16 Simple Rules for Better Jury Selection

by Mark Bennett

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When a lawyer screws up jury selection, there is little hope for the rest of the trial.

After watching many inauspicious jury selection efforts by prosecutors and criminal defense lawyers, I realized that I might be able to contribute to the state of practitioners' jury selection art by codifying a few of the things I've learned in fourteen years of trying cases and many hours of extracurricular study.

Simple Rule Zero: One Rule to Rule Them All

Jury selection is not only—nor even mostly—about selecting (or deselecting) jurors. Your objectives in jury selection are: 1) to build rapport with the jurors, forming a group to include you; 2) to educate the jurors, or to help them educate each other, about the issues in your case; and 3) to find and eliminate unfavorable jurors. If you use voir dire simply to find the jurors whom you want to strike, you're missing out on most of the value of jury selection.

Simple Rule 1: The Nike Rule

Just do it. This is a rule on three levels.

First, the view from 30,000 feet: without picking juries, you will never learn how to pick a jury. Reading about jury selection is better than asking other people for their scripts, and watching jury selection (good, bad, or ugly) is better than reading about it, but there's no substitute for getting up in front of 24 or 60 people[1] and trying to get them talking about what they feel and believe. Better that you should do all three—study, watch, and do—but if you have to choose one, just do it.

The second part of the Nike Rule, in the downwind leg: if you're going to trial in a court (like most federal courts) that doesn't

allow the lawyers to talk to the potential jurors, figure out a way to get permission. A judge doesn't share the lawyers' three jury-selection objectives; the judge's objective in jury selection is simply to get twelve people who can promise to follow the law.

This was powerfully illustrated in a cocaine case that I helped try in U.S. District court in Houston. The first time we picked a jury, the judge brought in 45 or 50 people and gave each lawyer 40 minutes to talk. My colleague busted the panel—there weren't enough potential jurors who could commit to being fair, after he had talked with them for 40 minutes, to allow the parties to use their peremptory challenges and still get a 12-person jury. The next day Judge Atlas brought in another 45 or 50-person panel and did all of the questioning herself. She asked the typical U.S. District Judge questions—"Can you be fair?"; "This is the law; will you follow it?"—and there were more than 24 people left after we lawyers had exercised our 16 peremptory challenges—with the same facts, same law, same lawyers, and same judge.

Was the second panel intrinsically fairer than the first? That's unlikely. Demographically, it was much older, whiter, and otherwise less likely to favor our client than the first.

The difference between the two jury selections was that the lawyers' questioning was designed to get people to reveal things about themselves, and the judge's questioning was designed to get people to agree with the law. Even the best-intentioned questioner sitting up high in a black robe is never going to get the frank answers that a mere human can get, so get the judge to let you question the jury, if possible. (And if do you get to question the panel in a jurisdiction where it's usually not allowed, don't bust the panel unless you must.)

The third part of the Nike Rule comes into play on final approach, when you get up to start talking. Don't worry, don't think about it, don't plan your next question. Forget your script, forget the prosecutor, forget the judge, and talk with the people. The time for worrying and thinking and planning, for scripts and prosecutors and judges, is past. There is nothing more that you can do to be prepared for this moment.

Just do it.

Simple Rule 2: The Blind Date Rule

You may have noticed that people don't like lawyers very much. Or rather, they don't like people acting like lawyers very much. Once they get to know them, they like the human beings behind the label just fine, but it's not the jurors' job to go behind the label, and if you label yourself, "Big Important Attorney" they're not going to try to go behind that label. So Rule 2 of the Simple Rules for Better Jury Selection was originally The First Date Rule:

Treat jury selection like a first date with everybody on the jury panel.

But "blind date" is a better metaphor, since the parties to a non-blind date have presumably each chosen the other, or at least formed first impressions. In jury selection, neither the lawyer nor the jurors have exercised any selection before arriving in a room together.

So: *Treat jury selection like a blind date with everybody on the jury panel.*

How is jury selection like a blind date with 60 people?

Someone, thinking they might be a match, has put two parties in a room together. One party—the lawyer—has some desire to be there and some idea of a desired outcome. Neither party knows much about the other. The lawyer wants to learn about each juror (to find out if he or she is a suitable mate) while persuading him or her that the lawyer is likable, and thus a suitable match as well. It's not a perfect metaphor, but it steers us toward what should ideally be an unlawyerly way of dealing with those 60 human beings.

In a blind date, lecturing is out of the question. You can achieve neither of your two immediate goals (learning about your potential mate, and appearing not to be a creep) by lecturing. People feel appreciated when they are listened to. So you can achieve both of your immediate goals by listening to the jurors' answers.

The jurors' answers to what? To your questions, sure, but the questions are secondary; it's the answers that are important. If you could get your jurors talking without asking any questions, and then just listen, you'd be winning.

If you have to ask questions, what kind of questions? Yes-or-no questions can feel like an interrogation; open-ended questions might feel a little more comfortable.

Questions about facts, or about feelings? A little bit of both—either can get intrusive—but since jurors decide cases on feelings, and then use facts to justify their decisions, fact questions are most useful when they are introductions or shortcuts to the feeling questions.

Note that it's not 60 blind dates. It's one blind date with 60 people. Those 60 people have formed a group in the hours that they've been processed through the courthouse to sit before you. They know each other's names, they have a pecking order, they have inside jokes. If you treat one of them without the proper respect you can offend all of them. (If, on the other hand, you show respect for one of them, they'll all appreciate it.) Before you shut one of them down, you'd better be sure that you're culling an outcast.

If you're good, you'll wind up with six or 12 people who like you enough to want to spend a couple of days in trial with you and who you know enough about that you are comfortable returning the feeling. If you're very lucky, your adversary will have demonstrated her big-important-lawyerness to the jury, and the your jury won't feel the same way about her.

Simple Rule 3: The Shrek Rule

They are walking through the forest. Shrek belches.

DONKEY: Shrek!

SHREK: What? It's a compliment. Better out than in, I always say. (laughs)

DONKEY: Well, it's no way to behave in front of a princess.

Fiona belches.

Rule 3, the Shrek Rule, is this: *Better out than in.* It's related to the "hair in the food" rule. If there's a hair in your food (and you should always assume that there is), better that you should find it; if your jurors have unpleasant or frightening ideas (and they always do), better that they should reveal them in jury selection than conceal them until deliberation.

In jury selection, all untruthful answers are bad. If there are bad truthful answers, though, they are not what most trial lawyers are used to thinking of as bad. A truthful "I think the government is always right," for example, might be a terrible answer . . . for the government, for the same reason that it's a great answer for the defense: it allows the defense to identify, isolate, and strike a raging pro-government juror who, if he'd kept his mouth shut through jury selection, might have carried his views into the jury room. (It also gives the defense a convenient foil for uniting the reasonable remainder of the panel against such loony notions.)

Sometimes lawyers are concerned about these jurors "poisoning the entire jury panel." Except where jurors reveal prejudicial facts that won't be part of the case, I don't buy it. People leave jury selection believing what they believed going in. The juror with off-the-wall opinions might push other jurors to entrench their contrary views, but she is no more likely to change her fellow jurors' minds in an hour of jury selection than the lawyer is.

