



Winning Your Case In Jury Selection & A Defense Perspective On Jury Selection

Presented by :

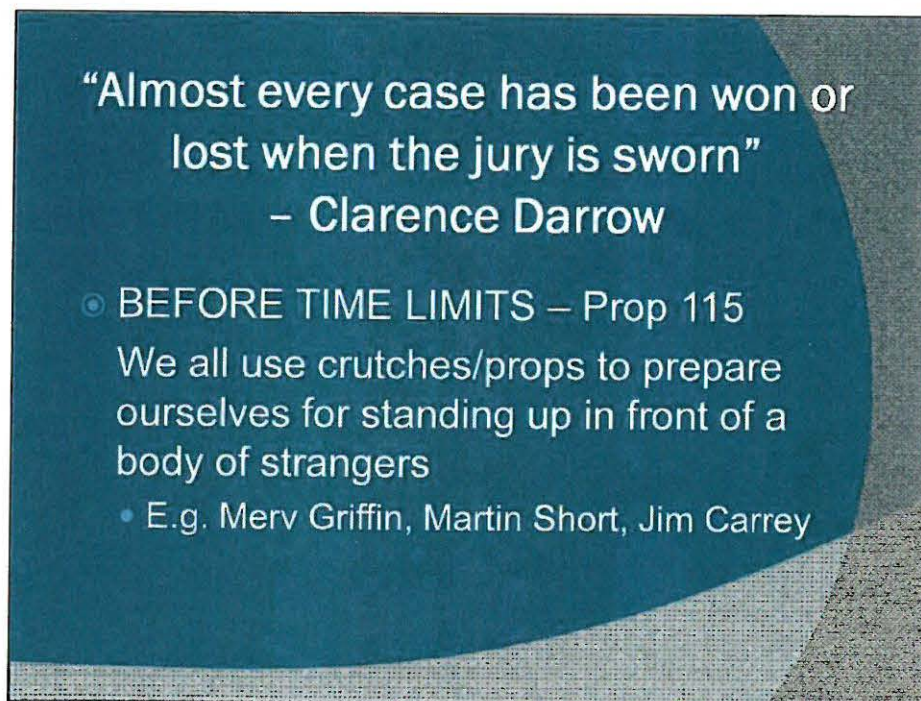
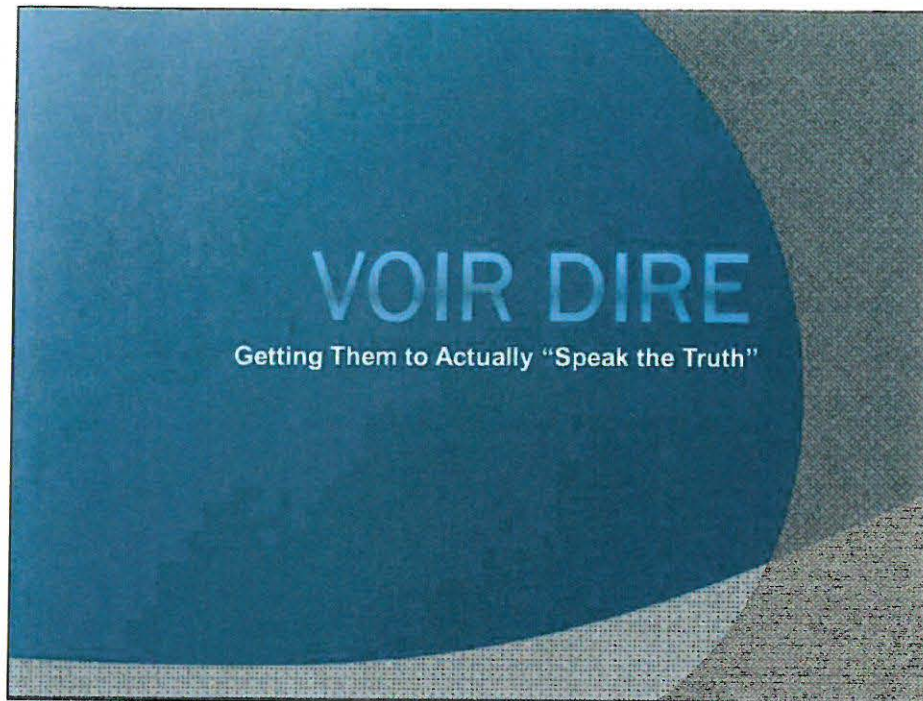
Richard Gabriel

&

Henry Salcido

OCDA Training – September 17, 2016

Time: 9:00-11:30 a.m.



