

# Picking a Winner: Ten Tips for Selecting the Best Possible Jury

By Judge Richard M. Berman and David R. Marriott

The right to a jury trial depends on the proposition that some decisions should be made by “the people.” Who those people are affects the outcome of any jury trial. Indeed, the composition of the jury can be dispositive. While the make-up of the jury is largely outside counsel’s control, there are nevertheless steps that can be taken to maximize the probability of selecting—or more accurately “deselecting”—a receptive and fair panel. Although there is no simple formula, this article offers 10 tips for picking the best possible jury for your case.

## 1. Know the Rules of the Road

Rules governing jury selection can vary widely. They differ from state to state and sometimes even within a given state. In New York, for instance, the Uniform Rules provide for two methods of jury selection—White’s or Struck. Nor is there a uniform approach to jury selection in federal court, although some variant of the Struck Panel is often utilized by Federal Judges. In all courts, judges have developed their own practices and procedures concerning jury selection, some of which are unpublished, but can generally be discovered by specific request to chambers. These practices may cover the order and nature of permissible presentations, the kinds of questions that are allowed and prohibited, or the number of and manner for exercising challenges.

Not knowing the ground rules on these matters is not only a distinct disadvantage, but it can also create a bad first impression on the jury and result in a missed opportunity to shape the make-up of the panel. Knowing the rules, by contrast, puts counsel in a position to apply the rules to his or her advantage. A lawyer familiar with White’s method, for instance, knows that in the first round peremptory challenges are exercised in the order in which the parties are listed in the caption, whereas in subsequent rounds, the first exercise of peremptory challenges alternates from side to side. There can be little downside in asking the trial judge about his or her jury selection approach—in advance of the trial.

## 2. Create a Juror Profile

No two juries are the same. But every jury pool includes some people who are more likely to be receptive to or inclined against your case. Selecting the best possible jury requires identifying the prospective jurors most

likely to be receptive to or inclined against your case. You cannot promote the participation of jurors likely to be most receptive to your case or exercise challenges to jurors inclined against your case unless you can identify them.

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Since few jurors readily identify their predisposition and those who do are generally excused from the panel, identifying jurors’ predispositions usually entails making educated judgments about the qualities (such as education, employment, hobbies and family status) that incline a person to lean one way or another, and using those judgments to guide decision-making during jury selection. For example, a lawyer representing a corporate client asserting a claim of patent infringement might conclude that she is more likely to fare well with educated jurors holding stable jobs, rather than less-educated jurors who work sporadically. In that case, counsel would seek educated jurors who are employed. While there is no single way to create a juror profile, the most common methods involve careful consideration of how jurors are likely to respond to the facts and circumstances of your case, perhaps with the help of a jury consultant in an appropriate case. That is generally a function of experience, common sense and, frankly, educated guesswork. Given the uncertainty of the enterprise, it is wise to solicit feedback from people most likely to resemble the venire. Conducting a mock jury exercise that tests the themes of your case can be very useful in this regard.

## 3. Put Yourself in Jurors’ Shoes

The daily paper, the evening news, TV sitcoms and blockbuster movies—all offer insight into jury service. But many potential jurors have never actually sat on a jury and have little real-world experience with litigation. And even those that do typically know nothing about the parties, subject matter or facts of your case. Moreover, at least

some potential jurors have little interest in serving on a jury. Some may not see anything in it for them (at least in the short run), and jury service may be inconvenient, if not a hardship. Acknowledging this and expressing appreciation for jurors' service is not only professional, but also it can increase the probability of connecting with the jurors and prompting candid disclosure. More important still is conducting jury selection in a way that respects jurors' time and privacy, such as by avoiding unneeded repetition and steering clear of embarrassing questions. Not putting yourself in jurors' shoes runs the risk of putting jurors off and thus undermining your case before the jury is even empanelled. Jury trials are not popularity contests between lawyers, but common sense tells us that jurors are more likely to side with lawyers they can identify with and less likely to side with lawyers they dislike.

#### 4. Use a Questionnaire

To facilitate the selection process, many courts use questionnaires to collect information from prospective jurors. In New York State Court, for example, prospective jurors are asked to fill out a form, requesting information concerning marital status and family composition; employment status and occupation; education; prior jury service; recreational activities; and involvement in civic, social, union, professional or other organizations. Other courts are willing to use questionnaires upon request, especially where all parties join in the request. Questionnaires allow counsel to elicit more information than can often be obtained efficiently through oral examination and frequently result in more candid disclosures.

A juror questionnaire is, however, only as good as the use to which it is put. If used in conjunction with a juror profile, the information provided in response to a juror questionnaire can provide valuable insights into which jurors are likely to be for you or against you. Moreover, the questionnaire and a potential juror's answers to it can facilitate further questions and follow up on sensitive subjects and thus can be the basis for exercising a challenge. Furthermore, the information provided in response to a questionnaire can also be used to frame points made in both opening statements and closing arguments. It is easy enough to learn in advance whether your trial judge utilizes jury questionnaires and to obtain copies of (precedent) versions.

