

The simple truth about jury selection

Be yourself and follow your gut when selecting the jury

By Karine Bohbot

I'm not a traditionalist nor a traditional attorney. I don't wear black pantsuits at trial; I have been known to say "crap" on at least one occasion during trial; I don't have a big entourage of tech folks to help me with exhibits; and typically I am by myself trying my cases. Thankfully, I have my unbelievable, awesome and smarter-than-I-am partner, Elizabeth Riles, who always makes the time to come for jury selection, as well as opening statements and closing arguments, to help me as she does. But I'm the abnormal one in the family who loves being in trial. And I have to say I am pretty good at it. That does NOT mean I get multi-million-dollar verdicts all the time and that does not mean I don't screw up or embarrass myself at times. But I know that a courtroom is where I feel comfortable and am comfortable being myself.

In fact, I have several strong suits in my trial style. Aside from being real and being myself – for good or bad – with the jury, I am respectful of the court, court staff, and opposing counsel; I stand for the jury and face them when they come in and out of the courtroom out of respect; and I generally do all those things that ensure a level of professionalism and are expected of us attorneys while at trial. Do I sound like you? Oh . . . then I guess I'm not *that* special!

The scary part

I may not be so different from you when I say that one of the scariest parts of a trial is selecting a jury. You know, those 6 to 12 folks that you will hand your case to and, as such, the folks that take all control of your case from you. By far the biggest questions I struggle with are whether I know how to pick the right jury; am I applying natural biases and stereotypes without even realizing it? Is it better to have more women on this jury than men? More minorities than whites? More whites than minorities? These are all the thoughts that, in one admitted or non-admitted form or another, go through all our minds as attorneys picking a jury.

Of course, that is why jury consultants exist. They are great readers of people, can analyze your case and, based on studies, experience, and know how, can help you pick your jury. They can be invaluable and I am in no way discounting their importance. Heck, I *have* used a jury consultant once in my career, the great Patrice Truman. In helping Elizabeth and I select our jury, she was on top of it. She was wonderful at helping talk through the people we were "evaluating" and was the first to reinforce my



belief that color is very important in the wardrobe of the attorney and their clients. Yes, this may sound odd, but I'm telling you, it *is* ok to wear that salmon-colored tie, gentlemen! And *do* wear that gorgeous red pantsuit, ladies! Be yourselves!

Follow your gut

But what *I* found was that my view of the prospective jurors was not far from Patrice's. Of course that was both good and enlightening. In the end, what I took from that case was that the most important thing we attorneys need to do, and second guess way too often to our detriment, is to *follow our gut!* Follow that something inside you that says, "I know they all say never to have a Human Resources person on an employment jury, but gosh . . . I think if I can show her there were no policies, she is gonna be my champion because she knows all about the importance of policies."

Follow that feeling you might have that the owner of his own business might actually be disgusted with how the defendant treated their employee when they were injured on the job and needed accommodations. When you really listen to what individuals say in response to your questions, your gut lights up. You feel it, you know it, but sadly, you then question it. Now for many, that is exactly why we thank the powers that be for the

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Patrice Trumans of our community. But for most of us, it is simply remembering that when our gut tells us something, it is typically right. That is the case in our daily life experiences and, I kid you not, it applies equally to the jury selection process.

Yes, there are hundreds of studies about bias, implicit bias, stereotypes that kick in the minute you see a face, and they are all correct. That is indeed something we have to be aware of and truly fight against, even within ourselves, when we see those prospective jurors filling the courtroom. When you actually start to speak with these individuals is when your gut should start working with your ears. It is amazing how much you can find out by simply asking folks the simplest and most direct questions, such as what they like to do during the weekend. Asking them what their favorite television shows are. Asking whether they have a bumper sticker and what it says – yes, a classic.

Beyond gut feelings

There are some specific lessons to remember in the jury selection process. First, you obviously want to know the law that applies to your case. You do that by reviewing and knowing what the CACI Jury Instructions require you to show in order to win. Actually, this is something you should do the moment you decide to take a case on. Always know the elements to prove your case, always conduct your discovery with that in mind, and then ensure you translate those requirements to something a lay person can understand when you ask some of your voir dire questions.

You also should ensure you know the rules governing jury selection. Simple enough, right? Well actually, the rules may differ from judge to judge, so ask before you get started. I have had the pleasure of making a fool of myself because I was unclear of when my challenges could or should be made, whether I was making challenges to just the jury box folks or those folks *and* the other six the court was also questioning on the sidelines.

One way to deal with those embarrassing moments, one that I believe endears you to the jury, is to make fun of yourself. I apologized to the court and the folks in the courtroom for my lameness and managed to diffuse an otherwise awkward situation with an audience laugh. So, the lesson to learn here is to always talk to the clerk; ask the judge while going through your pre-trial conference; ask colleagues who have appeared before that judge how that court deals with the jury selection process.

Second, always, and I mean *ALWAYS*, ask to be permitted to use a juror questionnaire. Civil Procedure Code section 205(d) gives you the right to have a juror questionnaire to assist the voir dire process. So file a motion in limine to request permission to do so. This mechanism is invaluable in not only providing basic information useful in your analysis of these potential jurors, but saves time and permits you to focus your voir dire.

