

# **PERSUASION IN** **JURY SELECTION**

Halsey G. Knapp, Jr.  
Foltz Martin, LLC  
3525 Piedmont Road, N.E.  
5 Piedmont Center, Suite 750  
Telephone 404.231.9397  
Facsimile 404.237.1659

## **PERSUASION IN JURY SELECTION**

“The selection of a jury is probably the most significant procedure in the entire trial process. It involves a use of social sciences blended with the rules of law, and culminates in the art of advocacy in its truest sense.”

Joe Jamail quoted in Winning Courtroom Strategies by Edward T. Wright at page 157 (Prentice Hall 1994).

### **Introduction**

Voir dire, not opening statements, is the beginning of a trial, the first opportunity for the lawyer and his or her client to set the stage for a successful outcome. As in all legal endeavors, preparation is essential to cultivating the opportunities available to one who uses the tools and techniques available to him or her.

You should have four goals in voir dire. First, it is an important opportunity for the lawyer to make an impression with the prospective jurors. Second, it is an opportunity for your client to impress and persuade the prospective jury. Third, it is an opportunity for you and your client to impress the prospective jury with the merits of your case. Finally, you must eliminate those prospective jurors who can not or will not relate favorably to your client or his or her case.

Eliminating “bad” prospective jurors is the most difficult of these goals and many points of view exist on how best to accomplish it. Many litigants utilize the services of jury consultants to assist them in this effort, while others eschew them. Those that favor the use of jury experts generally have had positive outcomes utilizing them or enjoy sharing the responsibility of “reading” prospective jurors. Those that decline to use jury

consultants often cite their cost and their inability to accurately predict juror behavior. The latter view is expressed by Ross P. Laguzza of DecisionQuest, a respected trial-consulting firm.

Examples: “The goal during jury selection is to predict future behavior of a complete stranger, not just a few minutes after the prediction, but often days, weeks, even months later. This would be hard enough to do if the object of the prediction were a spouse or close friend or relative. How many of us have struggled to predict or even explain the behavior of someone we have lived with for years?”

\*\*\*\*\*

“The only clue available for making this prediction is behavior produced by this stranger in an unfamiliar setting in the presence of many other strangers, a judge, sometimes representatives of the media, and besuited trial attorneys and their assistants. And these clues are only available for a short period of time. To complicate matters further, the lawyer must predict the degree to which one stranger’s future behavior will coincide with the future behavior of as many as 11 strangers, which must also be accurately predicted.”

Judge Ralph Adam Fine, The “How-To-Win” Trial Manual: Winning Trial-Advocacy in a Nutshell (Juris Publishing 1998) at page 191.

Proponents of this later view often focus on simply trying to remove any person who is so obviously out of the main stream that their bizarre traits would be immediately apparent to anyone. Id. at pages 190 to 195. Their juror selection goals are more limited as they emphasize the advocacy goals of selling the client to the jury and inculcating the prospective jurors with their theory of the case. Id.

### **Selling Yourself to the Jury**

An attorney's credibility, sincerity and earnestness is perhaps his or her most effective tool in persuading the jury to return a favorable verdict. From the first moment in the courtroom, the prospective jurors are watching the attorneys, reacting to them, studying them and considering: (a) your appearance, (b) your sincerity, (c) your professionalism, (d) your concern, and (e) your attitude toward the prospective jurors. They are assessing whether you dress and act appropriately.<sup>1</sup> Are you candid and precise, or rather are you evasive and vague? Do you look them in the eye and tell them like it is or do you engage in exaggeration and hyperbole? Are you capable and prepared or are you sloppy and at the mercy of your opponent? Are you concerned about your client and his or her case or are you more concerned about your courtroom persona? Do you address the prospective jurors in a friendly, sincere and personal manner or are you condescending, aloof and above them? All of these questions are being answered by

---

<sup>1</sup> In Winning Courtroom Strategies, Edward Wright urges adherence to the "one step above" rule. Jurors expect you to be one step, not two steps, above the others in the courtroom. In regard to dress, this means you dress like a lawyer without dressing "too expensively." If you go too far, the jurors will resent you. Id. at pages 3 and 4.

prospective jurors as they watch you, the attorney, during voir dire.<sup>2</sup> If the prospective jurors like and respect you, they will believe in what you say.

