

# Jury Selection

## The Power of the Process

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## I. DISCUSSION

### A. Five Basic Goals

#### 1. To Demystify Jury Selection

Almost everyone acknowledges that during jury selection the lawyers have the least amount of control over what is going on in the courtroom. There are reasons for this perception. The judge has discretionary powers that can severely limit what the attorney is trying to accomplish. If the judge allows the attorney a free hand, the responses of prospective jurors are absolutely unpredictable. Because of this lack of control, a many lawyers confess to more nervousness here than in other parts of the trial. Also, it is in the area of jury selection that lawyers most readily admit they could improve their skills. It is probably the combination of lack of control, fear of what the *venire* will say, and the desire to be effective that has led attorneys to invent constructs and mechanisms they can control. This allows them to believe they have mastered this area. Here are some of the things attorneys believe about jury selection:

##### a. It's All Intuition Anyway

The thinking here is that you make your choice based on the feeling in the pit of your stomach and the hair on the back of your neck. This group includes the attorney who spouts, "I've *been doing it this way for years and I know how to pick a good jury.*" It makes selecting the people who will decide your client's cause like selecting a melon. This insistence and reliance on a "seat of your pants approach," thinly disguises the reluctance to undertake the considerable preparation effective jury selection requires. If the jury finds against this attorney's client a false comfort comes from "knowing" that juries are totally unpredictable.

##### b. It's All Very Scientific

This group is virtually the polar opposite. These lawyers are enamored of statistical surveys, numerical evaluations, community profiles and demographic data. They use the jargon of the social scientist and clinical psychologist. A pseudo scientific approach affords these attorneys a false sense of objectivity. If the verdict goes against the client, there is the intellectual comfort of knowing too many variables existed. By immersing themselves in the complication of the statistics and ratings they thinly disguise their reluctance to develop the interpersonal skills required for effective *voir dire* technique.

c. "Just Give Me the First Twelve..."

This bravado amounts to an empty boast that may stroke the attorney's ego but denies clients all they are entitled to in finding a jury of peers. The boast masks myriad insecurities, which inhibit this attorney's awareness and appreciation for the riches to be mined from effective jury selection. Deep Denial.

d. The Lawyer Sits in Judgment

Too often lawyers get off track and confuse finding the right juror with passing judgment on the panel. Thinking of the lawyer's role in terms of judging prospective jurors causes serious problems. Trying to judge people you hardly know can cause you to focus on the wrong issues and cause you a lot of stress. The men and women on the panel are not charged with anything, in fact they have probably done very little in our presence on which to base a judgment.

Our personal discomfort with this role becomes manifest in our physical and verbal reactions. A lawyer who sees the function of *voir dire* as sitting in

judgment, but who is fundamentally uncomfortable about it, wastes time on meaningless introductions, speaks hesitantly, rarely looks at anyone directly, formulates questions that require only consensus answers, and is frequently more absorbed in note taking than in relating to the people sitting before them.

Even more importantly, when the lawyers see themselves as judges of the *venire*, they run the risk of shutting down the entire process and missing the real purpose of *voir dire*. Jurors do not like being judged. Frequently, an attorney will begin by announcing, *"The questions I'm going to ask are not meant to pry into your personal lives, we are just trying to find out if you are qualified to sit on this jury."* People will shut down if we announce that our purpose is to evaluate them. The answers given following such an introduction reveal the juror's desire to "pass the test" and obtain a favorable evaluation more than it reveals their attitude or belief about the issues that prompted the question. The prospective juror quickly deduces that "correct" answers exist. It becomes a game of trying to get enough correct answers to be judged qualified.

Once the lawyer begins questioning the panel whose focus has become "pass the evaluation", closed ended, legally correct but incomprehensible questions start to flow. Somehow, amidst all that verbiage, the correct answers are implied and prospective jurors learn very quickly how to listen for them and feed them back to the questioner. The process becomes a game, which does nothing to help the attorney learn who this person is, what they bring with them and what will affect their reactions to the issues in the case. Judging the answers focuses on the quantitative evaluation of answers without ever going beyond right or wrong to figure out why that person is answering that way.

e. Jury Selection = Chaos

Some lawyers who see jury selection as a time for total panic. Because they think they cannot control what the prospective jurors will say, the whole trial teeters on the brink of chaos for the few hours jury selection is going on. They do not have enough trials behind them to believe in the intuitive approach or they are not sure enough of themselves to trust the scientific approach. These folks panic and therefore fall into the "let's wing it" school of thought. The fear is that if the prospective jurors reveal their attitudes and beliefs, the whole panel will be "tainted" or "poisoned" by the remarks. The lawyer who is convinced that the trial can disintegrate into chaos during *voir dire* is usually unprepared and disorganized. The lawyer who relies on intuition will at least have a memory of something that clicked in the past and work to recreate it. The "chaos lawyer" erroneously reasons that the whole process is unwieldy, nebulous, and unpredictable so there can be no way to prepare.

#### f. The Synthesis

These apprehensions about jury selections are for the most part phantoms. Many of the thoughts that have sprung up are half-truths and many of the lauded tactics are myths. Jury selection is not about determining what nationality would be best for the panel, or "psyching them out": jury selection is not about Voodoo or witchcraft on the jurors.

We need to see jury selection as a time for powerful communication with the men and women who will decide our client's cause. Depending on the circumstances of the case and the predilection of the court, an attorney will adapt and use whatever means possible to get a chance at selecting people who will give the case a fair hearing. Very often the first time the attorneys see the names of the prospective jurors is when the panel is ushered into the box. Matters are even more difficult when the judge limits the attorney's contact with the panel to just a few minutes after the court has spent many

minutes intimidating them into yes and no responses. The attorney must be totally prepared to capitalize on any situation the court can dictate.

We know a few things for certain: Jury selection cannot be taken for granted; it cannot be thought of as separate from the rest of the trial and; its power as a potent influence on the jury cannot be underestimated.

## 2. Consider New Ways to Get and Give Information during Jury Selection

A primary function of the voir dire is getting information from the juror to establish the basis for an intelligent decision about keeping or striking. That information exists on many levels and must be mined like precious ore. "The lawyer needs to understand that one must look deeper: at the juror's value systems, beliefs, morality; at the quality of their lives; at their level of disappointment or satisfaction with the hand that has been dealt them; at how empowered they feel to make changes and get what they want. These issues are reflected in how jurors handle their momentary power. This is where decisions and human responses really lie. This is where those instinctive human skills of sensing and recognizing must take you if you wish to find out what you really need to know in voir dire. You need to reject the simplistic categories and search for the 'but' and 'however'."<sup>1</sup>

There are numerous pressures on a panel of people labeled "prospective jurors". Perhaps the greatest is the self-induced presumption of objectivity. People know coming in that they must appear to be fair and impartial. Because words like "fair and impartial" are continually used in association with trials, jurors impose a burden to conform on themselves. It is an impossible standard because we all carry with us biases and prejudices based on how we experience our world. Yet under the weight of this perceived role, jurors will tell us with sincerity and belief that they can be fair,

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<sup>1</sup> **Sonia Hamlin, What Makes Juries Listen, (New Jersey: Prentice Law and Business, 1985), at 30.**

just, and impartial, even when in reality they cannot. They are not liars; they truly believe it is possible.

"The expression of attitudes elicited from the surface of the personality often conflicts substantially with those held at a deeper level."<sup>2</sup>

The questioning attorney needs to be aware that people "speak truth" on a variety of levels. It is wise to note also that people are tenacious about the beliefs they have formulated through a lifetime of experiences. Research has shown that when there is a lack of specific evidence linking cause and effect, jurors are likely to decide the issue on the basis of the attitudes and beliefs that are firmly in place at the beginning of trial. "Even in the presence of strong factual evidence, people rely on their attitudes and beliefs and use them to interpret the facts and evaluate their importance".<sup>3</sup>

Clearly people want to hang on to what they've learned to believe. To prevail at trial it would be fruitless to ask jurors to give up their beliefs. Abandon the goal of trying to change someone's beliefs. The attorney would be better served by:

- (1) ferreting out jurors who can incorporate the facts and the law surrounding the event that led to the lawsuit,
- (2) working to get jurors to see the events through the client's eyes and;
- (3) allowing the jurors to find in favor of the client and go home believing they have not given up their basic value systems and beliefs.

In a later section we will delve into how those systems of belief become so entrenched and think of strategies about how to work with them in jury selection while making intelligent decisions on behalf of our client's interests.

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<sup>2</sup> Courtney J. Mullin, **Jury Selection Techniques Improving the Odds of Winning** ed. G. Cook **Readings in Forensic Psychology** (Springfield, IL, Charles Thomas Co., 1979).

<sup>3</sup> Fairald G. Belote, **Jury Research: Spotting Jurors Who Can Hurt, Litigation** (Summer, 1993), at 17-20.

### 3. Make It Interesting: Make It about Them

When the jurors come in to begin jury selection, they are probably the most alert (even if it is out of fear), the most focused (because they are trying to figure out what's going on and what will be expected of them), and the most impressionable. The principles of Primacy and Recency are in full force. Primacy means that which we hear first we tend to pay the most attention to, and means that which we hear last we tend to remember longest.

The effective voir dire capitalizes on this heightened interest working to convince the jury, through how we behave and what we do, that this part of the trial is about them we will capture their interest. Note the emphasis on behavior. What we do and how we act is much more persuasive than saying the words. We must convince them that we are interested in them. We can keep this interest by consistently resisting the desire to dominate and control the proceeding. Opening statement is a few moments away. From that point on the attorney will have more control of the events. During the voir dire the key to keeping the jury interested is to make it about them. Make it about them by talking about them.

### 4. Learn to Level the Playing Field

There are two essential steps in achieving this goal:

#### a. Recognize the Jury's Prejudice

A central emotional issue is at the heart of every case. The emotional issue tugs at everyone who hears about the case. The central issue strikes chords and resonates in each individual on the panel. The lawyer's task is to isolate the essential issue and to explore, in as much detail as possible, what reverberations the issue has with each individual.

Gerry Spence calls this process recognizing the common enemy. The jury identifies with an issue and you have to know what it is before you persuade

them. The common enemy might be the issue of drunk drivers. Yet, because almost everyone has had the experience of driving after a drink or two, it is possible to evoke a "there but for the grace of God go I" sensitivity and sensibility. The juror just might be able to see the facts from the defendant's point of view.<sup>4</sup> Whatever the case and whatever side you are on, the effort spent isolating the essential emotional issue is effort well spent.

To crystallize that issue, talk about the case to acquaintances, family and friends. This does not mean talk about the case in a way that disparages the parties, ("you know what this jerk did"), nor does it give you the opportunity to lament the lack of helpful evidence, ("I'm telling you, there is not one good fact for our side in this case. I just don't know what we'll do!"), or to bemoan the judge you drew, ("... and you know what she's like. She just can't seem to utter the words not guilty"). Such conversation indicates that the attorney is "laying a mattress" to soften crashing in defeat. The conversation you want to invite with friends is laying out the facts without too much detail, then listening for what grabs the person about what you have just said. Listen for what that person is drawn to as important or unfair or damaging for them. Listen to the questions they have because they will focus you on how the non-legal mind is trying to make sense out of the facts and issues. Where they get stuck is where you start looking for the central issue.

b. Tackle the bad facts head on

A tendency exists to ignore bad facts or wish them away. They never go away. Every trial has problem areas. Good facts are wonderful and each side believes they have good facts otherwise there wouldn't be the need for a trial. You need a strategy for how to present the information about the "warts" on

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<sup>4</sup> Gerry L. Spence, **Dynamics of Identification in Jury Selection or How You Lost Your Last Case Without Knowing About It: A New Approach to Voir Dire Examination**, National Criminal Defense College Manual, 1991.

your case. Jury selection is the place to start presenting it. These issues are called the "Facts Beyond Change" or "FBC's." The "FBC's" will not go away. We must develop an attitude toward dealing with these rivets in the middle of our theory. Develop an, "I can use that", attitude toward any fact that comes up. Thinking this way becomes a reflex and soon we stop worrying about the bad facts and begin automatically considering how we can incorporate them or neutralize them in some way. The successful lawyer is constantly looking for a way to win.

