

## PRACTICE POINTERS

# Effective Techniques for Trying Media Cases: Choosing Your Jury Panel

### Editor's Note:

This is the debut article in a new practical tips series that will offer insights and concrete suggestions from seasoned trial lawyers on each phase of the trial, from jury selection to closing arguments. In this first installment, we've called on five attorneys to share their own experiences and advice on selecting a jury in a media case.

## Make It Relevant and Solicit Juror Comments

THOMAS S. LEATHERBURY

Two tips: make your case real and accessible and encourage the jurors to speak in voir dire.

First, pick something about your case that the potential jurors can relate to their own experience and talk about it in voir dire. In a very complex patent dispute about lighting controls, my partner likened the way our clients' lighting controls were networked with the way computers in an office are networked. He simplified the concept and made it more accessible to the members of the panel.

In the most recent libel case we tried, one of our themes was that the broadcast at issue told a story that the public had a right and a need to know. In that case, we asked the potential jurors if they ever learned something from the news about their local school district or

their city government that they felt they had a right to know. We knew about several recent local controversies from subscribing to the local paper in the year leading up to the trial.

Second, get everyone who could be on the jury to say something in voir dire. Pick work, family, activities, or another subject that should not be controversial, and get the potential jurors talking individually as much as time permits. The specific traits you may be looking for will vary from case to case. In many cases, voir dire time is so severely truncated that you may have to be satisfied with your impressions of how outspoken or outgoing the jurors are, how they seem to react to you and your clients, and the small amount of information they share; but at least you will have heard them speak and seen them react in a one-on-one exchange.

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## Make the Best of What You're Given

ROBERT C. BERNIUS

Jury selection is based on skill, judgment, experience, intuition, and luck. Good questioning won't get you an ideal jury but can get you a jury that will give you a fair chance of winning—or at least a jury that is not openly hostile to you. However, there is no litany of questions for a media case on which you can rely. Your questions can't be generic; they are part of your trial story, they establish the themes to which you will return in summation, and they allow you to gauge each juror's reactions to those themes. How do

you do it? Here are a couple of basic suggestions.

First impressions count. If the jury thinks you are a decent person who knows what he's doing, they'll try to give you the benefit of the doubt. Introduce yourself and your client even though ten lawyers ahead of you have done so, but don't be folksy ("Hi, I'm Freddy Forbush, and this is my client, Corky Jones."). You're in a courtroom, not at a picnic. Even if your case isn't much and you are sorry you ever got into it, act with confidence. You're trying to sell something. If possible, get the jury to smile with you. You're not there to put on a song-and-dance act, but a little humor helps. Vary the wording of your questions; if you repeat the same ones over and over, you will get rote answers. Try to say something to each juror individually, and use her name when you do it. But don't ignore what is going on in the jury box while you try to memorize names; and if you can't use names naturally, forget it—jurors know when you are patronizing them.

You aren't apt to find many leading lights of the community in the box; the sad fact is that people who should be on juries aren't. You aren't going to get jurors to go along with you if they don't know what you are talking about, so don't use lawspeak; jurors may not understand it. Keep it simple, but don't talk down to people.

How do you tell if you and a juror are on the same wavelength? Things can change, of course, but if at the outset you don't like her looks, the chances are she doesn't like you either. Does she look at you when she's answering a question? Does she mumble or speak right up? Does she fidget around when she's talking? Does she giggle or cross her arms? Does she say "How's that again?" to perfectly simple questions? Does she look at your opponent as the Second Coming? Pay attention to all of it.

Guard your peremptories. If a juror says that a newspaper wrongly reported

his arrest on a morals charge, try to get him to excuse himself rather than use a peremptory. You can suggest to him that perhaps he might not feel comfortable in the case or that his past experience might affect his thinking no matter how hard he tries to put it out of his mind. If you keep at it, he'll probably get the point, but nail it down so the other side can't rehabilitate him. On the other hand, if you detect a hesitation in a juror's answer when she's asked if she could treat your client as she would any other defendant, resist the temptation to inquire; the answer could infect the rest of the panel. If you're running low on challenges and don't know whether to excuse juror X, look around to see what's left. They may not be any better; everything is relative.

Of course, in a lot of jurisdictions, the judge handles jury selection. If that is the case, don't lose hope. Although your written questions may not be asked and probably won't elicit meaningful responses, you can still rely on stereotypes (e.g., postal workers do little or no work, eat out of the public trough, and are not bothered by getting something for nothing; social workers are all for the little guy who's been ground down by the system, etc.). And, if it looks grim, recall the observation of Finley Peter Dunne's fictional character Mr. Dooley: "Whin th' case is all over, the jury'll pitch th' testimony out iv th' window, an' consider three questions: 'Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we want to supper?'"

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## Weeding Out the Toxic Juror

RICHARD M. GOEHLER

Although many nonmedia cases attract little attention, the media become news whenever they go on trial. Moreover, more than most types of litigants, the media face bias the moment they walk into a courtroom. Nearly everyone these days holds a strong opinion—generally, a neg-

ative one—about the people who produce newspaper copy and television programming. Thus, successful trial strategies of media counsel must include strategies on how to weed out biased, and especially toxic, jurors in the jury selection process.