In conclusion, an attorney sells himself or herself by looking and acting like a lawyer, being professional (and on time!), being prepared, being friendly and considerate in dealings with the prospective jurors and every member of the courtroom staff interested in your client and your lawsuit.

### **Selling Your Client to the Jury**

Long before the beginning of trial, you must assess whether your client will be effective in front of the jury. It is likely the same analysis that you made when you first decided to take the case, again when you elected not to accept a settlement offer that was close but not close enough to your figure, and again when you chose to proceed to a jury trial and not elect a bench trial. That is, do you have a client that the jury will like and identify with? There are five basic techniques to selling your client to the prospective jurors.

- (1) Tell the client's story during voir dire. You have some latitude to tell what happened and the jurors will begin identifying with your client upon hearing this.

Example: "Mary Jones was driving home from her first football game as a cheerleader for Long Street High School. The

---

<sup>2</sup> Of course it is important to remember that these impressions and assessments go on throughout the trial. In fact, conduct during breaks or before and after sessions often provides jurors credible insights into whether the lawyer or the client's conduct is sincere or a put-on. Accordingly, the lawyer and the client must remain focused, serious and controlled throughout their entire time at the courthouse.

euphoria of being in front of the crowd and leading those cheering had not fully worn off. Nevertheless, this straight A student deliberately slowed her Honda Civic, earned after a summer of working at McDonald's, when she approached the Arden Road intersection only to be side swiped by Darth Vader Waste Haulers. Have any of you heard of this case?"

- (2) Tell your client's background. You must explore and uncover the life experiences which are common to your client and the prospective jurors.

Examples: "Ms. Jones worked at the McDonald's down the street. Do any of you eat there?"

\*\*\*\*\*

"Ms. Jones worked at the Atlanta Woman's Shelter for many years with other young women from Smithsville. Do any of you remember her from your work there or do any of you have daughters who also worked there?"

- (3) Control your client's appearance. The jury will make judgments on what your client wears, how he or she acts and with whom your client associates. Your client must be pleasant but serious.
- (4) Control your client's attitudes. He or she must act in the manner of the perfect dinner guest: cooperative, friendly, respectful and interested in everything that is said and done.

- (5) Control your client's conduct. He or she must understand that they are constantly on display and you must prepare him or her for the courtroom experience.

It is important to recognize that your client is not required to be present in a civil trial and that your trial strategy must take into account how much your client is exposed to the jurors.

In summary, you help your client's case by preparing your client for the continuous display of the courtroom. If those efforts will not succeed in presenting a likeable personality, then determine the minimal amount of time your client must be present in the courtroom and exclude him or her from the remaining proceedings. Also, be sure to explain to the jury why he or she is not present for those instances where they are absent.

Example: "Ladies and gentlemen, my client, Mr. Smith, sitting here is the defendant in this action. Unfortunately, Mr. Smith's mother is quite ill and he may be absent intermittently during the trial should his mother's condition worsen. If he is absent, please understand why he could not be with us."

### **Selling Your Story and Theme to the Jury**

Your story is an explanation of what happened. In contrast, your theme explains why your client is entitled to win your lawsuit. You must begin to explain your theme during voir dire because jurors choose sides early. Find the parts of your suit that involve themes, morality, philosophy or other issues about which people have strong opinions. While appellate opinions suggest that telling your story during voir dire is prohibited,

there is no way to conduct voir dire without talking about your lawsuit, and it is in the bits and pieces of the individual questions of voir dire that you begin to structure an effective presentation and to prepare the jury for your case. Alternatively, a summary is permitted to discover if a juror knows anything about the case or has formed an opinion.

Example: “Mr. Kincaid, you told the Plaintiff that you feel most crime is committed by illegal aliens, and I appreciate your being candid with us, but though my client is Hispanic, he is a vice president at Coca-Cola, a deacon at the largest white Baptist church in town, and for many years has been the treasurer of the United Way. Do you think he is more likely to have committed the fraudulent offenses Plaintiff alleges than a white person who does not have this excellent background?” (Explore further to see if he will make an exception, and even if he does not, the dialogue may show others the foolishness of his bigotry.<sup>3</sup>)

### **The Tools of Effective Voir Dire**

According to Michael E. Tigar in his book Persuasion: The Litigator’s Art, at page 60 (American Bar Assoc. 1999), lawyers are ill prepared by our training to listen and to care. Yet, listening is the key to communicating and connecting with prospective jurors. In Tigar’s words, lawyers must become “hearers” and be interested in what the jurors want and what the prospective jurors say. This may be the most important tool a lawyer brings to voir dire.