Jury Selection is the Opening Act to YOUR Play

- The truth is that we are **actors**.
- The Jury is watching – and judging – everyone and everything. **Every movement, every action counts.**
- Everything you do – your every action – and everything you say should be calculated to affect/impress the jury.
- Dress the part
 - Nothing flashy.
 - Clean, conservative, yet impressive. If you dress like a sleazy/fancy/overpriced attorney (aka car salesman) then the jury will view you as such.
 - There is a reason why prosecutors have instant credibility.

THE REALITY AND TRUTH OF JURY SELECTION

- The law says we want 12 fair and impartial jurors
- In reality, if we had our choice, we would pick 12 biased jurors in our favor
- Or, we would kick off the 12 who are most biased against us
- This is why we must ferret out their biases and then select the jurors who are most biased for us

YOU HAVE TO / MUST ESTABLISH YOUR CREDIBILITY

How?

1. Your professional manner.
e.g. Your Honor / Counsel / Yes Ma'am
1. Your personal manner / makeup.
2. Where you stand.
lectern?
1. Voice inflection.
2. Sidebars – positioning.
3. Being hyperaware of everyone / everything.
4. React / play on words / statements.
Compton – She doesn't work.
1. Start with an obvious talker.
2. Appropriate humor.
3. How to excuse jurors.

ESTABLISHING CREDIBILITY JURY SELECTION OFTEN IS THE MOST IMPORTANT PART OF THE CASE

- The purpose of the jury selection process is to:
 - (1) get to know the jurors (looking for potential biases);
 - (2) connect with the jury; and
 - (3) to subconsciously plant the seeds of your trial theme(s)
 - **(4) to charm them/ingratiate yourself**
 - Don't argue your case – just plant the seeds. They will blossom later in cross examination and closing argument.
- The jury selection process is not to pick the best jury – this is a byproduct of the process, and ultimately what happens. But the goal is to get them talking to get to know them so that you then can pick the best jury. **DON'T LOSE SIGHT OF YOUR GOAL**

ESTABLISHING CREDIBILITY JURY SELECTION OFTEN IS THE MOST IMPORTANT PART OF THE CASE

- This is your only time to speak with (not to) the jury. You must connect with them. They must view you as the most honest, genuine, trustworthy, friendliest and knowledgeable person in the courtroom.
 - If you are all of these things, they will look to you.
- Human nature dictates that our likes and dislikes towards something – or more importantly someone – will sway our ultimate reasoning.
 - If the jury likes you, they will let you get away with more, will give you more grace/leeway when you go after a witness, will dislike a witness for fighting with you, will be more apt to listen to your argument, and ultimately be more likely to “vote for you (i.e. your client).”
 - If they dislike you, they will be more critical, apt to tune you out during your argument, and “vote against you”
 - E.g. COMPTON Sometimes righteous indignation is okay.
 - More importantly, if they like you, you will have advocates fighting for you – and thus your client – in the jury room.

TIME ISSUES

- Main problem today
- Judges are increasingly decreasing/restricting time for jury selection
 - Not as big a problem for DAs since all jurors walk in thinking the defendant is guilty
 - A problem for all attorneys because it limits the time for building the connection with the jury.

TIME ISSUES - SOLUTIONS

- ◉ Ask the judge for more time
 - Go into chambers with judge and counsel
 - Jointly ask for more time
 - You will never know if you don't ask
- ◉ Stipulate that both sides agree for more time
- ◉ Be smooth in your presentation
 - Judges will often give you more time if you are in a flow, asking relevant questions that go to the heart of bias & challenges for cause
 - Tell the judge you will not violate his time limit
 - Ask the judge to call out your time progress

TIME ISSUES - SOLUTIONS

- ◉ Get the judge to do the work for you
 - Find the case common ground with opposing counsel
 - Agree to the "hot button" areas/issues with opposing counsel
 - Stipulate to having the judge do some of the heavy lifting
- ◉ Examples
 - Stipulate to have the judge read a summary of stipulated facts
 - Non-argumentative facts that both sides agree to and the evidence will prove
 - Stipulate to "common issues/questions" for the judge to question on
 - Goal is to have the judge spend his/her time doing the set up, so you can spend your limited time following up
 - Pre-instruct
 - Stipulate to law that both sides agree upon