#### 5. Why judge conducted Voir Dire is Insufficient

The most obvious barrier affecting direct and meaningful communication between the judge and potential jury members is the authority of the judge. Most men and women called for jury service have never met anyone as powerful as the judge. They certainly have not met anyone in their experience that is addressed by everyone as "your honor." The stature of the judge affects the way jurors respond to his/her questioning.

"Broder (1965) found that potential jurors frequently distort their replies to questions posed during the voir dire. Considerable controversy has arisen over whether more honest, accurate information is elicited by a judge or by an attorney. The experiment manipulated two targets (judge versus attorney-conducted voir dire) and two interpersonal style variables (personal versus formal). The dependent measure was the consistency of the subjects' attitude in reports given at pretest and again verbally in court. One hundred and sixteen jury eligible community residents participated. The results provide support for the hypothesis that attorneys are more effective than judges in eliciting candid self-disclosure from potential jurors. Subjects changed their answers almost twice as much when questioned by a judge as when interviewed by an attorney. It was suggested that the judge's presence evokes

considerable pressure toward conformity to a set of preconceived judicial standards among jurors, which is minimized during an attorney voir dire.<sup>5</sup>

One explanation for the influence the judge has over jurors is that the judge is perceived to be objective and impartial. Potential jurors, in a strange environment not knowing what is expected of them will try without thinking to be like the person they perceive to be the most powerful. They impose this standard of impartiality and objectivity on themselves and end up thinking they are more desirable as jurors if they have not opinion. Judge conducted voir dire convinces them that they should not have any opinions and prevents them from being forthcoming. Jurors need to be shown that it is OK to talk about their opinions so we can determine if those opinions are harmful to the client's cause.

How the judge conducts the voir dire also affects the openness of the responses from members of the panel. In most judges conduct jury selection as if it were a suppression hearing after which they were going to make a legal finding. The questions asked illicit factual answers, which do not provide information about attitudes and values. When the judge is done with the interrogation the lawyers have little information on which to make intelligent peremptory challenges. The attorneys end up relying on a person's demeanor rather than knowing how the person thinks.

Time is also a factor affecting the way the judge conducts the voir dire. The judge has an interest in "moving things along." The perceived pressure of time causes the juror to compress his responses. Judges often dismiss a lawyers request to participate in voir dire arguing that they wan to "respect" the jurors and not pry into their lives. This is "judgespeak" for not wanting to take the time. It would be much more respectful to listen to what the jurors have to say and assure them that they are being heard. The rapid fire, close ended questions the judge asks about setting aside their thoughts and beliefs are not conducive to getting information that will tell us how the juror will use the information he receives.

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<sup>5</sup> **Susan E. Jones, Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor, Law and Human Behavior, II (March 1987), at 136-146.**

Lastly, the judge was probably a lawyer before taking the bench. One does not automatically become good at voir dire when the black robe is put on. Even if the judge happens to be skilled at jury selection she does not know your case as well as you. She will not be attuned to answers that require follow up and development. An attorney who has lived with the case and has developed a theory that makes the best fit between the facts and the law will hear the juror's responses differently than the clock driven judge. In addition, the attorney who will have to exercise peremptory challenges when the judge is finished is likely to think of more questions. Judges need to be educated to the reality that their results are no better and the process does not go any faster when the judge conducts voir dire. To the contrary, the integrity of the whole system is jeopardized.

"We would as judges have to ignore what we know as men to assume that only the law and the naked facts carry the burden of persuasion. Psychology governs human affairs even in the courtroom... legitimate efforts in the cause of jury selection can and should always be used to give a jury a favorable view of any litigant's case... our system of justice is deprived of its fullest potential when the lawyer is denied the right to examine the veniremen in an adversary setting."<sup>6</sup>

B. "If someone had told me these five things ten years ago ..."

1. There is no such thing as a perfect juror.

Sandy Koufax once said, "There is no such thing as a perfect pitch. The perfect pitch gets hit out of the park." There is no perfect juror. The juror perfect for your case will get belted out of the box by the other side. You need to look instead for the person you think you can persuade.

2. You cannot do it the same way each time

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<sup>6</sup> Donald P. Lay, *In a Fair Adversary System the Lawyer Should Conduct Voir Dire of the Jury*, *The Judges Journal* 63 (July 1974), at 49b.

Attorneys with considerable trial experience run the risk of trying each case the same way. Repetition leads to mediocre performance. No two trials are alike and no two issues are the same. Community values change and a group of twelve people will never react the same way twice for the same reason.

Lawyers who specialize in certain types of litigation run the risk of developing a "style" for such cases. Thoughtless repetition leads to the empty rituals and legal mumbo jumbo for which attorneys are soundly criticized. The jury needs to know where you are going during jury selection. The jury evaluates the attorney very closely. If they sense the attorney is not genuine during this interaction they will punish him throughout the trial and possibly exact their revenge on the client.

### 3. Jurors reach their Decision on Something Other Than the Facts and The Law...

Psychologists and sociologists have been telling us for years that listening and understanding our native language takes up about 5% of our mental capacity in a communication interchange. Figures on how much of the message is received non-verbally vary between 50% and 80% depending on who you read. Further, it is widely acknowledged that an information overload causes a listener to shut down on content and reliance on impressions takes over.<sup>7</sup> We have known since Aristotle that factors such as stature and authority of the speaker as well as good old "likeability" have as much impact on persuasion as does any specific piece of information. It is also agreed that communication with another person is a multi-leveled, complex and constantly changing dynamic. The inescapable conclusion is that a large part of successful jury selection is having the ability to get your attention off yourself, focusing on everything that is going on and selecting people who are susceptible to being persuaded.

These acknowledged assertions about interpersonal communications beg the question:

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<sup>7</sup> Michael F. Coley, *The Opening Statement: Structure, Issues, Techniques*, *Trial Magazine*, (November 1982), at 53-57, 109.

"How come attorneys eschew developing the personal skills necessary for dynamic communication and continue to rely on a legal analysis approach when attempting to communicate with prospective jurors?"

The answer is because dissecting and analyzing is familiar and comfortable. Detachment and objectivity are safe, involvement and emotion are messy. Defining the case in terms of its legal elements and arguing both the affirmative and negative point of view may be exercises that is of interesting to other lawyers. Everything we know about persuasion tells us they are probably the least effective ways to get someone to see the facts from our point of view.

#### 4. You Don't Even Want the Control you wish you had...

Jurors are very quick to perceive the hierarchy of power in the courtroom. The majority see the judge as the most powerful person in the room and the attorney as the second most powerful. Some are perceptive enough to see the trial as a constant struggle for power between the two. Lay people invited into this arena are wary of the power. They will do what they can to please the judge. After all, he or she, like the Queen of Hearts in Alice in Wonderland, can have them literally removed. Even though jurors view attorneys in a much more informal way, they are suspicious of being controlled and manipulated.

In other parts of the trial, the attorney's influence over the events is much more apparent. The attorney knows the direction he/she wants the events to take and they do their best to bring that about. All of that intervention and control is detrimental to jury selection. During voir dire, the controlling attorney must realize that it is OK not to know what the jurors are going to say. Your goal is to get enough information so you can select the best jury possible for your client. You want the jurors to be open

and honest. You don't want to manipulate the jurors. You don't want yes-no answers. In other words, don't tell the jurors what to say; ask them what they think.<sup>8</sup>

#### 5. You Can't Change Anyone's Mind during Jury Selection

Somewhere along the line, the goal of educating the jurors became confused with trying to brainwash them to your view of the facts. For many attorneys, jury selection has become an opportunity to make a speech about the case. Lawyers using questions that imply the correct answer badger jurors, punish them for candor and close down a potentially dynamic process. Contrary to what many suppose, jurors do not come into the courtroom with their minds an empty slate (even if they tell us they do). They are brimming over with attitudes, beliefs and values based on experience and they are anxious to use this background immediately to resolve their own inner conflicts about the trial and have a comfortable orientation from which to view it.<sup>9</sup>

The very least and the very most we can accomplish in jury selection is to get the prospective juror to talk to us about what is going on for them regarding the issues of the trial. They manage conflict on an unconscious level. If we are successful in getting them to talk openly by creating a non-threatening atmosphere, they will be frank with us about how they are predisposed to look at the issues we are presenting. If we can uncover what it is that they brought with them into the box, we can decide if that belief is harmful to our client. While we may never totally change their minds, we can educate them to see our information in a way that does not threaten their beliefs and values. A sympathetic view of the client's version of the facts may be possible. Education does not mean beating them over the head with our conclusions about the case. It means bringing them to a different understanding about an issue. The jurors can hang on to their values and beliefs because we have shown them how to incorporate new information. We add to what they know rather than take anything away or ask them to give up anything.

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<sup>8</sup> James Lugenbuhl, *Improving Voir Dire, The Champion*, (March 1986), at 12 - 17.

## II. Getting Organized:

"You have to know where you're going otherwise you won't recognize when you're lost."

(Lawrence "Yogi" Berra)

### A. Three steps to developing the Jury Selection Plan

#### 1. Brainstorm the case: Know the Facts... Know the Law...Have A Theory and Theme That You Can Talk about Confidently

Most lawyers think they brainstorm their cases when in fact all they do is talk it over with people on the trial team who are already familiar with the case. It is like preaching to the converted. Such a conversation quickly disintegrates into rehashing supportive ideas and congratulating each other. Real brainstorming is a dynamic interactive process that provokes thinking without challenging anyone's worth.

The key to a successful brainstorming session is to get everyone to agree to withhold judgment about what is a good or bad idea. If the creative ideas are going to flow, those participating have to be certain that no one in the group is going to negate a suggestion with statements like, "No, that won't work because," or, "yeah but, if you do that you'll run into," or, "There is no way the judge will." Judging ideas too soon will stifle the flow of ideas from the group. The practicality of an idea at this point is not the issue. Figuring out why an idea won't work comes easily enough and there will be ample time for it later. The goal here is to think about as many approaches as possible to the problem.

A workable format is to designate one person a moderator with an easel or a chalkboard to write down all the ideas that come up. The types of questions that get the ball rolling are:

1. What is this case really about?
2. What is our best evidence?

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<sup>9</sup> Donald E. Vinson, *How to Persuade Jurors*, ABA Journal, (October 1985), pages 72-76

3. Who are all the witnesses?
4. What are the bad facts that we have to bring out?
5. What are the good facts that we have in our favor?
6. What is the key emotional issue for the jury?
7. What do you like about our case?
8. What really bothers you about it?
9. Legally? Emotionally?
10. What is their best evidence?
11. On whose testimony does their case rest?
12. What is credible about that person?
13. What is the best attack we have on their case?

Eventually, as a topic gets exhausted, weak ideas become supporting points for stronger ideas and those that cannot be incorporated fall away. They are not useful; therefore, a valid reason exists to no longer spend time on them. They do not fall by the way side because they were wished away, overlooked, or ignored.

