MONDAY, MARCH 14

7:45 - 8:40 A.M. (3rd Flr Cafeteria Seating Area)	STUDENT REGISTRATION
(Room 210)	After you register, you are welcome to come to our central working room, Room 210, where the program will begin at 8:45 A.M., but please register first.
8:45 - 9:00 A.M. (Room 210) All Students	WELCOME AND INTRODUCTION INCLUDING FORMER STUDENT PROGRAM PREVIEW.
9:00 A.M. (Room 210) All Students	EXPLANATION OF CASE LETTER, WORKSHOP AND WORKSHOP STRATEGY ROOM ASSIGNMENTS - (MAKE SURE YOU ARE SIGNED IN AND REGISTERED.)
9:00 - 10:00 A.M. (Room 210) All Students	THE PERSUASION METHOD: BUILDING THE POWERFUL DEFENSE - STEVE RENCH
10:00 - 11:00 A.M.	CASE STRATEGIZING INCLUDING DEVELOPING YOUR "THEORY OF INNOCENCE" AND A "STORYTELLING" OPENING STATEMENT
Students B, D (Room C35) Students E, F, H (Room C25) Students A, C (Room 165)	**People v. Robinson Jeffries** **People v. Curtiss Mayfield** **People v. Jason Hunt**
11:00 A.M. - 12:00 P.M. (Room 210) All Students	VOIR DIRE PREVIEW - HON. THOMAS DONNELLY - TIMOTHY O'HARA and DEBRA CRUZ
12:00 - 1:00 P.M.	LUNCH AND PREPARATION TIME FOR VOIR DIRE WORKSHOPS
1:00 - 4:00 P.M. (Rooms C35, C25, 165, 210, 345)	VOIR DIRE WORKSHOP Working for the first time in your assigned Workshop rooms you will be conducting voir dire.
Students B, D Students E, F, H Students A, C	**People v. Robinson Jeffries** **People v. Curtiss Mayfield** **People v. Jason Hunt**
4:00 - 4:45 P.M. (Room 210) All Students	THE OPENING STATEMENT- MARY MORIARTY
4:45 - 6:00 P.M.	*Opening Night Reception - Lobby*

Voir Dire Sequence

2016

1:00 - 1:23	H	*Mayfield/murder*
1:23 - 1:46	B	Jeffries/rape
1:46 - 2:09	D	Jeffries/rape
2:09 - 2:19	**BREAK**	
2:20 - 2:43	E	*Mayfield/murder*
2:43 - 3:06	F	*Mayfield/murder*
3:06 - 3:29	A	Hunt/armed robbery
3:29 - 3:52	C	Hunt/armed robbery

YOUR JURORS
JURY QUESTIONNAIRE

1. Name_____

2. Age_____

3. Marital Status_____

4. Number of Children and their Ages_____
_____

5. Occupation_____

6. Employer_____

7. Highest Level of Education_____
_____

8. City in which you Live_____
_____

9. Have You Ever Been a Victim of a Crime?_____
_____

10. Has a Family Member Ever Been a Victim of a Crime_____
_____

Welcome to the Illinois Public Defender Jury Selection Workshop. The goal of the program is to train public defenders to better represent indigent clients at trial.

You have agreed to participate in the mock jury selection segment of the workshop. You will be put in a small group with other "jurors" to participate in jury selection. The workshop participants will ask you questions about yourself just as they would if they were selecting jurors in a real case. Please answer honestly. There is no WRONG answer to any question.

The faculty wishes to make this exercise best reflect an actual jury selection. Toward that effort, we have created a jury questionnaire. Please fill out the questionnaire and take it with you each time you move to a different room.

The faculty thanks you for agreeing to participate in this segment of the workshop.