STIPULATED FACTS - EXAMPLE

- On August 20, 2011 at approx 7:20 p.m., DEFENDANT was driving his vehicle westbound on Compton Boulevard. He drove through a red signal light at the intersection of Compton Boulevard and San Pedro Street at an approximate speed between 60 and 80 MPH. His vehicle collided with a vehicle being driven by VICTIM.
- VICTIM died as a result of injuries sustained in the incident. Her daughter, was a front seat passenger in her vehicle.
- DEFENDANT told officers at the scene that he was being chased by two individuals in another vehicle and that one of them pointed a handgun at him and he was in fear of being shot and killed.
- DEFENDANT also told the officers that he had smoked some marijuana sometime prior to the incident.

TIME ISSUES - SOLUTIONS

- Prepare a mini-juror questionnaire to judge to ask these questions to the jurors
- Include common questions plus fact specific questions

COMMON DA VOIR DIRE QUESTIONS

- Burden of Proof
 - What burden of proof will you require the People to prove?
 - "Beyond all Doubt" or "Beyond any doubt" and why is this not possible
- Direct Evidence
- Circumstantial Evidence
 - Law views both direct and circumstantial equally
- One witness **if believed** is enough to convict
- Law Enforcement
 - MUST BE ADDRESSED given recent events/news
 - Pros & Cons
 - Unjustified speeding ticket – how did you react?
 - Feel officer doing his/her job or did you feel singled out?
- CSI Effect
 - Difference between fictional entertainment and real life investigations
 - DNA may not be present in all cases. Why? Examples?
 - Videos / Dash cams
 - DNA may be difficult to recover – may not need to recover in every case
 - Would you want evidence like they have on CSI? Why not possible?

COMMON QUESTIONS

- Judge will ask every juror (by questionnaire or in-court colloquy) these questions as part of the general voir dire
- Murder Case (involving gun)
 - What are your thoughts on guns
 - Ever been a victim of a crime involving a gun?
 - Dead body
 - Self-defense
 - Motive
 - Differing eyewitness testimony
 - One witness
 - CSI effect
 - DNA
 - Snitches
 - Cops – present climate

TIME ISSUES - SOLUTIONS

- Must be boiled down to 2-3 main issues/problem areas
- Save enough time to focus
- Question posed to the 18 prospective jurors asking for raise of hands
- Finish up "if the evidence proves beyond a reasonable doubt the truth of the charges, will you have the courage to vote guilty?"
 - Shows you have confidence in your case

JUDGES IMPROPERLY REHABILITATING JURORS THE "MAGIC QUESTION" PROBLEM – THE JUDGE

- "Can you be fair and impartial in this case?"
 - His/her concern
 - Limited jurors - 35
 - Smaller panels
 - Does not want to start all over again
 - Want to get the case started and finished
 - Most judges: "the best 12 are the first 12"
- After you spend your time diving into bias, getting a juror to admit they have a bias, and it will/may affect their ability to be fair and impartial, you challenge for cause.
- The judge then asks the "magic question" and denies your challenge for cause
- Almost no one can/will say they can't/won't be fair – WE ALL BELIEVE WE CAN

THE "MAGIC QUESTION" PROBLEM

- "Breaking the Spell of the Magic Question During Voir Dire" – *Patrick Barone & Michael Skinner*, THE CHAMPION. March 2015
- Improperly rehabilitated jurors can corrupt the jury process
 - Even though we all think/hope we can not allow our baggage to influence our decision – science says it will
 - Our past history develops us (and our thinking/perception) into who we are
- The "magic question" turns the jury process into a fruitless exercise.

PREVENTING THE "MAGIC QUESTION" PROBLEM

- Educate the judge regarding case law on the issue of "rehabilitation"
 - *Morgan v. Illinois* (1992) 504 U.S. 719
 - *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970
- Convince the judge that the attorneys know best
 - *People v. Tyburski*, (1994) 445 Mich. 606 ("a judge cannot have the same grasp of the facts, the complexity and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of each litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until facts are revealed.")
 - May help with time issue too!
 - 15 minutes may reveal a lot of bias, that need more time to be explored. May be appealable issues!
- Additional Preemptory Challenges
- "Motion to Require Constitutionally Adequate Questioning During Voir Dire"
- Jury Questionnaire
 - Allows for detailed jury information without "wasting" Court's time.

