Jury selection from a defense perspective

Make a good first impression on the jury. If they like you, the better the chance they will like your case. And being a woman trial lawyer won’t hurt

It has been reported that anywhere from 70 percent to 90 percent of jurors do not change their minds after they have heard the opening statements of counsel. For this reason, opening statements, which frame the juror’s belief regarding what the case is about and therefore who should win, are considered by many to be more important than final arguments or even the actual evidence itself.

Most good trial lawyers believe that most jurors make up their minds by the end of jury selection, before they even hear opening statements. This makes the jury selection process, also known as voir dire, arguably the most important part of the trial. Yet it is the part of the trial in which new attorneys, in particular, feel most uncomfortable and unprepared. Understanding the psychology behind jury selection, and having a strategy before beginning the process, is key to winning the case.

Jury selection

Each juror brings to the courtroom life experiences that predispose him or her to one side or the other, and in reality, these predispositions are more important than skillful lawyering, indoctrination or preconditioning during the voir dire process. Although jurors are required to base their decisions and ultimately their verdict on the objective evidence presented at trial rather than on sympathy, passion, prejudice or bias, the fact is that a juror, in deciding whether to believe the plaintiff’s or defendant’s version of reality as presented at trial, will be inclined to interpret the evidence to fit within that juror’s preconceived ideas or beliefs.

In a medical-malpractice case, if a juror has had good experiences with his or her doctor, has respect for the profession, and believes that doctors are basically honest, caring and competent, then that juror is more likely to believe that the evidence of malpractice presented by the plaintiff is the result of an honest mistake or error in judgment that can happen without negligence.

If however, a juror or a family member has had a bad medical outcome it may cause the juror to believe that doctors are incompetent, careless, or are driven by a managed care system to the detriment of their patients. That juror will be more likely to see the evidence favorably for the plaintiff.

While these biases can be overcome in a lopsided case, if a juror with a strong bias remains on the jury there will not be the level playing field that prospective jurors are told is the ideal. In reality, all good trial lawyers are really looking for jurors that are pre-disposed to their case, even if the juror is able to say under oath to the court and counsel – and believe it – that they can be “fair” to both sides. Most jurors would like to believe they can be fair. It is difficult, however, to persuade a juror to believe something during trial that does not fit within their view of the world.

In the past, it was very common to conduct voir dire by asking prospective jurors mostly leading questions in order to “indoctrinate” them with their view of the case. The judge had already asked the basic demographic information, and neither side would ask the jurors many open-ended questions. Rather, they would rely on long-held stereotypes and make up their minds about each juror’s “predisposition” based on their sex, race or ethnicity, religion or employment.

Jury panels, without a doubt, have become more diverse over the years and the old stereotypes are just not reliable.

Finding out about a juror’s attitudes about the issues that are central to your case will likely be more important in selecting a good jury than trying to precondition the juror. That is not to say that the art of persuasion is not a central part of jury selection. A skillful voir dire can guide the jury to view the case from your perspective, make them more receptive to your case theme, and highlight the strengths of your case. Those
strengths will remain in their minds as they hear the evidence at trial.

If this is done by asking open-ended questions, rather than by arguing the case, you will discover the jurors preconceived biases. This will in turn allow you to de-select those jurors whose view of the world is unlikely to be in line with your side of the case, and you will have also begun to advance your themes subtly but persuasively from the outset. Because very few jurors can truly “keep an open mind” throughout the case, success at trial means having a head start that begins with jury selection and continues throughout the case.

The disadvantage of the defense

The disadvantage of being the defense attorney in a trial, starting with jury selection, is that you go second. However, if the plaintiff’s attorney does not make the most of going first, going second becomes the defense advantage, no matter what time limitations are imposed by the court. The plaintiff’s attorney has the opportunity to connect first with the prospective jurors by getting to know them and beginning the process of introducing them to the strengths of the plaintiff’s case. But if the plaintiff’s attorney does not connect with the juror, doesn’t obtain information necessary to determine the predispositions of the members of the panel, elicits objections from the court, and basically just fails to impress, there is a better opportunity for the defense attorney to shine.