Rule 431. Voir Dire Examination

(a) The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

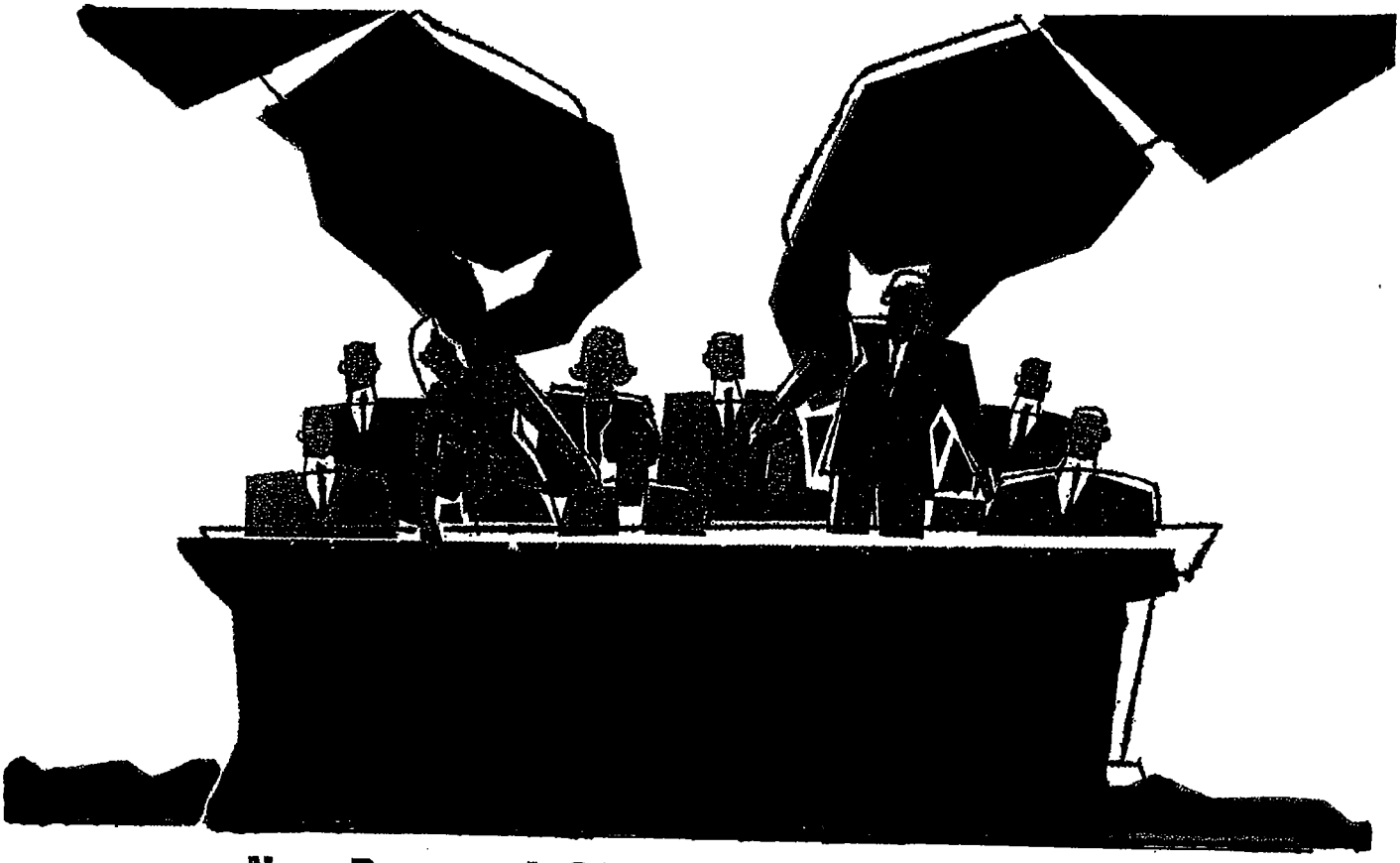
(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that ~~the defendant's failure to testify~~ if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's ~~failure~~ decision not to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.

Renumbered October 1, 1971; amended April 3, 1997, effective May 1, 1997; amended March 21, 2007, effective May 1, 2007; amended April 26, 2012, eff. July 1, 2012.

Committee Comments

The new language is intended to ensure compliance with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984). It seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.



New Research Challenges Old Assumptions

Research shows that 1) judge-directed voir dire can be less revealing of juror prejudice than lawyer questioning and 2) attitudes toward hot-button issues like tort reform are better predictors of juror bias than race, class, and other demographic factors.

By Frank P. Andreano

Voir dire, the literal translation of which is "to see and speak the truth," is generally considered one of the most critical aspects of a trial.[1] During this pre-trial interview, prospective jurors are asked to provide information about their background, attitudes and beliefs.

In theory, these self-disclosures reveal any bias or prejudice that would prevent the juror from acting in a fair and impartial manner. The problem with voir dire as currently practiced, however, is that courts rarely understand the psychological underpinnings of self-disclosure interviews and why attorney participation is so critical to effective voir dire.

Current social science research shows that levels of juror self-disclosure vary widely depending on the identity of the questioner, the style of questioning, and the manner in which the questioning is conducted.[2] Corollary research shows that demographic profiles and other traditional assumptions about race, class, and socioeconomic status are not necessarily reliable indicators of verdict predisposition. Rather, juror attitudes about the legal sys-

1. Irving Goldstein and Fred Lane, 1 *Lane's Goldstein Trial Technique* § 9.45 (2d ed 1984).
2. Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 Law & Hum Behav 131-146 (June 1987).

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tem, tort reform, corporate misconduct, and other hot button issues are much more reliable measures of verdict predisposition.

By learning basic psychological precepts of self-disclosure interviews and examining recent shifts in public opinion about the legal system, attorneys can better prepare themselves for the task of jury selection.

History and trends

The right to a fair and impartial jury is a cornerstone of American jurisprudence.[3] The Sixth and Fourteenth Amendments provide for trial by jury, including the right to an impartial jury.[4] Although questioning of prospective jurors is constitutionally required, exactly how it is done is controlled by applicable statutes and rules.[5]

In Illinois, Supreme Court Rule 234 provides that the trial court "shall" allow each counsel to supplement the trial court's voir dire with direct inquiry of the venire.[6] Though this mandate applies to both civil and criminal cases,[7] the extent to which the attorneys are allowed to directly question prospective jurors varies widely.

One of the most frequently cited reasons for limiting attorney voir dire is belief that it unduly prolongs the trial process. A survey of 124 federal judges conducted by the Federal Judicial Center, however, reported no significant increase in jury selection times between those judges who allowed attorney conducted voir dire and those that did not.[8]

In an effort to promote a more uniform and effective system of jury selection and service, the ABA's American Jury Project has produced a set of modern jury principles.[9] Though a complete analysis of these principles is beyond the scope of this article, they include provisions for jury selection questionnaires, substantive pre-trial instructions to the jury, trial time limits, questions by the jury during trial, substantial questioning of prospective jurors by counsel, and interim statements to the jury by the attorneys. The authors of these principles used social science research to help develop a framework for refining and improving jury trial practice.