---

<sup>3</sup> This example is paraphrased from an example found in Winning Courtroom Strategies at page 12.

In addition to being a good listener, there are specific steps which should be followed in an effective voir dire.

- (1) Obtaining basic and specific commitments through voir dire<sup>4</sup>:
  - (a) use close ended questions;
  - (b) obtain basic commitments regarding the trial process, that is that they will listen to the evidence, apply the law and return a fair and just verdict;
  - (c) obtain special commitments in each case that fit the facts and circumstances of your particular matter;

Example: “Mr. Wardle, there has been a lot of media attention to this case and you indicated you had seen some of the publicity but really hadn’t formed an opinion. Can we agree then, that when you go back to the jury room and decide this case your verdict will be based on the evidence in the courtroom and not what a news reporter said? That is right. Thank you.”

- (d) appreciate the difference between a commitment and prejudging<sup>5</sup>;  
and

---

<sup>4</sup> Winning Courtroom Strategies, at page 14.

<sup>5</sup> See 47 Am Jur 2d, Jury § 203; 79 ALR 2d 539, Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 106 S.E. 2d 417 (1958). See also USCR 10.1. As Judge Ralph Adam Fine warns, be careful not to ask the jurors to commit to holding their ground if they are in the minority during deliberation. It sends a

(e) ask the jurors to follow the law.<sup>6</sup>

Example: “Is there anyone on this panel who will not follow the judge’s instruction and bring back a conviction when there is a reasonable doubt in your mind as to my client’s guilt?” (Not enough) “Let me put it this way, do you agree that you will vote for a guilty verdict only if you feel he is guilty beyond a reasonable doubt?” (Still not enough) “If you feel you will have any problem following this instruction, will you please raise your hand?” (You are nearly there) “Since none of you have raised your hand, I assume you have no problem with this.” (There can be no question. You have a commitment.)

---

message that the lawyer, whom the jurors believe knows the truth, is looking for someone to hang the jury rather than evaluate the client’s case on the merits. Judge Ralph Adam Fine, The “How-To-Win” Trial Manual: Winning Trial Advocacy in a Nutshell page 195 (1998).

<sup>6</sup> See, e.g., Frazier v. State, 195 Ga. App. 109, 393 S.E. 2d 262 (1990) cert denied 1990 Ga., Lexis 756 (Ga. 1990)(The court has discretion whether to allow questions regarding the prospective jurors’ willingness to follow the presumption of innocence and the requirement of proof beyond a reasonable doubt.) But see Frazier v. State, 138 Ga. App. 640, 642, 227 S.E. 2d 284 (1976)(It is well settled that counsel is not entitled to question prospective jurors regarding their attitudes or knowledge of matters of law.)

- (2) Be sure to bring up aggressive voir dire questioning with the Judge in pre-trial conference so that you will know what is off limits and what are the Judge's procedures prior to the beginning of voir dire.
- (3) Explain voir dire to prospective jurors. Help them appreciate voir dire, bring some drama to voir dire and emphasize the jurors important role in voir dire.

Examples: "I am sure that the trial of a lawsuit is not something you do every day and that you are unclear at exactly how this process works. How many of you have seen Ally McBeal or LA Law on T.V.? Well it isn't much like what you see on those shows, particularly when it comes to voir dire. They never show this process. Well, this process is important. It's the only time we can talk to one another and see if we have any experiences in our lives that might influence our ability to render a fair and just verdict in this matter. I would suggest and encourage you to participate and share freely with me your feelings about the subjects we are going to discuss."

\*\*\*\*\*

"Mrs. Jones, if my client happened to be your very best friend, it would only be fair that my opposing counsel knew that so he could question you about

that, we all agree about that, don't we? Well, if there were something else, such as you had worked at the same place, maybe I wouldn't think to ask you about it, but it is something we should talk about. Can you see why it is important that all of us talk about these things and that you tell us what you think we should talk about?"

