



How my horse helped me learn to pick a jury

Refining jury selection skills through the application of horse-training principles

BY CYNTHIA MCGUINN

I was well into my forties and over a decade into my practice as a plaintiff personal-injury lawyer when I had my first experience with horses. I had quite a few jury trials under my belt, and my success rate was good. But I was often surprised to discover during post-verdict interviews with jurors that I had failed to discover in voir dire what their true feelings were about the law, about my client and about the case. It was only after I began working with horses that I learned why.

Non-verbal communication

My first learning experience was with "Jett," my then fifteen-year-old Arab gelding. He was a rather skinny, smallish horse with a sleepy expression who would poke his head over the stall door and nicker for the sugar cubes and carrots I brought when I came to the barn to visit the horses. I thought he would be a calm and willing horse and bought him straightaway after seeing the trainer ride him in the arena at a sedate pace. Yes, I assured myself, he will be a fine pet for me; we would become best friends and he would be responsive to my every command.

The first time I worked with Jett was in the arena. He was standing at the railing, facing away from me and looking out at something in the adjacent field. I wanted to put the halter on him and take him for a hike. How hard could that be? I called his name and waited for him to come. He looked over his shoulder at me and then turned back and looked over the rail again. "Well, he just needs a



The author's horse, Jett, frequently consults on jury selection.

leader to tell him what to do," I thought. I walked toward him calling his name and explaining to him my plan for our walk. Once again he glanced over his shoulder at me but this time also laid back his ears and moved off slowly toward the far end of the arena, keeping an eye on whatever was in the field that I could not see.

I decided to head him off by cutting across his path of travel. We met near the corner of the arena where I maneuvered into a position that wedged him between me and the arena railing. "Fine," I thought, impressed with my skills of persuasion, I was nearly at my goal. I moved in. He tried to squirt out sideways. Ignoring the fact that he seemed a bit agitated, I pressed forward and swung the halter line at him. Surely this would garner his acquiescence. He turned away from me

and cocked his right leg in my direction, then put it down and stood still. Sensing my advantage, I moved in closer, looked him directly in the eye to impress upon him that I was the leader and quickly tried to slip the halter over his head. The next thing I knew he'd spun around and kicked me and I was flying through the air.

I bore the horseshoe imprint of that kick on my upper arm for months to follow but learned some invaluable lessons about horsemanship that are applicable to jury selection.

The danger of superficial assumptions

In jury selection many attorneys rely solely on ethnicity, gender, marital status, profession, apparent disposition and verbal responses about the issues as the sole hallmarks of significance in selecting or rejecting a potential juror. For example, there is a commonly-held belief that certain cultures are stoic and therefore make poor jurors with respect to general damage claims, that potential jurors who are attorneys should always be challenged because they will carry too much weight with the other jurors, that engineers make poor jurors on complex issues, etc. Just as I thought Jett would be a pleasant, malleable horse, I soon learned otherwise. The same is true about broad generalizations concerning prospective jurors.

Early on in my trial practice, I made the mistake of leaving jurors on the panel that my intuition told me were bad because they fit what I had been told or had read was the favorable plaintiff juror profile. Similarly, I excused jurors that I intuitively believed would be good because



they did not fit the commonly accepted profile of a favorable plaintiff juror. As you can imagine, I had a few “bumpy rides.”

Create an environment for an open communication

Jett wasn't receptive to having any interaction with me since his focus was out in the field. Instead of making an effort to learn why, I pressed forward with my agenda. I later learned there was a bobcat out there. Horses are not predators, they are prey animals, so knowing where that bobcat was, was way more important than listening to me. I did not know what was bothering him, and I didn't care. I was too focused on what I wanted to communicate and how I wanted to direct his behavior.

The same is often the case when we start to question prospective jurors. They most likely will always have other things on their mind. They may be uncomfortable speaking in public. They may be worried about what their friend or their employer will think if they sit on a jury with issues that conflict with the values of their family, friends or employer. They may be concerned about how they will pay their bills if they can't work and their employer only pays for a few days of jury service. They may believe the issues in dispute are too complicated for them to understand and they are embarrassed to say so. They may have had experience with matters similar to those in dispute and therefore be biased for or against your client. They may have artificial limits with respect to damages that would preclude a full value compensation award for the injuries your client has sustained. Or they simply may be opposed in principle to the civil justice system and determinations being made by jurors as opposed to judges or other professionals.

