

## ***Tips For Selecting The Best Jury In Patent Litigation***

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There are many important factors that impact the outcome of a jury trial; jury selection is one of them — but often gets attention only late in the process and not in enough depth. Jury selection can be particularly important in intellectual property litigation where the fact issues tend to be complex and the legal doctrine foreign to the average person. Yet, we trust average citizens to decide these cases as a matter of course and, for the most part, jurors do a pretty good job. In patent litigation, where the focus can so easily be directed elsewhere during trial preparation, taking time to prepare for voir dire and jury selection is a necessity.

### **Understand the Process: Know Your Judge**

Almost every federal court in the country uses a different process for jury selection. Moreover, within each courthouse, every judge has his or her own preferences. Thus, it is essential to investigate in advance the particular process that the judge assigned to your case uses.

#### ***Find the right person to whom you can direct questions.***

Every judge relies on someone in his/her court to ensure the jury selection process runs smoothly. It could be the courtroom clerk, the docket clerk, or even the judge's career law clerk (should he or she have one). Find this person and do not be shy about asking questions. Call or visit with this person well in advance of trial. This person will always be helpful because helping you understand the process makes their job easier.

Generally, the jury liaison in each courthouse coordinates ensuring that there are enough jurors on a given day to fill the jury pools for all judges — this person is not always intimately familiar with each judge's process for jury selection. So, be sure that you are directing questions to the person most knowledgeable to answer.

#### ***Obtain the jury list in advance, whenever possible.***

Some courts will not circulate a list of jurors prior to the start of trial. Other courts will. This list generally provides name, city of residence, age, occupation and employer, and marital status. The advantage of an advance list is the ability to conduct Internet research on the panel. While it may not seem like much, this data yields a great deal of information with minimal work.

If an advance list is provided, it will almost never be in the order in which the jurors will be seated for voir dire. It is also probably longer than the actual pool of jurors who will show up for trial. In most cases, the final list is randomized just before they enter the courtroom. At this point, counsel should rearrange the list to reflect the order in which jurors arrive and are seated. This helps keep track of jurors during voir dire. One way to facilitate this rearrangement is to have a single page of notes for each juror. Always be prepared for jurors

to be reordered. For example, if a juror is dismissed, most times the jury pool will simply move up to fill the seat. But, sometimes another juror is called at random to fill the seat. This is why it is best to think of jurors by name and juror number, which don't change, rather than by seat number, which often changes.

Typically, voir dire begins with questioning by the court, followed by examination by attorneys. The court questions jurors to determine their eligibility to serve, usually followed by questions related to potential challenges for cause. These questions involve identification of any relationships to the parties and their counsel or interest in the outcome of the case. Often, the court then moves into hardship issues such as length of trial, travel issues and personal conflicts.

How a judge handles challenges for cause and hardship varies. As to cause, some judges make the decision on their own; others invite challenges for cause from counsel. Here, your job is to protect your client. Challenges should be made where a prospective juror demonstrates a bias. Opposing a challenge is also appropriate and consistent with your representation of the client's interests. Sometimes, however, the bias is so clear that it makes little sense to oppose the challenge at the cost of credibility with the court.

Hardship excuses are different; they are within the discretion of the court, though most judges confer with both sides. If all parties agree, it makes for a cleaner record. Also, there is an opportunity for counsel to establish credibility with the court. If a juror presents a good faith case of hardship, counsel should agree. The court will likely excuse the juror anyway, so counsel might as well be cooperative. More importantly, the integrity of the jury system requires that the court be reasonable and not create an undue burden on citizens. You may be tempted to consider whether the juror seeking a hardship excuse is "good" for your side of the case. However, it is unwise to do so. The judge is seeking your support, but does not need it. It is better to be seen as reasonable than to try to hold on to a good juror.

Although the [American Bar Association](#) recommends it, many courts do not permit written questionnaires in advance of voir dire. Some courts allow them, but limit them in scope. Questionnaires are useful if they are well focused and counsel has sufficient time to review the jurors' answers. One advantage is that every juror provides answers to the same questions, allowing for apples-to-apples comparisons.

***Know whether you will be able to directly question potential jurors.***

Some courts do not permit direct questioning by lawyers, and permit only limited requests from attorneys for follow-up questions by the judge. Some courts will voir dire the entire jury pool that enters the courtroom; other judges will voir dire only a subset. Another alternative is for a judge to ask several general questions to the entire pool and then only permit additional voir dire for those seated in the jury box — as jurors are excused from the box and new jurors are added, the new jurors may be subjected to additional voir dire.

Each party is allowed peremptory challenges, which should be reasonable in number.

***Determine the method of exercising peremptory challenges.***

Some courts ask that lawyers exercise challenges in the courtroom in front of the opposing side. Other courts ask lawyers to go to separate rooms to exercise challenges. In the first, more common circumstance, consider the order of challenges exercised. Start with the juror you believe the other side will most likely expect you to challenge. This will help conceal your jury selection strategy. Save your last challenge for the juror you believe the other side might challenge — if they do, you are left with an extra peremptory challenge.