The aim of the legal theory that emerges from such a session is a solid fit between the facts and the law. Themes also start to emerge as well. They become threads of emotion that get woven throughout the trial.

In a recent case on a criminal matter in Florida, everything about the incident pointed to a "Battered Spouse" defense. A creative brainstorming session convinced our trial team that the term "battered spouse" was too loaded and ran the risk of collateral issues coming into focus. The best approach to this shooting was a straightforward self-defense theory and that we should, if possible, avoid putting the defendant on the stand. The theme that emerged was that this woman feared for her life and the lives of her children. The legal theory of self-defense driven by the primal emotion of a mother trying to save her children is the beginning of a good drama. The jury in this case acquitted in two hours.

Inadvertence is the ruination of a case. The attorney may choose to not focus on certain issues or to not develop certain areas. Such decisions must be made as a result of having thought through the issue, not because it was ignored. Jury selection is an ideal place to begin educating the jury to the theory and themes of the case, albeit obliquely.

## 2. Prioritize the Issues You Want the Jury to Be Thinking About

Once the theory and theme of the case are grasped, the areas of focus and questioning for jury selection become readily apparent. Knowing what you are going to ask the jurors to accept about your version of the case helps you decide which issues are most important to talk with them about.

In a voir dire situation where the judge limits the attorney's opportunity to interact verbally to just a few minutes, it is critical to go directly to an issue at the heart of the case. The jury will see you as someone, who comes to the point, deals directly with the important matters and who moves things along. In addition, knowing what it is you want to talk with them about allows you to focus them and satisfy their need for concrete information. Also, if the jurors are doing the talking and the conversation is interesting enough, the possibility exists that the judge might let it go on longer than announced. Judges have no problem turning off the lawyers; but they have a little more difficulty pulling the plug on a prospective juror.

## 3. Picture the Jury You Want

With the theory well thought out, the themes in hand and the issues prioritized, it is time to start thinking about the kind of people you want to hear the case. Remember that part of the art of jury persuasion is selecting people who can be persuaded. While most modern psychologists will agree that reliance on stereotypes in jury selection is not a good idea, begin by making a list that permits you to categorize the prospective jurors. Think as specifically as possible about the kind of person and the type of life experience they might bring to the issues that are going to come out during this trial. Think about that person in relationship to the client, but also think about them in relation to the kinds of witnesses they

are going to hear. If the case is going to rely heavily on expert testimony from your side, you might want to take that into account when thinking about whom will be listening. On the other hand, if their case rests on experts and you want a common sense rebuttal to the esoteric theories, figure that into your thinking about who you want to listen to their case, but who will really hear yours.

In criminal cases the state of mind of the defendant is often an element in the defense. It would be ideal to think that you will get a person on the panel who has had some experience with psychological evaluation and study. It would also be naive to assume they will remain on the panel. On the other hand it might be possible to look for someone who has life experiences in which a relative or a close friend was in a distraught at one point in their lives but with intervention at the right moment everything worked out.

Here are some questions that might get things rolling in brainstorming session:

1. What do you think the impact of their best evidence will be on the jury?
2. What kind of person is it that would be receptive to this type information?
3. What type person will bridle and resist this type of information? What level of intelligence do we want on the panel?
4. What type person will accept our information and strategy?
5. What is appealing or distracting about their witnesses?
6. Our witnesses?
7. What are the attributes of our attorney that jurors will like?
8. What about theirs will they like?<sup>10</sup>

Once you get started developing the questions that will focus the trial team on basic criteria for the type of juror you want to work with during the trial other questions flow readily. Such an approach has the benefit of creating a mind set for the attorney that the people out there who will be chosen are potential partners and allies. If we think in terms of enlisting the jurors in our cause, it feels less overwhelming than to think of them as this inert group, impossible to move and predisposed to not like our case.

It goes without saying that thinking about the ideal juror has the benefit of putting you in touch with who you don't want to have to convince. However, more likely than not we are going to end up with some people we don't want on the panel. Their point of view might be somewhat neutralized by an active and lively discussion during jury selection. By exposing their potential bias, you can bring out difficulties they have with the case that are operating for them on an unconscious level. By sensitizing them and their fellow jurors to the problem it is possible that those issues will not come into play in an unfair way.

In picturing the ideal jury, it is very important to not get bogged down in your stereotypes. Any attempt to select jurors based on ethnicity, race, gender or even profession is apt to blow up in our face. The categories defined pre-trial in picturing the ideal juror are just a starting point and must be flexible. The single woman sitting on the panel who lists a college education but who is currently employed at McDonald's will not fit neatly into any category and must be spoken with. The retired businessman who looks like an authority figure to be avoided at all cost, might have a family member who is battling alcoholism who has sensitized him to the benefits of treatment and therapy. We cannot tell by looking at someone what experiences have filled his or her lives.

What we do know is that what goes on in a courtroom takes enormous concentration and focus. While it might seem paradoxical to some, being organized and prepared actually frees you to be responsive and flexible during the process. You are better able to focus your attention on what is going on and are therefore in a better position to react to the clues given by jurors as well as the contingencies thrown at you by opposing counsel and the judge.

**B. What Jury Selection is and what it is not:**

Ten sure fire ways to know when you are about to "shoot yourself in the foot"

**1. Lack of Preparation**

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<sup>10</sup> **Cathy E. Bennett, Lecture Give at National Criminal Defense College, (Summer 1988)**

Too many attorneys believe that preparation for jury selection is something separate from preparing the case. It is left until the last minute and a "go in and wing it" attitude prevails. Nothing could be more harmful to the process of jury selection and the outcome of the whole trial. You must have a theory of the case that you will be trying to sell to the jurors. While developing the theory you will automatically begin thinking about how you will recognize the prospective juror who will be receptive to it.

As you think about your case, you will begin to think about and anticipate the opposition: how they will come at you, the witnesses they will call and the jurors they will be looking for. Even if you must accept a less than favorable juror, a careful and well thought through voir dire might reduce their role and impact during deliberations.

2. Not getting permission to encroach on their physical and psychological space.

Assuming a motion for individual sequestered voir dire has been denied, almost everyone delivers a perfunctory paragraph about how "these questions are not meant to pry into your personal lives." Having said it, asking questions that put prospective jurors off.

We build credibility by doing what we say we are going to do to reassure the juror that we are not prying. We can build in phrases like:

"Without giving us names, could you tell us how that happened?"

"Would you mind telling us more about that?"

"If you don't mind, I'd like to know more about that..."

Also, give them the opportunity to talk about, "someone they know," who might have faced a similar situation. Similarly, the attorney cannot presume to own the space. The panel is confined to their seats. The attorney must earn the permission to come up on them. It is best to remove all barriers between you and them. However, counsel table or the podium may be used as an anchoring spot. For example, the initial question for a given area on a specific issue may be delivered standing to one side of a podium. As the dialogue progresses, the

attorney can work closer to the panel, but returning to the anchor as that topic ends and beginning the dialogue on a new area from that safe distance. Respecting someone's physical and psychological space is a convincing way of letting them know you respect them and of building credibility.

### 3. Disrespect

Jurors see everything that goes on in the courtroom-everything! The judge for most lay people is the most powerful individual they will ever encounter. At the beginning of the proceedings it would be fair to say they are aligned with the judge. The attorney must balance the following three elements to begin winning credibility and shifting their natural alignment.

#### a. Be Courteous

People appreciate courteous behavior enough to reward it with positive credibility points. The attorney is required by form and protocol to engage in certain amenities during a trial. They should be conducted with assurance and purpose. You are an officer of the court who has rights and privileges. You should claim them in a way that lets everyone know you are a professional and you love what you do.

#### b. Mean Business

Empty rituals resound with no one. If you discharge your courtesies perfunctorily, you will look shallow and insincere. Similarly, kowtowing to the judge will not win points with the jury. If courteousness racks up credibility points, obsequiousness is as big a force in the negative column. Kowtowing to the judge is a degrading spectacle and jurors don't like watching it. The jury expects you to go to the mat for your client - do it!

#### c. Avoid Contentiousness

It is not to the attorney's advantage to appear to the jury as though he or she is waiting to pounce on everything the judge or opposing counsel does just for the sake of an argument. Nor is it advantageous to be perceived as a whiny piss ant. You have to earn the permission of the jury to take on the judge. A useful rule is that the jury's "sense of indignation has to be higher than yours," before you decide to take on a witness, an expert, or, the judge.

When you have earned their permission, do it right. If it is necessary to confront the judge try it first out of the presence of the jury. Always keep the confrontation respectful and polite whether the jurors are present or not. Your goal is to make it clear to everyone that your job is to stand up for your client. Try to wait until you have established yourself with the jury as a reasonable person. Once you've confronted the irascible judge and made your point, drop it. Get out of that mode and assume your respectful attitude until the next instance or issue.

During jury selection, you do not want the jury to sense that the judge is diminishing your importance in the proceedings. On the other hand, you do not want them to perceive you as contentious over every minor detail.

#### 4. Leading Them On

Be yourself. You do it best. You should treat the jurors as though they are your peers. You don't want to put on airs and appear as something other than what you are. Don't affect someone else's style because you think it would be "cool" to be that way. Chances are you will not be able to keep up the false persona for more than a few minutes. It is always a huge step to dare to be yourself. If you are going to lead these people on this planet called trial, they have to know that you are real and genuine. There simply is no other way.

#### 5. Boring Them

When lay people are asked to name the reasons they dislike lawyers one frequently noted fact is they think lawyers tend to go on long after the point is made. No one wants jury selection to go on and on---especially the jurors. They will get bored first, then defensive and begin to feel the process is invasive. It is up to the attorney to move it along keeping in mind that the most effective way to keep someone from getting bored is to keep the conversation about them.

Get to the important issues –

"When you came in here earlier and saw this young man sitting here in a wheel chair what kind of case did you think this was?" "What do you think now that you know it is a murder case?"

Some tedious questions must be asked. Devise a plan to work those in around more interesting points so the process isn't bogged down for what seems to be an interminable length of time. Preface questions with short sentences that let the jury know the relative importance of the issue, e.g. "As you can see, Mrs. Linden is a large person and she is overweight. We need to know what you think about a person who battles their weight..."

Give the panel a sense of beginning and closure on a topic by using a headline to indicate when you are finished in an area and where you're going next.... "I want to talk to you about..." or, "I'd like to change the subject." This allows everyone to sense movement from one topic to the next and know progress is being made.

Humor is a tension breaker and good way to keep interest up, but it must be spontaneous and arise naturally out of the circumstance:

Juror: Well, you know, lawyers have a way of twisting what we say so I don't know.

Lawyer: Only if you were up there (indicating the witness stand). But here we're all on the same side, just talkin'."

Humor is a very tricky area. Planning a joke is a disaster for credibility. In your efforts to make people comfortable, you don't want to appear as though you are doing a lounge act. The best advice is not to plan the humor but be flexible enough to seize a moment when it arises.

## 6. Ignoring Them

Your attention on the jury is the first step in building your credibility with them. When they first come in, you have an opportunity to see them before they begin to put the burden of conformity on themselves. Similarly, they get to see you and it is certainly to your advantage to let them know immediately that they are the center of your attention at this point.

Usually before the jury is brought in there is a hearing on some issue that will have bearing on the trial. The ruling invariably disappoints one side and being preoccupied with it when the jury is filing in can severely erode your first chance at contacting them in a non-verbal but open and communicative way. Stand as they enter and watch them. You face them confident and prepared. You have picked out the clothing that makes you feel great and you are ready to try this case.

They should be able to tell when they look at you that this is your domain, your arena, your life's work. The confidence you have should be apparent in your whole presence. Make eye contact with individuals if they are comfortable doing that but do not give them the impression that you are sizing them up.