In the jurors' shoes

Then, try putting yourself in the prospective jurors' shoes. Most jurors have actually not sat on a jury before and know nothing of the process. Your job is to make them comfortable, make yourself appear approachable, and to empower them in the process. You do this not only in your questioning of them, but by always thanking them for their time, acknowledging they would rather be anywhere else but in that courtroom; tell them about *your* fears and concerns for how this case will be resolved, and about your own feelings of awkwardness in having to ask personal questions of people you don't know and who don't know you.

Also remember that it is your job to lead them, to educate them and to teach them about the process and, in the end, what you want them to do (i.e., find for your client). How you speak to them, look at them, the information you provide them and your mannerisms toward them all work towards that end.

Talking and acting

I start my voir dire by taking off my jacket, after I've asked the clerk or the judge if that is acceptable, sit on the edge of my desk, or whatever table is closest to the jurors, and basically start "shooting the shit." I talk about how this is the most difficult part of the trial for me. That they don't know me from Adam and that I can only imagine how weird it must be. That I'm always working through my fear that I will not pick the right people to judge my case. That I will make mistakes during the trial and hope the jurors won't take that against me or my client.

I tell them a little about my client, which typically includes the fact that they are not perfect, and lay out some of the facts that will not be positive about my client right out of the gate because I want them to know that I will not hide anything and will be honest about the good, the bad and the ugly of my case throughout the trial. And then I start asking my questions.

One of the other important things as you work through this process is to be organized. Figure out what works for you, but have something in front of you that allows you to write down basic information about the prospective jurors you are questioning to at least be able to refer to them by name and know something about them. Have someone else sitting at your table writing down the information being relayed while you ask the questions. You *cannot* be natural and be writing at the same time. In the end, this is where your gut will kick in, so you *have to be present in your discussion*. This will be the way you will know who you believe to be the "right" juror or not. You can then confirm your gut based on the information documented by your partner, secretary, kid . . . whoever you can get to sit with you through the selection process. If you can't find someone, call me! I'll come and be your assistant.

And for god's sake . . . *don't argue with the prospective jurors!* You don't have to

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agree with them, you don't have to like what they are saying; they may be the devil in your eyes, but don't try to change their minds! It won't happen. Just use it to get that cause challenge so you can save your peremptory challenges for those on the fence. And if opposing counsel does it, by God, take advantage! I had one defense counsel basically insult a prospective juror. Not only did he forever taint the jury against him, but I used that as much to my benefit as I could. Those facial expressions that you are not supposed to show to the jury? The "Oh my, I can't believe he just did that to you! I'm so sorry!" look, works *wonders* to get the jury to favor *you* more. Yeah . . . trial *is* indeed like acting. So, act!

There are, in the end, many techniques you need to remember when selecting a jury. There are steps you need to know before you start voir dire and there are steps you need to know while you are questioning the jurors. Your primary job in selecting the jury however, is to make them believe you and trust you as much as you can in that amount of time. Be yourself, teach them about your case; teach them about the law regarding your case, even if as part of a general conversation. "The one right we all know an employee has in the workplace is to be treated fairly, not to be discriminated against or retaliated against, and to know that those policies and procedures the employer has in place that they expect their employees to follow apply equally to the *employer* as well.. . . Would you agree with that, Mr. Jones? Yes? Why? Ms. Williams, do you agree with Mr. Jones? Does anyone not agree? And if your employer has policies in place but does not follow them, there is a problem with that don't you think, Ms. Heart? Why is that?" Not only are you teaching the jury about your case and what you know you will show the evidence to be, but you are getting them, and others listening, to agree with you before you have even put on any evidence.

I had one case that was a rear-end collision resulting in soft-tissue injuries. The one thing I knew I had going was that the car had been completely destroyed and my clients were actually lucky to have walked out of the wreckage with only minor injuries. But how do you deal with that during the selection process, knowing of the bias against soft-tissue injury cases and rear-enders?

Well, I knew my job during selection was to get the prospective jurors to agree they could not see themselves award large damages if it was a simple rear-ender that caused minimal damage to the car. The potential jurors went on and on about how they could not see themselves giving much weight to injuries that resulted from a low impact rear-end collision and that they would have to see serious damage to the car to make them "believe" that my clients were injured, especially if only soft-tissue injuries. Many of those folks I kept on the jury.

Why? Because when I showed the car during my opening, the look on their faces confirmed that I had already won and they would not be giving a nominal award. I knew what they needed to see to justify the award I would ask for, and I had just shown it to them. I knew the jurors I had kept already saw the evidence they needed from the pictures of the car – they would agree my clients were lucky to have come out of the wreck alive.

And when I was questioning, I was relaxed, basically acting as though I was having a conversation with a friend, and chatting away. I even agreed with them that it would take more than a little damage to a bumper for *me* to believe there were real injuries. And ultimately I followed my gut in picking the jurors. And my gut was right.

So when you combine a style that is natural and conversational, when you approach the process as your effort to "get to know" your jurors and have them get to know you, to trust that you are being honest and will show them what you say you will show them, then you will naturally *feel* who makes sense for your case. So, follow that gut people! It will take you all the way.


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