The Shrek Rule dictates that the lawyer should, rather than shutting down (or not listening to) the potential juror who has views that would be unhelpful in the jury room, draw that person out and encourage him to share and expand upon his views.

How? Listen attentively and actively, thank him, and ask how many others agree. The more people agree with him, the better: *Better out than in.*

Simple Rule 4: The 90/10 Rule

We lawyers love to hear ourselves talk; that can be the death of a jury selection. In a good voir dire, the jurors do most of the talking. Even if I can't hear what the lawyer and jurors are saying, I can tell a good voir dire from a bad one by listening, as long as I can tell who is talking. Lawyer talking most of the time? Bad. Jurors talking most of the time? Good.

So the fourth Simple Rule for Better Jury Selection is the 90/10 Rule: *Let the jurors talk 90 percent of the time (or more) in voir dire.*

Try to find a way to elicit more information with fewer words (more about that later, especially in Rules 8 and 11). If you have a brilliant defense, try to find a way to get one of your jurors to come up with it. If a juror or your adversary says something that must be refuted, let your jurors refute it (if, given the choice, none of them refute it, it's probably not worth refuting). Among the many benefits of talking less, you'll learn more, the jurors will like you more (or at worst dislike you less), and the judge will be more reluctant to limit your time. Get them talking, and keep them talking.

Simple Rule 5: The MacCarthy's Bar Rule

To the lawyer who identifies himself as "attorney" and "Esquire," and wants people know that he has a law degree and is therefore superior: This one is for you.

The fifth Simple Rule for Better Jury Selection is blatantly stolen from and therefore named in honor of Chicago federal public defender Terry MacCarthy, who likes to say, "Talk in a courtroom like you would talk in a barroom."

The MacCarthy's Bar Rule is: *Talk in jury selection like you would talk in a barroom.*

This rule is in part a matter of word choice: don't use lawyerly words. If you might have to define a word for the jury, find some substitute that you won't have to define. For example, this process that we're studying is not "voir dire" but "jury selection." "Credibility" becomes "believability." The "jury charge" becomes "the judge's written instructions to you at the end of the case." And so forth.

It is also in part a matter of tone: don't condescend. You may think you're better than some of those 60 people, but you're not. More importantly, if it seems to those 60 people that you think you're better than any of them, they're going to punish you for it. But don't grovel, either. Nobody likes a groveler.

We could discuss word choice and tone, but it comes down to status. Jury duty is the ultimate leveler. You can play higher status than your jurors, talking down to them. They might nod, smile, and humor you, but they'll dislike you, and when they get out of your control (that is, back in the jury room) they're going to show you who is in fact boss—probably to your client's chagrin.

Or you can follow MacCarthy's Bar Rule, treating the jurors like equals whom you need to like and understand you. They won't bow and scrape to your superiority, but they will understand you more, like you more, and communicate with you better.

Talk in jury selection like you would talk in a barroom.

Simple Rule 6: Improv Rule I

Rules 6 and 7 are timely, come from days of intensive improvisational theatre training at Bay Area Theater Sports in San Francisco.

The first rule from improv, Simple Rule 6, is: *No scripts*.

Voir dire scripts don't work. You're not going to get very much information if you walk the jury through your list of questions. If you have a list of questions, you're not ready for the unsettling answers.

More than a few times I've heard a potential juror tell a lawyer that the juror lost a family member to a drunk driver, only to have the lawyer make a note on a piece of paper and move on to the next question. If someone tells you his brother was killed by a drunk driver, there is a correct response, and it's not written there in your list of voir dire questions.

This is related to the Blind Date Rule as well: if you show up for your blind date with a list of questions, you'll be seen as creepy, and rightly so.

Most trials boil down to only one or two issues. When you go into jury selection, have a few subjects you want to discuss with the jurors. Figure out a few ways to get the jurors talking about each of these subjects, then stand up and do it.

No scripts.

Simple Rule 7: Improv Rule II

Rule 7, also from improvisational theatre, is: *Don't block.*

In improv, blocking is when you take another actor's idea, and negate it:

"It sure is quiet here on the moon."

"No, this is the bottom of the sea."

Your partner looks bad, and you've killed a scene. In improv, if your partner says you're on the moon, you're on the moon.

You may not like hearing them (see The Shrek Rule), but the jurors' ideas are their ideas, and are true to them. If a juror says something that makes you uncomfortable ("Anyone who doesn't testify must be guilty"), don't argue with it, deny it, or otherwise block it. Instead mentally stick "in my world," on the beginning, and deal with it as a belief that is sincerely held at least at the moment of its revelation. Then turn it to your advantage. "How many of you feel the same way? Do any of you feel differently? Why?" (Notice the difference in wording between the first and second question. We'll talk about that in Rule 16.)

If a juror says something that makes you uncomfortable and you ignore it, or browbeat the juror, or argue, you cut off the flow of information not only from that juror, but also from every other juror. You will probably win the argument, but you make yourself less likable and detach yourself from the group that you are trying to form with the jury. In other words, you make it impossible to accomplish the major goals of jury selection.

So *don't block*.

Simple Rule 8: The Shrink Rule

We lawyers are analytical creatures. The LSAT doesn't include a section of intuition puzzles. So Simple Rule 8 for Better Jury Selection is The Shrink (as in therapist) Rule: *How Do You Feel About That?*

Jurors decide cases based on their guts, then look for intellectual reasons to support their emotional decisions. As a result of confirmation bias they might not see, might disregard, or might discount all facts that don't support their (gut) preconceptions.

If you want a really hard job, try to win your case beginning with the presentation of evidence. It's not always impossible, but it's not nearly as easy as using the evidence to confirm what your jurors already believe.

Can you talk with (or to) the jury about ideas and things, and trigger a discussion of their emotions? Not likely. Can you talk with them about ideas and things, and influence their emotions? Sure, but it's an unnecessarily roundabout approach.

Here are some possible ways of finding out jurors' views on one of the issues in your case:

- Bad jury selection question: "[Proposition you'd like your jurors to accept.] Who disagrees?" (Followed, for the lawyerly coup de grace, by "I take it by your silence that you agree.")
- Better jury selection question: "What do you think about [issue]?"
- Even better jury selection question: "How do you feel about [issue]?"

If you want to know what people's guts say, you can't ask them what their brains say.

How do you feel about that?

Simple Rule 9: The Beer Pong Rule

In Beer Pong, "the ball is always in play. If the ball hits the floor, ceiling, wall or even leaves the room it can still be, and should be, hit back in the direction of the table."[2]

So it is in jury selection, except that "the ball" is the conversation and "the table" is the case. Almost anything that any potential juror says can be hit back toward another juror.

Simple Rule 9, The Beer Pong Rule: *The ball is always in play.*

For example, Mr. Jones says that he thinks your client is guilty because she is charged with a crime. You could flinch, make a note, and try to move on, or you could hit the ball back:

"How many of you agree with Mr. Jones?"