\*\*\*\*\*

"Sometimes a juror will feel a question is not important and fail to tell us about it, and later the case must be retried because of this. Please answer the questions to the best of your knowledge and if you think of anything you feel we should know, please raise your hand and tell us. Some of the questions we ask may seem a waste of time, but let the judge decide that. If he permits the question, then he is telling you to answer it the best you can."

\*\*\*\*\*

"This is the most important part of the trial, because you have a chance to tell us about yourself, and tell us about your feelings on matters that are important in this lawsuit. I know that if you have formed an opinion that would keep you from bringing back a

verdict that is fair to both sides, you would rather wait and serve on another jury.”

\*\*\*\*\*

“It is my job to help you discover your feelings and to tell you about who will testify, what the evidence will be, and what kind of case this is, so that we can have a completely impartial jury. First, do any of you know of any reason right now that you should not serve on this jury?”

\*\*\*\*\*

“If your brother is one the parties to this lawsuit we can tell you right away whether or not you will be excused. However, if one of the parties is just someone you met once at a P.T.A. meeting, we’ll have to discuss that. We want you to serve, but having an impartial jury is so important we want to make sure you won’t lean just a little toward one side or the other. Do all of you agree with that?”

- (4) Save time by listening and eliminating redundancy to win the admiration of the Judge and jurors. Even when you have to pursue a matter previously covered do so in a way that everyone knows that this is not a repetition.

Example: "I know the Judge asked about prior jury service but I would like to know if those trials were civil or criminal. You see there is an entirely different burden of proof in a criminal case and sometimes a juror who has served in a criminal case does not realize that."

See also Lawton v. State, 191 Ga. App. 116, 118, 381 S.E. 2d 106 (1989)(Repetitive questions are objectionable).

- (5) Identify the likely leaders in the panel.
- (6) Skip around the panel, instead of going one by one down the row, so that everyone stays alert and pays attention.
- (7) Tell your entire story during the questioning of the entire panel but remember to save a few questions for individual questioning.<sup>7</sup>

Example: "Mary was intensive care for twenty days. How many of you have ever been in intensive care? How many of you have ever visited a person who was in intensive care? John Wilkens visited his wife in intensive care every night for twenty nights and she did not even know he was there. How

---

<sup>7</sup> But be aware that a party does not have the right to "outline the evidence and then ask a prospective juror his opinion of that evidence." Blankenship v. State, 258 Ga. 43, 45, 365 S.E. 2d 265 (1988) and that hypothetical questions including evidence should be excluded. Gunnin v. State, 112 Ga. App. 720, 146 S.E. 2d 131(1968).

many of you have had this experience of just sitting there? There will be medical testimony as to why Mary was in intensive care, but will you also listen to other witnesses such as her husband and her mother who will tell you about those twenty days?"

- (8) Show jurors that you respect them.

Examples: "We are not going to pry into your personal affairs and we are only going to ask questions that past experience tells us may help us learn if you have formed an opinion. We will not ask any questions that will embarrass you, and I think you will enjoy our discussion. We all have had personal experience that have helped us form opinions and we are trying to find out if any opinion you have formed would in any way affect your verdict."

\*\*\*\*\*

"Have any of you ever been involved in any kind of lawsuit, and I do not mean a divorce suit, I do not need to know about that."

- (9) Create an atmosphere that will start the winning process. It is important for the Plaintiff to establish that the circumstances of the client are serious. The defense on the other hand, is trying to undermine those efforts and keep the atmosphere light.

Example: Clarence Darrow said that jurors will not send a man to prison if they are enjoying their experience on the jury. Once he began a murder trial which his client was charged with murdering his wife by saying, "It was his own wife, wasn't it." The jury never got serious enough to convict.

(10) Ask questions that reveal the jurors' philosophies. For example, it is proper to ask questions relating to the racial prejudice of the jurors in order to test their impartiality. Deering v. State, 168 Ga. App. 835, 310 S.E. 2d 720 (1983).

(11) Prepare jurors for any weakness in your case. This is so important to gaining the respect of the jury.

