will take whatever issue was going on in their head out of the picture for them. So, even-

Michael Cowen:

Or it lets you know that there are some people that are primed to look for any reason to blame your plaintiff and that maybe bringing it out is going to hurt you because then they're going to go, "Aha."

Malorie Peacock:

Right.

Michael Cowen:

And they weren't looking at it because they were trying to blame the defense. They're looking out because they're looking for reason to blame the plaintiff. So I think you get the information because sometimes you're going to see that there's some jurors who just do not want to ...

Malorie Peacock:

Correct.

Michael Cowen:

... rule a certain way and they're always going to find some excuse not to and it's not really the reason. And I think you got to take everything in a whole. Just because one juror says, "People with blue shirts are not trustworthy, so never"-

Malorie Peacock:

Right.

Michael Cowen:

I knew a lawyer he was so scared going to trial because one juror said they didn't like his tie, one juror ... He had all these things and they weren't the reasons he was winning or losing cases, but he was just absolutely convinced he had a long list of things, "I can't wear green tie. I can't wear this kind of shoes. I can't do this. I can't do that." Every excuse that someone gave for why they ruled and those weren't the reasons that people rule.

Malorie Peacock:

Right.

Michael Cowen:

But I think the things they bring up in discussion I think are really important, but you also have to, like I said, take it all and this is just one weird person or is there something that group has as a whole ...

Malorie Peacock:

Right.

Michael Cowen:

... in that community.

Malorie Peacock:

Right. The other thing too is if you are testing an exhibit or an illustration or an animation, it's important that you take what the focus group says seriously and go back and make the edits that need to be made and then test it again, right? So you can't just take what they say, go do it and say, "Now it's good to go." You need to make sure that those edits actually did what that focus group thought it would do, right? So sometimes they say, "This is a confusing exhibit. I don't understand. You need the dictionary definition of

whatever and whatever," and so then when you add that and you go test it again, the people are like, "Why is this dictionary definition of whatever on there?" So that, with you're testing those kind of things, you need to do it and then go back and test it again. You can't just test it that one time if you're making changes to it.

Michael Cowen:

Yeah, I think the big message though is if you have a big case, you owe it to yourself and to your clients to do some kind of focus groups. It's a big enough case, hire a professional. If you have the right professional, they do do it better than we do. And they also make it easier because they handle a lot of the logistics and a lot of the other stuff and you can just be the lawyer. But even if you don't have a case or a budget that supports that, it's better to have some information, do it yourself. And if you can afford to do more than one, on a big case, we like to do some early, some halfway through discovery, some towards the end and then we have our trial tune-up stuff.

In other cases, either the budget doesn't support it or you have to make choices. Even if you have 20 cases, you can't do 20 focus groups on each case. You have to figure out, "What is the best use of my time where I'm going to get most bang for the buck?" but do what you can. But on the bigger ones, definitely do multiple, but even on a small one, just doing something is better than nothing, even though it's just, "What do they think about non-economic damages in this community? How can we best where ... This is what my client says is wrong with him. Is that going to resonate with jurors or do we need to go find another way to put it? What else do they want to know?"

Just the more we arm ourselves with this information, the better off we're going to do at trial. And I think one of the reasons that the plaintiff's bar ... Verdicts are going up. People are winning more cases for more money lately. It's a wonderful thing. It's a wonderful time to be a plaintiff's lawyer right now, but I think part of that is that people who have taken what they've learned doing jury research and focus groups, applied it, shared it with others, other people are using it and we're all helping each other do better for our clients. And frankly, for those who believe that good tort law, which jurors follow the law and allow money damages when people cause harm is eventually going to make us a safer society. And so these are good things. So let's just keep doing the work and keep sharing with each other so that we can all do better. Thank you, Malorie.

Malorie Peacock:

Thanks.

Michael Cowen:

Just another reminder, our Big Rig Bootcamp is coming up we're going to have in San Antonio June 16th. Registration is open. If you go to [bigrigbootcamp.com](http://bigrigbootcamp.com), that's B-I-G, R-I-G, [bootcamp.com](http://bootcamp.com). There's a forum where you can register. It's going to be a great presentation. It's going to be a lot of fun. We're not only going to share everything we know about trucking cases, we're going to talk about our method. That's going to be in my upcoming trial guides book, which is Big Rig Justice, which should be out by the seminar, that's what they're telling me, that we've developed to work up these cases and then examples of how to put it into practice.

But we're also going to have a lot of fun things, even for the ethics. We're not just going to have people talking about ethics, but Malorie, you're going to be our game show host on Ethics Jeopardy where it's going to be competitive, fun, win prizes, lights, music. It'll be just a wonderful experience and free drinks and an open bar.

Malorie Peacock:

It'll be a lot of fun. I'm so excited. So much is getting put into this year. So if you've been before, this year is going to be even better. So-

Michael Cowen:

Yeah, we're really upping the AV, the lights, the screens, all that kind of budget. We're really working on our presentation. So it's five months away, but we're already working really hard on it. And hopefully, anyone that does any kind of trucking or commercial vehicle cases, we're also going to talk about how you apply what works in trucking cases to cases involving other kind of employers from an air condition company and oil field company, even your Domino's repairman, not Domino's repair, Domino's delivery driver.

So it should be a good presentation. We're really trying to make it useful so that you will be able to take things and use them in your cases. It's not just about, "Hey, give Michael and Malorie your cases," it's about, "We want to make you a better lawyer. If there's cases we can work together, wonderful. If not, we want you to thrive and succeed in your practice and we want to share what we've learned with you," and it's just another way we can do that.

Malorie Peacock:

All right, sounds good. I can't wait to see everybody there.

Michael Cowen:

All right, talk to you soon. Thank you for joining us on Trial Lawyer Nation. I hope you enjoyed our show. If you'd like to receive updates, insider information, and more from trial or nation, sign up for our remaining [list@triallawyernation.com](mailto:list@triallawyernation.com). You could also visit our episodes page on the website for show notes and direct links to any resources in this or any past episode. To help more attorneys find our podcast, please like, share and subscribe to our podcast on any of our social media outlets. If you'd like access to exclusive plaintiff lawyer-only content and live monthly discussions with me, send a request to join the Trial Lawyer Nation Insider Circle Facebook group. Thanks again for tuning in. I look forward to having you with us next time on Trial Lawyer Nation.

Voiceover:

Each year, the law firm of Cowen-Rodriguez-Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death or catastrophic injuries and would like to partner with our firm, please contact us by calling (210) 941-1301 to discuss the case in detail and see where we can add value in a partnership. This podcast has been hosted by Michael Cowen and is not intended to, nor does it create the attorney-client privilege between our host, guest and any listener for any reason. Content from the podcast is not to be interpreted as legal advice. All thoughts and opinions expressed herein are only those from which they came.