One way to obtain valuable information from prospective jurors is to create an environment that makes them receptive to answering your questions. Assure them that you really want to know what they think, that there are no right or

wrong answers; there are only their opinions based on their own life experiences and that is what you want to know about. Validating their answers by thanking them for having the courage to step forward and speak their minds on sensitive issues, even those opposed to the facts of your case, is key to engaging other similarly-minded jurors to step forward with their opinions as well.

Non-verbal communications

Horses couldn't care less about what you say. They pick up on your energy and what you do with it and they expect that you will do the same with them. Jett communicated no less than five distinct messages and one final warning that he wasn't ready to buy into my plan of action. First, his attention was focused elsewhere, and not only did I not know why, I did not attempt to find out. Second, he gave me several non-verbal cues that communicated his disagreement with my plan: beginning with failing to come when I called him, to laying his ears back when I approached him, followed by moving off to avoid me and becoming agitated when I pressed him against the rail. He even gave me fair warning that I wasn't listening to what he was trying to say by his final “don't you hear me” non-verbal message of cocking his leg and waiting before he kicked.

Jurors provide similar non-verbal clues through lack of eye contact, body orientation, posture, hand movement, speech patterns, handwriting (on juror questionnaires) and even the clothes they wear. Not only do you want to be aware of and evaluate these cues, you want to note whether they are congruent with one another and with the verbal responses provided. If they are not, you will want to assess why the juror is manipulating his or her answers, which is in itself a communication about the kind of juror they will be.

There are basically two types of human non-verbal cues. *Paralinguistic cues* are the manner in which a given message is delivered, e.g. the speaker's tone, vocal

pitch, rate of speech, etc. *Kinesic cues*, on the other hand, refer to physical signs such as body language, expressions, eye contact, hand gestures, etc.¹ Attorneys are sometimes so focused on their *voir dire* agenda that they ignore the obvious messages sent by way of non-verbal cues and consequently miss the opportunity to learn more about how a prospective juror really feels.

Don't waste the valuable time you have to learn about prospective jurors by trying solely to indoctrinate or persuade them. They're smart, and they'll just move on down the fence line like Jett and shut you out. So talk with your jurors, not at them. And stop, look and listen to them so that you can learn how they really feel. Having a second person to observe prospective jurors' non-verbal cues is very helpful in that regard.

“Consciousness” rather than “control”

To obtain your goal of a pleasant trail ride or a beautifully executed dressage routine requires that you establish a relationship with the horse based on fair leadership. That requires that you recognize and respect what is going on with the horse and its needs. You cannot force it or manipulate it. If you try to do so, you will go home with a bad ride and a big bruise to your body and your ego. The same is true of obtaining your goals in jury selection. Abuse the process, and you will proceed to trial with a poor jury that will garner a bad result for your client and a huge bruise to your ego.

Like horsemanship, jury selection is not about “control.” It's about “consciousness.” To be conscious is to be present in the moment, attentive to what is being communicated and how it is being communicated; it is about being curious about the process while being committed to obtaining the best outcome possible, not focused solely on the prize.²

I've had many learning experiences with horses, and like my learning experiences with juries over the last three decades, while they may have occasionally



FEBRUARY 2012

been painful, they've always been challenging and rewarding and I'm grateful for them.

Perhaps one day we'll run into one another in court, at a deposition or at a legal function and you can share some of your learnings with me. For now, happy trails.

Cynthia McGuinn has represented plaintiffs in catastrophic injury, wrongful death, products liability and, professional negligence

matters for over 30 years. She specializes in jury trial work and often consults with and tries cases for attorneys with matters going to trial. A partner in the San Francisco firm of Rouda, Feder, Tietjen & McGuinn, McGuinn was a 2003 San Francisco Trial Lawyer of the Year and has been recognized annually as one of the "Top 50 Woman Litigators" in California since



McGuinn

2005. In 2011 she received the American Board of Trial Advocates Masters in Trial Award for her work in teaching trial skills to attorneys.

Endnotes

¹ Voir Dire, An Art in Search of Science? Author: Vicky Campana 2009 citing Bernstein, C. (2008). Voir Dire: Getting Jurors to Talk.

² "Steadfast: A Communication Practice" www.rockroseinstitute.org

