

IF YOU'RE PICKING A JURY, PICK THE RIGHT ONE

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Most criminal cases are resolved by pleas to lesser offenses, and many that proceed to trial (in the local courts at least), go non-jury. In superior court where the stakes are higher, defendants often opt to roll the dice with a jury of 12 people who have little or no first-hand experience with the inner workings of the criminal justice system rather than put their fate in the hands of a single judge who has pretty much seen and heard it all and is already familiar with the case and the defendant's criminal history (if he/she has one).

Defendants and, more importantly, their lawyers, who elect to go with a jury MUST take sufficient time well in advance of trial to think about the kinds of people they want (and don't want), sitting in judgment of their client in their particular case. This requires not only complete knowledge of the facts and law of the case, but a good understanding of human nature and interpersonal dynamics so that themes can be developed to shape the narrative of the case and, hopefully, determine the outcome in your client's favor.

Some lawyers view jury selection as an awkward if not painful drudgery, and others consider it to be, at best, an educated guessing game where, once you've eliminated the obvious trolls and gargoyles, you're left wondering whether those you've kept are dragons who will defend your castle or burn it down.

However uncomfortable it may be, jury selection is the MOST IMPORTANT part of the trial because that is when you (subject to the rules of cause and peremptory challenges), will be selecting the 12 heads (and hopefully the hearts and minds) of the dragon that will be deciding whether your client gets to go home or someplace far less pleasant when it's all over.

It is critical, therefore, that counsel not only think about the relative acceptability of each individual juror (i.e. open-minded, receptive, skeptical of authority), but consider how each of them is likely to relate to the others in a GROUP DECISION MAKING DYNAMIC. So, in addition to asking questions (preferably open-ended ones), that elicit useful information about personal background, biases, beliefs, prejudices, sympathies, preferences and experiences that might predispose them to a particular conclusion (in this type of case), counsel should also seek to determine whether this prospective juror is, for example, a leader or follower, conformist or contrarian, stubborn mule or push-over, is willing to participate in deliberations thoughtfully and analytically, and most importantly, HOLD THE PEOPLE TO THEIR BURDEN OF PROOF.

This is important because there can be no verdict without unanimity, and all it takes is one juror who is unwilling to succumb to the will of the group for the sake of convenience to create either a hung jury or, as in Reginald Rose's famous play, several angry ones. In *Twelve Angry Men*, at first tally, 11 jurors immediately vote "guilty" in what they perceive (mostly through the eyes of prejudice, personal animus, ignorance and impatience), to be an "open-and-shut" case of murder (18-year-old minority charged with stabbing his abusive father). The lone dissenter

(Henry Fonda), while unsure of the defendant's innocence, figures that the least they owe the accused is a fair discussion of the evidence before sending such a young man (who had a terribly disadvantaged life), to his death.

What follows is an acrimonious but deliberate dissembling of the prosecution's case (clearly not done by the accused's trial counsel), which eventually persuades even the smallest-minded and hateful-hearted members to find reasonable doubt in the People's proof. It also illustrates how widely disparate character and personality types (e.g. quick-to-judge, eager-to-please, unwilling to think, wishy-washy, willing to reconsider, curious about details and perceptive of human nature), can interact and ultimately reach a unanimous verdict (spoiler alert: NOT GUILTY) in spite of themselves.

Whether that 1950's fictional jury bears any resemblance whatsoever to a modern one is questionable, and it is probably not too common for juries to do a 180-degree turn-around from a near unanimous vote reached at the outset of deliberations. (Some studies suggest that 90% of final verdicts are consistent with the conclusion reached by a majority of the jury at the outset. See Article on Jury Decision Making Psychology by Bruce Bornstein and Edie Greene, 2011).