#### 5. Find and Follow a Methodology

Jury selection requires the processing of a lot of information in little time. Organization is essential. Techniques vary, but it is important to come up with a system that is simple, scalable and facilitates easy follow-up and quick decision making. One tried-and-true method is to prepare a juror worksheet by dividing a large piece of paper into

as many boxes as the court will seat jurors. As prospective jurors are seated and provide information about themselves, a sticky note reflecting that information can be put in each of the boxes on the chart. Abbreviations such as "Md" for married, "S" for single or "Div" for divorced, can be used quickly to capture jurors' information. As jurors are removed from the jury box, new post-it notes can be put on top of the notes prepared for the stricken juror. The most important thing is to find a methodology you are comfortable with. Devising a comfortable methodology to organize, follow up regarding and make decisions concerning the information gathered in jury selection can go a long way toward increasing the probability of selecting the best possible jury. You can almost always obtain a brief recess from the trial judge to collect your thoughts before final jury selection.

#### 6. Question with Purpose

In many courts, especially federal courts, counsel is often not permitted to question jurors during jury selection. In these courts, questions put to prospective jurors are asked by the court. That does not mean, however, that counsel does not have a role to play. Most judges will permit counsel to propose questions to be asked of jurors by the court. Persuading the court to ask questions that probe jurors' openness to your themes is advisable and can provide valuable information as to their openness to your position.

Lawyers permitted to question jurors have an additional opportunity to influence the make-up of the jury and jurors' perception of the case, but questioning jurors also generates additional risks. Pressing a juror for the details of an arrest or even family circumstances can cause embarrassment. As a result, it is generally advisable to question potential jurors only where necessary to achieve a specific, important purpose, such as unearthing the basis for a challenge for cause. If you cannot articulate a good reason for a given question, then it probably should not be asked—at least by you. There is no point in wrestling information from a prospective juror, especially if it is not highly likely that the information obtained will result in the juror being excused.

#### 7. Avoid Argument on the Merits

Most, if not all, courts forbid "argument" on the merits of the case during jury selection. Lawyers are rarely, if ever, allowed to describe their legal contentions in detail, explain why their client should prevail in the case or say what jurors should or should not conclude. That is the stuff of summation or closing argument. (Lawyers are encouraged to submit to the Court a brief—and deft but fair—summary of their case for the Court to use in *voir dire*.) Moreover, jury selection is often too early in the pro-

cess for merits arguments, which are generally best received after counsel has established some credibility with the jury. That said, the line between impermissible argument and permissible introduction to the issues and the parties' positions is not always clear. Some (few) lawyers believe it is wise to come as close to the line as possible, on the theory that it is never too soon to begin winning over the jury. While lawyers may begin to introduce their theory and themes of the case during jury selection, if the opportunity arises, crossing the line into argument during jury selection is a bad idea. A sustained objection can create an early and bad impression of not playing by the rules.

### 8. Remember First Impressions

Jury selection is the last opportunity to make a good first impression. From the moment jury selection begins, jurors start to form opinions about the case, including the lawyers. That is true whether or not counsel seeks to make an impression. Everything said and done in jury selection affects jurors' perception of the case and jurors can be unforgiving of lawyers they perceive to play fast and loose with the rules. Jury selection is the time to begin showing jurors that you are fair and trustworthy, not that you will do anything to win. A lawyer making a good impression during jury selection is more likely to find a receptive audience during opening statements. And, bear in mind that jurors are often quite "protective" of the trial judge so it is inadvisable to challenge the Court inappropriately during jury selection.

### 9. Beware of "Conventional Wisdom"

"Conventional wisdom" abounds as to the "types" of jurors who are "good" or "bad" for certain cases. Some lawyers may believe, for example, that female jurors are more sympathetic than male jurors and are therefore "good" jurors for a plaintiff in a personal injury case seeking damages for pain and suffering. Others may believe that low-income jurors are more inclined than high-income jurors to mistrust law enforcement and therefore "bad" jurors for the defense in a case alleging law enforcement misconduct. While it may be unwise to ignore such stereotypes altogether, there is little empirical evidence to support them, and they should be used cautiously, if at all. There is no substitute for preparing a case-specific juror profile (based as much as possible on empirical evidence), listening carefully to jurors to figure

out how they really think and feel, and exercising judgment based on the facts and circumstances of your case.

### 10. Use Challenges Wisely

Exercising challenges is the principal means by which trial counsel influences the composition of the jury. Challenges for cause result in a juror being excused where it can be shown that a prospective juror could not be fair and impartial, such as because she is closely related to one of the parties' attorneys, has a case pending against one of the parties, has a family member who is employed by one of the parties or has a direct financial interest in the outcome of the trial. There is no limit to the number of these challenges, but care should be taken not to stretch so far to show cause that you lose credibility with the court.

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In contrast, peremptory challenges can be exercised on any basis, except impermissible classifications (such as race or gender). Peremptory challenges, however, are limited in number. In New York State Court, for example, plaintiffs collectively generally have three peremptory challenges plus one peremptory challenge for each two alternates. Defendants collectively (other than third party defendants) also generally have three peremptory challenges plus one for each two alternates. Check the Federal Rules of Civil Procedure and 28 USC §1870 for the number of preemptory challenges available in Federal court. Because they are limited in number, peremptory challenges must be used to strike the most "dangerous" jurors. For this purpose, the most dangerous jurors are usually those perceived to be (unfairly) disinclined toward your case *and* also likely to be leaders; such potential jurors may have the most potential for swaying a jury against your case.

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