



Crafting the Perfect Jury for IP Trials

Intellectual Property



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Voir dire, from the Old French phrase “to speak the truth,” a legal process where potential jurors are questioned to assess their suitability for a case, is a crucial part of a jury trial. Although many attorneys treat jury selection as an ordeal to finish quickly, the most important part of any decision is the decider. A single mistake in jury selection can cause even a slam-dunk case to turn into a loss.

The jury selection process

Preemptory and cause strikes

Jury selection is actually a *deselection* process. Rather than choosing jurors they want on the jury, attorneys are presented with a group of jurors and exercise preemptory strikes to remove the jurors they do not want. Although the number of strikes on the state level varies by jurisdiction, in federal civil court, 28 U.S.C. § 1870 provides that each party is entitled to three preemptory challenges. The attorneys decide who to strike based on a myriad of factors that include a juror’s leadership potential and the juror’s receptiveness to the attorneys’ case.

In addition to preemptory strikes, attorneys have unlimited strikes for cause. Striking a juror for cause removes jurors who are unqualified in some way (e.g., they no longer meet residency requirements)

or are too biased to judge the case fairly. While the cause strikes are unlimited in number, they are also limited in scope. In practice, judges infrequently grant cause challenges, making the decision of when to use a preemptory challenge that much more critical.

Factors for strikes

At core, the jurors an attorney want to strike are those jurors who exhibit leadership skills, but who are also likely to vote for the other side. Accordingly, it's critical to assess the jurors for their leadership qualities as well as their potential receptiveness to the case. Preemptory challenges are reserved for jurors who will be advocates for the other side during deliberations.

Jurors' leadership qualities

Assessing leadership attributes is perhaps the most crucial part of jury selection. If a juror is a follower, he or she is likely to follow the herd when it comes to the important decisions during the jury's deliberation, no matter their initial receptiveness to your case. These potential jurors are not as important to focus on during jury selection.

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To identify leaders, assess their roles at work and activities in their free time. From an employment perspective, leaders tend to have a supervisory role at work. They'll supervise from as few as one person to potentially thousands. Finding out whether they have the power to hire and fire can be particularly instructive. For example, if a juror has fired a subordinate, you know they will not likely have difficulty rendering a decision in even the toughest case.

Judges, attorneys, and others working in legal professions tend to be leaders in the jury room, whether they self-select or are given a leadership role by their fellow jurors seeking an "expert" to assist them with the process. Judges and attorneys deserve scrutiny during jury selection because they often dominate proceedings. Leaving an attorney on a case who may favor the other side is a disaster waiting to happen.

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Teachers and doctors are also natural leaders, which translates into a leadership role in the jury room. Doctors are accustomed to giving orders and seeing them carried out. Teachers, who spend most days talking to classrooms full of students, won't be hesitant to speak out during deliberations. Teachers, because of the skills they develop in the classroom, also tend to be persuasive during jury deliberations.

In their free time, leaders tend to be active in their communities, often belonging to organizations and assuming leadership roles in those organizations. They are also outspoken. They post frequently on social media, particularly about political topics, and post in the comment sections of publications. They also tend to have bumper stickers on their cars. Some judges dislike the question whether a juror has a bumper sticker on their car. However, the juror with the bumper sticker is unafraid to voice their opinion to hundreds, if not thousands, of people each day. This is an important data point.

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Jurors' receptiveness

Determining juror receptiveness is a little more nuanced than identifying their leadership qualities. If your client is a major corporation or employer in the community, you will want to know whether the jurors have had any dealings with it. You'll also want to know your client's reputation. In a patent or trademark dispute, gauge the juror's knowledge and opinions about the US Patent and Trademark Office and the process of securing a patent or trademark. You'll want to know what the jurors' opinions are about protecting intellectual property (IP), including whether they think those protections are too broad. It is also often important in an IP case to gauge a juror's familiarity and comfort level with technology. A juror who is interested in the latest technology is often quite receptive to being taught about a new technology in a patent case.

The questioning process

There are three methods to question jurors:

- (1) Questionnaires;**
- (2) Group questions;** and
- (3) Individual questions.**

Questionnaires, which judges sometimes frown on, are gaining popularity as a way to streamline the jury selection process. They can be particularly helpful in complex cases expected to lead to lengthy trials. Beyond obtaining biographical information, such as a juror's occupation, questionnaires can be useful for determining the juror's potential biases without subjecting the entire venire to potentially harmful information. For example, if a juror has had a particularly negative experience with a party or the type of case (e.g., had intellectual property stolen), the judge may dismiss that juror even prior to questioning, saving valuable time.

Group questions are just what they sound like. They are asked by either the judge or an attorney to the entire venire or to a specific panel. The jurors are asked broad questions such as, "Who here has registered a trademark?" and they respond by raising their hands.

Individual questioning usually involves follow-up on answers provided in questionnaires or during group questioning, but it doesn't have to. Typical questions during individual questioning are open-ended. It's important to pay attention not just to what the juror says, but also to how they say it. Are they using passive voice? What is their body language telling you about their feelings, and is it consistent with their verbal answer?

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Judges differ in their approach to questioning including imposing time limits, so it is good to talk with your judge at the pretrial conference about their method of jury selection. A good lawyer knows the law. A great lawyer knows the judge.

Secondary goals for jury selection

In addition to asking questions that will ferret out the jurors' leadership qualities and receptiveness to your case, there are other goals in jury selection. Those goals include getting your theme to the jury early, educating jurors on key pieces of your case, and developing a personal rapport with the jurors.

Every trial should have a theme, and jury selection is an excellent time to introduce that theme to the jury. Some themes for intellectual property cases can be "patents protect innovation" or "Overly protective copyrights stifle creativity." If your client is much smaller than your opponent, a "David versus Goliath" theme would be appropriate. Additionally, if your opponent has a well-known corporate slogan, like Allstate Insurance's "You're in good hands with Allstate," the slogan can be creatively and rhetorically twisted to "Was [insert client's name] really in good hands with Allstate?"

Educating the jury on some of the facts of the case is also important. If you have a juror familiar with the process of creating IP, such as a scientist, engineer, artist, musician, or writer, it may be good to use them to walk through their creative process to demonstrate the amount of work it takes to develop a product or idea. If there is a juror who's received a cease-and-desist letter, you might walk through how that made them feel.

If your case has flaws, like in an IP case the patent might have been tough to get from the USPTO or there are damaging documents about copying someone else's technology, then educating the jury on those flaws and countering them in jury selection can be helpful. Often, countering the flaws in a case is about framing the flaw in a way that does not significantly hurt your client's case.

Finally, establishing rapport and credibility with the jury is important. Even in the most serious cases, there are times when a carefully timed quip can break the tension and make a jury find you likable. Just be careful that the quip is not at a juror's expense.

With upfront work, you're on the way to a happy verdict

With a well-crafted *voir dire*, you are well on your way to achieving victory in your case even before the first witness has testified. It takes work, but the work is worth it in the end.

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Scott Culpepper is an experienced technology general counsel with a background in engineering and a legal career spanning both the courtroom and the boardroom. As Mailchimp's first-ever general counsel, he served on the company's executive leadership team during a period of significant employee and customer growth. His role included advising

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Before joining Mailchimp, Culpepper was a trial attorney focused on technology and intellectual property cases in federal courts and before the International Trade Commission. A registered patent attorney, he holds a bachelor's degree in aerospace engineering from the Georgia Institute of Technology and a juris doctor from Vanderbilt University Law School.

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