Watch the panel during the prosecutor's questions and the responses. Jurors watch lawyers like hawks during the rest of the trial. Here the reverse should be true. Watch how they look when they are engaged in answering but be certain to watch what others are doing while someone else is answering. Even without an expert on the trial team who can interpret body language, close attention can reveal clues that are worthy of follow up:

Mr. Schneider, when the prosecutor was up here asking his questions, I noticed that when Mrs. Harper was answering, you were looking down at the floor and shaking your head... Was there something in her comments that caused you to do that? What was it?

Jurors have an expectation that lawyers pay attention to them and show interest in them. It is a good idea not to disappoint them.

## 7. Your Language

The language used by an attorney can easily be intimidating to the men and women of the venire. This imposes a burden on the attorney to speak the language of the court and the language of the jury. It is essential to conduct the questioning of the jury in a professional manner. Being professional, however, does not mean being a stuff shirt and using language and jargon that is out of their experience.

Frequently attorneys characterize jurors in a disdainful way lamenting the fact that most of the jury pool can't read beyond a seventh grade level and/or that they have limited vocabularies. The use of legal terms and big words by the attorney becomes almost an intentional "put down" of the jury. A lawyer's job is to make sense out of what is going on at trial and to make relevant connections between what might appear to be disparate elements in the case. To do that it is necessary to use language that is within the juror's experience. Common sense should tell us that if the person we are speaking to cannot understand what we are saying there is no persuasion.

## 8. Distancing Yourself from Your Client

The ladies and gentlemen of the jury assume that you have a relationship with your client. Don't disappoint them. At work in each of their minds is the thought that if they ever needed a lawyer they would want that attorney to be connected to them in a meaningful

way. Unfortunately, some attorneys prefer the company of the other lawyers in the room to the company of their client. The jury will hold this against you.

Jury selection is a good time to convey to the jurors that the trial team you are leading includes the client. Confer with the client occasionally during the questioning and again just before exercising peremptory challenges. This conveys the client's interest in the proceedings. This is a sure way to humanize the client, who is also and alien on the planet called trial.

#### 9. Give the Other Side Too Much Credit

The strength of our system is that both sides get to vigorously argue their point of view. The jury expects each attorney to want to win. It rings hollow in the ears of the juror when you play it down. Similarly, when you wax eloquently about the regard you have for opposing counsel, you risk appearing insincere. You are governed by rules of conduct and you must stay within those boundaries. But you do not need to risk credibility by going overboard and convince the jury of something you probably don't believe anyway.

#### 10. Getting Good Jurors Struck

Once a lawyer has uncovered a juror who seems favorable to his/her side there is a temptation to return to that person when a new area is about to be explored. The juror has made us comfortable by being receptive to you: it feels safe talking to this juror about the new subject. Each time you return you run the risk of giving that person another opportunity to reveal a bias that will remove this person from the panel. Even if no bias is exposed, opposing counsel will, unless she's asleep, notice the rapport building and feel obligated to remove the juror perceived as your ally.

### III. Peeling the Layers: Building Rapport and Establishing Credibility

#### A. Carl Rogers: "On Becoming a Person "

In 1961 the distinguished American psychologist, Carl Rogers wrote, *On Becoming A Person*, a work that focused the field of psychology on client-centered therapy. One of his aims was to get psychology out of the laboratory and awaken his colleagues to the concerns of growth and potential in man. In his view of psychology every person is an individual with qualities and possibilities capable of development. In the book he discusses the process, based on his research, of becoming a mature person, flexible in human relationships, more creative and less open to the pressure of suggestion and control. What follows are keys to his approach in making others comfortable in an interview situation.

As many attorneys know, Cathy Bennett devoted her career to improving voir dire conditions as well as working tirelessly to make attorneys more comfortable with the process. In an article written years ago she said:

Many attorneys have described how uncomfortable voir dire can be because of its intimacy with the jurors. It is an intimate relationship and one that requires a different kind of lawyering skill. This lawyering skill is called the listening skill. In other words, during voir dire one is called upon to be a superb listener, a counselor of sorts. It requires that a person be open, sincere, vulnerable and receptive to jurors. This is often difficult for an attorney to achieve in that he is in an adversary role in the other parts of the trial. This often can produce a conflict in roles for the attorney, which largely grows out of the anxiety, frustration and anger that surrounds the trial situation. Unfortunately, people, especially jury people, who feel threatened, will not respond to a frustrated, angry and dominating personality. They will respond to a gentle and sincere person whom they believe is interested in listening to them.<sup>11</sup>

These elements assist the juror to feel more equal to the attorney and to diminish the perceived social distance between the attorney and the lay person.

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<sup>11</sup> Cathy E. Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case, National Criminal Defense College Manual, (Revised 1991)*.

## 1. Empathy

Empathy has been defined as the capacity to enter into another's circumstances and appreciate the world from which the response is coming. If we can imagine ourselves in the other person's world we can begin to hear much more than words in their answers.

Have you ever been in a situation where you are talking to a stranger and sense that there is a very personal level to the conversation? Perhaps you have prefaced a statement with "I don't even know you," or even said (either out loud or to yourself) "Why am I telling this to a total stranger?" If you have experienced that, you have experienced an empathic listener. When someone is talking to us we if they sense that we are listening to that is going on in the communication process they will want to continue to talk with us.

## 2. Warmth/Accessibility

Being accessible to someone means communicating to them that we are there for them. It cannot be done in words. How many parents say to children: "You know you can talk to me about anything." Such an invitation is ignored unless they have a history of behavior to back it up. In the relationship with a child, the seeds for accessibility may have been sowed years ago. In the courtroom we don't have years to establish a relationship, but we can learn that communication comes through what we do as well as what we say. By focusing total attention on the panel as they enter, by watching them attentively - making eye contact, as they answer questions, by NEVER cutting them off while they are talking and not writing while they are speaking, we let them know that we are interested in what they have to offer and say. One of the most common barriers to effective listening is thinking of your next question instead of listening to the answer being given.

## 3. Respect

To gain another's respect in an interview situation we must establish early that we will not judge their responses to our questions. This relates back to an earlier point about how off track things can get if the attorney sees himself as judge of the panel. We communicate respect when we have positive regard for the other person's world of experience and we let them know it.

"Mrs. Smith, you mentioned that you had twelve children. That is an extraordinary accomplishment... several of them have started their own businesses may I talk with you about that for a minute..."

Or...

"Mr. Washington, on the information sheet you indicate that you worked for the railroad for 49 years before you retired. Staying in one job for that long is just about unheard of these days, isn't it?" (You might end up striking him because he is too much a "company man" or rule follower, but you can acknowledge his experience as meaningful and at the same time let the other members of the panel know you are the kind of person who respects someone's world).

Similarly, when jurors offer information about themselves, we cannot judge it and punish them for their answer. It is amazing how ready people are to talk about their own or a relative's experiences of horrible diseases, acrimonious divorces, personal battles with alcoholism, difficulties with the law. When we hear this information we cannot be shocked or judgmental about it.

In criminal cases it is a fairly well established fact that most jurors would like to see the defendant on the stand and to hear the defendant's version of what happened, if not an out and out denial of guilt. Too often an inexperienced criminal defense lawyer will go into the jury selection process teetering between depression and rage about this common juror preconception. The interchange might go something like this:

Atty.: "Mrs. Grace, How would you feel if James and I decided that he will not take the stand during this trial... Would that bother you in any way?"

Mrs. Grace: "Why yes it would! I feel that if he didn't do it then he should get up there and tell us that he didn't do it!"

Atty.: Have you ever heard of the presumption of innocence and do you know what it means?"

The juror has just been told that she gave the wrong answer and she is going to be corrected by the person in charge. It has been communicated to her that her that this lawyer does not respect her answer.

An alternative response might be:

Atty.: I think most people now a days feel that way. Why do you think that is so?

This invites Mrs. Grace to elaborate on her answer and it might be revealed that she does not know anything about the presumption. By bouncing her answer to others on the panel, discussing the issue, and constantly following up by asking, "Why do you think it is that way?" A poignant civics lesson can be taught to the whole panel without making anyone feel disrespected. The most beneficial aspect of treating potential jurors with respect is they get the message that they can be themselves without fear of judgment. They will demand the same respect from others on the panel once deliberations start.

#### 4. Congruence

This is how the listener communicates to the panel that he or she is a whole person. The listener expresses what is going on inside at the moment. While it might seem that telling a prospective juror what their response is evoking in you is a dangerous proposition, it is, in fact, not dangerous and has a positive result with the panel. For example:

"Mr. Smith, I notice that you look off into space every time we talk about the role of the emergency room staff and it makes me feel that you want to avoid this subject. Can we talk about that for a minute?"

By letting the jury know you are reacting to what is going on you solidify the goal of letting them know that you too are a human being with concerns and fears. Also, by being candid in your reaction, you are committing the same forthright behavior you are asking of them. Because you are the one seeking the information and the one conducting this interview you cannot be afraid to be genuine with the group. We cannot ask them to be genuine if we do not give them a model.

#### B. Jury Selection Involves Uncovering Attitudes

The courtroom is not the environment where one would expect total strangers to come together for the first time for a soul-searching conversation led by yet another stranger. The formality of the setting as well as the sense of importance that surrounds being called to court are inhibiting. In addition, the case itself might have issues and topics that can engender personal conflict or be a matter of public controversy. Neither is conducive to getting people to reveal their attitudes. There is also the element of seeking anonymity in a large group; few care to be in situation with the potential of being judged by one's peers. It is up to the attorney conducting the voir dire to break through these barriers. You can do a few things almost immediately to begin this process:

[assume] the role of interested interviewer. Tone of voice and demeanor is important... If the questions are asked in an accusing or judgmental tone prospective jurors will be even more inhibited... Begin establishing a relationship the moment the prospective juror enters the box. Acknowledge his or her presence with a nod of the head or some other sign of recognition. At the beginning of the voir dire, introduce yourself and your client. If you like and respect your client, the jurors will take note and be more likely to extend respect themselves. Move away from the

table or lectern [if possible] to conduct the voir dire. People feel more comfortable answering difficult questions if the demeanor of the questioner is somewhat relaxed and casual... Make eye contact with the prospective juror when he or she is speaking. Intermittent but frequent eye contact, not a hard stare, allows the juror to know that the questioner is really listening to their answers. It also enables the attorney to tell if it is appropriate to ask a few more questions or if it is time to stop questioning in a particular area... Be courteous... Pause after asking a question and wait patiently for the juror to answer [sometimes a pause provokes them to speak even when a question has not been asked], Turning one's back or scrambling through papers and books... are mistakes commonly made during voir dire.<sup>12</sup>

These little rules of behavior are mostly common sense but they are too frequently ignored, which gets the trial attorney off on the wrong foot with the jury.

#### 1. Self disclosure

If one of the goals of voir dire is to get personal, heartfelt and revealing information from the juror, the last thing the attorney wants to do is come across as an inquisitor. At the outset of the voir dire, prospective jurors perceive you as having power and they will withhold information as a means of gaining some sense of control in the voir dire situation. If the lawyer's goal is control, a hopeless gridlock occurs. If the attorney instead rethinks the priorities of voir dire and stops using phrases like, "interrogate the panel", and "evaluate the jurors", it will become clear that the goal is not control but getting information. Self-disclosure is a means to accomplishing that.

Social interactions involve "reciprocity." That is what self-disclosure is really all about.