The federal district courts in the seventh circuit have implemented a program putting many of the ABA's model principles into practical application. For those interested in the program, the Seventh Circuit Bar Association's Web site is an excellent informational resource.[10] The ABA and seventh circuit's model program demonstrates an increasing willingness in the legal community to use social science research to help improve and refine the American jury trial system.

Judge versus attorney conducted voir dire

In one of the largest empirical studies of voir dire, funded by the U.S. Department of Justice, researchers sought to determine whether the level of juror self-disclosure was affected by the identity of the questioner or the method of questioning. The researchers sought to verify or refute past social science research about self-disclosure interviews.[11] A long series of studies conducted in the employment field have identified what researchers described as "reciprocity effect."[12]

At its most basic, reciprocity effect holds that the level of self-disclosure an individual will make depends on whether he or she first receives self-disclosure from the interviewer.[13] In the employment context, researchers have found that individuals "reciprocate" with self-disclosure when they receive moderate self-disclosure from their interviewer.[14] The degree of self-disclosure also varies based on the interviewer's perceived status within the employment organization; that is, employees were more willing to self-disclose to interviewers within their own hierarchical level rather than to more powerful superiors.[15]

To test whether prospective jurors "reciprocate" with self-disclosure consistent with past research, 166 jury-eligible residents were selected from a county voter registration list.[16] The participants were told that they would be participating in a mock trial and that the judge and the attorneys were authentic.

They were further told that the judge had been delayed and they were asked to complete an Attitudes Toward Legal Issues Questionnaire (ATLIQ) while they waited.[17] The ATLIQ posed 29 statements regarding various issues, including (a) treatment of minorities by the court system, (b) controversial sociological issues, e.g., marijuana use and abortion, (c) attitudes toward the courts, e.g., judges, attorneys, and (d) attitudes about deterrence.[18]

The venire was then asked to agree or disagree with the statements along a 10-point Likert-type scale.[19] The goal of the ATLIQ, which was also based on earlier social science studies, was to gauge the venire's relative conservatism or liberalism regarding the justice system.[20]

Researchers have found that prospective jurors view the judge as an authority figure and are less revealing in their responses.

3. Deidre Golash, JD, PhD, *Race, Fairness, and Jury Selection*, 10 Behav Sci & L, 155-177 (1992).
4. Id.
5. Valerie P. Hans and Alayana Jehle, *Avoid Bald Men And People With Green Socks? Other Ways To Improve The Voir Dire Process in Jury Selection*, 78 Chi Kent L Rev 1179, 1183. (See FN 16 in article for compendium on practices in state and federal courts).
6. 177 Ill 2d R 234.
7. *Grossman v Gebarowski*, 315 Ill App 3d 213, 732 NE2d 1100 (1st D 2000); *People v Allen*, 313 Ill App 3d 842, 730 NE2d 1216 (2d D 2000).
8. Hans and Jehle, *Avoid Bald Men And People With Green Socks*, 78 Chi Kent L Rev at 1185 (cited in note 5) (citing 1994 memorandum of survey of 124 federal judges conducted by Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules, Oct 4, 1994).
9. http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf.
10. http://www.7thcircuitbar.org/associations/1507/files/01ProjectManual.pdf.
11. See Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law & Hum Behav at 143 (cited in note 2).
12. Id at 133.
13. H. J. Erhlich and D. B. Graven, *Reciprocal self-disclosure in a dyad*, J of Exper Soc Psych 7: 389-400 (1971).
14. L. D. Goodstein and V. M. Reinecker, *Factors affecting self-disclosure: A literature review*, in B. A. Maher (ed), *Progress in experimental personality research*, 49-77 (New York: Academic 1974).
15. Id.
16. See Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law & Hum Behav at 143 (cited in note 2).
17. Id at 136-137.
18. Id at 136.
19. See A. Campbell (ed), *International Encyclopedia of the Social Sciences, Biographical Supplement* (New York: The Free Press 1988). (A Likert scale (pronounced 'lick-ert') is a type of psychometric scale often used in questionnaires. Invented in 1932 by social scientist Renis Likert, a question is posed and the respondents are asked to indicate their degree of agreement, or disagreement on a categorical scale.).
20. See Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law & Hum Behav at 136 (cited in note 2).

The participants were then excused and the venire broken down in cross sections based on their ATLIQ scores. Then, multiple voir dires were conducted twice a week for two consecutive weeks in a moot courtroom, with a uniformed sheriff, clerk, attorneys and a judge.

In examining courtroom behavior, the researchers found that the prospective jurors viewed the judge as an authority figure and were much more guarded in their responses.[21] The jurors tended to provide less self-revealing information than their ATLIQ questionnaire suggested and were much more conservative with the responses during judge initiated questioning.

This correlation to past research lead to the observation that "it seems from the direction and magnitude of the change scores that during a judge-conducted voir dire jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear."[22] This skew continued to exist even when the judge adopted a less formal method of examination.[23]

In contrast, the jurors did not view the attorneys as possessing the same type of authority as the judge, which tended to result in a greater degree of self-disclosure.[24] When the attorneys provided some self-disclosure, e.g., admission of nervousness or cursory biographical information, and further conducted the voir dire in a warm and "liking" manner, self-disclosure levels rose. As with the judge-conducted voir dire, however, self-disclosure dropped dramatically when the attorneys provided the jurors with no self-disclosure and adopted a cold and aloof manner.[25]

Other empirical studies have confirmed the validity of "reciprocity effect" as a method of increasing juror self-disclosure during voir dire.[26] These findings correlate with much of the antidotal reporting from trial advocacy institutions and well known attorneys, both plaintiff and defense. These findings strongly suggest that attorney-conducted voir dire, when conducted correctly, leads to an atmosphere where prospective jurors are more likely to provide meaningful self-disclosure and thus produce a more effective voir dire examination.