CHALLENGES FOR CAUSE

- When there is someone you can – or think you can – try to kick for cause, you need to be able to overcome the standard “can you be fair” question by the judge. Must establish:
 - Strong held opinion – e.g. “sounds like you really believe that”
 - Long held opinion – e.g. “you didn’t just start believing that on your way to the courthouse, you have felt that way for a long time right?”
 - Unlikely to change – e.g. “I could talk to you for 30 minutes, and I probably wouldn’t get you to change your mind/opinion, right?”

The questions are not as important – as long as the question gets them to talk

- “What we say, is who we are”
 - We can never know who the juror is – looking at their biases and thinking - unless they talk. The goal is to get them talking.
- Too much emphasis is put on asking the “right” question.
 - We are trained that the only way to get the “right” answer is to ask the “right” question. This may be true when it comes to questioning witnesses, but it is not true when it comes to jury selection. The only right question is the question that gets the jurors talking.

WHAT IS A RIGHT ANSWER?

- The “right” answer is any talking answer. The answers – any answers - are a window into that juror.
- If you tell them – or cue them – into what the right answer is to your question, they will give it to you, whether they believe it or not.
 - Remember, inherently, people don't like speaking in public. They will do whatever they can to divert the attention from them, and get you to move on so that they can stop talking. If you are only looking for the right answer – they will learn to give it to you.
- Getting the “right” answer is not as important as getting them to tell you what they really feel/believe

STOP BEING A LAWYER, AND BE A HUMAN BEING

- Jury selection is the process of communicating and connecting with people.
- All too often, lawyers can't stop talking like lawyers, but we learned the art of communicating long before law school. Use it.

BE YOURSELF

- You are trying to connect with the jury. If you are fake, the jury will see it.
- Don't duplicate style. Use ideas/questions from other attorneys.
- The importance is incorporating those ideas into your own style.

BE HONEST

- If you want a jury to be honest with you, you have to be honest with them.
- Honesty promotes trust.
- They will start out distrusting you. Get them to trust you by giving them honest disclosures about your fears/weaknesses.
 - Especially if you can honestly disclose personal knowledge that relates to your case.
 - E.g. my daughter was molested as a little girl, just like my client is accused of doing.
 - E.g. my mother was murdered, just like my client is accused of doing.
- The more honest you are with them up front, it will carry through to closing.

BE CONFIDENT

- If you are not, the jury will sense your uneasiness and possibly assume lack of confidence.
- **A person who is confident often has instant credibility.**
- If you are confident, it will translate into your having confidence in your case.

BE COURTEOUS

- Please and thank you go a long way.
- Jury's don't like it when you fight with the judge.
- Jury's don't like it when you unnecessarily fight with your opponent.
- But, if necessary/required - make sure any fight (e.g. opposing counsel, judge, juror) is justified
- Make sure any outburst/outrage is righteous
- Always ask for permission

BE LIGHTEARTED

- Humor is the best medicine
- An **appropriate amount** of lighthearted humor can break the ice. Remember, goal is to get the jurors talking
- E.g. If juror not giving detailed answers (only yes or no) say "The longer you say 'no' or 'yes' the longer I am going to stay with you." Makes other jurors laugh. Also lets the jurors know who is in charge.
- E.g. Ask a bashful juror if they would like to give a 15 minute speech
- E.g. Say "the sooner you answer my questions, the sooner I will move on."

BE NON-JUDGMENTAL

- You can never judge – or even give the appearance of judgment – a juror. Otherwise they, and the rest of the panel, will never talk with you.
- Ask open ended questions
- Be interested in what they have to say
- Everything a juror says is a gift – you can only deal with a juror's mindset and attitude if you know about it.
- Be empathetic
 - E.g. Juror told the judge during voir dire of a ADW case that she had been attacked on the street a week before. Judge asked the standard "will that affect you in this case." She said no. Judge did not follow up. Attorney's first "voir dire" question was "are you okay?"