Suggs and Sales (1981) aptly characterized the voir dire as a self-disclosure interview in which information is sought from potential jurors concerning their

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<sup>12</sup> **The National Jury Project, Jurywork: Systematic Techniques, (Clark Boardman Co., Publishers), Chapter 10, page 4.**

history, attitudes, and beliefs. Empirical investigations on self-disclosure have repeatedly found that individuals disclose more to,

- (a) those from whom they receive moderate self-disclosure (reciprocity effect),
- (b) those whom they like more and
- (c) those whom they perceive as sharing equal status with themselves (status similarity) (Chelune, 1979).<sup>13</sup>

The quote from Jones indicates that when attorneys ask "What can I do to be more effective in jury selection?", the answer is:

- (1) learn how to disclose something about yourself before you asking the juror to disclose things about themselves,
- (2) be a likable person,
- (3) do what you can to tear down real or imagined status barriers between you and them.

Self-disclosure may be as simple as attaching a slight preamble to a question that reveals something about yourself...

"I remember when my daughter was an infant. The first time she had a fever and broke out in that rash called "rosiola" I was in a panic that there was something seriously wrong. I needed to hear from the pediatrician that this rash was nothing to worry about. Have you ever had an experience were you became overly concerned about a minor illness?"

Or...

We all have routines we like to follow, I know that when I get home in the evening I enjoy taking my dog for a walk, he needs it, it calms me down and I find it relaxing before getting on with the evening. Mrs. Freeman is there a routine you follow that helps you transition from day to evening?"

This lets the jurors into your world a little bit and lets them know something about you as a person. It goes without saying that you should tell the truth and that you should use a predicate that you can relate to the case. No judge is going to let you talk about your favorite evening cocktail, fuzzy slippers and TV show unless you make a quick segue into something that is relevant to the case.

Because of her tremendous insight into how we all behave and because she had the ability to push an idea to its limits, Cathy Bennett saw self-disclosure going further. In her view, self-disclosure was the attorney feeding back to the jury what he or she was perceiving, feeling or wanting to do at that moment. She constantly pushed attorneys to be authentic with jurors and suggested that self-disclosure could occur when an attorney was rewarding the panel for their candor by telling them how much he respects them for it. However, she felt that it was most useful when the attorney felt the juror was being untruthful: "Ms. Jones, I believe that you have been evading my questions and I am upset and bothered by that." This would let the juror know that the lawyer was paying attention to her. To the rest of the panel it would indicate that this attorney was a whole person susceptible to hurt feelings and who was being genuine and authentic about them.

A RULE: You cannot fake being genuine and authentic. You must be genuine and authentic to be perceived as genuine and authentic!

## 2. Listening for Their Clues

The axiom: "it's not what you say but how you say it," has been used so frequently and in so many inappropriate contexts, its value has worn thin. If ever a circumstance exists to which it aptly applied, it most is jury selection. The language a person uses and words they choose reveal to the listener the workings of the speaker's mind. Thoughts people hold grow out of the feelings they have and give rise to the words they use to express those thought/feelings.

First, a reminder that you cannot get sidetracked into the interesting world of semantics and linguistics in this conversation with the panel. Your job is to win your client's case. Your assessment of how language reveals the thought-actions of a prospective juror must be made in relationship to the case, the issues that will emerge and the juror profile you have drawn up.

Successful and enduring playwrights have known this since the tragedies of Sophocles have given important clues to how the character should behave by carefully crafting the words they speak. So it is in life. How often, after listening to someone, have you come away drawing a conclusion about who they are as a person. We say things like:

"He's scatterbrained"

"What an air head"

"She's really immature"

"Now, that guy off the wall!"

It should be stressed that if an essential factor in a successful voir dire is listening, its first cousin is the art of the follow up question.

Sonia Hamlin very important work, "What Makes Juries Listen?" serves as a wonderful guide to the art of picking up on clues. What follows are some examples from her work and some ideas that her insight has inspired.

Fairly standard questions such as:

"What do you do?"

"Do you own your own home?"

"How do you get your news?"

"What newspapers do you read?"

are all gold mines of information about how person functions in his or her world these questions require following-up.

We have to listen for the way people qualify what they do:

"I'm only a ..." or "I'm just a..."

"I've worked for \_\_\_\_ for 27 years."

"I own my own business."

Are they apologetic or do they speak in an assertive voice? Depending on the nature of your case and the type person you want to argue it to, this could lead you to some interesting follow-up questions.

When we ask about owning a home we can uncover a wealth of information that might point to their attitudes about specific things that are in the case. Suppose race is an issue in your case:

"Do you own your own home?"

"Tell me about the neighborhood it is in?"

"Has it changed much in the past few years?"

"Who are your neighbors?"

"Do you visit back and forth?"

"Are property values what you'd like them to be?"

"Are you planning to sell? Why?"

A person who is not happy about a neighborhood becoming racially diverse will have difficulty concealing frustration.

If you are in litigation that involves a large company, asking someone about their home and following up effectively could reveal a middle aged man, edged out of a corporate position who has to sell his home and whose life is in upheaval at the moment. Short open-ended

questions will lead to a flow of information that you can use to decide if this person would truly "hear" your case.

Frequently attorneys ask people about their hobbies and interests with no clue about what the answer can mean. Does a person jog or work out at a health club because they are committed to the discipline of an exercise regime, or are they trying to stave off old age, or trying to meet people and find companionship and dates. These are things that we need to assess when we consider how this person might react to the damages we are seeking in our case.

Asking people about their children is also a fertile area that can lead us to attitudes and values. As people describe their children's lives they will reveal what they hold important and deem valuable. Do they talk about what their children have accomplished or do they tell us about who they are as people? Consider a statement like: "I have two sons. One is an accountant for a huge firm downtown, the other is just a construction worker". It begs follow up to uncover why the construction worker has the qualifier, "just", or, "only", in front of it. What is this person's standard for success and how will he or she feel about your client. If you happen to be representing a laborer you've got to spend some time with this person to find out if the voiced disappointment with his son's trade will have impact on what he thinks about your client.

Who among us has not been sensitized to women's issues like equality and harassment? How a woman describes herself could lead to great follow up questions. Is this a woman who defines herself in terms of her husband's career? Does she see herself as "only" a homemaker or does she see herself as a life partner who manages the home? If she's single, does she define herself in terms of her career? Can you detect frustration and disappointment about where she is at this point in her life with regard to career or relationships? Depending on your case, each of these areas could reveal a clue that when developed will reveal a bias.

A man's answer to "What does your spouse do?" can begin to unearth an attitude you might want to know about. Do the responses to questions about her job reveal that he dismisses it or that he doesn't consider it "a real job." Is he embarrassed and feel that his wife's employment is a statement that he's not making enough to support the family? Listen to the words that qualify or describe her job and listen for the attitude behind those words.

If both work if both work you can naturally progress into questions about how they manage the house, chores and kids. Does she have a nanny or maid or do they have a housekeeper who helps out? Do they share the work? How do they manage day care? All of these things speak to the acceptance this man may have toward circumstances and situations in your case where people don't fit into traditional roles.

Non- traditional families are more the rule than the exception these days. Divorced couples are becoming more and more enlightened about the need for joint parenting even if the other spouse remarries. The circumstance of children who live and who are loved by more than one set of parents is quite common. Multiple sets of grandparents are common in many families today. When talking to a person about relationships and whether or not there are children, we should not assume that the relationship is a heterosexual one. Nor can we assume that a homosexual couple is childless. Non-traditional households are more commonplace than we realize and seeming to cast judgment on them may deeply offend someone on your panel.

Another area that lawyers ask about regularly is TV. However, very little is done with the information. It is good to know that most people lie about how much TV they watch. On questionnaires, people respond that they watch two or three hours a week. Yet in response to "where do you get your news," people will say they watch the national news in the early evening and local news at 11:00 just before bed. If each of those shows is a half-hour, that's five hours a week just counting weekdays! A recent statistic said that, on average, Americans watch, approximately, seven hours a day!

It is too easy to look down on or feel superior to someone who watches a lot of TV. That is an unproductive, judgmental route that is not helpful in deciding if this person can help or hinder your client's cause. TV, like it or not, has taught people how to receive and process information. If that person ends up on your jury knowing how they receive information is far more important than passing judgment on how much TV they watch.

People who get their news from television may be satisfied with small bits of information. They may not be motivated to go beyond what is presented. You will have to motivate this person to keep up with the information flow and encourage him to analyze it before he accepts it.

People who watch news on television but read the paper as well are people who are interested in going beyond the "bite" and finding out more. People who subscribe to newsmagazines are motivated to go into depth. They pay for the opportunity to analyze.

Criminal defense lawyers would do well to ask about the kinds of programs that are watched. A recent study at the University of Florida revealed that people who watch a lot of police shows on TV tend to favor heavier sentences. They believe in "putting the bad guys away" and that heavy handed law enforcement is a deterrent to crime.

Once you begin to open up to the possibilities of what can be revealed, you begin to make connections and sense how topics flow. When an attorney becomes accustomed to picking up on the clues given in the juror's answers there is virtually no end to the number of follow up questions that can grow out of the discussion.

IV. Knowing what's going on with the panel:

"Who are these people!" (Butch Cassidy and the Sundance Kid)

A. THE PLANET CALLED TRIAL <sup>14</sup>

With everything that has been written and all the seminars given on voir dire, lawyers continue to underestimate how alien the courtroom is to lay people. While the lawyer is focused on the case, the prospective juror is, at least initially, focused first on the event of jury selection and then the trial.

The average person is lifted out of their everyday routine and transported to a cold unfamiliar place. They do not realize the reason they feel like they are being ignored is because of their special-ness and the aura of propriety that surrounds them at the courthouse. They don't know yet that just about everyone they run into is, or soon will be, forbidden to speak to them.

They are given numbers and assigned seats. No one tells them why they have to wait so long and the cloud of apprehension over not knowing what is going on begins to descend over them. Everyone else seems to know the procedure and protocol. They lose their individuality, get herded around in a group and are given orders by a sheriff's deputy. An entire day might go by without them even getting into a courtroom.

When they finally are led into the box, they are on an edge between miffed at having to be there in the first place and relieved that something is finally going to happen - even though they have no idea what! The judge says a few words to them and begins the questioning. The attorneys are given a chance and if the voir dire is typical of most, no one has a clue as to what any of it has to do with anything.

In a recent discussion with a trial lawyer from Georgia, he related his impressions of the jury service he had just completed in a criminal trial. What stuck out in his mind was:

- (1) being ignored for most of the day,
- (2) not being struck after everyone found out he was a lawyer whose practice includes some criminal work and
- (3) that he had no idea what the case was about and even after opening statements, found himself wishing for a chance to read the pleadings.

## 1. Scripts

Human beings have a built in mechanism for dealing with unfamiliar situations and circumstances. It is called scripting. We automatically generalize information that we have learned in the past. In this instance, the prospective juror would draw on information gleaned from movies as well as from TV shows whose stories grow out of and revolve around trials. Bits and pieces of information from friends and relatives get worked in and eventually the juror creates an internal script for the new situation. We learn how to do this as children and psychologists tell us that if parents tell children what to expect going into a new circumstance, anxiety is greatly reduced. Adults are prone to a similar kind of anxiety and carry with them the skill of scripting.

Scripts are not bad things. They help us more often than not. They are a way of generalizing about previously acquired learning so that we can learn more quickly in the new situation.

A person formulates an internal script in lieu of other information. Humans have a tremendous drive to make sense out of the world around them. Left to their own devices they will explain to themselves what is going on in the external world. They will do it in a way that causes them the least amount of anxiety and conflict. On the whole, it is good that we know how to do this for ourselves.