Examples: Gary Spence is famous for bluntly acknowledging his problems from the front end as shown in the following example. "Folks, I have a big problem. You see, I represent this Indian in this murder trial and the problem is I am prejudiced against Indians. It isn't such a big thing that it eats away at me, but it is something that I am not real proud of. You see, when I think of an Indian I think of the one that broke into our ranch house or I think of going to town on a Saturday night and seeing some Indian laying on the street drunk. For this trial I have to

set aside that prejudice because I represent this Indian and I don't do my job unless I am to that. How do you feel about Indians? If you serve on this jury can you set aside your prejudices and do your job as a juror and give this Indian a fair trial?<sup>8</sup>

\*\*\*\*\*

Joe Jamail represented a drunk driver as the Plaintiff in a personal injury action. He began his voir dire by walking up to the jury and saying, "Folks, I have a problem. This fellow I represent is a drunk. Now is there anyone on this jury that feels just because he is a drunk that this woman had the right to run him off the road and put him in a wheelchair for the rest of his life." There was no such person on the jury, or if so, such person was stricken, because the jury came back with a three million dollar verdict for the drunk driver.<sup>9</sup>

- (12) Consider a juror's educational background. Consider technical background versus a liberal arts background. Consider experiences that may substitute for educational background. Complex cases need intelligent jurors.

---

<sup>8</sup> Gary Spence as quoted by Edward T. Wright in Winning Courtroom Strategies, at page 154.

<sup>9</sup> Joe Jamail quoted by Edward T. Wright in Winning Courtroom Strategies, at page 11.

- (13) Question the jurors' familiarity with the facts of the case. Remember that at early common law jurors were expected to base their verdict on what they knew before trial. In fact, in England jurors were originally witnesses to the matter. When someone had collected a sufficient number of witnesses, the assembled "jurors" voted and the majority vote decided the matter. The last remnant of this can be seen in the Federal Rules of Evidence where the drafters found it necessary to specifically provide that a juror can not testify in a case. See Fed. R. Evid. Rule 606(a).
- (14) Learn the law of your jurisdiction.
- (15) Be sure to explore in depth any matter that seems potentially an excusal for cause. The appellate decisions of this state make clear that one affirmative response to the question, "Can you give a fair and impartial verdict?" will sustain on appeal almost any challenge to a sitting juror. Thus, it takes numerous prejudicial responses to persuade the Judge or the appellate panel to overcome their natural proclivity to allow a simple response to immunize an otherwise flawed juror.
- (16) Look carefully for jurors' expertise on key issues.
- (17) Use prior jury service to discover attitudes of prospective juror, but be aware that failure to disclose the fact of prior service is not a basis for a new trial. See Bell v. State, 17 Ga. App. 119, 86 S.E. 533 (1915).
  - (a) Explain the difference between the burden of proof in a civil case and a criminal case. Learn what you can from a juror's prior jury experience in terms of deliberation and whether he was satisfied with the outcome

of the case. Learn how the experience effected the juror's attitude towards justice.

- (18) Discuss willingness and ability to follow instructions. Discuss burden of proof.
- (19) Spot the military mind. But see Brown v. State, 170 Ga. App. 398, 399, 317 S.E. 2d 207 (1984)(Questions regarding prior military service are objectionable).
- (20) Learn about memberships and organizations. For example, in Georgia inquiring about membership in the Ku Klux Klan was a legitimate inquiry especially where defendant was a member of the Klan, Mize v. State, 190 Ga. App. 166, 378 S.E. 2d. 392 (1989). See also Atlanta Coca-Cola Bottling v. Shipp, 41 Ga. App. 705, 154 S.E.2d 385 (1930). Get the jurors to discuss their attitudes towards people who sue.
- (21) Discuss frankly the potential size of verdict. See, e.g., Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 106 S.E. 2d 417 (1958). Compare Jones v. Parrott, 111 Ga. App. 750, 143 S.E. 2d 393, (1965) with Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 270, 390 S.E.2d 398 (1990).
- (22) Be sure to close with the all encompassing "Is their any reason you should not serve on this jury?" question.

### **Bibliography**

Edward T. Wright, Winning Courtroom Strategies (Prentice Hall 1994)

Robert Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation (1995)

Michael E. Tiger, Persuasion: The Litigator's Art (American Bar Assoc. 1999)

Judge Ralph Adam Fine, The "How-To-Win" Trial Manual: Winning Trial-Advocacy in a Nutshell (Juris Pub. 1998)