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Some people think a trial is won during opening statement. This author's opinion is that it is more likely won during voir dire, when jurors get their first impression of counsel. Not only are first impressions indelibly imprinted, you never get a second chance to make a good first impression. So counsel beware: From the minute you stand up and introduce yourself to the jury panel in voir dire, you are "on stage" and the judging has begun.

The following strategies are designed to assure that jurors will perceive you favorably during voir dire, and that the setting you establish at the outset of the trial will dispose the jurors to lean in your direction as they hear the evidence.

Engage Each Juror in Conversation

In many cases these days, counsel gets so little time to voir dire that it is impossible to discover a jurors' potential biases. Too often, the judge does the voir dire and asks meaningless yes/no questions like, "You will be able to be fair and impartial in this trial, won't you."

Under the circumstances, counsel has two alternatives. You can use the time you have to educate the jurors about the issues - and try to put your subjective spin on them - or you can try to establish rapport with each juror by engaging in a little chit-chat. The former might be easier to do than the latter, but the latter is more valuable.

The seemingly innocuous chit-chat ritual plays an important part in the communication process. It replicates the ritual that animals perform upon first meeting. They "sniff" each other out. They look at the other, wondering: "Who are you? Are you like me? Am I safe around you?"

People do the same thing. In the first minutes of an interaction, we "sniff" each other out and ask the same questions: "Who are you? Are you like me? Do I like you?" So these first minutes of an interaction can determine the relationship you will have with your jurors throughout the trial. You want the juror to recognize you as someone like him/her, i.e., from the same species and non-threatening.

During this interaction, give the juror your undivided attention. Keep the eye contact; do not look at notes. The visual attention you give your juror allows you to touch him/her in a meaningful way, changing the interaction from one of a cross-examination to a conversation.

Try to be sincerely interested in who this person is, rather than focus solely on the implications of what he is saying, or whether he fits your juror profile. You can find out a great deal about a person while chatting about his job, family, where he comes from, what school he attended, how long he has lived in the area. Have someone else in the courtroom who can help you process the information later. Use those precious minutes to show your interest and make a connection.

Even if a juror goes off on a tangent and is not answering your specific question, let her talk. Research suggests that when people divert from the subject, they are going in the direction of their thoughts and feelings. So probing a juror's 'irrelevancies' can uncover interesting and important

information that you would never otherwise discover.

Furthermore, by giving the juror your undivided attention and allowing her to talk, the other jurors perceive you as polite and respectful. Jurors especially like attorneys who are polite and respectful.

After you have finished voir diring a juror, before going to the next one, take time out to say "thank you." Too often attorneys forget that small courtesy, and the relationship with the voir dired juror ends too abruptly. The juror feels "dumped."

Find a Common Bond With Each Juror

The major objective in establishing rapport with your jurors is to find something that connects you to them, so that when they look at you, they see something of themselves.

If you are using a juror questionnaire, for example, you might learn that a juror has an adolescent boy. If you have a boy around the same age, when you voir dire that juror individually, you might remark about the "joys of parenting teen-age boys."

Another way to establish rapport is to find something to which you can say, "That happens to me, too." For example, in your questioning, a juror may mention that he doesn't remember exactly what year an event took place. You might reply, "I hardly remember what took place last month, so I understand."

Or if a juror shakes her head instead of saying "yes," you might comment: "I do the same thing in conversations, too – just shake my head – but in the courtroom here we have to let the court reporter get the words down."

Other universal areas around which you can establish common agreement are the following: Both you and the jurors

- Are a little nervous
- Have had unsatisfactory experiences with large corporations
- Care about the environment
- Get confused over contradictory evidence
- Want to expedite the trial process
- Sympathize with the plaintiff
- Want to give both sides a fair hearing
- Aim for a fair and just verdict

Use Humor

Humor is one of your most valuable weapons in the courtroom. Anytime you can get people to laugh, you have established a leadership role.

Introduce little anecdotes and humorous comments in your voir dire. Your humor releases tension and makes jurors feel comfortable. For example, I have seen defense counsel ask the jurors if any of them use the products manufactured by her client. When no one raised a hand, she said: "That's very disappointing. Could some of you give our products a try sometime?"

When talking about where a juror lives, counsel quipped: "I am reminded of the criminal defendant who took the stand one time. He was asked the first question, 'Where do you live?' The defendant replied, 'Well, that is what his lawsuit is going to decide.'"