In the instance of a trial, where our goal is to persuade them to see the facts from our point of view, it would make little sense and increase our persuasion burden to let them sit with their own script for too long. The information they are drawing on is:

Lawyers are not to be trusted.

Trials are boring.

People lie about the extent of their injuries to make money.

Judges are fair and powerful.

The person accused wouldn't be here if he didn't do something, etc.

Their scripts are not written in stone and people will abandon their internal script if usable information about the new outside world is provided. It is important here to remember that the prospective jurors on this first day of jury selection are scrambling to put together a script about that whole process. Simultaneously, they are gathering data and formulating a script about the case. Our first job in jury selection is to intervene in their script about lawyers, jury selection and trials. On a base level, when we are empathic, accessible, respectful and congruent, we have thrown in the clutch; an their internal machine, using stereotypical, information about lawyers, can not continue to grind on.

After being referred to as numbers and being shunted from one waiting room to another by impersonal court officials, they are ready for someone to behave like a real and genuine person toward them. It is a time for what Carl Rogers called "concreteness". This is where you tell them who you are, what you're doing and why.

Most attorneys botch this propitious moment by making some official sounding little speech about ... how the questions are not meant to pry ... that the attorneys need to evaluate the panel to see who is qualified to sit on this jury. Instead of getting a genuine person, they are getting someone in authority who separates himself from them by status and who they are apt to be dislike for threatening to evaluate their qualifications. Whatever was negative in the script they were pulling together has just been reinforced.

If the attorney chose to be concrete and genuine, he/she might come from a different mind set and indicate:

"I need to ask you some questions about some of the things that are going to come up in this case. I have concerns about the fact that we all have subjects and issues about which we are emotional and would stop us from being totally fair. I need to find out if anything in this case that will prevent you from being fair to my client. Why do you think it is important for me to find out about those things?"

This attorney doesn't use authority to distance the jurors. There is no threat of evaluation and the attorney self-discloses concerns. This person is easier to like and, therefore, easier to follow. The more helpful information you provide about this alien territory, the better guide you become and the more likely you are to put a halt to the script that they are organizing on their own!

## 2. The Torque

Many people who have written on the subject of jury selection have talked about the importance of the attorney's first few moments in front of the jurors.

Some of the insights focus on the attorney's need to "make a good impression" while others center more on what is going on with the jury.

...so must the trial lawyer become attuned to the juror's expectations... For that first instant, you are not there to present the case, but rather to present yourself ... Your confident and prepared appearance should radiate your attitude and belief in the case at hand ... Jurors, like attorneys, quickly mold their behavior to conform with what is perceived as "proper" for their role in the court room. Once seated in the jury box, as the selection process is about to begin, their demeanors become similar. The important moment is just prior to that time. Is a panel member by scar, gait or demeanor showing physical disability or strong personality traits.<sup>15</sup>

Psychologists generalizing about how most people behave in groups, admonish that we should back up even further and make some assumptions about what is going on with them before they enter.

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<sup>15</sup> Leonard M. Ring, *Voir Dire: Some Thoughtful notes on the Selection Process*, *Trial Magazine*, (July 1983), pages 2-4 & 75.

A courtroom is a place that encourages jurors to look for someone who possesses strength, power and leadership ability ... Jurors want to be respected and approved of ... People are less likely to be honest in a group situation. They see themselves as obliged to answer to their peer group and people want to please their peers. As soon as jurors are brought into the jury room they identify with one another because they are going through the same process. When placed in a big group, they begin to listen to the "right" responses, and they cannot help but be influenced by what they hear.<sup>16</sup>

People in groups will conform to the will of the group more readily than one might suppose. Conformity begins with a phenomenon called "norm formation."

[Norm formation] ... in an ambiguous situation, people are highly receptive to the behavior of others and will allow their own decisions to be influenced by the decisions of others ... For example, people will make obviously incorrect statements and will publicly state beliefs with which they privately disagree ... Subjects said they conformed out of a fear of rejection: they did not want to be different from the others.<sup>17</sup>

Research into conformity reveals that people are influenced by the behavior of others not only in an ambiguous situation, but even when the correct response is obvious. The fear of rejection by the group is a powerful motivation.

The point in citing works from a lawyer, and two somewhat different psychologists, is to show that wherever we look for answers about what goes on for jurors, we are hammered by information which reveals that this universe called a trial put a torque on people. Once chosen for jury selection, a person steps into an arena where dynamics are at work that are

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<sup>16</sup> **Cathy E. Bennett, Voir Dire That Works, National Criminal Defense College Manual, (Revised 1993).**

<sup>17</sup> **James Lugembuhl, Improving Voir Dire, The Champion, (March 1986).**

not present anywhere else in their lives. People who know how to navigate on this planet must help those who will be buffeted by forces of which they are totally unaware.

By giving a person the opportunity to speak and by respecting them through engaged listening we are empowering them to resist, hold out, against “ norm formation”. The person who is given permission to find their voice during jury selection, just may, use that experience as a model to find their voice during deliberations.

## B. Their Biases and Prejudices

Of all the preconceptions that jurors bring with them into the box, perhaps the most powerful is the idea that they should have no biases, no pre-judgments and be unaffected by the world they experience around them. They have created a script of what a juror should be and a big factor in the formulation of that script is their belief, unvoiced as it may be, that this is what the judge and the lawyers expect. They want to give you what they think you want so badly, that they will lie and say they can be unaffected when, objectively, there is no possible way for them to be as neutral as they think they have to be.

At the core of everything Cathy Bennett wrote and taught was the absolute necessity to assure jurors that only one thing is expected of them: to speak honestly in response to questions. Close to that core was a constant plea to lawyers to not judge people who are courageous enough to do what we asked of them. Jurors may not be overtly afraid but at work somewhere in their thinking is the idea that it is bad to talk about what they may have seen, read, or heard about the incident that has caused this trial. The following is a true story that shows how powerfully the belief that "neutral is best" works:

...In a Boston state court, the chief judge in a highly publicized case, asked juror after juror if they heard anything about the case. Some answered yes, some answered no. The defense attorney requested the right to voir dire the jurors herself, and finally the judge granted her one question. A juror who had previously told the judge that she had heard nothing about the case was asked,

"My case has received a lot of public attention, and a lot of people in this community have heard about this case. Would you please tell me everything you can think of about what you have heard or think about in this case?" The juror's response was "Like I said Miss, I've never heard anything about this case, except that she robbed the bank and shot the police officer." After this response the judge allowed a few more questions and he himself asked "Well, do you have any opinions about this?" The juror answered "No", and the lawyer followed up with "Miss Smith, what are your opinions?" Her answer: "I don't have any other than the fact that she is guilty of shooting and killing someone."<sup>18</sup>

Cathy Bennett used this story to illustrate the need for attorney conducted sequestered voir dire, but it serves also to illustrate the point here that jurors, in spite of deep beliefs, will try to convince the court that they have no pre-judgments. It behooves us to look at the kinds of prejudice we might expect prospective jurors to bring with them.

#### 1. Three Basic Kinds of Prejudice

It is probably rare for a trial lawyer to encounter the overt racism and bigotry that immediately pops into mind when words like bias and prejudice are used. Morris Dees, at the Southern Poverty Law Center, who regularly sued white supremacist groups, deals with that kind of ugly hatred and fear more regularly than many would care to. For the most part, we are ferreting out much subtler, pre-judgments about issues that are not as volatile but which may certainly be harmful to our client. Here is a suggestion list of some of the types of prejudice we might encounter:

- racial
- religious
- national
- ageism

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<sup>18</sup> Cathy E. Bennett and Robert Fogelnest, *The Need for Individual Sequestered Attorney Conducted Voir Dire*, National Criminal Defense College Manual, (1992).

- sexism
- class including professions
- prior experience in courtroom procedure
- prior experience with this type of case

It is very important to stay focused on your goal while exposing someone's bias. It is not the job of the attorney to pillory the person who exposes his bias. What you are doing is making a decision about how this thinking will affect your client's cause; refraining from being judgmental and strategizing how to deal with the biases and prejudices that might be uncovered. It is a good idea to understand a little bit about how biases are formed and how that affects the way people make judgments. V. Hale Starr and Mark McCormick in their comprehensive work, "Jury Selection" <sup>19</sup> offer an informative look at the kinds of jury bias an attorney might encounter. They list 4 types of prejudice.

#### a. Beliefs

Beliefs are perceived truths that an individual holds because they are shared and reinforced within one's community or group. Beliefs are shared within a cultural environment. A person's belief system defines his or her reality.<sup>20</sup>

Sonia Hamlin, in discussing how jurors reach judgment refers to this building of belief systems as, "Early Influences", <sup>21</sup> and says:

We make judgments based on our original ethical values: the paternal family and cultural influences that were the first voices we heard. They taught us what was right and wrong, acceptable and unacceptable, punishable and forgivable. These earliest tapes run

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<sup>19</sup> V. Hale Starr and Mark McCormick, *Jury Selection, Second Edition*, (Boston, Little Brown & Co., 1993), pages 331-335.

<sup>20</sup> *Id.* at 331.

<sup>21</sup> Hamlin, *What Makes Juries Listen*, page 313.

in our minds throughout our lives, and they are probably the first things we think of whenever we judge anything. They may be superseded by what happened to us later on but the very first and deepest experiences of morality and judgment are the ones we still bring to bear with great effect particularly in a jury room.<sup>22</sup>

b. Pre-dispositions

A pre-disposition is an acquired response that affects an individual's inclination to accept or reject some thing, person, situation or event. Pre-dispositions are preferences, values, or attitudes. A preference is a tendency to accept or reject things people or events. They are usually culturally reinforced. Attitudes are more complicated. An attitude establishes a basis for a ready-made response; when it is negative it is considered a prejudice. The prejudiced person is one who has an emotionally charged negative attitude toward some social category or social experience. The prejudiced person does not stop to determine how to respond to individuals in a societal group but will reject all members of the group categorically. Because prejudice makes it easier to deal with complexity, it causes people to be resistant to change. A value system is more abstract and is frequently so deeply ingrained that the individual is not aware of the extent to which it dictates behavior and reaction i.e., Americans are strongly affected by a puritan ethic - love of God, home, family, hard work and such.<sup>23</sup>

Sonia Hamilin discusses these pre-dispositions as "Later Conclusions":

People also judge by their own hand-crafted individual morality and standards, by the additions and departures they have made through their own life experiences from those original ethical values they learned at their parent's knees ... If life has, in one

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<sup>22</sup> **Id. at, 314**

way or another betrayed him or her, then there is anger and disappointment and a forceful rejection of the systems he or she believed in. This disillusionment creates a dichotomy, an inner tug of war about which way to decide what is right and wrong ... unreasonable arguments [during deliberations] that usually stem from this inner conflict of what people would like to believe and use to believe versus other things that life has taught them.<sup>24</sup>

### c. Emotional Response Systems

Previous experiences may cause certain words or images to recall a whole sequence of events that are highly charged with emotion. A person who has been assaulted, someone who has lost a family member to cancer, AIDS or some other long drawn out illness might have reactions that are harmful to the case you are about to present.<sup>25</sup>

The passages cited from Starr and McCormick's work are focused on voir dire. The passages from Ms. Hamlin's work come from the section of her work where she addresses final argument.

