Lessons from a novelist on picking a jury

The story you tell must be yours, not one that somebody else has told in another place at another time

By Walter "Skip" Walker

In my "other" career, I write novels. Usually they are about lawyers. Always they have been published by major publishing houses. On more than one occasion they have met with success. From time to time I am asked to lecture about this. I stand before an audience of four (no, really) to 400 people poised with pens and notepads waiting for me to tell them how to write a book – and I think, "how can I do that?"

I can tell how I wrote *my* book. I can tell how *I* got published, how I wrote the book *I* did, why my book achieved the success *it* did. But there is no secret I can impart. There is no formula. There are, in fact, no rules. What worked for me may not work for the four to 400 before me who are writing different stories about different events, with different characters in different places.

I have also had the opportunity to talk (lecture) to lawyers about the other great mystery of my professional life, how to pick a jury. ABOTA provides demonstrations of effective voir dire; other trial lawyer associations (SFTLA, CAOC, AAJ, AIEG) have programs designed to help, and I have participated in many of them, either as a speaker or a listener. All provide valuable advice. But none of the providers, myself included, will be standing in your shoes when you try to choose among 18 to 100 strangers, most of whom do not want to be in your presence for the next several days or weeks.

As with writers, what was effective for wizened trial lawyers may not work for you. What worked for them may not work in your county, with your judge or your client, or even your personality. An approach by a New York lawyer may not play in the South ("My Cousin Vinny" notwithstanding).

Once, as a young San Francisco lawyer, I had a trial in Placer County, where we took two and a half weeks to pick a jury. The judge pretty much let the attorneys do as they wanted. My opposing counsel, a wily old veteran, got very folksy with the jury. Many of the prospective jurors appreciated folksy. I was representing the families of two dead men. There was not much for me to be folksy about. Besides, I don't look folksy or

sound folksy when I talk. As it turned out, the trial went four months, so I am not sure how much effect defense counsel's voir dire folksiness had on the outcome, but he certainly had a distinct advantage over me by the time the first witness was sworn.

Years later, I tried a case in Federal court in Boston. It involved the crash of a commercial airliner that went into Boston Harbor and broke apart. The judge would not let counsel do any voir dire ourselves. If we had a question we were required to give it to the judge and he would decide whether he would ask it.

In the Placer County case the jury came in with a defense verdict. In the Boston case the jury came in with a substantial plaintiffs' verdict that made national news.

Just keep your mouth shut?

Obviously from the above examples I should just keep my mouth shut. But is that the lesson to be learned?

We know keeping one's mouth shut is no way to try a case. We trial lawyers want to control things as much as possible. Control the jurors, control the evidence, control the judge, control the narrative. Can you do this by talking like me? No more than I can by talking like Joe Cotchett, Mike Kelly, Brian Panish, Tom Girardi, or Nina Shapirshteyn.

Little of that which people like me tell you is going to give you magic words any more than when I talk about writing a book to people who themselves want to write books. I can tell you what I have done, what seemed to work for me and what I know did not work, but the only rules to be found regarding jury selection are those in the Code of Civil Procedure (CCP), most particularly section 222.5, which gives us the law in civil jury trials, including the following:

- Counsel for each party *shall* have the right to examine any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause;
- During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case;
- The trial judge *shall* not establish a blanket policy of a time limit for voir dire.

While the above are quotes from CCP section 222.5, most of us with any degree of experience know they do not always apply to the degree we would like. Most of us have heard the dreaded words from the bench, "Move it along, counsel." And some of us, alas, have even been subjected to time limits by judges who perhaps do not interpret CCP section 222.5 the way we think they should.

Judicial discretion over voir dire

How does a judge get around the statutory rules? Well, despite the "shalls" and the "shoulds," the statute also provides a great deal of judicial discretion. "The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion." Rarely is a judge's discretion in this regard found not to be sound. In this regard, it is strongly recommended that you read *Alcazar v. Los Angeles Unified School District* (2018) 29 Cal.App.5th 86.