BE THE COMMUNITY LEADER

- One goal of jury selection is to plant the seeds of your case (e.g. facts, themes, reasoning, etc.)
- You must work to:
 - (1) plant those seeds with everyone, creating a commonality between the jurors, and
 - (2) be viewed as their leader.
- A leader is one of the group. Make yourself one of them.
 - This is done throughout the trial, not just jury selection
- People will follow a leader. People trust a leader. People will listen to a leader. People will agree with a leader.

DO NOT TAKE NOTES

- DO NOT take notes during jury selection when you are standing and talking with the jurors.
 - Hire or bring someone to take notes for you.
- You are getting to know the individual jurors. You would never take notes during a cocktail party or 1st date, so why take notes when you are trying to get to know your jurors?
- NEVER let your client take notes about jurors. Jurors don't like defendants writing down their personal information.

DO NOT BE AFRAID OF YOUR WEAKNESSES

- As we all know, we never have a perfect case. There are facts, law, or witnesses/victims that we wish we could change. But the reality is we cannot hide from them. So, why not bring them out into the open. BE HONEST about your case weaknesses.
- There are things we don't want to talk about, but we know we have to.
- "What I am afraid of is [bad fact/theme/thought process]. Is that a legitimate fear? Do I have reason to be afraid?"
- E.g. victim rap sheet, sex victim is a prostitute
- Promotes Honesty

HAVE AN IDEA OF WHAT TYPE OF JURY YOU WANT

- Jury Consultants are critical
 - Richard Gabriel
 - If no money, run your case by as many different types of "reasonable" people you can (e.g. men, women, rich, poor, black, white, etc.) to get a reaction.
- If you are worried about a hung jury, you want a jury who will avoid conflict. Select strong jurors who are for you, they will lead/control the others.

USE WHO YOU CAN

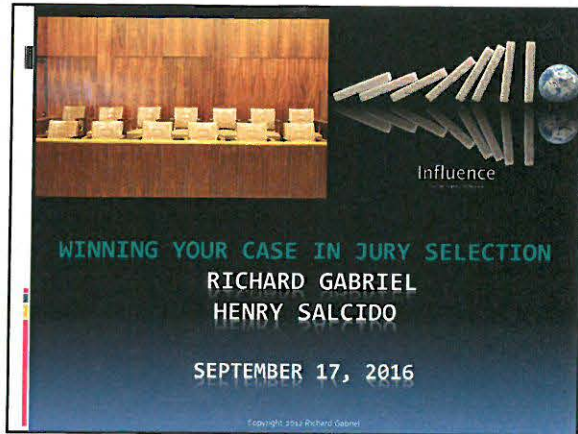
- If there is a juror you know either side will kick, use them.
- E.g. there was a juror who was a police captain. I knew I was going to kick him. By the time I was done with him, the jury knew that police lie, make mistakes, fabricate, etc.

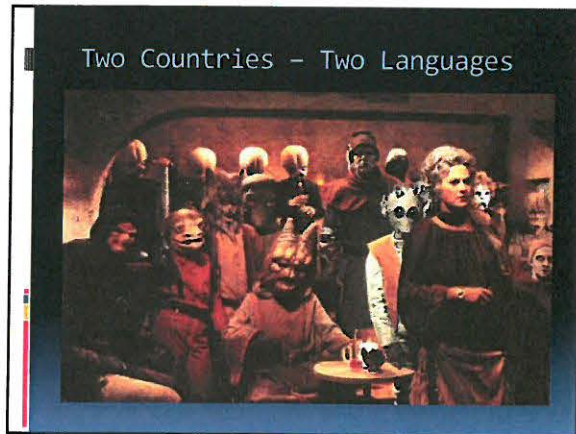
THE JURY HAS TO GET THERE BEFORE YOU DO

- Too often, attorneys will pound away at a concept until the jurors "get it" and start to give the right answer. However, like Pavlov's Dogs, the other jurors will learn that if they give the "right" answer, you will stop asking them questions. This is contrary to the ultimate goal of jury selection- TO GET THEM TALKING.
- Jurors will hold onto the ideas they come up with on their own, before they attach to the ideas you give them, even if it makes complete logical sense.
- Jurors cannot/will not understand/accept things that are outside their knowledge/experience.
 - Must make every point understandable on a 3rd grade level. Don't dumb it down, but simplify it. STOP BEING A LAWYER, AND BE A HUMAN BEING