Even with a skillful voir dire by the plaintiff’s attorney, the defense has the opportunity to explore areas that were not covered by the other side, either by design or because of time limitations, and can further explore areas of bias to establish a basis for a challenge for cause.

When the jury comes in

Projecting confidence is important. Stand, turn to jury, make eye contact and look natural, confident, and neutral. Survey the people in the audience and the options you have been given for your jurors. If your client is present at that point in trial, instruct him or her to do the same. A lot happens before the attorneys are given the opportunity to address the jury. First impressions are made early and are hard to change. The jurors are looking at you and your client. They are assessing the possible trial they will hear, and they are making judgments from the beginning, so behave in a professional manner at all times.

The judge will at the outset, seat at least 12 jurors, and more likely 18. The judge will, at a minimum, ask them to answer the basic demographic questions that are almost always posted on a board. Most judges will first introduce the court staff, and ask the attorneys to stand and introduce themselves and their clients. Most judges will also spend some time talking to the jury before getting the demographic information. The judge might start with the hardship questions, addressing the entire audience as well as the jurors in the box.

Pay attention to the answers to the court’s questions regarding hardship.

Some jurors who attempt to make compelling “hardship excuses” may be unsuccessful and end up in the box for further questioning or even on the jury. Whenever a prospective juror speaks, you are getting information about that juror, and to some extent his or her attitudes about the lawsuit and predispositions.

Pay attention to the court’s inclination on handling hardships – whether the judge is strict or lenient in excusing the juror – since that will tell you how the judge is likely to rule on cause challenges later in the process.

No matter how good your homework is, you might not get a feel for the judge’s style until you are there in the jury selection process. Pay attention to the judge’s questions to the jurors – write fast! Some judges will elicit a lot of valuable information. So much that you may know who you likely want to keep on the jury.

Other judges will only get the bare essentials and will go so quickly that you might be required to waste valuable time re-asking questions because you didn’t hear them the first time. It’s usually smart to ask the judge to ask any sensitive questions – it’s a less confrontational way to get necessary information about the jurors and you will be less likely to inadvertently embarrass a juror or the panel. When there are significant limitations on attorney time for voir dire, it’s important to get the court to cover some necessary topics. Many judges ask a lot of their own questions regarding the jurors’ experiences in relation to the subject matter of the trial. Before voir dire begins some judges will ask the attorneys to submit questions they want the court to ask. Take advantage of that opportunity.

Mini-openings

More judges advocate “mini-opening” statements at the very beginning of the case, before the formal voir dire process begins. They are not evidence, but are an opportunity, in about five minutes, for the attorneys to give the prospective jurors what the basic facts of the case are, and what the evidence will show.

Mini-opening statements are an excellent opportunity to frame the case, and they allow the court and attorneys to obtain a lot more information from the juror and his or her attitudes about the issues because the jurors will know, during jury selection, what the case is really about already. They give the attorneys the opportunity to showcase their abilities as lawyers, and to get the facts and themes of the case to the jury panel where the same information, if conveyed in conventional voir dire, would likely be objected to as “preconditioning” the jury or arguing the facts.

Many attorneys’ natural reaction is to shy away from mini-openings (they are usually voluntary and must be agreed to by both sides), but if it is crafted as carefully as the “real” opening statement is, a mini-opening can be instrumental in making a good first impression on the jury. Preparing for a mini-opening forces the trial lawyer to distill the essence of the case: a sometimes difficult but essential thing to do.

What questions to ask and how

Speak to the jurors – make eye contact, don’t fidget or use distracting

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habits, be respectful, and don’t get on the wrong side of the judge. Jurors believe that the judge knows more about the case than they do, and surprisingly they often like, and more importantly respect, even the most unlikable judges. A juror will believe that when the judge is hard on one side, it’s because the lawyer or the case isn’t good, so it’s important that from the beginning you don’t ask questions that are inarticulate or improper and cause you to be admonished by the judge at the outset.

I suggest having an outline of the questions and areas of inquiry that you want to cover in voir dire. You might want to actually write out any question that you want to ask the panel that is sensitive, or is factual enough that it could be viewed as pre-conditioning or argument. A nervous lawyer can blurt out a question that is phrased in a way that can inadvertently offend the jurors, or raise objections from the court or opposing counsel.