The Code gives us guidance at section 225, where challenges are defined. Of particular importance is the distinction that is made between "Implied bias" (§225(b)(l)(B)) and "Actual bias" (§ 225 (b)(l)(c)). The latter is easier to discern and understand, as it calls for disqualification if a juror has "the existence of a state of mind...in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

"Implied bias," however, is defined as, "when the existence of the facts as ascertained, in judgment of law disqualifies a juror." *Ahem*. The legislature, in its wisdom, has left it to counsel to figure out what that means. But CCP section 229 gives eight instances of implied bias, including:

> (e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

Unfortunately, "unqualified" is not defined.

CCP section 229 gives another example of "implied bias" as occurring where there is:

> (f) The existence of a state of mind in the juror evincing enmity against, or bias toward, either party.

How that differs from "actual bias" is not explained.

A final rule, and one of profound importance for a number of reasons, not the least of which is that it can be used to overturn a verdict[1], is found at CCP section 231.5 and pertains to peremptory challenges (of which CCP section 231, subdivision (c) tells us there are typically six in a two-party case):

> A party may not use a peremptory challenge to remove a prospective juror on the basis of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.

So there are rules, and there is discretion, and there are a near infinite variety of situations, claims, venues, and clients. What's a poor trial lawyer to do?

I have heard psychologists say that it is important to ask open-ended questions. I have heard learned counsel from around the country share secrets about how they precondition prospective jurors even though CCP section 222.5 specifically prohibits that (See *People v. Williams* (1981) 29 Cal.3d 392, 408; and *People v. Butler* (2009) 46 Cal.4th 847, 860, discussed in *Alcazar, supra*, 29 Cal.App.5th at 97).

I have heard one of California's most successful practitioners urge his listeners to ask prospective jurors to be "brutally honest" with him. I have heard another suggest that lawyers tell jurors the worst aspects of their case in order to see who reacts. I have heard yet another recommend asking a negative juror if he/she can put his/her negative feelings "in a

little box" and set that box aside for purposes of being fair and impartial. Obviously, each of those approaches has worked or professionals would not be telling us about them. But, once again, will they work for you? Tell me, can you write like Faulkner, Hemingway, Hammet, John Grisham...Stephen King? Danielle Steele?

Perhaps. And more power to you if you can. But what are the certainties in jury voir dire? Only the CCP rules and the concepts underlying those rules, the most prominent of which is that you do not want jurors who have pre-judged your case. As an advocate, you interpret that to mean you do not want jurors who cannot be brought around to your way of seeing the case.

We all pre-judge

Not many jurors are going to admit to being prejudiced, but try reminding them that we all pre-judge. We do it based on hairstyles, clothing, body decorations. As much as possible, neutralize rather than stigmatize the concept. Take advantage of the fact that CCP section 222.5 now allows you "a brief opening statement" prior to the commencement of oral questioning, and use that brief opening to tell prospective jurors anything that may cause prejudice against your client or your case. Then ask in voir dire if what you have said has caused pre-judgment.

This leads you to the second thing you really want to know: will each juror follow the judge's instructions? You want your jurors to follow the instructions because you believe that if they do, your client will prevail. If you did not believe that, you would not be in trial.

There are many ways to explore this – ask whether jurors are happy or unhappy to be there. It stands to reason that a happy juror is more likely to follow instructions than an unhappy one. In trying to determine whether they will, indeed, follow instructions, ask whether they are open to the concept of monetary compensation, of substantial monetary compensation if warranted, whether they or people close to them have been victims or accused, injured in any way, damaged by the fault of others – and, if they have been damaged, what, if anything, they did about it.

Of paramount importance is that you, the person in the fancy clothes and shined shoes, with your thick trial book and your papers and documents and computer at the ready, actually talk *with* the people in the box, not at or to them; and that you get them to talk *with* you. Among those who have picked juries, who has not had the experience of realizing that in your eagerness to question the talkative venirepersons, you have all but ignored those who have not spoken out? The essence of talking with someone is to get that person to talk back to you. If you are lucky enough to achieve that, respond to what the person says and not just what you want him or her to say.

Finally, do remember, like I try to tell people in my literary audiences, that the story you are going to tell is yours and not the one that somebody else has told in another place at another time.

It isn't easy, but of course if it were, anybody could do it.


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Endnote:

[1] See, e.g., *People v. Trinh* (2014) 59 Cal.4th 216, 240, citing *Batson v. Kentucky*, 476 U.S.79 (1986)