

4 Ways To Seat The Jury Of Your Dreams

By **Alex Wolf**

Law360, New York (July 29, 2016, 5:19 PM EDT) -- For trial attorneys, the closest thing to seating a dream jury is picking a group that isn't closed off to particular arguments from the start, which can be done by knowing what signs of bias to look for and crafting questions that elicit a would-be juror's feelings about the case.

The key to selecting a favorable jury boils down to identifying individual biases and making sure that people with them are either stricken or unlikely to hurt your side, according to experts.

"Probably the most important thing is to understand that jury selection is looking for jurors who are against you rather than looking for jurors who are for you because you can't choose your juries," said Kathy Kellermann, president of litigation consultancy ComCon. "You can only deselect people by exercising peremptory challenges or asking the judge to excuse people."

Here are some ways that attorneys can position themselves to seat an ideal panel.

Plan Ahead

Thorough trial preparation is crucial not only so attorneys are able to direct a thoughtful line of attack or defense in the courtroom, but also so they are familiar with the case elements and arguments that resonate with potential jurors or provoke their disdain.

In order to effectively sift through potential jurors, an attorney should think through all of the arguments in their case and figure out what types of people are going to be receptive or unreceptive to them.

To do this, experts recommend surveying the community where the jury pool will be drawn from and conducting mock trials to see what sort of facts in the case elicit strong responses and what sort of people tend to have them.

"It's important to remember that most jurors bring with them to the courtroom their own personal experiences, attitudes and beliefs about all kinds of topics but certainly whatever the topic of the trial happens to be," said Philip K. Anthony, CEO of trial consulting firm DecisionQuest.

Getting a sense of how potential jurors react to particular arguments or case facts enables attorneys to carefully craft their questions going into voir dire and be on the lookout for people with strong feelings one way or another.

Lawyers should also know that not all jury selections are the same, and it is the responsibility of the attorney to find out beforehand what type of engagement a trial judge will allow counsel to have with the jury pool, experts said, noting that some judges may ask

all the questions themselves or restrict certain questions.

"You need to know what your judge allows going into jury selection because what works for one judge will almost certainly not work for another, and so you need to be prepared with the local intelligence before you come in to select the jurors," Kirkland & Ellis LLP partner Atif Khawaja said.

Put the Jury Pool at Ease

For most potential jurors, their appearance at voir dire marks the first time they've ever been probed about hearing a case and likely the first time they've ever been in a courtroom. Therefore, it is important for lawyers to make them feel comfortable about the process so they can be forthright in answering questions, Anthony said.

Trial attorneys, who are naturally accustomed to being in court and putting witnesses on the spot, should keep in mind that their primary objective during jury selection is to get people who are likely tense about being in court to reveal things about themselves that color the way they view certain aspects of a case, according to Kellermann.

"So the trick with voir dire is to not treat it like a cross- or direct examination but instead to treat it like you're talking to your children, and you want your children to speak," she said.

It's also worth keeping in mind that jury selection is the first time that an attorney will have contact with the eventual jurors, and it could be helpful to instill a sense of trust and respect off the bat, according to Quinn Emanuel Urquhart & Sullivan LLP trial lawyer David Elsberg.

"It's not just that you're trying to figure something out about them. You want them to figure something out about you, and you want it to be positive," he said.

Elsberg added that it is also wise to be restrained in making promises about how a case will play out because the jurors will remember the assertions that were made early on.

Though experts acknowledged that an attorney's mindset during voir dire should above all else be focused on identifying how potential jurors feel about the facts of a case, they say it doesn't hurt to also preview the themes and issues that underscore their side's arguments.

Focus Questions on Individual Experiences

Experts roundly professed that an individual's ability to either lean in one party's favor or be open to certain arguments is rooted in personal experience above all else, and it is therefore important to craft questions in a way that will reveal the attitudes of each person in the room.

If given the opportunity, trial lawyers should be asking potential jurors how certain aspects or parties in the case make them feel and should not be readily making assumptions based on demographics, according to Kellermann.

"There isn't a juror who's good in all cases," she said. "A juror who's good or bad for you in a given case depends on what the arguments are going to be in that case."

She also advised that attorneys "front" the worse facts of their case — essentially, get everything bad about one's own side out in the open — during voir dire to see how jurors react and focus solely on getting rid of those "whose ears are closed to you."

When presented with the facts or background of a case, jurors tend to think about what they have or would have done in a similar situation, so it is crucial for attorneys to ask

questions and deliver information in a way that gives them access to these types of thoughts, according to Khawaja.

"Ultimately, you're looking to find a creative parallel in their life comparable to your situation that you want to draw upon," he said.

Identify Leaders and Followers

In addition to asking the right questions, attorneys should be closely monitoring the way that potential jurors are answering and engaging with others in the room. Though it may make sense to strike a juror based on their responses to certain questions, it could be advantageous not to strike someone if they show signs that they can be easily swayed by others, experts said.

"You've got to take into consideration that maybe that juror will be neutralized by the balance of the power, in which case, there's no point using your strike upon that person," Anthony, a doctor of social psychology, explained.

It's also possible to identify someone who's sympathetic but demonstrably quiet and likely to follow the lead of other more assertive jury members, Elsberg noted. He believes that if a trial team does identify someone it wants on the panel who shows sympathy for its side, it should limit the number of questions it asks so the juror's bias isn't exposed to the opposing counsel, who may then be inclined to strike that juror.

After identifying how each potential juror feels toward a party's side, the key is to determine the degree to which each person can influence others to adopt a viewpoint or accept an argument, Kellermann said.

"If you strike people who aren't influencers, then you're striking somebody that you can live with because you're never going to have a perfect jury," she said. "And so the issue is, 'Who can you live with?'"

--Editing by Christine Chun and Emily Kokoll.