"Who disagrees with Mr. Jones?"

"Ms. Smith, how do you feel about what Mr. Jones just said?"

"Ms. Leonard, Mr. Jones says that my client is guilty because she's charged. What are we doing here, then?"

or

"Mr. Brown, I see you sadly shaking your head and fighting back bitter tears. What's going on with you?"

Even when a particular topic is exhausted, you can keep the ball in play: "Who thinks it's time to move on to another subject?" Let the jury help you decide. (This is an idea that I hope runs through these rules: that jury selection is a game played with, and not against, the jurors.)

Sometimes someone (a juror? the judge? you?) steps on the ball and it won't bounce anymore. Then it's your job to find another ball and serve it.

Until then, though, *the ball is always in play.*

Simple Rule 10: The Marathon Rule

I do not do foolish things like play beer pong or run marathons. Instead, I draw inspiration from the foolish things that others do. So the next Simple Rule for Better Jury Selection is The Marathon Rule: *Save something for the end.*

In jury selection there's the possibility that, while the game is still afoot, the court will try to artificially limit your time. Or, if the judge doesn't limit your time, when you're conducting an organic unscripted jury selection, you and the jury will at some point all just run out of steam—endings are difficult to improvise.

In the first situation, a little more than an "out" is called for. So have some lawyerly yes-or-no questions to toss into the mix in case a curmudgeonly judge starts grumbling while you're engaging the jury with open-ended questions. "Mr. Gonzalez says that he'll assume that Fred is guilty if Fred doesn't testify; that reminds me: how many of you have been witnesses in criminal cases?" or "Ms. Berg has told us that she is married to a police officer. How many of you have close relationships with cops?" Those are the kinds of questions that the judge is used to hearing lawyers ask, and they might buy you a little more time to ask questions that will do your client some good.

Whether the judge finally decides that the jury has had enough jury selection goodness or you realize that the game is over, it's good to have an "out"—one final unifying question to ask the entire panel, so that you can sit down on a high note.

This one question should be designed to get all of the potential jurors to agree on some fundamental proposition favorable to your case, and therefore will violate most of these rules. For example, "Can we all agree to wait till all of the evidence is in before deciding this case?" or "Raise your hand if you promise to give Fred a fair shake."

Think of a question you like. *Save something for the end.*

Simple Rule 11: The Playing Doctor Rule

So you're in jury selection, and you want to get the jurors talking about things that they're not used to discussing in front of 60 near-strangers. What do you do?

Well, everyone knows The Playing Doctor Rule: I'll show you mine if you show me yours. That's our 11th Simple Rule for Better Jury selection: *If you want to see theirs, show them yours.*

In jury selection, show them what? Whatsoever a man soweth, that shall he also reap. You want truth? Tell them the truth—if you lie to your jury, they'll lie to you. You want depth? Go deep—if you only talk to the jury about shallow things, they'll do the same.

If you want your jurors to talk about their prejudices against the minority group your client belongs to, what do you need to talk about? Your own prejudices.

Everyone has prejudices. It's entirely natural; we're hardwired by natural selection to prefer members of the group we identify with over members of other groups. We can overcome our hardwiring, but not by pretending the hardwiring doesn't exist.

If you haven't committed the introspection necessary to acknowledge your prejudices, you're not dealing with them. More to the point here, you can't expect your jurors to do any more than you're willing to do yourself. Imagine: you get up and say, "I don't have any prejudices. Do any of you?"

What are your personal issues in your client's case? When you first heard about the case, what was your "yeah, but . . . ,"?

"Yeah, but he shouldn't have been there in the first place"?

"Yeah, but he's a gang member"?

"Yeah, but this is his third DWI"?

This "yeah, but," is probably a good place to start showing the jury yours. Why? Several reasons, but this should suffice: Because your "yeah, but" is probably their strongest "yeah, but" and if you can at least mitigate (if not eliminate) that factor before the prosecutor gets up to make his opening statement, there's a chance that the presumption of innocence will last at least until you get up to make yours.

How do you show them yours? However you're uncomfortable doing it. You're going to ask the jury to do something uncomfortable, sharing intimate truths with strangers; you can't expect them to do that if you remain within your comfort zone. Push a little bit farther than is easy for you. And please tell them the truth: this is not a time to be making up cute little stories.

If the truth is that your client's tattoos made you nervous, tell the jurors that. If that's easy for you, tell them more specifically how the tattoos made you feel—in danger, frightened. If that's easy, push a little farther out—talk about what, when you saw the tattoos, you imagined about your client that frightened you. It's okay to show that you don't feel the same way any more (by sitting close to your client, touching him), but don't talk about how you got over it—you want jurors to tell you how they are going to get over it.

Do you have the audacity to tell the 12 people who will be deciding your client's fate that you found him scary? If you don't, why would they admit to you that they find him scary?

Show them yours. They'll show you theirs.

Simple Rule 12: The Field Trip Rule

In The Blind Date Rule, I pointed out that the 60 potential jurors, by the time they reach the courtroom, are no longer strangers to each other; they have formed a group.

When you get up to talk to them, what's your relationship to the group? You're an outsider. You are not someone who they are eager to follow. In the best-case scenario, your opposing counsel has gone before you and acted like Big Important Lawyer, and the jury is expecting more of the same from you (in the worst-case scenario, your opposing counsel has found a place in the group).

So Rule 12, The Field Trip Rule, is: *Stay with the group!*

You have plans for voir dire, and places you want to go—a story to tell, compelling arguments to make, information to discover. But you've got to go there with the group.

You will find friends on the jury panel—characters who seem simpático and bright, and understand what you're trying to convey. Don't go off and chat with these friends; if you do, you're not staying with the group. Your friends are the first people the other side is going to strike, and if you've spent all your time chatting with the

people with whom you're most comfortable, you'll be left with twelve jurors with whom you haven't talked. Jury selection is not a time to stick with what is comfortable.

Like people, groups have personality and character. They also have rhythm. If you are talking with Mr. Jones about guns and Mr. Jones is done with the topic, it doesn't mean that you are done because the rest of the group might not be. You have some authority, because of the situation, to choose what the group talks about, but staying with the group means making sure the group is ready for you to move on to the next topic, and knowing when the group is ready for you to quit.

As you observe the group (from the moment they enter the courtroom), you'll start to see some of the group's internal divisions and relationships. Ms. Gonzalez and Mr. Moncriffe definitely get along, but Ms. Gonzalez does not care for Ms. Gupta. Mr. Stanley has strong definite feelings about drugs; Ms. Anderson rolls her eyes at him. And so forth. The twelve jurors that wind up in the box are going to form their own group, and its dynamics are going to be based on the dynamics of the larger group.

It's all about the group. *Stay with the group.*

Simple Rule 13: The Undertow Rule

The group of The Field Trip Rule has 60 heads and 60 bodies, each one of which is throwing off communications cues every second. It is impossible for any lawyer, talking to 60 people, to listen to and record what one person says and how she says it while tracking the nonverbal communication provided by the other 59.

