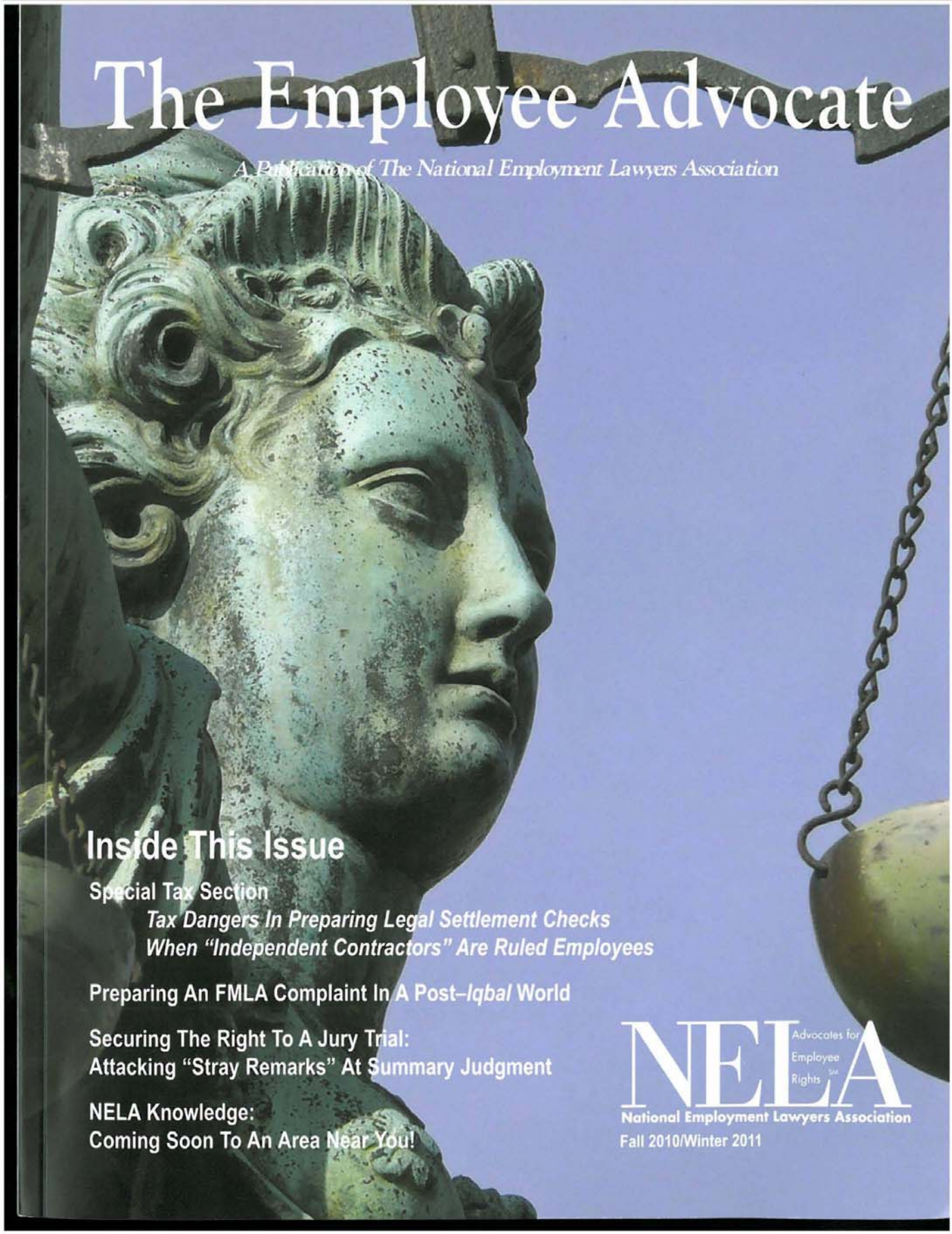

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Put Your Case On A Budget With Early Focus Groups

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INTRODUCTION

Employment lawyers traditionally use focus groups on the eve of trial to test their case themes and to identify what evidence to emphasize during their case-in-chief.

At The Employment Law Group, we use focus groups much earlier. We conduct our first focus group at the time that we accept the representation to identify what claims to bring (and which to avoid), what witnesses to interview and what evidence to target during the discovery phase. We often will conduct a second focus group during the discovery phase of the case to test the strength of the client's *prima facie* case and to challenge any employer defenses.