It is very important to remember that you can only be effective in jury selection if you look at the jurors when you speak to them, which will be difficult if you are tied to your notes. Many of the questions you will ask a prospective juror cannot be written down in advance because the questioning will be based on the answers you get. One advantage to the defense attorney is that he or she will be asking follow-up questions to answers given to the court and plaintiff’s counsel. The defense therefore will have the opportunity to be more direct in its questions. So use your notes as a guide, not a script.

Speak English in a way that the jurors can understand. It is just as easy to use the word “after” instead of “subsequently.”

It is essential that jurors are asked during voir dire if they routinely use the Internet, search engines like Google, and what sources to the Internet they have, i.e. their cell phone, Blackberry, iPhone, or iPad. Find out if they are on Facebook, Twitter, or if they blog. Not only must jurors refrain from discussing the case with anyone during the trial, they cannot discuss the case on any social networking site either. They are not permitted to go home and Google a medical term or procedure, or conduct Internet research.

Google Earth is well known to many prospective jurors, so they not only have to be admonished not to visit the scene of the accident, but must be told that it is not permissible to check out the traffic intersection where the scene occurred on the Internet.

Plaintiffs’ lawyers will ask the questions that relate to jurors’ attitudes toward too many lawsuits, and how jurors feel about big verdicts. As a defense lawyer, I love it when my opposing counsel not only brings up the infamous McDonald’s case in which a woman was awarded millions for spilling hot coffee on herself but also attempts to defend that verdict to the jury. Most jurors will cite their knowledge of that case as an example of the system not working and are actually offended that the plaintiff attorney’s attempts to justify the verdict. The answers that the jurors give to questions about “too high” verdicts, elicited by plaintiff’s counsel, will probably give the defense attorney enough information about the jurors’ attitudes toward the tort system that he or she will not have to venture into additional questioning on that subject.

The general rule is that the more negative jurors are toward lawyers, the more likely they are defense oriented. Jurors who don’t like lawyers are usually more skeptical about the merits of the case and are more likely to view the plaintiff’s attorney as an “ambulance chaser.” The more compassionate and accepting the juror is of large verdicts, the more plaintiff-oriented that juror is likely to be.

Some counter questions to the “big verdict, too many lawsuits” questions that the plaintiff’s attorney will ask are questions such as, “will you be willing to turn the plaintiff away without any money at all if she can’t meet her burden of proof, if she cannot prove her case?” Defense counsel might ask the panel whether any of them believe that the case must have merit because it has gotten that far along in the process. Surprisingly, some jurors will say that they do believe there must be a case because they are there. This is the opportunity for defense counsel to remind them that anyone can file a case, and that just as the plaintiff has the right to come to court because he believes he has been wronged, a defendant has the right to come to court and defend himself against claims he feels do not have merit.

Choose essential questions. While it might be nice to know what magazines and books the juror reads, or what their favorite TV shows are, are the answers to those questions where you are going to get the most bang for your two minute per juror buck? Probably not.

As a defense attorney, I like to include some variation of questions regarding the jury’s understanding of the importance of keeping an open mind throughout the case. Since the plaintiff goes first, starting with jury selection and continuing with the opening statements, the introduction of evidence and final arguments, this is a good time for the defense to remind the jury about who has the burden of proof – the plaintiff. While we know from jury research that jurors are probably incapable of truly keeping an open mind throughout the case and do make their judgments as early as jury selection and opening statements, it’s still important to remind them that there are two sides to every story.

Try to stay away from words like “bias” and “prejudice”; be more subtle. While one of the primary goals of the jury selection process is to uncover juror biases, no juror will admit to being prejudiced and will be offended at the suggestion. Most jurors believe they are nothing but fair and just. Asking questions such as “Is there an even playing field?” or “Are you already leaning a certain way?” or “If we were running a race, is my client already a little behind, given how you feel?” is a better way of getting to the issue of bias. Jurors should be reminded that there are other cases being tried in the courtroom, and if this is just not the case that is right for them, because of similar life experiences, it doesn’t mean they are not a fair person. They are just not right for this case. A juror will be
more likely to admit to a bias if they are not attacked directly on their predispositions.