Attitudes, voir dire, and the legal system

The ability to effectively elicit information directly from prospective jurors, however, is only part of productive voir dire. The more pressing question becomes "what information should be asked of prospective jurors?" Because no two cases are identical, no set of stock questions can be considered sufficient.

However, recent research demonstrates that popular attitudes about the legal system, jury awards, corporate misconduct, and other hot button issues are crucial indicators of verdict inclination.[27] The ability to discuss such issues with prospective jurors is critical to obtaining a fair venire.

Empirical and anecdotal evidence strongly suggest that the millions of dollars spent each year on anti-lawsuit advertising has changed public perception of the legal profession and has strongly shifted attitudes in both criminal and civil cases.[28] It has become an accepted precept in the field of scientific jury selection (SJS) that attitudes about tort reform, concerns about insurance rates, and support for damage caps are better predictors of jury verdict inclination than are demographic variables.[29]

In a similar vein, corporate litigators have become increasingly concerned about jury prejudice following the collapse of Enron, WorldCom and the multiple corporate accounting scandals which followed.[30] The *National Law Journal*, reporting on its top 100 verdicts of 2002, attributed some of them to "juror rage" against corporate entities.[31] According to one national survey conducted by Decision Quest, a jury consulting firm, "more than 80% of those polled agreed that 'the events of Enron and WorldCom are just the tip of the iceberg.'"[32]

In order to test the validity of public opinion trends on verdict inclination, members of the Psychology Department at Florida International University undertook a multi-phase study of several hundred jury eligible persons chosen from a racially and economically diverse cross-section of the South Florida community. The participants were administered an Attitudes Toward Tort Reform (ATR) questionnaire where the venire was asked to answer on a modified Likert type scale ("agree," "strongly agree," "neutral," "disagree," "strongly disagree.").

The ATR covered attitudes towards attorney fees, limits on pain and suffering, as well as questions about criminal deterrence, e.g., "The courts are far too technical in protecting the so-called rights of defendants." The participants were then provided with various criminal and civil case scenarios, including an attorney charged with controlled substance conspiracy, a RICO case involving stolen goods, a neurologist charged with medical insurance fraud, and a "slip and fall" case where the plaintiff suffered from pre-accident depression and claimed that the fall caused mild organic brain damage.

Jurors who show a strong tendency toward "legal authoritarianism" are much more inclined to rule for the government in criminal cases and the defense in civil cases.

The results of the study showed those jurors who showed a strong tendency towards what the researchers called "legal

21. Id at 143.
22. Id.
23. Id at 134.
24. Id.
25. Id.
26. Id at 143.
27. Robert Trager, Sandra Moriariaty, and Tom Duncan, *Selling Influence: Using Advertising To Prejudice The Jury Pool*, 83 Neb L Rev 685 (2005); and Valerie Hans and Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 Notre Dame L Rev 1497 (Aug 2003).
28. Gary Moran, Brian Cutler and Anthony De Lisa, *Attitude toward tort reform, scientific jury selection and juror bias; verdict inclination in criminal and civil trials*, 18 Law & Psych Rev 309-313 (1990).
29. See Gary Moran, Brian Cutler, and Elizabeth Loftus, *Jury selection in major controlled substance trials: the need for extended voir dire*, 3 Forensic Rep 331, 346 (1990); Douglas J. Narby, Brian Cutler, and Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J Applied Psychol 34 (1993).
30. Tamara Loomis, *Scandals Rock Juror Attitudes: Enron/WorldCom Ripple Seen Across the Board*, Natl L J, Oct 21, 2002, at A30.
31. Gary Young, *Jury Room Rage*, Natl L J, Feb 10, 2003, at C17 ("If punitive damages are a measure of juror anger, there were a lot of angry jurors last year").
32. See Loomis, *Scandals Rock Juror Attitudes* at A35 (cited in note 30).

authoritarianism," i.e., the strongly held belief that "the system is too soft on criminals" or that jurors in civil cases "often give money awards that are too large," were much more inclined to rule for the government in criminal cases and the defense in civil cases than were those who were neutral or more civil-liberties conscious. Interestingly, those persons who tended towards "classical authoritarianism" in their personal views (e.g., stiff punishment is a good way to teach people right from wrong) but maintained a belief in the importance of the legal system and the necessity of protecting citizen rights did not skew as strongly pro-government/pro-defense.

Researchers concluded that those persons holding negative attitudes about the legal system are strongly inclined towards a particular result in both civil and criminal cases. Social psychologist Melvin Lerner has theorized that the concept of undeserved suffering; or the existence of an unjust world, often challenges the core upon which certain personalities base so much of their sense of self.[33] To accept that the world is sometimes a random and unjust place calls into question the validity of the concepts of "self-reliance" and "self-motivation" upon which authoritarian personalities base their world view.[34]

Several studies have confirmed these basic precepts, using different testing models such as the "Hans and Lofquist Litigation Crisis Attitudes Scale"[35] and the "Just World Scale."[36] What can be taken from the research is that traditional methods of juror profiling, such as age, race, sex or wealth, do not accurately predict juror attitudes when compared to directing questioning. Attitudes about the legal system, lawsuits, and certain hot button social issues seem to provide a much more revealing method of assessing preconceived juror inclination.[37]

Conclusion

The essence of voir dire is to open a dialog with prospective jurors in a way that encourages meaningful self-disclosure. When the attorneys present prospective jurors with some self-disclosure, and conduct the voir dire examination in a way that appreciates how intimidating it is to make self-revelations in a crowded courtroom, a dialog becomes possible. The goal of this dialog is to encourage the prospective venire to reveal their true attitudes and beliefs, even if they are antithetical to lawyers, the legal system, or the type of suit at issue.

