

How to Pick the Right Audience

Successful jury selection requires targeted questions and a watchful eye.

By Wayne R. Cohen

If trials are Broadway shows, then trial lawyers are the actors and the jury is the audience. At the end of a Broadway show, the actors are at the mercy of the audience members. They'll clap if they liked the show and boo if they hated it.

Similarly, at the end of a trial, the jurors evaluate the case and decide who wins and who loses. Picking a jury, therefore, is one of the most important aspects of any trial—and one of the most difficult.

People are complicated. It takes years to get to know someone, and sometimes he can still surprise you. Trial lawyers don't have that luxury. We can't call the family members of a juror and ask, "Is John a sympathetic person?" Or write to Jane's former employer to inquire whether she is a good listener. Instead, we have only a few moments to gauge the way a potential juror thinks and feels about a particular case.

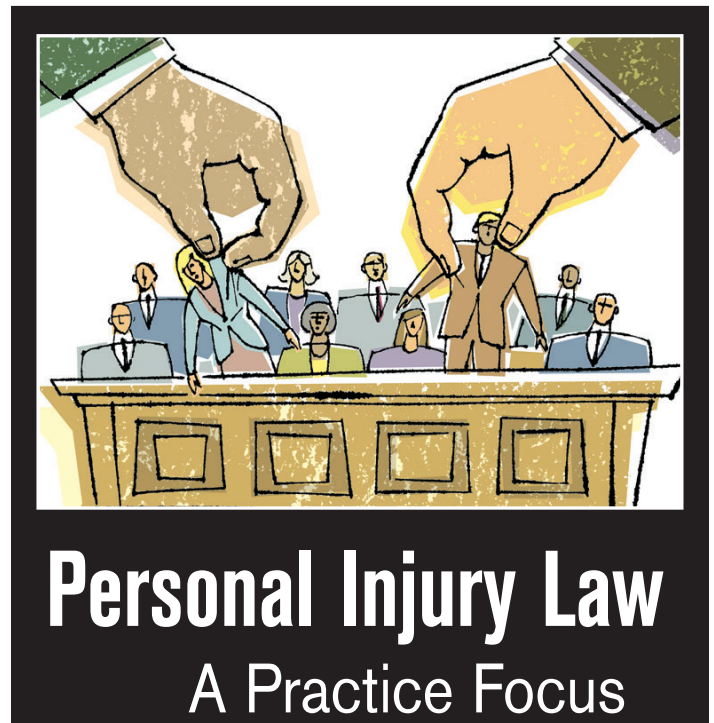
This is a tremendous challenge, but there are five steps we can take to increase the odds that we'll select audience members apt to give us rave reviews and find in favor of our client:

1. Submit relevant questions.

It sounds basic, but many lawyers fail to do it. And I'm not talking about the "Can you be fair?" or "Do you have any illnesses?" questions that are always relevant.

Instead, take time to think about the key information you really need to obtain. If you're litigating a medical negligence case, then be sure to ask whether any of the jurors have had good or bad experiences with the doctors or hospitals involved. If you're litigating a product liability case, ask about the experience that the jurors have had with the product itself or with a closely related product. If you are litigating a construction case, find out whether any members of the panel have worked in the field.

One effective technique I use frequently is to take out a plain sheet of paper and, at the top, write one sentence describing my theory of the case. Then I list all the key factors that could determine how jurors judge that theory. The list is usually only 10 or 15 questions long. Then I will add in the



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usual other questions—Can you be fair? Do you know the lawyers? etc.

2. Keep questions short, simple, and open-ended.

Never, ever, ask questions that are complicated. Most voir dire occurs in open court, and potential jurors will be nervous about speaking in public. The questions you ask, or that you provide to the court to ask, need to be brief and straightforward. Limit the clauses, and be as direct as possible. Assume that you're sitting having a cup of coffee with the panel and that you just need to get some basic information. The simpler, the better.

The questions themselves shouldn't be leading unless you are trying to fight for or against a motion to strike. Your goal is to elicit information, and open-ended questions are best.

Never ask questions that can be answered with a yes or no. You'll win the battle of getting your question answered, but lose the war of really understanding what makes the juror tick. Ask potential jurors questions that begin with *what* and *how*. These types of questions allow potential jurors to expound on their own feelings and beliefs. And that is the kind of information that will help you decide whether keeping a particular juror will benefit you.