If we believe all the research (and we should) which shows that jurors make up their minds early, it does us little good to leave a consideration of how the jurors will reach their judgments until preparing final argument. If we are armed with knowledge about the emotional, cultural and psychological screens through which everyone filters their information we can plan a strategy for voir dire as well as final argument. In voir dire we want to know how the information we are going to present will fare as it comes through their filters. In final argument we want to construct an argument that acknowledges what they have to overcome in order to

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<sup>23</sup> **Starr & McCormick, Jury Selection, page 333.**

<sup>24</sup> **Hamlin, What Makes Juries Listen, page 313.**

<sup>25</sup> **Starr & McCormick, Jury Selection, page 335.**

focus on what we've accomplished throughout the trial. The progression of the trial is not about changing their minds. It is about showing them how they can incorporate the new information.

Having identified several reasons for a juror to carry a bias in with them, we can hopefully create an environment and devise questions that will allow them to reveal them to us.

### C. Non-Verbal Clues

Discussions about non-verbal communication and body language are at best troublesome and at worst a boondoggle! The study of non-verbal communication occupies a small, esoteric corner of the world of psychology. Few people are trained and skilled enough to read it well enough to predict behavior. When lawyers venture into the area they become fascinated by the pseudo-objectivity of it and fall victim to the axiom extracted from an Alexander Pope poem: "a little learning is a dangerous thing."

Dr. Richard Crawford provides an interesting and insightful disclaimer to the area of non verbal communication:

There is almost a cult that has arisen in the study of nonverbal communication. The result is that the art of reading juror body language is sometimes used as the primary foundation for exercising peremptory challenges. Indeed, you should trust your instincts and be highly sensitive to all nonverbal signs you observe during voir dire, but such approaches are simply insufficient for purposes of sound jury selection. A pretty reliable guideline is that when a prospective juror consistently sends highly negative nonverbal messages to you and your team, you should probably exercise a peremptory challenge even if that person looks very good on paper and fits your jury profile. Conversely, when a citizen seems pleasant and your instincts tell you this person is responding favorably, you should probably exercise a peremptory challenge when that person looks very bad on paper and is highly contrary to your jury profile. The simple truth is that it is much easier to be fooled by positive

nonverbal messages than negative ones. Many post-trial interviews have revealed serious errors in peremptory challenge situations in which a lawyer was almost certain from pretrial investigations and analysis that a given prospective juror was dangerous, but left the juror on the panel because of positive nonverbal signals and a mistaken belief that the citizen would rise above his or her negative indicators. Despite such advice, you should remain careful to avoid putting too much stake in either your instinct or the art of reading body language.<sup>26</sup>

Given the disclaimer, there is this to add. On the level that most of us can understand and apply the criteria used to evaluate body language, you don't have to be very sophisticated to pick up on whether what someone is doing physically will interfere in their ability to hear your case.

Non verbal communication is any human response that falls outside a verbal utterance. It can include facial expression, gestures, movement, use of space (proxemics) and paralanguage (the tone, rate and volume of the voice). Feelings, attitudes and predispositions may be revealed in any of these. "As the language message is being framed for social approval, affect leaks out into unobtrusive channels of the body. Also body reactions will be occurring even when the person is being quiet."<sup>27</sup>

Providing a list of things to look for, (i.e. shifty eyes, squinting eyes, nose touchers and nail pickers) will only predispose lawyers to looking and draw them off the purpose of the voir dire: : to get information and to educate. Lawyers are advised to enlist the services of another pair of eyes during jury selection. And rather than comb the crowd looking for "cues," wait until you feel the communication is thwarted by someone's overt physical behavior. Follow up with that person and see if the reactions you are getting are connected to issues you need to talk about. When the man in the back row sits back in his seat placing

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<sup>26</sup> **Richard Crawford, The Persuasion Edge: Winning Psychological Strategies and Tactics for Lawyers, (Wisconsin, Professional Education Systems, Inc., 1989), pages 65 & 66.**

<sup>27</sup> **Thomas Sannito, Ph.D., Non Verbal Communication in the Courtroom, The Champion, (September - October 1985), pages 8-14.**

the thumb and forefingers together to form the shape of a steeple, it will catch you or your assistant's eye. As you pursue that person's opinions you will no doubt find that he is an authoritarian who believes his opinion is more valid than anyone else's and who wants to pontificate on points. What's important is that you know you don't want this juror. It is not as important for you to know that the gesture is called "steepleing" and that it is indicative of overly confident people who want to impress.

Dr. Sannito points out that non-verbal movement and gesture is important only if it is in reaction to something, in a context that gives it meaning and that it must be cross-checked to insure correct interpretation.<sup>28</sup>

## V. Conducting the Group Interview: The Art of Being Open Ended

### A. Elements of the open ended conversation

In establishing other points about relating to the panel, we have discussed the elements of empathy, warmth, respect and congruence presented in Dr. Rogers's book as four important aspects of building rapport with prospective jurors. We have also talked about self-disclosure and concreteness as two meaningful relationship building tools. We need now to add two remaining elements of Dr. Rogers's theory that invite the jurors to engage with us.

#### 1. Reflection

A reflection response is a mirroring of the verbal statements and non-verbal actions a juror makes. Reflection is an important part of the dynamic that invites dialogue. In reflecting back you:

- (1) let the juror know that the attorney heard what was said,
- (2) clarify for the juror what messages they are sending
- (3) encourage the juror to keep talking and

(4) assist attorneys in clarifying for themselves what the jurors have said.

Reflection speaks directly to the natural desire we all have to be heard. The best way to let a person know that his message has been received is to feed it back to him. This feedback can be about physical, non-verbal cues as well as the actual statements a person makes:

Mr. Smith, I know that being the center of attention when I ask you a question is like being in the spotlight and that makes some people pretty uncomfortable. Is there anything about the questioning that is bothering you? Is there anything else you would like to say about the issue of driving while drunk?

This type of statement lets Mr. Smith know that you've seen his discomfort; the messages he's sent have been received. You are acknowledging him. You are identifying the problem and you are giving him a chance to say something about it. You are also reaffirming for him and the rest of the panel that you are going to stick to your point.

Nothing will be lost. The juror committed the behavior to be noticed and you noticed it. If he gets short with you for calling attention to it and putting him in the spotlight again, other members of the panel will not fault you for giving him the attention his actions said he wanted. On the other hand, if he responds (as he probably will) you've gained ground with him for acknowledging his reality and with the rest of the panel for being attentive and caring.

When reflecting back what someone says, you also can create a no lose situation. When a juror keeps insisting that she can be fair you might reflect back, "Mrs. Jones, I sense that you are frustrated that I won't believe you can be fair." This lets the person know she's been heard and invites her to talk about the frustration. No matter what she says you learn something and you assist the relationship between attorney and prospective juror.

## 2. Clarification

Clarification can accomplish much of what reflection does and it summarizes the response. There are two differences. Clarification expresses some doubt on the part of the listener and, therefore, invites the speaker to go on:

I seem to be frustrating you. I hear you saying that you are angry with me for asking too many questions.

The second difference is that clarification points out conflicting statements that the juror has made in a non-threatening way and invites the juror to talk more about it.

Mr. White, earlier you said you thought there could be some situations where a person would be justified in using a deadly weapon to defend themselves, but then you said you could never imagine yourself being in such a situation. Can I speak with you a little further about that?

When asking for clarification it is important to be accurate about what the jurors said. Their favorite complaint about lawyers is that they twist people's words.

A statement that reflects back a signal or asks for clarification followed by an open-ended question is a powerful invitation to speak.

Four elements that we have defined and discussed are key to an open-ended atmosphere during jury selection:

- Self disclosure
- Concreteness
- Reflection
- Clarification

B. Framing an Open Ended Question

Now that we have discussed an open ended attitude and mind set that go into the preparation of voir dire and we have talked about how to conduct ourselves in the open ended conversation, it is time to talk about what gets the ball rolling; the open-ended question. Everyone agrees it is essential to starting dialogue but it is amazing how few people know what an open ended question is. The simplest definition to remember and the easiest to apply is: An open ended question is one that cannot be answered with yes or no. Some think that a question is open ended if it is asking about thoughts, feelings, opinions, attitudes and other subjective areas. Those are the areas we want the juror to respond from, however, they do not in and of themselves make a question open ended. Questions that begin with, "Would you", "Will you", "Have you", and "Did You", are not open ended. Apply the definition. Can this question be answered with yes or no ? If so it is not an open ended question.

Here are two simple rules to follow:

- (1) assume the person has an opinion, thought, feeling, or reaction and simply ask for it, and,
- (2) begin each question with a journalistic, Who, What, Where, When, Why and occasionally with a How.<sup>29</sup>

Following these two simple steps the question will meet the definition and always be open ended. Initially, you may find it necessary to think about how to work one of the journalistic beginnings into your questions, but with a little practice it becomes a natural way to converse with the panel.

## 2. Getting Started

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<sup>29</sup> Stout, Michael L., "The Problem with Jury Selection, or. Raise Your Hand If You Are Prejudiced and Unfair," *New Mexico Trial Lawyer* , 1986.

Many people don't know how to get the dialogue going with the group and the answers flowing. Deciding what to ask first and who to start with can be a paralyzing situation for some. Unfortunately, no hard and fast rules exist and attorneys as well as highly regarded jury selection experts differ in their advice. Some say never ask a question that calls for a consensus answer. The thinking is that it is too easy for jurors to hide in a group.

Anonymity allows the reluctant juror to avoid talking to the attorney. On the other side of the aisle, some very respected, if not renowned attorneys, recommend getting jurors to raise their hands as a first step in getting the jury involved and when a person has self-identified by raising their hand you have a place to target the follow up questions.

Obviously, the technique used must grow out of the circumstances encountered in any given courtroom. If the judge is not afraid of "losing control" of the courtroom, and allows full attorney conducted voir dire (there are some around), it certainly is worth taking the time to build rapport and get information individually.

#### a. The Open Ended Conversation

When we engage someone in a conversation and our goal is to learn something about them, we follow a certain progression that is both polite and natural. We move from the general to the specific, from the objective to the subjective and choose topics from which we can distance ourselves to topics that are closer to our emotions. We move almost without thinking about it from what the person thinks to how they feel. As we frame our open ended questions around a specific point, we initially allow them to think that they can respond in what they believe is an unemotional, detached, cerebral way: "How many of us here drink alcohol?" (a show of hands) "What do you think about laws concerning drunken driving?" "Why do you feel the laws are too lenient?" Of course there would be other questions in between these to draw out the information in incremental steps. The juror, through everything we've talked about up to this point, is revealing values and attitudes throughout the conversation and we may know how they feel long before they give the feelings verbal reality.

As we go through this progression we build bridges with the other person, letting them know we can be trusted, exposing things about ourselves to put them at ease and inviting them to continue with their statements. They pick up on signals, weigh and evaluate them, make adjustments and go on. The interaction involves both people and happens on many levels. The one on one is a great opportunity to build rapport and let the juror know who you are as a person.

It is worth mentioning that the attorney should approach areas like drinking, medical problems, psychiatric care and other potentially charged personal areas very carefully. Just coming out and asking if anyone has ever had psychiatric treatment or been to see a psychologist on a regular basis could embarrass the juror to a point of never opening up. The approach to these areas is to give them a chance to talk about someone else who might have had such a problem. As the conversation develops the issues will invariably turn to how the intense situation we are referring to affected them. Think about it as getting permission to talk about this subject and then proceed respectfully. You should also thank them frequently for their candor during this type of questioning.

#### b. Limited Time

If you find yourself in a situation where the judge throws you the ball after he/she leads the jurors and intimidates the jurors into answers that are more expedient than probative, you have to go with that. Usually, one can feel the energy drain out of the group as the judge works his way through the venire. When you get up, make a few statements about the area you want to go into, then ask one or two questions that require them to raise their hands. They get to do something physical, which changes the dynamic and it gets them involved. It is essential to use the techniques of reflection, concreteness and clarification and follow up with open ended questions that get them to talk:

"Mrs. Jones, I notice that your hand shot up almost immediately, what was your experience with...."