So The Undertow Rule is: *Never swim alone.* Get someone on your team to pick the jury. It doesn't have to be a jury consultant. Second-chair jury selection is an excellent assignment for a young lawyer seeking trial experience, but your assistant doesn't even have to be a lawyer. You want someone at your side to notice that Mr. Bryant was looking crosswise at you while Ms. Velasquez was hanging on both lawyers' every word. All socially-competent people are experts at reading faces and body language.

You have your client, but his position as the guest of honor—especially in a criminal trial—suggests that he might not be entirely socially competent (not that he's necessarily guilty, but people rarely wind up charged with crimes because they've made all the right decisions). Besides, this is a situation in which four eyes is good, but six eyes is better.

Never swim alone.

Simple Rule 14: The Atticus Finch Rule

Recall the scene near the end of *To Kill a Mocking Bird* in which Atticus Finch, having lost the case, wearily packs up his things to leave the courtroom. As he's preparing to leave, the blacks in the gallery stand up for him; Reverend Sykes tells Scout, "Miss Jean Louise? Miss Jean Louise, stand up! Your father's passin'."

Why did they stand up for Atticus Finch? Because he was an upright, honest man fighting for what he—and they—knew was right.

Simple Rule 14: The Atticus Finch Rule: *Be the lawyer they want to stand up for.*

Simple, right? Not easy, in some cases maybe not even possible, but simple. Atticus Finch acted with courtesy and dignity. He didn't lie, cheat, or rant.

Even in the worst case for the defense, there are human beings on the other side. The jury panel is watching us and listening; they see how we behave toward the judge, witnesses, court staff, prosecutors, and most particularly them. How we treat other people reflects on us and on our clients.

This doesn't mean we have to be meek. Sometimes in the course of battle feelings get bruised; the jurors know that. They will forgive us our zealous advocacy, but they won't forgive us our rudeness.

Nor will they forgive us if they catch us lying, or cheating, or pretending to be something we aren't. And since they can't punish us except through our clients, that is what they will do.

So don't be rude. Don't lie. Don't cheat. Don't pretend to be something you aren't (unless you're a rude lying cheater—then *pretend with all your might*). Say "ma'am" and "sir" and "please" and "thank you," and listen when someone else is speaking. At least until the jury has given you permission to do otherwise, treat everyone in the courtroom with courtesy and dignity.

Be the lawyer they want to stand up for.

Simple Rule 15: The Bat Rule

This probably should have received much higher ranking. The Bat Rule: *Ping, then listen. Or fail.*

Bats use echolocation: *ping!* and detect food and obstacles by the signal that bounces back. A bat that doesn't ping doesn't eat, but neither does a bat that doesn't listen.

Your ping is a question. You have to ping. If you don't ask any questions, you don't get any information. But if you ping and then immediately start thinking about your next ping instead of listening to the signal that comes back to you, why ping at all?

You don't get any information by asking questions.

Ping, then listen. Or fail.

Simple Rule 16: The Herd Rule

I've talked about how the jury panel is a group and the jury is a group. Why? Because people like to be in groups. Most people will, given a choice between being in a big group and being in a small group, choose the big group. A relic of evolution? I think probably so. If I stay with the bigger group, we'll all be safer from predators.

So Simple Rule 16, The Herd Rule, is: *Remember that you are dealing with herd animals.*

I've given examples of questions for the jury panel in other simple rules:

"Do any of you {whatever}? " versus "How many of you {whatever}?"

The second question presumes that there are some people who {whatever} and is therefore (because of our preference for larger groups) more likely to get responses than the first question, which doesn't contain the same presumption.

If you want to find as many people as possible who share some opinion that won't be helpful if it gets carried into the jury room, or if you want the jurors to commit to a basic and uncontroversial principle, ask the question the second way: "How many of you agree with Mr. Jones that Fred is probably guilty?"

If, on the other hand, you want the people who share Mr. Jones's opinion to keep their mouths shut about it, ask the question the first way: "Do any of you (or does anyone) agree with Mr. Jones that the government should be held to a higher standard than beyond a reasonable doubt?"

Herd animals don't want to be cut out from the herd; they want to blend in. The jury panel is a group, and the group is a herd. When you are picking a jury, *remember that you are dealing with herd animals*.

As a criminal defense lawyer, my attitude toward rules is flexible: rules are made to be bent. These rules are not canonical—there will be occasions on which some of them cannot be applied, and I hope that the jury consultants responding to this piece will have discovered many more that I never thought of. But any rule from this list, applied singly, will improve any jury selection; combined, the rules are powerful and versatile tools for forming a better jury.

Endnotes

[1] In the Texas state courts where I try most of my cases, most voir dire is conducted in open court with the entire panel.

[2] Beer Pong: http://www.beergood.com/pong.asp?menublock=beerpong

We asked four experienced trial consultants to respond to Mark Bennett's Simple Rules and we asked each of them to come up with a new 'simple rule' of their own based on their individual experiences in jury selection. On the following pages, Andrea Blount, Ron Matlon, Beth Bochnak and Paul Scoptur bring their individual backgrounds and ideas to bear in their responses to Mark Bennett's practical voir dire/jury selection 'rules'.

Response to Mark Bennett's 16 Simple Rules to Better Jury Selection: A Verdict Takes a Group

By Andrea Blount

Andrea Blount, Ph.D. (ablount@dbhjury.com) is a Psychologist, Trial Consultant and Partner with Dodge Blount & Hunter, LLP based in Seattle, WA. She applies her understanding of the interaction between psychology and the law within her practice in civil cases.

As a trial consultant, during jury selection my entire focus is on trying to predict the behavior of the jurors and how they ultimately will influence each other within the jury group. In contrast, attorneys have a different perspective and additional tasks during jury selection – they must stand up before the court, ask the right questions, respond in the moment, and begin to establish rapport with the jury. Thus, as I reflect on Mr. Bennett's "16 Simple Rules for Better Jury Selection," I am struck that his rules appropriately focus on advice for how one effectively conducts voir dire – how to phrase the questions, listening more than talking, sharing your own biases so others will be more likely to share their own, and treating the potential jurors with respect.

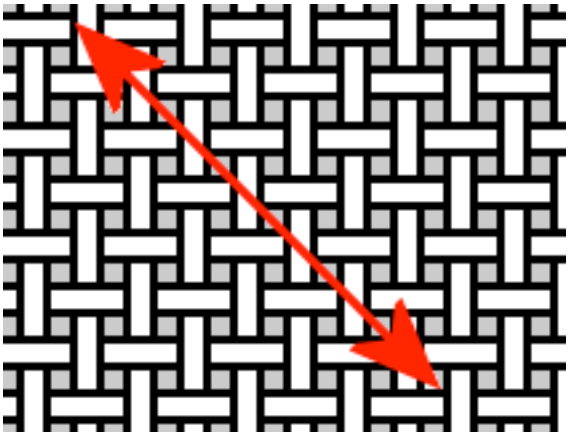
Although there are numerous avenues one could take in responding to this article, I have opted to focus on one aspect that stood out to me because it is rarely discussed regarding jury selection – the group factor. More often than not we talk about individualistic components of jury selection: the *juror* profile, which individuals to strike, individual challenges for cause. Thus, it was refreshing to see Mr. Bennett address the role of groups because jury selection is, at its core, the selection of a small group of individuals (the jury) from a larger group (the venire). Through the process of striking individual jurors, we are creating a group that will decide the case.