TRUST YOUR GUT

- 80% of all communication is non-verbal.
 - You must pay closest attention to this. It is not necessarily about what is said – although that is important – but how it is said.
- You will never learn enough about the individual jurors during jury selection to know whether or not they are a “good” juror.
- Even jurors who give the “right” answer, may not be good jurors for your case.
- Don’t chase the “right” answer. Any answer they give you is the “right” answer. The goal is not to pound home a point, but rather to open up a line of communication







Jury Myths

- Jurors are blank slates
- Jurors are passive observers of a trial
- Fairness and impartiality are standardized
- Jurors listen raptly to the evidence and the experts
- Jurors rely on attorneys to interpret the evidence
- Jurors are guided by the law
- Demographics determine preference



Truths about Jurors and Cases



- Jurors are inherently resistant
- Jurors want to learn more than they want to be persuaded
- Life experiences and beliefs drive juror interpretation of facts
- Jurors use stories to understand the case
- Jurors work hard to organize a vast amount of case information

Jury Decisions

The truth, in administering justice, is emergent, cobbled together from the collective puzzle pieces in twelve minds, driven by emotion, confirmed by fact. Evidence often follows emotion. An argument starts with a gut feeling, which leads you to seek out the evidence that supports or rejects your hunch. Even with that evidence in hand, selectively parsing it out to overcome the gut feelings of 11 other people required more digging, more discussion.


- Juror Phillip Bump - People of NY v. Anthony Marshall








The New Juror




- Is on a computer or television 6-7 hours a day
- Has a short attention span
- Controls information w/ phone, remote, and mouse
- Needs visuals
- Movies, classes, and religion
- Amateur detectives and psychologists

Primary Juror States of Mind


1. Confusion
2. Suspicion



Jury Selection



Your evidence is only as good as your audience.



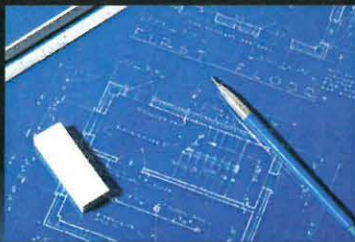
Primary Task in Jury Selection

To understand **HOW** jurors' life experiences and beliefs will affect how they view the case.



Voir Dire Strategy #1

Have a Plan




Voir Dire Strategy #2

Identify Juror Bias
(Step into Opposing Counsel's Shoes)




Voir Dire Strategy #3

Create Open-Ended Questions



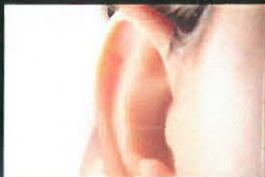
Voir Dire Question Design

- Identify the three to five major bias/preference issues in the case.
- Identify experience or attitude questions around those issues.
- Formulate open questions
- Formulate follow-up questions
- Design general and even ambiguous questions
- Leave room for silence



Voir Dire Strategy #4

Really Listen to Jurors




Voir Dire Strategy #5

Facilitate a Dialogue Between Jurors




Voir Dire Strategy #6

Stay Curious, Fascinated,
Non-Judgmental, and Hungry
for More Information




Voir Dire Strategy #7

Do Not Indoctrinate Jurors
(Or wait until the end of voir dire and
do not reveal positive jurors.)




Voir Dire Strategy #8

Don't Worry about
Poisoning the Panel



A graphic of a 'DANGER POISON' sign. The word 'DANGER' is in a red oval, and 'POISON' is in large black letters below it, accompanied by a skull and crossbones icon.

Voir Dire Strategy #9




An illustration of a balance scale, symbolizing fairness and impartiality.

Don't Use the Phrases:
"Fair and Impartial"
or
"Set it Aside"
(Unless Trying to Rehabilitate a Juror)

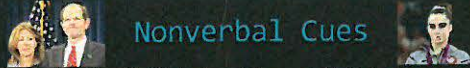
Voir Dire Strategy #10

Use Nonverbal Signals to Confirm
Feelings About the Juror



A photograph of three people: a woman on the left, a man in the center, and a woman on the right. The man is wearing a suit and tie, and the woman on the right is wearing a medal.