The judge should always seat alternates, though the number will vary. In federal court, alternates are not separately identified; all seated jurors deliberate. If a juror leaves, the trial may continue so long as six jurors remain.

### **Understand the Agenda: Goals of Voir Dire**

The purpose is to seat an impartial jury, which is a theoretical concept that is the responsibility of the court. In practice, it is an adversarial process used to filter out biased jurors. Ideally, impartial jurors are excused. In reality, each party seeks to remove jurors least likely to be favorably disposed to find in favor of their client.

#### ***The first goal is information gathering.***

Establishing grounds for cause, and deciding how to exercise peremptory challenges, requires good information.

Filtering out bias can be difficult: Although voir dire is intended to be a method of information gathering, it is a public process. Jurors are reluctant to be entirely candid in public. Thus, any opportunity to gather information privately, such as through a questionnaire, facilitates honesty.

The court will often consider information gathering to be the only purpose of voir dire — it is not. Counsel may have to push that construction in order to be effective.

#### ***The second goal is building rapport.***

Voir dire is an opportunity for lawyers to build a positive relationship with jurors. Counsel establish rapport by showing interest, being respectful, and making the jurors feel comfortable.

Counsel increase the likelihood that jurors will answer questions honestly by developing a trustworthy rapport.

Good rapport increases counsel's persuasiveness; positive feelings cause jurors to react better to the lawyer's arguments. Rapport also enhances the jurors' perception of the lawyer's objectivity, which weighs in favor of a counsel's persuasiveness.

#### ***The third goal is to establish a framework for the jury to understand your case.***

Jurors begin to process information as soon as they start to hear it; and as soon as they hear it, they will begin to organize it into their own framework. Jurors are not yet familiar with facts, parties, or the nature of the dispute. Thus, jurors begin thinking only in terms of narrative.

To shape that narrative early, begin publishing your key themes (i.e., competition in the market or taking something that doesn't belong to you). Be careful about which jurors you choose to engage in discussion, however, as you might signal to the other side that you like a particular juror.

## **Understand Your Case: How to Select Your Jury**

*Before entering the courtroom, you need to know what kind of juror you want and don't want.*

If you have to choose, be sure you know what kind of juror you do not want — this is more important than knowing what you want. Formulate a plan that is not based on pure demographics. Instead, think about the life experiences you are looking for in a juror.

- Indicators based on a juror's occupation/career: An individual's occupation is typically telling of their worldview. We believe a person's job falls on a spectrum that ranges from the "traditional bureaucrat" to the "free agent." The "traditional bureaucrat" is someone who has worked for an organization for a long time, albeit in a corporation or a government agency. This person typically equates well-being at work to well-being in life. This person is dedicated to the organization and believes that performing hard work in support of the organization's purpose is aligned with the individual's own goals. By contrast, the "free agent" believes that working on his or her own (or for him/herself) is most fulfilling. The free agent is typically someone who is uninterested in being associated with a particular organization, but can be successful in a variety of positions. This individual has goals that are not aligned with (and often independent from) his/her organization.
  - If your client is the patent holder, a "traditional bureaucrat" may be more sympathetic to the importance of IP to a company. By contrast, a "free agent" generally views patents as anti-competitive and as a restriction on an individual's ability to operate in the marketplace. Free agents tend to be younger, less organization-motivated, and less reliant on one company for job security. This pattern breaks down when the patent holder is an individual or small entity and the defendant is a very large company. Nonpracticing entity litigation fits this pattern, and here the juror profile becomes more complicated.
- Indicators based on a juror's family: An individual's family arrangement will range from "traditional" to "not traditional." For jury selection purposes, you may assume that "nontraditional" family arrangements will likely have experienced more bias/prejudice than the more traditional family unit. The levels of difference

between the “traditional” and “not traditional” family unit also vary, of course, geographically.

- Indicators based on a juror’s leisure activities: Although professionals are typically in jobs of their choosing, those who work in other occupations may not be doing so by choice. Thus, learning about a person’s leisure activities is a good indicator of the kinds of choices that person makes, which helps counsel get a fuller picture of an individual’s worldview. For instance, someone who hunts and fishes for fun is likely self-directed and values independence. By contrast, an individual who regularly volunteers is concerned about those who cannot help themselves, and is likely to identify the victim in any given dispute and be more sympathetic to that party.

***Apart from identifying favorable jurors, evaluate a juror’s potential for leadership.***

If an individual is low in leadership potential, you need not worry much about favorability. In our experience, at most three or four jurors will lead the jury. If a person is evaluated as a strong leader, it is important to have a good read on which direction that individual will lean. Leadership is not hard to evaluate — job experience, demeanor in court, and subject matter experience generally are good indicators. When selecting a jury, consider leadership potential first and favorability second.

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