Setting Group Rules in Voir Dire

Although individuals in the venire have widely disparate personal objectives (some may want to be on the jury, many do not want to sit on a jury, others may be interested observers), they are united as a group in that they are separate and distinct from the judge, attorneys and parties in the case. Whatever individual jurors' goals may be, for those in the venire it is "us" and "them." As the basis of his 16 Rules, in Rule Zero: One Rule to Rule Them All, Bennett states that the venire is a group and the objective in jury selection is to form a group "to include you." I have a different perspective and believe that the attorney should establish rapport and mutual respect with the jurors but an attorney cannot, and should not, become part of the group. Because the jury and the attorney have different roles, objectives, and rules, the distinction between "us" (the jury) and "them" (the attorneys) can be lessened through rapport but it will never disappear. Courts have multiple rules in place to keep the attorneys distinctly separate from the jury.

Nevertheless, attorneys have an important role in establishing the social rules, or norms, of the venire. At the beginning of jury selection in any courtroom cross the country, there are several safe assumptions about most people in the venire: (1) they have little, if any, experience in a courtroom; (2) they will feel intimidated by the setting, the attorneys and the judge; (3) they will be afraid of speaking in public, and (4) they believe that admitting you are biased or cannot be fair and follow the law is a bad, bad, bad thing. When we are in strange and anxiety-provoking situations, most people will watch others to see how they should act. Few will risk making themselves stand out from the crowd because no one knows what will happen. The result is dozens of people sitting quietly, waiting and watching to see what will happen.

In order for voir dire to be successful, those in the venire need to learn what is expected of them, that nothing bad will happen to them if they speak up and that it is good, even honorable, to admit that they may not be the most objective juror for this particular case. Thus, a primary rule of jury selection is to establish group norms so those in the venire are encouraged to share their experiences, admit their strong opinions and indicate their biases. Mr. Bennett's Rules do a great job of explaining how attorneys can easily adjust the group norms and create a comfortable environment for jurors to talk openly. Treating voir dire more like a casual conversation than a cross-examination (e.g., The Blind Date Rule), listening to what jurors are saying (e.g., The 90/10 Rule) and effectively following up on jurors' comments to gather more information (e.g., The Shrink Rule and the Beer Pong Rule) all help establish by example that it is safe and good for jurors to speak up in the group.



In terms of showing jurors that it is good to admit biases, however, one rule deserves a little more attention. Rule 11: Playing Doctor Rule suggests attorneys should share their own prejudices related to their client so jurors will be more likely to do the same. Sharing an example of one's own prejudices, however, does not have to be limited to your client. Since we want jurors to talk about their personal experiences and attitudes that will make them predisposed to find against you, we need jurors to admit that they would not be a good juror for this case. This works best when jurors understand that having a particular bias related to this case does not make them a bad person or generally unable to be fair. So, when attorneys admit that there are some cases that even they would have a hard time being fair on, jurors see that it is okay for them as well. For example, the attorney could say that as a child, her dog was run over by a teenage driver and to this day she completely distrusts teenage drivers. So, if she had to sit on a jury involving a 17 year old driver she could not be fair; that would not be the best case for her to be a juror.

Follow-up on this personal example, and create a role model for other jurors, by calling on a talkative juror. Ask this juror if he can think of any examples of a type of case where he might not be a good juror, even if it is not related to this case. Then, using the Beer Pong method, open it up to the venire and ask if there is anyone who believes *this case* might not be the best one for them. Setting the stage in this way also gives the attorney language to use when attempting to secure a cause challenge (i.e., "So, is this case for you like the teen driver case for me? Would it be difficult for you to put your personal experiences aside?")

New Rule: A Verdict Takes a Group

When attorneys follow Mark Bennett's rules during voir dire, chances are great that they will have unearthed many more people in the venire with relevant experiences and biases than they will be able to strike from the jury. With luck, some of these high-risk jurors will be eliminated for hardship. With skill, a good judge and a little more luck, a few more will be stricken for cause. More often than not, we are left with at least twice as many high-risk jurors as strikes. What to do?

Both sides in a jury trial want to win. The ultimate objective in jury selection is not to make the jurors like you, but to choose a group that is most likely to rule in your favor. In other words, the goal is to not only predict how jurors will likely receive your case story, but to also predict the different ways in which jurors will interact, what relationships will form between them and what sub-groups will develop within the jury. These sub-groups can have considerable impact on the direction that the overall group takes. To reach this goal, we need to anticipate how each person on the venire will interrelate with the group – how will they affect the group and what impact will the group have on them? Thus, the most general rule I can offer on how to decide which jurors to strike is to remember that *no juror reaches a verdict alone, a verdict takes a group.*

These predictions are based on a variety of information obtained during voir dire. Obviously, we want to know which individuals have strong attitudes against our client and we want to know how people are likely to act within a group. Who was comfortable speaking up in a crowd? Who rolled their eyes when the other side was talking (or when you were)? Who has a leadership role within their job or community? Who dropped out of high school? Who rarely makes eye contact or acts exceptionally shy? Who seems to easily annoy those sitting around them? Who smokes (and will share smoke breaks with other jurors who smoke)? All of these factors shed important information to help prioritize the strike list because we want to know who the social leaders will be, who the followers will be and who will likely form sub-groups within the jury.

Imagine you have one strike left and your high-risk jurors include a retired military officer, a mid-level bank manager, an outgoing soccer mom and an artsy-hippie. Which of these individuals has the most leadership potential (and would thus pose the most risk to leave on the jury)? The answer to which of these hypothetical jurors has the most leadership potential depends on the venue, the type of case and the other people on the jury panel. Each of these jurors has leadership potential, some of which may be more obvious than others.

For example, the retired military officer clearly has leadership potential and has advanced professionally because of it. If this person sits on a jury in a military-friendly venue where other jurors are likely to have military experience such as San Diego, CA he will likely be respected and looked up to as a social leader because of his military experience. However, if the same person was on a jury in Berkley, CA his military background and leadership approach would not have the same effect and his role within a group would likely be more of an outsider than social leader. But, venue does not control everything, the case issues matter as well. Even in a military-friendly venue, the mid-level bank manager might be a more important group leader than the retired officer if the case involves accounting fraud.

When might the outgoing soccer mom have the most leadership potential and thus be the biggest threat? She would rise to the top of the strike list if she has personal experience, either herself or someone close to her, related to the case or if she will have a calming influence on the other members of the group. For instance, a jury made up of a many different strong personalities will often turn to a mother figure to help keep everyone in line. The group role of the artsy-hippie person or the talkative retail clerk depends on the venue and who else is in the group. Are there other people like them? Are they likely to form sub-groups (increasing their leadership potential)? Or are they likely to be loners in the group (and thus not a risk to keep on the panel)? This is why the seemingly "nutty" people in a venire rarely concern me – they are likely to have little influence on the group. Who wants to align themselves with the nutty person in the group?