The simple truth is that attorneys must be willing to rethink their approach to voir dire and to appreciate the crucial role they have in selecting a fair venire. Jury selection is a human event. No set of stock questions, forms or a checklist can tell a trial lawyer what he or she needs to know.

Only by opening up to the prospective venire, and by accepting that answers received may be unsettling, can the trial lawyer progress to the point where voir dire is meaningful and revealing. It is far better to receive a "negative" answer during voir dire than to allow a predisposed juror to sit silently on the panel and dispatch your client on a verdict form. By studying social sciences and the lessons they have to teach, we can all become better trial lawyers and work towards the goal of true justice. ■

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33. Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum Press 1980).
34. Id.
35. Valerie P. Hans and William S. Loftquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 Behav Sci & L 149-160 (1994).
36. Id.
37. Moran, Cutler, and DeLisa, *Attitude Toward Tort Reform* (cited in note 28).

Getting The Venire to Talk, Actually *Talk*

Jamie Kunz

So, okay. You buy the notion that getting a yes/no from a prospective juror doesn't really get you anywhere:

> Q: Can you be fair to both sides?
> A: Yes.
>
> Q: Would you be more likely to believe the testimony of a police officer simply because he is a police officer?
> A: No.
>
> Q: If the State failed to prove each and every element of the offense beyond a reasonable doubt, what would your verdict be?
> A: Not guilty.

Now what? You want them to talk so that you can see and hear where they are coming from – how do you do that?

Body Language

By "body language" we mean the video tape without the *words*, or – maybe better – everything that does not appear in the cold transcript, everything that can make you look and sound like a human being instead of a lawyer. It includes far more than hand gestures and whether or not you're pacing back and forth: tone of voice, inflection, nods of the head, uptightness vs. relaxation, the look in your eyes, eye contact, spontaneity, responsiveness, the ability to smile, and timing. Timing, which includes a certain amount of patience-with-pauses, with silence, is very important. If you look and sound like you're more interested in getting your next question out than in listening to the answer you're hearing, you'll be cutting them off before you even start the next question. They will sense – subliminally, of course – "This lawyer's about to pounce," and they'll clam up. You've got to look and sound like you're interested in what they have to say. And you can't fake it. You've got to be interested in fact.

Agendas

But, you'll say, what if a juror goes off on a toot of her own? I may never get to the points I want to make. It's true. You may not. And in a way it's a trade-off. You've got your agenda and each individual juror has his or hers. But a major item on your agenda is, or ought to be, finding out what the juror's agenda is, what preconceived "script" they're bringing with them into the courtroom. Besides, we human beings tend to talk to people we trust. Oddly, the obverse is also true: we tend to trust people we talk to, people who show that they are willing to listen. Anything you can do to get the jurors to trust you is probably worth skipping the "education," which often means trying to tell them how they *should* think before you really know where they're coming from.

Follow-Up Questions

A good way to get jurors to talk more is to ask follow-up questions, suspending your agenda and going with the flow of theirs. These can be very, very short, as they often are in conversations actually observed between live human beings:

Q: Really?
Q: Say more.
Q: Such as –
Q: Like what?
Q: For example –
Q: What was that like?
Q: How often?

Q: Wow, that must have hurt the kids.
Q: I don't see what you mean, exactly.
Q: Based on what?
Q: Was that the only time?
Q: How did that strike you?
Q: You were there doing –
Q: You left there – when?
Because –

Form

Questioning prospective jurors is probably not something you should wing. Maybe Gerry Spence can do it. I can't. I find that if I just make myself a list of the subject areas I want to cover and try to take it spontaneously from there, I end up asking closed-ended questions – bad habits I try to break but which get reawakened and reinforced in almost every trial I do, first by the judge and then by the prosecutor. So I sit down in advance of trial and construct my questions with care to make them likely to elicit meaningful responses from the jurors.

This is, of course, largely a matter of form, but it's a different problem from the normal leading/non-leading distinction. "Have you ever broken your arm?" is leading in form, in "trial-form," but in everyday human conversation – which is the tone we're after in voir dire – it will rarely evoke a simple, "Yes." More likely something like, "Yeah – when I was a kid," or, "Uh-huh. I played football in high school," which takes you naturally to follow-up questions. A more likely one-word answer to this question is "No," but that gets followed up with, "Have you ever known anyone else who broke an arm?" which may evoke, "Yes. My son," or, "Oh, sure, lots of people."

The point is that in planning your questions you want to imagine how they're going to fly in court, the test being whether they're put in such a way that they invite juror responses. I keep a check list, not so much for content as for form, and I use it to get myself in the proper mind-set and tongue-mode as I write out my questions for trial the next day. It looks something like this:

1. How often do you see the son who's in college?
2. Where did you learn what you know about this?
3. I notice you hesitated for a minute – what were you thinking about?
4. Why do you think you feel that way? [How did that make you feel?]
5. How much thought have you given to this [subject]?
6. Can you think of why a person might confess to something he didn't do?
7. Have you ever supervised a group of people, or helped them to organize?
8. How much personal contact have you had with people of color?
9. Do you know anyone who's been treated for mental problems?
10. How do you feel about street drugs?
11. How much do you know about guns?
12. Why do you smile when you say that?
13. Do your friends and family feel the same way?
14. How much have your police friends talked to you about their jobs?
15. Do you know many people who drink?