The only exception to asking open-ended questions is when you are dealing with a motion to strike for cause. In those situations asking questions that can be answered with a yes or no is far more useful. For example, if you believe a juror will not be fair, you may wish to ask, "There are a lot of cases you could sit on as a juror. Is this the type of case which, in your heart of hearts, you know you can't be fair evaluating?"

3. Have a colleague observe the jurors during selection.

Some judges will conduct the voir dire, and others will have the lawyers conduct it. In either situation, it's imperative to have a colleague observe the panel during the questioning. Even the most-seasoned trial lawyer can't pick up on all the nonverbal cues expressed by potential jurors. Get a colleague's help.

I recently tried a case where the panel was asked, "Do any of you have any pre-conceived notions about the civil justice system that would prevent you from being fair and impartial?" One prospective juror raised his hand and was called to the bench. The judge, opposing counsel, and I were speaking to the gentleman. He had had a bad prior experience with the legal system and clearly didn't want to sit as a juror. I asked some follow-up questions and came to the conclusion that he could be fair.

Unbeknownst to me, but quite apparent to my co-counsel, he rolled his eyes at one of my questions while I was making a note. I certainly wouldn't have wanted to let this person sit on the jury, but never would have picked up on the eye-rolling but for my co-counsel.

4. Watch your demeanor—because they sure are.

Voir dire is the time for trial lawyers to seek the truth about the jurors. And yes, you're the one asking the questions. But they're the ones watching how you ask the questions. Their evaluation of you begins the moment the panel enters the courtroom. They'll watch how you interact with your client, with opposing counsel, with the judge, and with the courtroom clerk. Their opinions will be forming as you're conducting voir dire, and those impressions will last.

Be polite. Be courteous. And most important, be sincere. If the jurors don't believe the lawyer, it will be very hard for them to believe the lawyer's client.

The jurors will be seeking the truth about you just as you're seeking the truth about them. If you wear a fancy watch and gold cufflinks, they'll notice them and think you're greedy. If you're disrespectful to the courtroom clerk but polite to them, they'll think you're insincere. Never compromise your sincerity, or you'll be certain to hear boos at the end of the case.

5. Adapt your trial themes to what you learned in voir dire.

Good trial lawyers are well-prepared for their cases. We plan, we strategize, and we hold focus groups. We know our cases inside and out, and we know our opponents.

But no matter how well we prepare, there is one aspect of the case that we'll never know until the first day of trial: the composition of the jury. Will they be intellectuals? Working folks? Teachers? Doctors? Engineers? Housewives? Househusbands? Lawyers? Judges? Maintenance workers?

Without knowing the composition of our jury, it's difficult—or rather, imprudent—to etch in stone the themes of our case. Good trial lawyers are flexible enough in their thinking to adapt their arguments to the specific jury before them.

One experience I had as a very young lawyer taught me a valuable lesson. The case was a simple automobile accident. My client had suffered a herniated disk and required surgery. My opponent was a great trial lawyer—smart, passionate, and articulate. At trial, the defense called a world-renowned neuro-radiologist as its expert. The gravamen of the testimony was that my client's disk injury wasn't caused by the automobile accident. I was clearly outclassed. My cross-examination of the doctor failed, and the other lawyer made me look as if I had never been in a courtroom before (I barely had).

Right before my closing argument, I was looking through my notes and came across the words that juror No. 3 spoke during voir dire. "As a third-grade teacher, I always try to be fair," she had said.

The way to win the case suddenly hit me like a ton of bricks. My closing argument focused on the facts—not the lawyers, not the experts, but the facts. I used the metaphor of how my job was like that of a teacher: to educate the jurors about the facts and the law. Their job was to make a final decision. But the decision should be based on the truth, not on how good I was as a teacher.

"Use your common sense," I said. "Think back to the best teachers you've had in your lives. Maybe they weren't the best speakers or the best dressed. But they had the best message."

Suffice it to say that my client won a large verdict in the case. I spoke to the jury afterward, and the foreperson, who happened to be the third-grade teacher, told me something that I've never forgotten: "We believed you because you were sincere."

That, I believe, is a clear example of adapting your themes to what you learn in voir dire. (Oh yeah, she also reassured me that I would become better over time!)

Far too many lawyers underestimate the importance of voir dire. Picking a jury is not just a formal exercise we must go through. To the contrary, it is a vital component of trying—and winning—a case.

In the courtroom, you're the actor. If you want a standing ovation at the end of your case, make sure you pick the right audience.

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