The points to remember are that (1) a person' ability to affect others is determined by the other members of the group and (2) like attracts like. So, if there are multiple people on the jury panel who are similar to one another they will likely form a sub-group and increase their influence over the group much more than they would as single individuals. The decision of who to strike is based on the prediction of the impact each person will have socially. So, when it is time to name your strikes remember that *no individual person reaches a verdict alone, it takes a group*.

Response to Mark Bennett's 16 Simple Rules for Better Jury Selection

by Ronald J. Matlon

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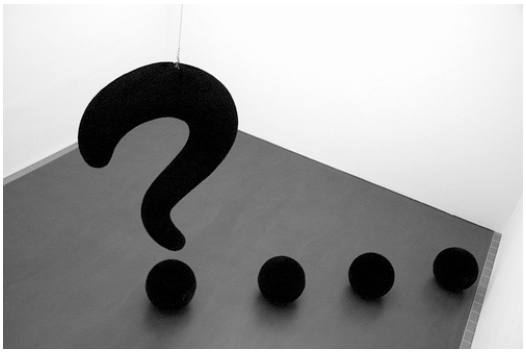
Mark Bennett clearly demonstrates how astute he obviously is during jury selection. His "rules" make good sense especially from an effective communication standpoint.

There are two rules that I would put at the top of the list as most important. The first one is #4. I am not sure the formula is necessarily 90/10 but listening to what the jurors say is paramount. After a juror answers, good listening should prompt you, the attorney, to give positive feedback to what was said. Then, if pertinent, ask follow-up questions.



Bennett's #8 is the other very important rule. Bennett appropriately suggests that a "how do you feel about that" question is good in order to get a juror self-disclosure. Sometimes, you might even get others on the panel to comment on what the talking juror just said. Let me elaborate on this rule because I think much more can be said beyond the "how do you feel" question. Other types of open-ended questions are possible too.

There should be a good blend of close-ended and open-ended questions. Here is how that blend might appear to ensure as much juror candor as possible. Close-ended questions can precede open-ended questions. Those are questions that can be easily answered with a "yes" or "no" answer, or by raised hands. Close-ended questions can identify juror experiences. For example, "Have you, or has anyone close to you, ever been on kidney dialysis?" For those who respond affirmatively, the open-ended request to ask of them is: "Please tell us about that experience." Or, in another kind of case, one might ask: "How do you feel about the dissemination of sexually explicit videos to adults?" Even if the answer is: "I have no strong feelings," an appropriate probe would be: "Well, then, what are your feelings even though they are not strong?"

Open-ended questions such as those above allow prospective jurors to do most of the talking, and this gives you a good opportunity to learn what you need to know. Listening to jurors reply to the open-ended request is the best way to detect juror bias in voir dire. As probable jurors are allowed to talk, their attitudes will be on display. Additional follow-up open-ended questions beginning with "how," "why," and "what" can go far in helping you identify bias (e.g., "Why did you find the services received by your mother's home health care provider to be insufficient?"). Consider this list as a series of well-constructed close-ended (experience) and open-ended (attitude) questions:

- Have you or has anyone close to you ever been seriously injured or killed in a vehicle accident?
- If yes, please describe the circumstances. (Follow-up probes may be necessary.)
- Was a complaint, lawsuit, or claim of some sort made about this?

- If yes, please explain. (Follow-up probes may be necessary.)
- How was the complaint or claim resolved?
- How did you feel about this resolution?
- Is there any reason why any of you who remained silent during this last set of questions chose to do so? (Follow-up probes may be necessary.)

The reason this is a good series of questions is because it follows an experience-attitude-bias continuum.

Another rather important Bennett rule is #13 (the undertow). I think it is best for the lawyer who is asking the questions not to take notes. You should have someone sitting at or near counsel table make all the observations and take thorough notes. It should be someone who has experience in jury selection and is relying on a jury profile prepared in advance. That profile identifies the riskiest jurors for your particular case. Rely on that person's advice when de-selecting your jurors.

The only rule I take some exception to is #6 (improvisation). Certainly a verbatim script that you read from is not a good idea. But, I do recommend that you have a list of topics in front of you to be sure you cover everything. Bennett's comparison to a blind date is simply not appropriate here. A casual conversation on a date is not a formal, legalistic setting at all.

Unfortunately, many of Bennett's "rules" are not applicable in states like mine (Maryland). Nor are they applicable in most federal courts where attorneys get almost no chance to build rapport with jurors. Nor do they get a chance to educate jurors about the case. Why? Because judges do most of the questioning with only occasional follow-up by counsel. It is often impossible to get jurors talking during a judge-conducted voir dire.

So, for jurisdictions where jury selection is more limiting, I am going to add one more rule to Bennett's list. However, I am going to call it a "recommendation." I make this recommendation wholeheartedly and in view of a substantial body of relevant jury research conducted over several years.

That recommendation is to have supplemental juror questionnaires widely adopted in trials where voir dire is limited. The use of such questionnaires allows prospective jurors to answer voir dire questions in writing. "Well-formulated juror questionnaires can provide counsel with a substantial amount of information about prospective jurors … especially in jurisdictions where the scope of attorney-conducted voir dire is limited or judge-conducted questioning is the mainstay" (Heaney, 2000, p. 3). Sample supplemental juror questionnaires are available from this author upon request.

There are many advantages to questionnaires. First, you can get an overview of possible bias from the entire venire, not just the people seated in the box. Second, because answers are provided in writing rather than orally, there is more candor and more assurance of identifying bias with questionnaires than having voir dire be entirely an open court oral experience. Third, questionnaires actually save court time inasmuch as judges and lawyers need not be present when this information is gathered. They need only be present for follow-up oral questions based on the questionnaire answers. Fourth, jurors appreciate the privacy of this activity. "Filling out the questionnaire is often less fraught with anxiety than answering questions out loud in front of an audience" (Heaney, 3). Fifth, questionnaires "can quickly pinpoint the specific areas that require individual follow-up questioning" (Hans & Jehle, 2000, p.1198).

To effectively use supplemental juror questionnaires, give careful thought to their preparation. Develop a good blend of close-ended and open-ended questions before sending a questionnaire to the other side and the judge

for review. Furthermore, prospective jurors should be given sufficient time to complete the questionnaires. You should arrange for duplication of the questionnaires, and time must be allowed for a thorough review and analysis of the data.

Supplemental juror questionnaires have received ringing endorsements. The American Bar Association has asked that courts consider using a specialized questionnaire addressing particular issues and permitting the parties to submit proposed questionnaires (American Bar Association American Jury Project). Even here in Maryland, the Council on Jury Use and Management concluded: "Advance written questionnaires for jury panels should be utilized. Questionnaires can provide information in a more efficient form and with less invasion of juror privacy. … Advance written questionnaires can be especially useful in protracted or complex cases where jury selection will require prospective jurors to answer many questions. They may also be useful in more routine cases where jurors are asked certain standard questions." (Council on Jury Use and Management, 2000, p. 6).