If your style is to interject humorous asides into interactions, do so in the courtroom. It is a powerful communication tool. But only do this if it feels comfortable for you and is a part of your natural way of interacting.

Assert Your Leadership

Your major challenge in the courtroom is to take control, so that jurors look to you – rather than opposing counsel – for guidance and leadership. Try these techniques for establishing your leadership role:

Set the Rules

Conduct a group voir dire and set the ground rules for the group; for instance:

- As defense counsel, you expect that the jurors will have sympathy for the plaintiff, but it is not acceptable that they make a decision based on that sympathy
- As plaintiff counsel, you expect that if the evidence warrants it, the jurors will be ready to financially compensate the plaintiff
- It is acceptable that jurors have biases, but not acceptable to sit on this case if their biases are going to interfere with their being open to both side

Be a Teacher

Jurors are unfamiliar with the court process; everything is new and strange to them. You will want to be the person who explains what is going to happen and guide them through the maze. Here you have to be careful not to step on the judge's toes, but since jurors know so little about what is going to happen to them, you can always teach them something. Keep in mind that when jurors come into the courtroom, many of them do not know what a "plaintiff" is.

Another area of confusion for jurors is proper trial etiquette. Explain that you are not allowed to talk to jurors outside the courtroom, so that if you meet them in the hallway, rest room or cafeteria, you will not acknowledge them. You would like to stop and chat, but the rules only allow a polite nod. Be sure to point out that you are not being impolite or trying to snub anybody – only following the rules.

Help the jurors understand what they might be seeing. If your co-counsel will be coming in and out of the courtroom throughout the trial, for instance, tell the jurors. Make it a virtue. Explain that since you are a sole practitioner with a small staff, somebody has to "mind the store." Be sure to point out that your associate's absence does not mean that you have any less interest in this lawsuit.

Make a Sacred Pact With the Jurors

Acknowledge the higher purpose the jurors have, i.e., to sort out the evidence and base their verdict on the facts and the instructions that the court gives them. Ask them – individually or collectively – to promise that they will listen carefully to your case and be open to your evidence in order to be able to deliberate fairly. Make this a personal pact where the jurors promise you, as counsel, to uphold the demands of the law.

The unspoken part of this pact is what you agree to do in return – i.e., be prepared, respectful, polite, honest, fair and articulate; organize your case clearly; teach the issues; avoid jargon; keep the jurors awake; stay in control of the process.

This kind of pact might not seem important, but it is – for both plaintiff and defense. It is important for plaintiff counsel because it allows plaintiff to take the high road. Yours is often an emotional case, but you want to tell the jurors to give you the verdict on the basis of the merits of the case – not on their sympathies. Jurors know they are not supposed to base the verdict on their feelings. And they do not like attorneys who they perceive try to "play on their feelings." By asking jurors to listen to the evidence and bring in a verdict based on that evidence, plaintiff counsel sounds fair, and in encouraging jurors to vote on the evidence, she sounds confident of her case.

Making a sacred pact with the jurors is especially important for defense counsel, and for the same reasons. If you have a sympathetic plaintiff, it is difficult for jurors to send her home with nothing –

no matter how vague her case is. One of the few ways jurors will vote against a sympathetic plaintiff and feel justified in doing so is if they feel they have made a higher moral choice – i.e., that they have 'listened to the evidence and brought justice based on Truth' rather than succumbed to their emotions. A juror will turn away a sympathetic plaintiff in the name of "Justice" and "Truth," but little else, one suspects.

Without bringing a higher moral principle into their deliberations, jurors easily slip into sloppy thinking and simplistic assumptions, i.e., 'if the nursing home patient slipped and fell and later died, then the fall was the cause of her death.' This kind of simplistic thinking is devastating to the defense. One way to stop it is to keep the jurors grounded in the process, committed to making a decision based on the concrete facts and evidence, no matter who that disappoints or how bad they might feel about it.

Defense counsel's challenge, therefore, is the same as plaintiff's. Both want to encourage jurors to find the legal hook on which to hang their feelings. For defense counsel, these feelings are for Truth and Justice. For plaintiff counsel, these feelings are for Compassion and Empathy.

Conclusion

Take advantage of these five strategies during voir dire: Engage in conversation with each juror, find a common bond with each juror; use humor; assert your leadership; make a personal, sacred pact with your jurors. Following these guidelines will set the stage in the beginning of the trial for positive results in the end.

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