Following are examples of cases in which we have used focus groups to help us decide when a case is better settled than tried and how to best position cases that we do take to trial. Sometimes a focus group will help us identify which claims to assert and which to avoid.

For example, in 2009 a female executive contacted us when her employer, a prominent government contractor, terminated her employment after she had filed a gender discrimination complaint with her employer's human resources department. At the time that we accepted her representation we ran a focus group to help us decide what causes of action to plead and to assist us in best describing her allegations. The female employee's male boss pushed her in a meeting following a disagreement. After complaining to her employer's human resources department, her supervisors subjected her to new unrealistic standards, diminished her job responsibilities, and routinely denied her leave requests while approving those of her co-workers. Her supervisor then placed her on an attendance improvement plan. Finally her supervisors fired her for what they claimed were her violations of the company's leave policy. Throughout, the female executive was vocal and complained that her supervisors were retaliating against her because of her gender discrimination complaint.

We considered bringing gender discrimination and retaliation claims. Before filing the complaint, however, we presented her facts to a focus group whose feedback was mixed. While our focus group believed that she had complained of gender discrimination in good faith and that her employer retaliated against her for complaining, more than half struggled to see any underlying gender discrimination.

Worse, the focus group found that asserting a gender discrimination count would undercut the strength of the executive's retaliation claims. In particular the focus group questioned whether the supervisor who pushed the female executive was motivated by gender bias and, if not, whether the female executive's retaliation claim was still viable. One focus group member put it this way: "She was right to complain, but I really question whether his behavior has anything to do with her gender."

In the end, we decided to bring only the retaliation claim, to allow us to focus our attention—and that of the employer's counsel—on the employer's multiple acts of post-complaint retaliation, which our focus group found compelling, rather than the supervisor's one act of aggression which our focus group found was not motivated by gender

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discrimination.

In other cases, a focus group will help identify which witnesses to interview. In 2003 a female automotive service technician hired us to represent her in a case of sexual harassment and retaliation. She complained to the dealership's General Manager that her direct supervisor had made lewd comments about her body shape and propositioned her for sex. Shortly thereafter her employer terminated her employment because, it claimed, she had been tardy too many times over a previous six-month period. We thought the employer's explanation for why it fired her to be transparent retaliation until we conducted a focus group. Our focus group sided with the employer. One focus group member stated: "I have to drop my kids off at daycare and then make it to work [on time]. If my [automotive] service adviser is late, even by 5 minutes, then I am late dropping off my son at daycare. That makes me late to work."

We asked this focus group member what she would have to see in order to conclude that the employer's tardiness defense was a pretext for unlawful retaliation. She said, "show me that when [your client] was late, no customers were adversely affected."

We then set out to interview the service technician's seven co-workers.[1] We asked her co-workers whether our client had ever been tardy. They all confirmed that she had, but told us that none of her customers ever had to wait for service. The reason: our client's peers would cover for her when she was late to work. When we asked our client's co-workers why they had covered for her, one of her co-workers said, "[She] never took lunch and would cover for me when I needed to run a [mid-day] errand."

At trial we called each of our client's co-workers to testify about the informal coverage arrangement that they had instituted. In particular we called our client's co-worker who confirmed that none of our client's customers ever had to wait for her. Even after the employer admitted more than forty time cards into evidence to support its tardiness defense, the jury rendered a verdict in favor of our client. When I asked one juror why she had found for our client even though our client had been late more than forty times, the juror responded, "because you showed us that none of her co-workers minded covering for her and that no customers ever complained. The employer's reason was a sham."

In other cases, a focus group will help to identify what evidence is important to develop during the discovery phase of your case. For instance in 2007 the former director of a university counseling center retained us to litigate his Whistleblower Protection Act claims. His employer terminated his employment because, it claimed, he was disorganized, a poor manager, and because a student had complained about his treatment of her. We ran a focus group to test the plausibility of the employer's explanation. The focus group dismissed the employer's claims that our client was disorganized and a poor manager because, as one focus group member stated, "[The employer] cited no concrete examples" to support either explanation.