It may also be that once jurors reach conclusions, whether after opening statements or during the proof,(which they are instructed not to do), they may view the rest of the case in ways that reinforce their pre-existing beliefs and/or initial conclusions (like people who watch Fox News, CNN or MSNBC). And, if they have biases/prejudices that are not easy to justify to the rest of the group, they may keep their mouths shut rather than reveal their true colors [except maybe as an excuse to get out of serving in the first place], and either say something like "I just think he's guilty," (as in *Twelve Angry Men*), or just go along with the others to avoid their disapproval. (See *Social Influences on Jury Decision Making* by Melissa Pigott PhD. and Linda Foley, *Trial Diplomacy Journal* vol 18 pgs. 101-108 [1995]).

Nevertheless, it is critical, within the confines and constraints of voir dire, to: know whom you're looking for (and whom you don't want), at the outset (based on the nature of the case, your client and issues to be decided), and what you're going to ask so that you get meaningful answers that enable you to make an informed decision whether this/these juror(s) is/are acceptable individually and collectively. (Since you go last, take full advantage of the judge's and prosecutors questioning and the jurors' responses [verbal and non-verbal], by paying close attention and taking helpful notes).

Once you've obtained sufficient biographical information (e.g. where they grew up, schooling, family dynamic [only child or one of many], current marital/family status, employment etc.), and attitudes regarding case-related issues (based on learning, experience or pre-trial publicity), counsel may, to the extent that the court allows, ask questions that reveal something about the type of decision-maker a juror perceives him/herself to be and whether he/she is comfortable participating and making decisions in a group dynamic where the ultimate objective is one hundred percent consensus (preferably in favor of an acquittal).

For example counsel may ask: 1. "Mrs. Smith, how would you describe the way you go about making important decisions in your life?" (e.g. buying a house or car) (is she deliberate or impulsive?); 2. "What decisions do you find to be the most difficult and why?"; 3. "Have you, in the course of work or in other contexts, made decisions affecting the status of other people?" (e.g. hiring, promotion, demotion, firing). 4. (If a teacher), "have you ever had to fail a student?"; "Have you ever been persuaded to change a student's grade?" (i.e. are you persuadable or

intransigent after you've made up your mind?) 4. "What experience have you had making decisions in a group setting?" (e.g. committees, school boards, parent-teacher organizations etc.); 5. How did you find those experiences?"; 6. (If prior juror): " how did you find that experience?"; 7. How do you feel about making decisions in situations where you are in the minority or are out there on your own?" (i.e. are you more likely to give in to the group or dig in your heels and stick to your position?). 7. "If you were in the military, what rank would you choose and why?" 8. Would/do you prefer to bake (following the recipe to the letter is usually required) or cook (much more free-wheeling: " a dash of this, a pinch of that."); 9. " How would you describe yourself in terms of being/interacting with other people?" (i.e. misanthropic or gregarious?). 10. "What three words best describe your personality?"

The type of questions you ask should be limited only by your own thoughtfulness and creativity (and obviously the court's patience), but, above all, they should elicit responses that will be useful to you in putting together a jury that you and your client are confident will give you a fair shake by evaluating the evidence in a reasonable, common sense way, holding the People to their burden of proof and not rushing to judgment based on preconceived biases, beliefs and prejudices.

Counsel should keep in mind that jurors, not unlike those in 12 Angry Men, do not check their personal baggage at the courtroom door, and also bring with them varying degrees of ability with respect to attention span, memory and analysis of evidence that may include competing conclusions on complicated issues from equally qualified expert witnesses.

They may also be subject over several days to a barrage of information that they are not at liberty to discuss until the proof is over, counsel has argued persuasively in favor of opposing outcomes and the judge has given them legal instructions in a new and foreign vocabulary. (When jurors request further clarification on a legal principle [e.g. reasonable doubt], rather than risk reversal with an off-script explanation in every-day language, judges are likely to just re-read the instruction set forth in the CJI).

That is why counsel must challenge the prosecution's case and present the defense's position in clear, concise and comprehensible terms that reinforce your theme, shape the narrative and, in the end, convince at least one (but preferably 12 jurors) that there is reasonable doubt in the evidence or lack thereof. Of course, your words, however persuasive in the abstract, will fall on deaf ears if your audience is not receptive from the start. So, if you're going with a jury, make sure that you take the time and trouble to pick the right one.