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How to Choose and Use a Jury Effectively

From the Experts

David Lender, Diane Sullivan and Adam Tolin

Jury selection can be the most important step in winning a trial. But it is not just an exercise in selecting the “right jury;” the information that you acquire during the process can be used throughout the trial to gain credibility with jurors and convince them of the merits of your case. This article offers tips from a defense perspective on both picking the right jury and incorporating information gleaned from the process in your trial strategy.

Selecting a Jury

Jury selection varies greatly from jurisdiction to jurisdiction. While there are exceptions, typically more voir dire is better. Counsel should also press for as extensive a jury questionnaire as the court will permit. More information is also almost always better.

There are a number of goals in selecting a jury. You want to “plant seeds” of defense themes, rehabilitate defense-oriented jurors in order to save them from cause challenges and develop an early rapport with prospective jurors. But no matter what type of voir dire you get, one goal should trump all others: identifying and eliminating jurors who are less likely to be receptive to your trial story and, where possible, developing “for cause” challenges to remove plaintiff-oriented jurors.

Often trial counsel waste valuable (and limited) time pursuing a faulty strategy. For example, if a prospective juror espouses a belief that plays right into the plaintiff themes in the case



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(e.g., that she has seen numerous TV exposes on large corporations manipulating the truth and putting profits ahead of the safety of their customers), a natural inclination is to attempt to temper that view so as not to infect the other jurors, or “reverse plant seed.” The right approach, however, is to politely follow-up and extract as much information from that juror’s personal life as you can to demonstrate that these beliefs are so strongly held that they impair his or her ability to be truly impartial. You should not dance around the uncomfortable areas. Particularly if your time is limited, you must remember that your number one goal is to do everything in your power to eliminate the truly “bad” jurors.

Identifying Plaintiff-Leaning Jurors

Whether you are in a jurisdiction with an open voir dire process (where ques-

tioning occurs in front of the entire panel), or where jurors are questioned privately, ask open-ended questions to individual jurors to get them speaking in their own words. It is critical to avoid leading questions that elicit one-word answers. Often cause challenges are denied when the judge declines to put much stock in a juror answering a leading question in a certain way, especially after that same juror is “rehabilitated.”

Consider the following example: In a jurisdiction where there is open questioning to the panel, after a series of jurors expressed negative views about large corporations, you ask if anyone else shares that view. A juror raises her hand, and you ask:

Question: Do you believe this corporation is starting off a bit behind in your mind before you have heard any evidence?

Answer: Probably a little bit.

You decline to follow-up. The juror, however, is later “rehabilitated” by the plaintiffs’ lawyer in the following manner:

Question: Are you willing to put aside any preconceived notions you have and listen to the evidence before reaching your decision?

Answer: Yes.

Depending on the law in your jurisdiction, and your judge, it is possible that such a juror would not be excused for cause if that were the extent of the individual questioning. The judge may conclude that the bias was not overly troubling and the juror swore he or she was willing to be impartial. On the other hand, there is a significantly better chance you will succeed on your cause challenge if you take the time to follow-up with simple questions like: “Why is the corporation a little bit behind?” Or “What experiences in your life have you had that make you say that?” In our experience, when a biased juror is forced to explain her biases in her own words, the justification for a cause strike often becomes self-evident. The bias often reveals itself to be more deep-seated, and additional follow-up questions will further justify the cause challenge.

In jurisdictions where individual questioning is more limited, consider asking questions like “if you believe the plaintiff is a little (or far) ahead in your mind now, can you explain for us why you feel that way?”

In addition to fashioning the right lines of questions, it is worth remembering that prospective jurors who have been terminated by corporations, or have seen members of their family victimized by downsizing, are generally believed to be “red flags” in cases where you represent a large corporation. The same is true for jurors who are antagonistic and clearly do not want to serve on the jury, since they may be more inclined to punish someone for making them be there every day. Equally problematic are jurors who are overly cooperative and appear eager to serve on the jury (since those jurors often have unstated reasons for wanting so badly to serve).

Identifying Defense-Leaning Jurors

A frequent mistake a trial lawyer can make is spending too much time during voir dire on planting the seeds of a defense case. While every opportunity to speak in front of the jury can be an opportunity to argue your case, you should be extremely careful about doing the work for plaintiff’s counsel to identify your perceived best jurors for them to strike with peremptory challenges.

Incorporating Juror Information into Your Trial Strategy

To the extent possible, you should use the voir dire process to learn as much as you can about the individual jurors so that you can incorporate themes, questions and/or arguments into your trial that may appeal to those jurors. This should be done with caution to avoid sounding like you are pandering. However, like all people, jurors tend to connect with people who have similar life experiences. A simple example is discovering that certain potential leaders on the jury are fans of certain sports or certain teams. Other examples may be learning that a juror comes from a family of teachers, or works in a factory or has a number of small children. Those tidbits can be used and incorporated into direct examinations or your closing argument. For example, your expert may be able to incorporate such information as he or she uses an analogy to explain a complex problem. This information can also help your company witness connect with the jurors as well during his or her direct examination, either when discussing his or her background and experience, or when explaining the facts at issue.

Finally, and perhaps most important, as an attorney representing a corporate client, you must always remember that the jury will be watching every interaction with co-counsel, opposing counsel, court staff and the judge. This begins during jury selection. Even during this preliminary stage, the company will benefit from, or be penalized by, counsel’s actions and demeanor.

David Lender is co-chair of Weil Gotshal & Manges’ global litigation department and has over 20 years of experience trying complex, international commercial disputes in state and federal courts around the country. Lender’s practice encompasses all substantive areas of the law, with emphasis on RICO, patent, antitrust, consumer fraud and contracts, including in the class action context. His recent trial engagements include successful representations of Credit Suisse and General Electric. Diane Sullivan is also a partner in the firm’s litigation department. She is a nationally recognized trial lawyer who focuses on commercial litigation and arbitration, class actions and mass tort disputes. Her recent trial experience includes successful representations of and verdicts for General Electric, Merck, and ESPN. Adam Tolin is a counsel in the same department. He focuses on complex commercial litigation and product liability disputes. He has significant experience at trial, having recently served as trial counsel defending a major energy company in a \$1 billion confidential arbitration involving a complex construction project that resulted in a complete defense verdict.