

5 Tips For Seating A Sympathetic Jury

By Shannon Henson

Law360, New York (February 22, 2010) -- Choosing the right jury can be a make-or-break moment for a lawsuit, a client's business or an attorney's career, jury consultants told Law360 in sharing winning tips for how to select a favorable jury.

The control a lawyer has in choosing those who will occupy the jury box depends on the jurisdiction and presiding judge. But no matter the situation, attorneys need to make the most of the opportunities they have and focus on finding out as much as possible about potential jurors, according to jury consultants.

Here are some tips for seating a sympathetic jury:

1. Don't ask questions that can be answered with a yes or a no.

It seems obvious to say that lawyers need to ask excellent questions and pay attention to how potential jury members answer. But attorneys often miss opportunities by asking questions that can be answered with a yes or a no, consultants said.

Kathy Kellermann, president of litigation consultancy ComCon, said attorneys are used to asking pointed and closed-ended questions of witnesses. "They very naturally apply the same techniques to voir dire," she said.

But as an alternative, she recommended giving potential jurors a choice between two specific options, such as asking whether they think it's worse for an innocent person to be sent to jail or a guilty person to go free. "You get to know them by the way they answer," she said.

Jocelyn Cinquino, a jury consultant with Kroll Ontrack/TrialGraphix, noted that much can be gleaned from a response to a nuanced question.

She described how a lawyer had asked potential jurors in a termination case whether they had ever been fired and, if so, to describe the experience. One potential juror said he had lost his job because of a reduction in force; another said his whole department had been sacked.

"They had two different perceptions of the same experience," Cinquino said. "One was less emotional, the

other more reactive. By opening it up, you get to hear the language they use and see the back story."

Marshall Hennington, founder of trial and jury consultant firm Hennington & Associates, recommended asking a potential juror how he or she determines if someone is telling the truth.

How they respond "can be revealing in terms of someone being an analytical thinker as opposed to someone who will follow the lead of everyone else in deliberations," Hennington said.

After deciding on the best questions and how to phrase them, attorneys need to be tuned in to the responses of the jury pool members. Susan Powell, president of Strategic Litigation Research, said it's not uncommon for lawyers to interrupt a potential juror.

"For heaven's sake, let them answer and listen to them," Powell said. "There may be something in there that you need to hear."

2. Focus on de-selection and identifying potential leaders.

During the selection process, lawyers should aim at rooting out the jurors who might seem attractive to opposing counsel, rather than identifying the ones that are the most likely to be sympathetic, consultants said.

"You can't choose the jurors, you can only strike them. So look for your worst jurors and strike them," Kellermann said. "You aren't looking for who is your best juror. You're looking for who is their best juror."

Cinquino also said lawyers need to be able to hone in on the jurors that could do the most damage and focus on asking the kinds of questions that would identify them.

Not all potential jurors are important, according to Kellermann. For example, people caught nodding off or sleeping "aren't necessarily your enemies. They are unlikely to be leaders, so why focus on them?"

Rather, it's pivotal to find those who would be influential in a jury room. Kellermann suggested that attorneys ask potential jurors if they traditionally take on leadership positions or hold a management position.

"If you can make sure the other side has no leaders, and you do, you don't have to worry as much about the people who won't participate as much," Kellermann said.

3. Watch potential jurors throughout the process, but don't put too much weight on body language.

Much can be learned by watching potential jurors during the jury selection process, Cinquino said.

"Are they relating to others in the group? If you see jurors starting to form friendships or becoming

comfortable with one another, you want to take that into account. If they are chosen to serve, it may have an impact on how they deliberate," she said.

Cinquino recounted how a potential juror kept raising her hand to ask if she could change her seat, go to the restroom or get a drink of water. "It all seems irrelevant," Cinquino said. "But it indicated a sense of entitlement" — a quality that could come into play during deliberations and ultimately have a bearing on the case.

Some consultants cautioned lawyers against reading too much into body language when identifying potential jurors. Potential jurors often are nervous because they may have never been in a courtroom before or participated in voir dire, according to Kellermann.

4. Don't tip your hand to opposing counsel.

A lawyer has to know when to pull back and not expose too much about a potential juror to the opposing side, according to Cinquino. Knowing when that point is reached is often intuitive and occasionally perplexing to attorneys.

"At some point a lawyer has to use their judgment," Powell said. "You have to realize the juror is going to get struck if you keep going, and you are doing the opposing side's job for them" by doing so.

5. Be on the lookout for stealth jurors.

Some people just want to be picked for a jury. They have their own agenda, regardless of what matters are put before the court. Chances are, they won't want to view or decide the case on any terms but their own, consultants said. Lawyers should be on the lookout for such jurors and try to strike them.

Some people in the potential pool "will say anything" to win a spot, according to Kellermann.

This kind of willingness is undesirable, and it is also "very hard to detect," Kellermann said.

"You should be looking for inconsistencies, which may be subtle," she said. Either they "won't be telling you something" or "their response seems not to line up with something," she added.