However, the focus group was deeply troubled by the alleged student complaint about our client. This led us to track her down and interview her before we filed our client's complaint. She told us that, contrary to the employer's assertion, she had not complained about our client but rather had complained about the amount of paperwork that the counseling center required her to complete before she received treatment. She testified at trial that, in her opinion, our client treated her "wonderfully" during the four months that he counseled her. She stated that she was "distressed" when the university terminated our client's employment before assigning her to a new counselor. She testified that she had no subsequent counselor for three months after our client's employment was terminated. Following her testimony our jury rendered a verdict in favor of our client. One juror said afterword: "After [the student] testified, I knew I was going to find for [your client]."[2]

After discovery begins, we use focus groups to help gauge the persuasiveness of employer defenses, especially in the light of documents (or lack thereof) that an employer produces in discovery.

For example in 2009 a former loss-prevention manager hired us to represent him in a wrongful discharge in violation of state public policy claim. His employer terminated his employment shortly after he notified his employer that rats had infested several stores in his territory. During

discovery, the employer articulated, for the first time, that the reason that it had fired our client was because three employees that he had investigated complained about the way he treated them when he interrogated them. The employer stated that our client had violated company policy when he photographed one of the employees while the employee showed our client where she had hidden the money that she had stolen from the employer. The complaints looked genuine and concerned us. We decided to test how a focus group would view them. While the focus group members concurred that the three employees were genuinely distressed by how our client had treated them, one stated that loss-prevention managers have difficult jobs so the fact that employees our client investigated might complain "was not surprising."

Importantly, the focus group members faulted the employer for not confronting our client with the complaints of those he had investigated before it terminated his employment. One stated, "You don't just fire a [seventeen] year employee without giving him a chance to explain [his conduct]."

In 2008 a facilities manager retained us to represent him in an FMLA retaliation claim after his employer forced him to apply for short-term disability and later fired him upon his return from work following a heart attack. In what appeared to be a flimsy defense, the employer stated that it was concerned that the facilities manager could not safely perform his job duties because he was taking "powerful narcotics." The employer produced documents that showed that it had considered, over the course of several weeks, whether our client could perform his job duties notwithstanding his condition. We decided to test the employer's defense with a focus group.

Our focus group's responses surprised us. Many of the focus group members recognized the common side effects of the medication that our client was taking. They questioned whether an employee legally using such narcotics could perform his duties at all, much less safely. One focus group member stated, "[He] is on high doses of Fentanyl, an opioid analgesic with many side effects (sedation, confusion, fatigue—which he has left work many times for and he also experienced withdrawal symptoms!)." With this type of negative feedback, we asked our client to lower his settlement expectations. He did, and we settled the case for a small monetary sum and a very favorable reference letter that our client used to secure his current job. Our client is now re-employed and happy.

In 2010, a pharmaceutical sales representative had her sales territory slashed after announcing that she was going to take 12 weeks of maternity leave after the birth of her first child. When our client objected that her employer was reducing her sales territory in violation of the Family and Medical Leave Act, her employer responded, "[N]ot to worry," the change was only temporary. Upon her return to work, however, the employer reneged and failed to restore her sales territory. Three years later, her employer "reorganized," and folded her territory into another territory because of its small size. After we brought suit on her behalf, the employer asserted that an outside consulting firm was responsible for the restructuring and did not take her FMLA leave into account. We convened a focus group to test the employer's explanation. The focus group members told us to highlight the employer's promises to restore her territory: "[The employer] repeatedly told [her] they would increase her territory but never followed through."

We emphasized the employer's repeated assurances to our client that it would "make her whole" after it cut her territory. After the jury found in favor of our client at trial, one juror remarked, "It was clear to us that [the employer] knew what it was doing was wrong. Otherwise why would they have promised to reinstate her [sales] territory?"

As illustrated, focus groups can be used for more than just preparing your case for trial. They give you the ability to test your case every step of the way. At the start of a case, you can learn the strengths of your client's claims and uncover what the jury will want to hear, helping shape your case and ensuring effective discovery. After discovery has begun, you can explore the issues you have developed, test employer defenses, and uncover problems that you did not know you had. Focus groups can also lend validity to your conclu-

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sions when you are communicating with your client and aid in the effective management of client expectations.

And of course, you can use focus groups to refine the delivery of your case and prepare for trial. ■

End Notes

[1] Before contacting a plaintiff's co-workers, review Rule 4.2 of the ABA's Model Rules of Professional Conduct which restricts contact with members of the employer's control group, persons with privileged information, and persons who can bind the organization in the case.

[2] In addition to testing the employer's defenses, the focus group showed us that we should take the time to develop a negligent hiring claim in addition to the Whistleblower Protection Act claim that we had already planned.

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