VOIR DIRE CHEAT SHEET

1) *People v. Garstecki*, 234 Ill. 2d 430 (Ill. 2009) - Defense counsel was not allowed to directly question the jurors during *voir dire*. Instead the court required that counsel submit all written questions to the court and follow up questioning was done by the court. Illinois Supreme Court found that the trial court complied with S.C. Rule 431.

"Thus, what the rule clearly mandates is that the trial court consider: 1) the length of examination by the court; 2) the complexity of the case, and 3) the nature of the charges; and then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate. **Trial courts may no longer simply dispense with attorney questioning whenever they want. We agree with the *Allen* court's observation that the 'trial court is to exercise its discretion in favor of permitting direct inquiry of jurors by attorneys**.'" *Id.* at 444 (citing *People v. Allen*, 313 Ill. App 3d 842 (2000))(emphasis added).

N.B.** "The court further asked if the case was going to involve either a blood draw or complex legal issues, and the defendant's attorney agreed that the case would involve no complex factual or legal issues." *Id.* at 444.

2) *People v. Rinehart*, 2012 IL 111719 (Ill.) – the state questioned the panel about potential reasons why a victim would not report a sexual assault to the police right away. Using an abuse of discretion standard, the Illinois S.C. found that the trial court did not abuse its discretion in allowing such questioning – no error occurred.

"Unlike the questions in [People v. Bell and People v. Boston], the questions here were less fact-driven, and **more focused on potential jurors' preconceptions about sexual assault cases, in an effort to uncover any bias regarding delayed reporting and the credibility of a victim who informed no one about the alleged attack when it happened.** An answer which indicated a juror was less likely to believe a victim who did not immediately report an incident would have given the State grounds to exercise intelligently its peremptory challenges." *Id.* at Page 6, paragraph 21.

3) *People v. Gonzalez*, 2011 Ill. App. (2d) 100380 – The trial court prevented defense counsel from examining the jury directly, stating: "This is the new regime." The 2nd District found that the court's failure to abide by S.C. Rule 431 was plain error and the defendant's conviction for aggravated assault on a police officer was reversed.

"**The upshot is that it appears from the record that the court simply decided that it would dispense with all direct attorney questioning without consideration of Rule 431(a), which is exactly what the court in *Garstecki* said was prohibited**. See page 4, Paragraph 24 (citing *People v. Garstecki* at page 444)

4) *People v. Strain*, 306 Ill. App. 3d 328 (1st Dist. 1999) – the trial court's limited inquiry of the venire about gangs was insufficient on the topic since the jurors were only asked whether they or any member of their families had ever had involvement with street gangs - the defendant's first degree murder conviction was reversed.

Since there is a strong and prevalent bias in our society against membership in gangs, and the prosecution successfully emphasized the role of gangs as central to this case, identifying gang bias among the prospective jurors was essential for an adequate *voir dire*. *Id.* at 338-339 (citing *Gardner v. Bennett*, 175 F.3d 580 (7th Circ. 1999).

5) *People v. Terrell*, 185 Ill. 2d 467, 489 (Ill. 1998) – a juror's slight favoritism to police officers led the Illinois Supreme Court to uphold the trial court's decision to dismiss the juror for cause. After the juror stated that he would have "a little more belief" in the testimony of a police officer, the judge dismissed the juror.

[The juror] expressed doubt as to his ability to be impartial regarding police testimony and, thus, was "not prepared to stand indifferent, and to be guided only by law and the evidence." *Id.* (citing *Peeples,* 155 Ill.2d at 463, 186 Ill.Dec. 341, 616 N.E.2d 294).

BUILDING THE WINNING CRIMINAL CASE: THE PERSUASION METHOD

By

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BUILDING THE WINNING CRIMINAL CASE

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I. WINNING CRIMINAL CASES

A. Many more criminal cases can be won.

B. Only a relatively small percentage of criminal cases are won.

C. A significant number of innocent people are convicted and even sentenced to death. See B. Scheck, P. Neufeld, and J. Dwyer, *Actual Innocence,* Signet Printing (2001).

D. That so few cases are won has a further psychological effect of causing criminal defense attorneys to be pessimistic thus affecting their ability to win.

E. The major factor in the loss of winnable cases is the use of a method of trial lawyering resulting from the law schools that is psychologically and persuasively unsound.

F. The good, indeed great news, is that there is a method of trial lawyering used by the great trial lawyers over the decades that wins.

G. This paper sets forth in outline form the winning persuasion method and particularizes its application in building the winning criminal case.

H. It is time to speak of the elephant in the parlor - the teaching and use of an outdated and wrong method of trial lawyering and the resulting injustices.

I. It is vital to note that the wrong method is the method resulting from our legal education and is *in no way* the fault of our trial lawyers.

II. THE STANDARD LOSING METHOD

A. The standard trial lawyering method used throughout the nation has the law (rather than persuasion psychology) as its center with emphasis on the failure of proof beyond a reasonable doubt by the prosecution.

B. The standard method consists mainly of the following:

1. Legalisms and obvious unconnected facts.

2. Going through legal rituals meeting the minimum requirements of the law rather than using maximum persuasion.

3. Doing legal analysis for the jury, not persuasion.

4. A defensive and negative case based on burden of production and burden of proof

5. Weak, abstract and conclusory language rather than power language.

6 Lack of appropriate emotion, rather than the attorney being a true believer making use of the power of ethos.

7. Anger, tricks, and legal technicalities resorted to when the lawyer feels the weakness of the standard method.

8. Failure to realize the power of 100% credibility.

9. Failure to develop a case that dovetails with and appeals to the belief systems of jurors rather than that of lawyers.