While supplemental juror questionnaires do not solve all the problems inherent in places where there is limited voir dire, they go a long way toward doing a better job of uncovering juror bias over the present system. Since the goal of voir dire is to help both judge and counsel identify bias that can taint jury deliberations, this recommendation should be implemented. I'll call it Bennett's Rule #17 if you like.

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Response to Mark Bennett's 16 Simple Rules for Jury Selection

by Beth Bochnak

Beth Bochnak, MA (bbochnak@njp.com) is the president of the National Jury Project East. Based in Madison, NJ, she works on criminal defense and civil plaintiff cases.

I am a fan of Mark Bennett's blog and was pleased to see that our rules for jury selection are pretty much the same. However, to paraphrase a standard survey answer, when he says, "*Jury selection is not only—nor even mostly—about selecting (or deselecting) jurors*," I agree somewhat and disagree somewhat.

I believe jury selection *is* about de-selection. You *should* use voir dire to find the jurors you need to strike. However, this does not preclude you from bonding with those you hope to keep. It's a matter of how you go about it. You can build rapport by having an honest discussion with them about the issues in your case. But if you are spending your limited voir dire time talking to them, rather than listening to them, you've wasted the only opportunity you have to learn their opinions until they announce their verdict. The more you get them to talk, the more you learn, plus, if it is interesting, the judge is more likely to let you continue.

Building rapport is a process. It begins with jury selection and continues throughout the trial. You don't need to tell the jurors about yourself, although you should tell them about your client. The jurors will have ample opportunity to get to know you. They will consider your clothes, your shoes, and all your mannerisms and speech habits. They will speculate about your home life. The question is, what will you have learned about them?

The best way to get good information from jurors is to engage them in conversation - one where they do most of the talking. Ask open-ended questions – that is questions that can't be answered by "yes" or "no." In a group voir dire, you can ask a question of the group, "how many of you think a defendant should take the stand and testify on his own behalf?" Then follow it up individually with those who have raised their hands. You can ask why those people feel that way, and you can ask those who didn't raise their hands why they didn't. You can ask if anyone can think of a reason why a defendant might not testify. There are usually a variety of reasons. In asking the questions, it is important to keep in mind that most jurors have not spent any time thinking about the issues in your case. Therefore, it may take 30 seconds or so before anyone responds. Please be patient and resist the temptation to start providing the answers yourself. You don't learn much from multiple choice questions either. Acknowledge that you realize this is new to them, and you want them to think about their answers.

You build rapport by paying attention to jurors, valuing what they say, noting who is shaking her head and who is nodding agreement with what another juror says. Get them to talk to each other. Be pleased when a juror says something terrible, appreciate his honesty. "Thank you, Mr. O'Brien, I'm sure you are not the only one who feels that way. Who else in this room believes defense attorneys should only represent people who are innocent?" Then you can ask people what they understand the burden of proof to be and whose burden it is. You can discuss "innocent" versus "not proven."

Getting useful information from jurors is a matter of asking the question the right way. Attorneys often ask jurors what their verdict will be if the state doesn't prove its case, expecting each to say "Not Guilty." Most will, because they know that's the right answer. Recently, we tried asking this question another way. We asked jurors if, at the end of the trial, they could vote not guilty if they weren't sure whether or not the defendant was guilty. Almost a third of them indicated that if they thought the defendant was guilty but it was not proved by the prosecution, they would be unable to acquit. Even after the defense attorney said the judge would instruct them that if they had a reasonable doubt they would *have* to acquit, many continued to say they would not feel comfortable doing so.

We already know there is no presumption of innocence, so any opportunity you have to get jurors to talk to you about this gives you another chance to educate them about it or use a cause challenge on those who cannot accept it. When I say "educate them," I don't mean lecture. The defense attorney's job in voir dire should be that of a facilitator. Ideally, you are facilitating a discussion among several jurors with different views about the presumption of innocence and the role of the defense. You can say, "Her honor will tell you that it is the prosecutor's job to prove the defendant is guilty of the crime charged. What do you think my job is?" Most jurors we've come across think your job is to prove the defendant is not guilty. "Well, suppose we get to the end of the trial, the defense doesn't put on any witnesses, the defendant doesn't testify, and you're not sure what happened? " Again, the most common answer is "I'm not sure." If you ask, "how many of you think you should vote not guilty if you're not sure?" Probably the best you are going to get is a few hands, but you will have had a good discussion, and a pretty good idea of who should not stay on the jury.

I have been asked to provide only one rule for jury selection. It's tough to narrow them down.

1. It takes a village to make a juror.

You definitely want to know what each juror thinks about the key issues in your case, especially the "bad facts." But keep in mind that jurors don't live in a vacuum. Jurors, their families, their close friends and associates have varied life experiences. Maybe your juror has never been the victim of a crime - however his sister was, and she told her brother how scared she was and how awful the experience was and this has had a huge impact on him. In fact, he now feels anyone who uses a gun in the commission of a crime should get life in prison. The life experiences of a spouse, co-workers, parents, friends, old boyfriends, poker buddies and so on will have an impact on your juror's attitudes toward the issues in your case. That's why it isn't enough to ask, "has ___ever happened to you," or even, "have you or anyone in your family ever ____." You want to know if the jurors or anyone close to them - family or friends - ever experienced_____.

After you find out, you want to know what impact it may have had on him. Ask if that person ever talked about it with the juror, and how that has affected your juror. Has it changed the way they behave? Do they have strong feelings about the use of a weapon? Has the juror expressed an opinion about perpetrators in general to the friend or to others? How does the juror think his sister's experience might affect him in *this* case? Often a juror will say ":Oh that has nothing to do with *this* case. It wouldn't affect me at all." And then *you* can be the judge of whether he is telling the truth or is in touch with his feelings about what happened. Of course if he says it will affect him a great deal, you can excuse him for cause, after asking, "and an experience like that, so traumatic, isn't the kind of thing you can just eliminate from you mind, is it." (Notice no question mark. You don't want a long answer, just a "No it isn't.")

Part of your prospective jurors' village are people of other races (or a lack of them). It is important to know what your jurors think and feel about them. Therefore, your job is to find out what experiences, especially negative ones, your jurors have had with someone of another race, ethnic group, or other outgroup. You also want to ask how much contact they have had, because sometimes, the reason they say they've never had a negative experience is because they have lived their life in such a way to avoid contact with people of other races. So in addition to asking how often (and where) they come in contact with people not of their race (be specific as to the race/ethnic group), you want to know how that contact went. "Have you or anyone close to you had a negative experience with an African American?" (Or white person, gay person, Muslim, etc depending on the race/ethnicity of your client and the race of your juror.) Generally jurors think of themselves as fair minded unbiased people, especially when asked by a judge if they can be fair. However, many jurors, or people close to them, have had a bad or unpleasant experience - real or imagined - with someone of another race. If you ask them, they will tell you about it.