Start “arguing” the merits of the case from the beginning. Not by actually arguing the case; that will elicit an objection that will be sustained by the court. Start by highlighting your strongest evidence in question selection and by pointing out the weaknesses of the other side’s case.

Asking questions that are too subtle or too parallel to the facts of the case could confuse the jury by leading them to believe that the case is about something it’s not. It can be a fine line. For example, if one of the defenses in a medical-malpractice case is that the plaintiff didn’t follow her doctor’s instructions and therefore contributed to the delayed diagnosis alleged, defense counsel might just ask a juror, “Do you believe that it’s important for a patient to follow her doctor’s advice?” Of course, defense counsel will want jurors who do believe in going to doctors and following their advice, rather than jurors who question advice. At the same time, such questions will alert the jury that this will be an issue in the case.

Move along, counselor

Don’t spend too much time on any one topic, even if it is a strong one. Jurors don’t like wasted time, and sticking to one subject for too long could make the jurors think that it’s a problem issue, rather than a strength.

Probably the best advice in picking a jury is to roll with the punches. A perfect voir dire isn’t common. Things can happen that are very discouraging and interfere with your belief that you are getting a fair and impartial jury for your client. For example, the judge could disallow an entire line of questioning—questions that you made the centerpiece of your voir dire. You could get a panel in which the jurors are unusually silent or express no opinions, which makes it difficult to get information or to create any sort of bond with them. Sometimes, the panel will “turn” on one side or the other. They could all start piling on the plaintiff regarding “runaway verdicts.” Or, they could start all raising their hands to talk about what bad experiences they have had with their managed-care system—even in a medical malpractice case that doesn’t have anything to do with managed care. There will always be the person who raises his or her hand in response to every question; that juror is usually bad for both sides and can derail a voir dire by monopolizing precious time. And, don’t miss quiet jurors—they are the ones most likely to stay on the jury.

Special considerations for the female trial attorney

Since this issue of the Advocate is focused on women trial lawyers, I conducted a very informal survey of my female trial-lawyer friends on both sides of the aisle to see what voir dire issues they believe are unique to women trial lawyers. As someone who has tried cases for 30 years, I really wasn’t surprised that no one I asked could really offer anything other than anecdotes from many years ago, usually related to sexism from the opposing (male) attorney, or from the (male) judge presiding over the case.

While there can certainly still be a degree of bias against the woman trial lawyer in some courtrooms, I find that the advantages outweigh the disadvantages. Most jurors do not like boorish behavior from opposing counsel, particularly if directed at a woman attorney. First impressions are so important. Women trial attorneys are still watched more closely than male attorneys, from what they wear to court to the nervous habits that they demonstrate during trial.

While jurors may be more inclined to be dismissive of a woman trial lawyer who is too timid—or too loud and argumentative—than they would her male counterpart, so are they more inclined to respect the attorney who is professional in appearance and style, well-prepared, knowledgeable and articulate. There was a time when I wouldn’t dare wear a pantsuit in trial—I wouldn’t want to offend an older, conservative juror. Now I wear pantsuits, as they are completely acceptable in today’s business environment, although I admit that I still wear my conservative, navy blue skirt suit on the first day of trial for voir dire. My advice to women attorneys who are selecting a jury is to recognize that you are being observed closely by the jurors, and project a confident and competent image from the outset, as that is the impression that will last.

Conclusion

Even though we know the minds of many jurors are made up in advance of the presentation of evidence, and in many cases before the opening statements, the well-prepared lawyer will likely have numerous opportunities to select the best jury by deselecting those jurors whose natural predispositions favor the other side, and by subtly introducing your own case theme from the outset. Defense counsel knows that, even though plaintiff’s counsel “goes first,” there will be ample opportunity during jury selection to capitalize on mistakes that the plaintiff’s attorney makes, or to build on the responses that are given in the voir dire conducted by the court and opposing counsel. Whatever side you are on, capitalize on your first opportunity to make a good impression on the jury. If the jury likes you, the better the chance the jury will like your case.

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