10. Thinking like a lawyer rather than thinking like the human beings we are trying to persuade.

C. Reasonable doubt centrality is the epitome of the wrongness of the standard method for its actual message to the jury is that the defendant is guilty but should be allowed off because of the legal technicality of failure of proof. Reasonable doubt, however, is useful in a supporting role, as preventing innocent persons from being convicted.

D. A thorough study of the cases of the great and winning trial attorneys, past and present, shows that not a single one used the standard method.

E. The ideas and constructs of the standard method came from the law, however unpersuasive and contrary to the science of persuasive psychology.

F. The law sets forth the law and is not meant to be a guide to jury persuasion.

G. There is a tremendous difference in power and results between the standard method and the persuasion method next discussed.

H. The standard method produces disastrous results

I The history associated with the standard method is enlightening and explains why this hodge-podge of ineffective and counterproductive methods developed. In 1871, Harvard Dean Christopher Columbus Langdell, initiated the "case method" which inexplicably is still the very narrow method of legal education. The case method was a compilation of appellate decisions and dealt only with law and not facts, skills, etc. Trial lawyers were knowledgeable only in law. Being untrained in trial lawyering, they looked only to legal decisions for help in what to do in trial. Not surprisingly, the standard method over time developed based on repeating legalisms no matter how unpersuasive to jurors. Because law schools teach virtually the same (case method law) as in 1871 and lawyers have yet to make persuasion psychology central, the ineffective and even counterproductive standard academic method still reigns supreme.

III. THE WINNING MINDSET

A. The culture, too often, among criminal defense attorneys is that they are expected to lose and that nothing can be done to change this losing.

B The reason for our consistently losing is that we are using methods that are simply wrong and inconsistent with sound persuasive psychology.

C. There is a way, set out in this paper, to find and build criminal cases that do consistently win.

D. The criminal case must be approached with the mindset that criminal cases can be won and that this trial lawyer can win this particular case.

E. The Persuasion Method, set out below, will not win every case, but will result in substantially increasing the batting average of wins.

IV. THE PERSUASION METHOD

A. Persuasion, in the trial context, is influencing the jury to undertake the course of action that is desired—a verdict of not guilty..

B. Persuasion has two fundamental principles: (1) know your audience, and (2) adapt your arguments to the audience.

C. Because the objective of every single action during the trial is persuading the jury, this method is appropriately called the Persuasion Method.

D. The essence of persuasion is focusing on what influences the jury—it is jury-centered.

E. The persuasion method is based on and consistent with the techniques of winning trial lawyers all through history.

F. The persuasion method is scientifically based on such disciplines as persuasion, psychology, social psychology, interpersonal communication, linguistics, speech, drama, etc. and other soft sciences (but sciences, nevertheless backed by the experience of the great trial lawyers).

G. The persuasion method is based on persuasion psychology.

H. The persuasion method is narrowly founded on the idea that the object is to persuade the jury, not just to go through legal rituals.

I. The focus in persuasion is in influencing the decision-making of the persuadees (here the jurors).

J. A sine qua non of this method is a paradigm shift from a thinking-like-a-lawyer legal analyst to being a humanistic persuader focusing on the jurors.

K. The persuasion method, therefore has the following constructs and features and is:

1. Multidisciplinary
2. Jury-centered
3. Humanistic, not legalistic
4. Realistic
5. Is easy, natural and intuitive
6. Dovetails with jurors' belief systems

L. Central to being a persuader is being a student of jurors' belief systems. Jurors' belief systems deserve separate discussion.

V. THE JURORS' BELIEF SYSTEMS

A. Jurors do not think like lawyers and lawyers do not think like jurors.

B. Study of psychology, jury research and experience suggest that the following are important factors in jurors' belief systems:

1. Need and desire to do the right thing - the equity theory
2. Truth and justice are overriding values

3. Operate from belief systems - how the world works

4. Have attitudes, beliefs and values

5. Life experiences are important

6. They remember that which is familiar and meaningful

7. They make decisions emotionally and then rationalize

8. They remember only 10% after 72 hours

9. Have short attention spans

10. Distrust lawyers

11. Dislike "legal technicalities"

12. Want to feel good about that which they have done

B. At least as important is that which jury research, study of psychology, experience and common sense tell us jurors do not do. They do not in deliberations conduct a legal analysis with importance to elements and burdens of proceeding and proof

C. Our case and everything we do in trial must be with awareness of the jurors' belief systems.

VI. CREDIBILITY

A. Studies show that the four most influential qualities are:

1. Credibility

2. Competence

3. Dynamism

4. Likeableness

B. Credibility necessarily applies to both the advocate and the case

C. Aristotle, three thousand years ago, said that ethos (character of the advocate) was the most powerful factor in persuasion and present-day experts agree.

D. Unfortunately, many lawyers feel that game-playing is a part of trial lawyering. As soon as the jury sees that the lawyer is a game-player and not a truth-seeker, the lawyer's credibility is gone and a win unlikely. It is that important.

E. Credibility of the case is emphasized below.

VII. KNOWLEDGE OF CRIMINAL CASE SUBJECT-MATTER

A. The prosecution's case consists of evidence such as eyewitness testimony, eyewitness identification, crime scene evidence, circumstantial evidence, other criminalistics, forensic evidence such as fingerprint identification, firearms examination, ballistics, chemistry, trace evidence, tool marks, etc., statements of the defendant, expert testimony and a myriad of other indicators of guilt.