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Nonverbal Cues

1. Watch for "baseline" behavior and changes in that behavior
2. The too perfect answer
3. Look for covering behavior
4. Dress and grooming can telegraph a juror's conformance with social norms
5. Speech frequency, word count, and a louder volume indicate opinion leaders
6. Interpret micro-expressions for emotional reactions
7. Message t-shirts, reading material, tattoos, and body piercings should be carefully analyzed
8. Group behavior indicates deliberation dynamics
9. Be careful of reading too much into certain body language signals
10. Race, religion, gender, socio-economic status, and culture all have their own nonverbal markers

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Voir Dire Strategy #11

Look at the Whole Panel When Making Strikes



Voir Dire Strategy #12

Target High Risk Jurors



Voir Dire Strategy #13

Tailor the Case to the Audience



Juror Characteristics



Layer #1: Demographics

Layer #2: Life Experiences

Layer #3: Attitudes/Beliefs/Values

Layer #4: Personality

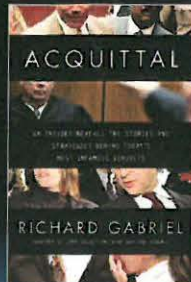
Layer #5: Group Interaction

Jury Selection: What to Look For

- Peel the onion
- Look at decision process
- Look at expectations, standards & rules to live by
- Look at neutral or non-responsive jurors
- Stay curious



Shameless Plug



Available Now on Amazon

What is real persuasion?




"Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win. The greatest victory is that which requires no battle."

— Sun Tzu, *The Art of War*

Strategy #1:
Frame the Case


- Different than a theme
- Defines the role of the jury/judge
- Determines where the jury focuses and spends their time




"Appear weak when you are strong,
and strong when you are weak."
— Sun Tzu, *The Art of War*

Strategy #2:
Establish POWER

- Expertise, Knowledge and Experience
= POWER
- For a jury, those who have the greater
POWER, carry greater responsibility, have
higher standards, and a higher code of
conduct.




"WITH GREAT POWER COMES
GREAT RESPONSIBILITY"
Stan Lee




Strategy #3:
Define the Rules

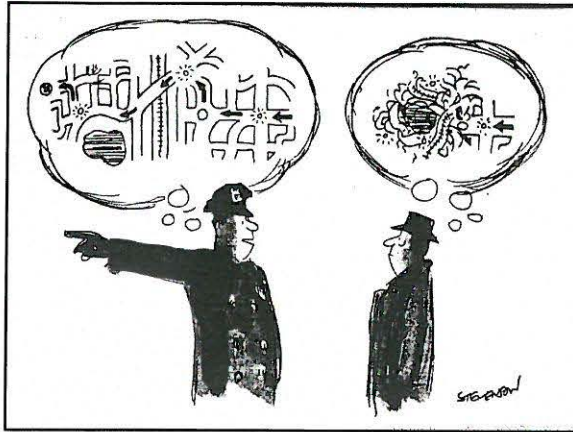
- Establish the rules that you say the other side must abide by
- Establish how they broke these rules



Strategy #4:
Create Context


- What is the background or historical information that would allow the jury to better understand the issues in the case?






Strategy #5:
Organize the Case

- Group in 3 main points
- Create headlines and subheads
- Sequence the points to the narrative
- Prioritize




41

Strategy #6:
Know the Rabbit Holes




Strategy #7: Simplify the Case

1. What happened?
2. What did they do?
3. Why did they do that?
4. What does that mean?
5. Why was that a good thing (or a bad thing)?
6. What happened next?




Strategy #8: Teach the Case



- Glossary of Terms
- Tutorials
- Historical background

Strategy #9: Tell a Good Story



- Include small, legally irrelevant detail
- Walk jurors through your thought process
- Embrace the flaws
- Create the **best** sequence of evidence and events
- Interpret the defense's evidence

Strategy #10:
Identify the Values and Emotions



- What are the underlying emotions in the case?
- What are the most important values to jurors?
- What is the tone you want to convey?

"So in war, the way is to avoid what is strong, and strike at what is weak. Thus the expert in battle moves the enemy, and is not moved by him."

— Sun Tzu, *The Art of War*

Strategy #11:
Take the Path of Least Resistance



Strategy #12:
Embrace the Undeniable Truths
Helpful, candid and forthright testimony



Strategy #13: Anchoring




Who thinks that the
population of Turkey is
26 million people?



Strategy #13:
Create Equations – Link to a Verdict

- Use jury instruction language throughout the trial
- Use opposing side's case to support your verdict
- Use admissions to link to verdict language



Your Jury Will Treat You
Exactly How You Treat Them



For more information about
consulting services, CLE's, and
articles on litigation persuasion:



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