### c. Waiting & Follow up

The next step essential to the dialogue is terrifying to most attorneys: waiting for the answer. Some say that lawyers talk too much but perhaps it would be more accurate to say they talk too often. Nature abhors a vacuum and attorneys abhor silence in the same way. They follow up their own questions with examples, additional information and details that end up first confounding the process then shutting it down. Put the burden of filling the silence on the person you have asked the question. Stand still, look at the person and wait for him to talk. They will. Once he starts, nod the head and make a few non-verbal sounds of affirmation to encourage them and just listen.

Don't race ahead mentally and think about the next question you want to ask. Listen, because the best follow up questions will come out of what they are saying, not off your legal pad!

Listen, then follow up. Let the juror do the talking. Then follow up. Develop a litany of follow up questions so that if something does not flow naturally out of what was just offered you are right back with an open ended follow up that gets the person to continue: "What do you mean by \_\_\_\_\_?"... "What did you do?" .... "Tell us more about how you came to that?" ... "How did that make you feel?"

Reflect back what the person tells you ... "You must have been furious, what happened?"; "That sort of thing can really make you worry, what did you do about it?"

When you are really stuck the most reliable open ended follow up question is "Why?". Simply ask "Why?"; "Why did he do that?"; "Why do you think that?"; "Why do you think someone would do a thing like that?".

That three letter word will keep the conversation going, keep the other person in the spot light and often give you time to think about where to go next. "Why" is especially useful as a follow up when the answer is going to give you an opportunity to educate the rest of the panel before striking the person who gave it.

#### d. Keeping It Interesting

Just as at a social event, be it a gala, a reception or a small gathering of friends, you want to keep the conversation interesting. In this gathering you can initiate the topics, so don't waste time. Get to the issues that are pertinent to the case. If you must discuss the law find a way to make it interesting. Capitalize on the average lay person's fascination with the legal world and draw them into it. Do not use language that distances you from them. When you are moving away from one area into another take the time to invite additional comments or disagreement. Ask, "Does anyone have something they would like to add?" Or, "Is there anyone who holds a different opinion?" Or, "I am going to move on and talk about another issue but before I do..." Always extend the invitation to speak up!

If you are successful in convincing the panel you are interested in them, that you won't judge what they say, and that you are the person in the room who talks about interesting relevant things, they will be ready to respond to your open ended questions.

#### IV. Tell your story from the GET GO!

- A. Three ways to get your story to the jury without making a speech

## 1. Education vs. Indoctrination

Judges across the country will argue that indoctrinating the jurors is inappropriate and therefore they should conduct voir dire. Few judges would argue that indoctrination is inappropriate. Judges, in the interest of saving time and being fair, actually do more negative indoctrination than lawyers. By asking tight close-ended questions they try to guide the jurors to think a certain way about an issue and often ask the jurors to go against something in their experience. We cannot change what a person has learned over a lifetime of experience and ask them believe something that works against their hard held inner belief. When the judge says: "You won't let your personal feelings interfere with the law if I tell you to follow the law, will you? ... You can disregard your personal feelings and follow the court's instructions, can't you?". They are indoctrinating the juror! People will agree with judges because of their authority and stature in the room but when he/she is not present they will not respond to that authority and may even hold the manipulation against him but take it out on you and your client.

If the attorney is doing the manipulation/arm twisting, the jurors will see that the attorney has a vested interest in the outcome and it is the attorney that is trying to prepare the way for his bias in the court room. It is best to operate from the premise that you cannot fool the jury because they see everything, are affected by everything and in the end "the jury is right whether it is or not"!<sup>30</sup> The jury will agree with their lips and possibly try to convince themselves that they mean what they are saying, but in the fiber of their being they cannot go against what they hold as a deep seated belief merely on the word of a stranger. We cannot make them believe something they otherwise would not. Attempting to twist their words into an interpretation that could be construed in your favor doesn't work either. Once you are out of sight they will ignore your subtle spin and ignore your words. Leading them into accepting some esoteric point of law is equally as fruitless. They will say they follow but internally they will not go against what they have learned; even if it is wrong!

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<sup>30</sup> Steve Goldberg, *First Trial: Where Do I Sit What Do I Say*, (St. Paul, MN, West Publishing Co., 1982), page 3.

People tend to hold on to what they have learned and have come to believe more readily than someone else's ideas or beliefs. This tendency can be overcome but the speaker needs to strike an emotional tone that is so powerful it shakes a fundamental belief. The opportunity to do that in court is rare and in jury selection such a speech would not be tolerated. Instead, we try to get the juror to talk to us knowing that the public statement of their belief or opinion will oblige the person to defend that statement. It is in that defense of their ideas where we learn about the beliefs that may be harmful to the cause we are here to advance. When the judge or attorney makes a speech that tells the juror what to think the juror has no such obligation.

## 2. The Poisoned Panel

We are at the point where we have to talk about the "poisoned panel." The fear that lives in the heart of every attorney – “What if the answer I get reflects an attitude or belief that is contrary to the way we want this jury to think in this case?” The most common response given by lecturers and trial skills teachers about the "bad attitude" or the "harmful statement" is: "Well, it is better to hear about it now." This is of little comfort when you are on your feet and you feel your stomach sinking into your shoes and you wish you could turn back the hands of time to recapture the question that you just asked! We have to readjust our thinking about this moment.

Remember we are not there to judge jurors nor are we there to change a person's mind. You are there to focus their attention on issues. Period! You do that by whatever means present themselves to us. An appropriate response lets you know something about that person's focus on the topics you brought up and gives you a chance to air that kind of thinking and information for the other jurors to use as a model. The inappropriate response alerts you immediately to the inner thinking that might be harmful. It is important to challenge that thinking when it is wrong with the right kind of follow up questions. Such follow-up allows you to educate the other jurors about how "off the wall" this type of thinking is. Your follow up questions will commit that person to a point of view that will make the challenge for cause apparent to everyone.

Everyone benefits when the jury is educated to and focused on the issues in the case. Challenge the jurors thinking when they are wrong but reward the honest reply even if it hurts to stand there and take it. This will, without verbal invitation, encourage other jurors to speak up and let them know that you mean what you say about honesty being their only obligation. Also, the long term lesson we are teaching is that everyone is entitled to speak and that following the herd with acceptable responses is not how we want them to behave either now or later in deliberations.

### 3. You Don't Have to State a Hard Fact To Begin Educating

The verb "educe" which is the root of the word "educate" means "to lead." To educate the person we are talking to, we need to lead them to thoughts and ideas that they might not have reached on their own. Most of what comes up at the trial has never before crossed the juror's mind in any meaningful way. It seems to follow that everyone connected with the trial will benefit from having the jury focused on ideas and issues related to the case. Sometimes when we are in a conversation with someone they get the point of where we are going long before we actually state it. A person can tell where we are going and the outcome we are looking for by the tone and intention of the questions we ask and the statements we make. They also read myriad non-verbal clues. This is similar to what we need to accomplish in jury selection.

If you use open ended questions that grow out of the pertinent issues of the case and have them prioritized in terms of their importance to the case, the panel will know the direction you want the discussion to take. This happens when the questions are crafted to make the jurors think hard about the topics and issues of the case. If we make people think about the topic we have introduced, we have begun to educate them.

The juror who is responding to your questions after thinking about them and seriously considering the answer will provide far more information about whether bias is present than

any speech or "mini opening" the attorney gives as an intro. to a complex, incomprehensible, leading question.

#### 4. See Your Case as A Sequential Story In Separate Scenes

In a criminal trial, the prosecution usually wants to focus on the incident. The prosecutor wants to keep the heinous details in the foreground so the jury will stay scared or roiled up about the "nature of the case." They want people to respond to the category of the crime and avoid dealing with the fact that our client is an individual, a human being who lives in a broader world that puts the incident in a much wider context.

When we are preparing for voir dire by; brainstorming the incident; the people involved; their reasons for their actions; the legal theories that might fit; and the emotional themes that can "hook" the listener into our version of the story, it might be helpful to think of the events as a series of scenes we want to link together as film director might using a story board. After all, one of our chief burdens is to make sense of the events for the jury.

As we begin to see the trial as a flow of little scenes we sense that each scene makes a point to support the overall picture/story we are telling. Each vignette has an emotional issue at its core and that emotional issue may be worthy of voir dire. Let's digress...

At about 3:00 AM on a Saturday morning a man waits outside a bar with a loaded gun in his hand. He shoots the next man to come through the door onto the street. The prosecution wants to keep the jury in the moment of the shooting and portray the shooter, now our client, as a cold blooded murderer who, after an argument in the bar, laid in wait for his quarry and shot him without mercy.

As we develop our theory of the case we learn that the two men knew each other. That our client was 5 inches shorter and 60 pounds lighter. Our investigator tells us that the two men got into an argument at the same bar a week before and the man who is now dead was thrown out of the bar red faced and screaming, "I'll get you,

you little fucker. You better watch out because I am coming for you.” We spend time with our client and learn that he knew the man he shot. He knew that the dead man’s nick name was “Big Bill” and everyone who knew him was aware that he carried a hunting knife strapped to his right leg. Our client who lives a lone uses public transportation to get to work. We learn too that he spent the week in fear of “Big Bill” mugging him at the bus stop, or showing up at work, or waiting in the hall way of the apartment where he lived. He was a small man living a terrified life for an entire week.

The emotional themes which reveal his state of mind start to emerge. We have to show the jury how he tried to avoid Bill and how his behavior and normal routine was changed because he was in constant fear for his life. How after a week of looking over his shoulder he decided to take his gun for protection against Big Bill’s knife and go to the bar and get on with his usual routine. He was not stalking Bill; he was living in fear. The legal elements that make Self Defense case succeed with the jury when the emotion of fear is driven home.

Each scene in the sequence has an emotional center and once that center is identified the trial team can decide if that area is one where the prospective juror may have a bias or leaning. A list of these areas will yield the topics we want to hear about from the jurors. We then prioritize this list deciding which issues we must get to first. Once we have this list of topics we can begin to start developing the questions we will ask in each area. Lawyers have a tendency to get bogged down in unnecessary introductions and spend a lot of time talking about “what we are going to talk about.” Get to it. Don't be afraid to jump in with an important topic and take off on the run. You will not lose the jury and they will probably, after a morning of shuffled around the courthouse, be relieved to get to something substantive. Remember they want and need information to feed into that script they are working on in their heads. If your goal is to undo their scripts, you must provide new information.

The list of topics for voir dire and its prioritized order of importance becomes the beginning of the outline for the opening statement and the start on the order in which you are going to call your witnesses. Give careful consideration to how when each witness adds a piece about the incident it will be a reinforcement of the discussion that went on in voir dire, and a follow through of what was foreshadowed in opening statement. Jury selection is a time to enlist and empower the jurors. As we learn about them in relationship to the important issues, they learn about the important issues. We can foreshadow every important issues in the case while asking them about their life experiences in similar situations. This cannot be accomplished while delivering a didactic speech to “educate” the panel. The judge will cut you off and the speech makes jurors feel manipulated. While the lawyer may think he is getting the information about his case to them, he, more than likely is alienating the jurors.

#### FINAL THOUGHTS

We are in a relationship with the jurors throughout the trial. We have to work at this relationship by being focused, committed and genuine. Jurors notice everything that happens in the courtroom. Behavior speaks to them as loudly as words. Be real and be the person that they want to follow through the labyrinth call trial.