Voir dire is the first opportunity to discover and overcome bias against the media, especially significant bias held by the toxic juror. Direct questions such as "Are you biased against the media?" are generally ineffective in learning what prospective jurors actually think. A more successful strategy is to ask about their experiences with the media:

- Do you listen to talk radio?
- Do you ever listen to Rush Limbaugh, Howard Stern, or Don Imus? What do you think of these shows?
- Do you ever call into talk radio shows? What do you think of people who do?
- Do you read the local newspaper? How about national newspapers like the *New York Times* or *Washington Post*?
- Do you watch local television news? CNN or Fox News?

Prospective jurors tend to freely discuss their media habits in general. This process can provide an excellent way to learn their opinions about and potential biases toward the media.

Voir dire can provide other opportunities to root out and reduce biases against the media in the courtroom. When there is an audio or video recording of a broadcast at issue, the media defendant should consider seeking the court's approval to play the recording for the prospective jurors. This can be especially important to accomplish at least two goals. First, it begins desensitizing the prospective jurors to statements that are shocking in nature: emotional reactions to the statements will likely have subsided by the time the deliberations begin. Second, airing the recording provides an opportunity to strike a juror for cause if the juror becomes instantly offended and expresses an inability to overcome a negative emotional reaction to the statements.

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## Top Ten Tips for Picking Juries

10. Make your case more accessible by comparing its facts to real-life experiences.
9. Get everyone who could be on a jury to say something.
8. Try to establish your personal credibility.
7. Weed out the toxic potential jurors, i.e., those who hate you, your client, your mother, their mothers, or themselves.
6. If an audio or video broadcast is at issue, consider asking the court's permission to play it for prospective jurors.
5. Ask indirect questions (e.g., "Do you listen to talk radio?") to uncover potential biases.
4. Remember that first impressions, yours and theirs, count.
3. Address prospective jurors by their names.
2. Avoid prospective jurors who don't have a spouse, children, or a dog or cat; read mystery novels; and are self-employed.
1. Don't panic.

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## Solicit Their Views on the Media

NANCY WELLS HAMILTON

In approaching voir dire in a media case, it is important to get a read on your panel to determine who is media savvy, who hates the media, and who is pro-First Amendment. Granted, their eyes will gloss over if you start inquiring about their views on the First Amendment, but you can use terminology that is more friendly to the layperson and more conducive to discussion, such as beliefs in free speech and free press.

One approach is to ask the panelists

(either through a prepared questionnaire or in voir dire) about their habits with respect to the types of media they use most frequently (“What type of media do you use most frequently, i.e., Internet, cable TV, radio, newspapers, magazines, books, movies, etc.?”) and then elicit responses as to why. Their responses will give you insight into whether they are news savvy or more interested in entertainment, whether they are critical thinkers or couch potatoes, and even what their political bent is (Fox, CNN, or E!; *New York Times*, *Wall Street Journal*, *Village Voice*, or *New York Post*).

For example, the other day while flying to Los Angeles, I finished the *New York Times* and offered it to the man in the seat next to me. His response was, “No, I don’t want it. I don’t want to ruin my view of the world.” He was serious. I didn’t explore why but did notice that he read mystery books and said he didn’t have a wife, children, or a dog and was self-employed. From this information alone, I know that I would not want him on my jury.

Another benefit to these questions is to ferret out the pro-speech First Amendment jurors and to condition the panel to themes that you expect to develop in your case. One of the techniques I use is to identify a pro-First Amendment juror, ask an open-ended

free speech question, and get that juror to make a speech to the panel for me.

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## Sift and Loop

CHARLES A. BROWN

In the jury selection process, keep it simple. Don’t try to argue your case; simply try to establish a rapport (i.e., establish your personal credibility) and eliminate the extremists (i.e., those who hate you, your client, your mother, or themselves).

In the jury selection process, don’t be afraid to “sift” and then “loop.” The sifting process is when you make inquiries with perhaps three or more potential jurors, probably not doing anything but dealing with names and places of employment and without really trying to create rapport. You are just sifting. But when you connect with a juror with whom you have some chemistry or just a nice comfort level, then start your real selection process with this juror. Establish a fundamental point; for example, “Whether or not you like the message the media convey, it is important in our society that the message be heard.” Then, when you get your nodding agreement, loop back to the

previous jurors and ask if they agree with this juror, Mrs. Jacobs. Now you have the other jurors agreeing with one of their own, and you can easily build upon this notion you have established.

The other jurors will hear the words being spoken, but, more importantly, they will sense the rapport between you and Mrs. Jacobs. By sensing this chemistry, they will be more willing to connect with you when you loop back. The chemistry and rapport for which you are striving is similar to entering a party or social occasion. You generally sift before you connect. Once you connect, it is easier to build rapport with others because you have a nucleus from which to begin. The same is true with jury selection, except without the wine.

I have tried cases where I have sifted through eight to ten potential jurors before I could find even one with whom I felt I could connect. Don’t panic. You will find someone; and then when you loop back, you will be surprised at how the short, cryptic answers become complete thoughts and sentences.

Don’t overcomplicate the process. Don’t try to establish an agenda. Don’t worry about all of the issues of your case. Just sift and loop.

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