It could be as a crime victim, but often it is something in their everyday lives. Such as when their children were in school and were called names; or they were walking down the street and felt threatened; or at work when a person of color was promoted over them. They may have sold a car to someone who didn't make payments on time; or their sister was married to a Muslim and they don't like the way Muslims treat women. These are examples you want to hear about during voir dire, not when asking about the verdict after the trial.

Find out what happened, and when it happened. Sometimes people are harboring resentments over things that happened to them in 3rd grade (meaningful in itself). If it seems that an experience that has stayed with them, follow up, acknowledging their feelings. "I'm sorry to hear that. How do you feel about

that now?" If they seem to be reliving it, ask, "Do you think you might start remembering that when hearing the evidence/seeing the defendant in this case?" Find out what the outcome was. "Was anyone arrested/hurt/questioned about this?" And how they felt about the outcome. Sometimes the outcome is a good one or the way they describe the incident shows they have processed it in a way that has neutralized the experience. Obviously, if in any way it resembles the crime charged in your case, or they are obviously holding a grudge you will want to follow up in greater detail.

After hearing about it from the juror, and seeing who else on the panel had a similar experience, you want to know how this has affected each of them. Again, they may say not at all. You be the judge of this. As with all voir dire questions, if you don't ask, you will never know.

Response to Mark Bennett's Simple Rules by Paul Scoptur

Paul J. Scoptur (www.paulscoptur.com) is a trial consultant and trial lawyer with Aiken & Scoptur S.C. in Milwaukee Wisconsin. He wishes he could still dunk a basketball.

Mark Bennett gives us 16 rules for better jury selection. Most of these rules are practical rules and hopefully should be known to most trial lawyers by now. Although I agree with many in principle, I disagree with some points and would also like to add several rules of my own.

Bennett seems to have one rule to rule them all and states that as his simple rule zero: One rule to rule them all. He sets forth three objectives in jury selection, and I must disagree with his objectives in principle. Jury selection is about identifying unfavorable jurors and deselecting them. It is also about building rapport, but I really think the day of educating jurors about your case in voir dire is over. Jury selection is all about finding out what jurors think. It is about finding their biases, their prejudices and determining how they will affect your case. It used to be about educating jurors, but not anymore.

A case in point: Last summer, I was chosen for jury duty. Being the good citizen that I am, I did not try to get out of it and in fact, went down and reported to do my duty. I might add that this was much different than when I was 18 and Uncle Sam wanted me to fight in his army. At any rate, I was seated in the jury box prepared to express my opinions, attitudes and biases about anything and everything. Imagine my surprise when I, along with everyone else, was simply asked one question by the plaintiff's lawyer. The case involved a dog bite, and the question was along the lines of "Do you agree that the owner of a dog should be responsible if it bites a person"? Well, that is sort of a no-brainer but as I sat there listening to the same question over and over, I became frustrated. Why? Because that lawyer did not know what I thought. He didn't know what I thought about insurance companies, he didn't know what I thought about people who get bit by dogs, he didn't know what I thought about caps on damages, he didn't know what I thought about anything other than should the owner of a dog be responsible if it bites somebody? Not only did he not know what I thought, but he also didn't know what anyone else on that panel thought about anything other than that one simple question.

Jury selection is primarily about finding out what jurors think. Only when we know what they think can we then deselect.

I do agree that building rapport is important, but we have to do this in a way in which we do not come off as lawyer man and lawyer woman. One of the best voir dires I ever had was in a dental malpractice case. After

voir dire, the defense lawyer came over and said, "If you were any closer to the jury, they'd be inviting you over to their house for dinner." I took that as a compliment.

Bennett does hit some important points in his rules. He emphasizes that good voir dire is jury talking and bad voir dire is lawyer talking. I don't know that it is 90/10 as he indicates, but voir dire is primarily the jurors talking and responding to open-ended questions. One of his important points is, "People leave jury selection believing what they believed going in". That is very true. Greg Cusimano, a trial lawyer and jury consultant from Gadsden, Alabama, has a phrase that I have always remembered: "A man convinced against his will is of the same opinion still." We find in focus groups and jury trials that this is true.

Lastly, Bennett makes an extremely important point. That is to listen to what the jurors are telling you. Many times, I have seen lawyers already thinking about the next question, reading notes, doing anything but listening to the answer and communicating with the juror. We need to be genuinely interested in the answer in order to effectively communicate and connect with the jury pool.

I would like to add several rules of my own. The first rule is to talk to everyone. When I do voir dire, I have someone sitting at counsel table with me, and they make sure that I have talked to everyone on that panel. If I have unintentionally omitted someone from the discussion, I am politely and gently reminded that I have not talked to juror number 14. I then go and talk to juror 14 to make sure that they are engaged in the process and not feeling left out.

The other rule I would like to share is "It's not what you say, it's what they hear." We have to make sure that we understand the message that we are trying to get across and the information that the prospective jurors are receiving. This was brought home to me clearly in a recent trial. As I do in every case, I talked to the potential jurors about money. One of my standard questions goes along the lines of this: "At the end of this case, I will be required by the evidence to ask you for money for my client. Some of you may think it is too much, some of you may think it is too little, but one of my jobs is to ask you for money for my client at the end of the case. How do you feel about that?" At this point, a young man raised his hand. I thanked him for raising his hand and asked him how he felt about giving money to my client. "I just have a question because I want to make sure I understand", he responded. I said, "Sure, what is your question?" He said, "I just want to make sure I understand, at the end of the case, you're going to ask us to give money to your client." "Yes", I responded. He said, "Well, I just have one problem." I said, "Go on." He said, "I don't have a lot of money!"

Clearly, I was not communicating very well with that young man, and I accept full responsibility for that. Remember, it's not what you say, it's what they hear. Make sure that what they hear is what you mean to say.

Mr. Bennett has given us some good rules to follow in voir dire but like all rules, they are simply tools that we can utilize when communicating with the jury in voir dire. Remember, it's a discussion, and the lawyer is simply a facilitator of the discussion.

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Editor's Note

Wow. Every issue I say to myself "This is our best issue yet!". I'm saying it again. It's amazing to watch an issue come together and I am grateful to all our authors, consultant-authors and consultant-respondents for contributing to yet another terrific issue of *The Jury Expert*.

We have articles on corporate defense strategies after a decade of corporate malfeasance, how to use simple rules for better jury selection, the legal and ethical implications of using trial consultants for witness preparation, specifics on how to prepare your witness to answer the "were you prepared" question, implications of the heightened use of images/graphics in the courtroom, skin color bias, and how defense attorneys can present damages issues effectively. Eighty-one pages of awesomeness!

I hope you find this issue useful AND if you do, please comment on our website. I know (courtesy of Google Analytics) how many of you read every issue. Comment! Or blog. And if you blog, let me know so I can link to your blog. Think of it as a small thing you can do to thank the authors who work hard to give us practical, relevant ideas to improve your litigation advocacy.

Happy January! And for those of you in snow-bound places--spring is a LONG ways away. So make some hot chocolate and hunker down and read *The Jury Expert*.

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