B. The prosecution's evidence is often junk, limited, or subject to an innocent interpretation. It can be destroyed, damaged, minimized, or even embraced as part of the defense case. This evidence is eminently attackable.

C. Criminal defense attorneys often give too much credence to the prosecution evidence as being "airtight", "scientific", etc. It often goes unchallenged, too, because, after all, the prosecution has the burden of proof.

D. While defense attorneys cannot be expected to be expert in all areas of subject-matter involved in criminal cases, there must be enough knowledge to know what weight to give the evidence and how to handle it in the case. It is suggested that this education be gradual as the need arises in cases but that this knowledge be recognized as important.

E. This knowledge is often the basis of cross-examination minimizing the weight of the prosecution's evidence. Cross –examination lectures almost always deal only with the form of cross-examination. This knowledge furnishes the substance without which the form is of little value.

F. Knowledge of criminal case subject-matter is often necessary to attack of the prosecution's case. Various attorneys and writers have developed ways to attack the prosecution's cases often faced. Examples of this literature are set out below.

G. The National Association of Criminal Defense Lawyers (NACDL) is a tremendous source of information on the subject matter of criminal cases. In particular, NACDL's magazine THE CHAMPION is great for finding articles on criminal case subject matter and we list some valuable recent articles. The Champion of April 2005 has several articles devoted to eyewitness identification defense, which is the kind of evidence most involved in the conviction of innocent persons. The December 2007 issue of The Champion deals with the false confession issue, which results in convicting innocent people under certain circumstances.

H. Some other valuable articles in The Champion are: Schwartz, *Challenging Firearms and Toolmark Identification* (October 2008); Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation*, (April and May, 2004); Thompson, *Tarnish on the 'Gold Standard: Understanding Recent Problems in Forensic DNA Testing* (February 2006); Tobin, *Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics* (July 2004); Akin, *Interpretation of Blood Spatter for Defense Attorneys* (April and May 2005).

I. In addition to learning what others have developed in criminal case subject matter, the criminal defense attorney is encouraged to develop comprehensive defense cases. Every office of criminal defense attorneys should have files on how to attack and win criminal cases.

VIII. FINDING THE POWERFUL CRIMINAL DEFENSE CASE

A. The tendency is to look at the discovery of the prosecution case, be impressed by it, and decide that there is no viable defense. One must become expert in approaching the case applying the principles of the art and science of critical thinking. One must believe there is a defense. If we approach a case with the attitude that this is just another case in which there is no defense then, of course, no real defense will occur to the defense attorney.

B. The defense is highly unlikely to be set forth in the prosecution's discovery, but will be found in the mind of the defense attorney who presumes the defendant is innocent. There are defenses to eyewitness identification cases no matter how positive the witness. There are defenses to confession cases, forensic evidence cases, circumstantial evidence cases and all other cases. We must proactively look for that defense, before we decide to take the plea bargain. This is not to say we should not plea bargain; it is to say we should find the defense case. This is so particularly if the defendant is seriously claiming innocence.

IX. THE KEY: CREATING FEAR OF CONVICTING AN INNOCENT PERSON

A. Jurors will convict if they believe the defendant is *in reality* guilty with little regard for legal standards for sufficiency of the evidence.

B. Jurors will acquit if they believe the defendant is innocent, or if they fear they may be convicting an innocent man. You only need a case good enough to create this fear of convicting an innocent man

C. Jurors live *in reality* and not in the lawyers' world of legalisms.

D. The winning criminal case takes the position that the defendant is *innocent,* not centrally that there is a failure of proof

E. The defense, to win, does not have to prove innocence but merely to create the fear of convicting an innocent man. This is true because of the power of fear and, as psychology teaches us, the power of emotion in determining verdicts.

F. That this analysis is correct is demonstrated by experience.

1. Every great trial lawyer in history tried or tries criminal cases from the standpoint of innocence, not from failure of the prosecutor to prove the case beyond a reasonable doubt.

2. The experience of the author in the public defender's office is illustrative. Trying cases from innocence produced wins at least five times as often as did the failure-of-proof-beyond-a-reasonable-doubt argument of other defenders.

G. This suggests a quick and accurate way of producing a winning criminal case. Start with the premise that Johnny Defendant is innocent. Then ask how it is that he is innocent. Then develop the 'how' of his innocence into a powerful positive case of innocence. This wins.

X. THE POWERFUL DEFENSE CASE

A. Credible.

B. Unitary and internally consistent. Everything fits together.

C. Consistent with jurors' belief systems and their ideas of how the world works.

D. Explains and interprets the facts and connects the dots.

E. Coherent.

F. Integrated.

G. Detailed.

H. Complete. The case must be such that, if true, the defendant is innocent.

I. The result is a powerful streamlined case furnishing a unified theory of innocence.

XI. BUILDING BLOCKS OF THE POWERFULLY PERSUASIVE CASE

A. Legal theory: The legal theory that entitles the defense to present its case.

B. Factual theory: Theory of how the event happened factually consistent with innocence.

C. Basic position or theory of the case: The case for innocence stated in three or four sentences as the guide to positions throughout trial.

D. Facts beyond change: Facts that the jury will believe no matter how capably you oppose them must be included in your theory of defense.

E. Strategic concessions: Concessions made to defme and confine the issues in the trial to winning issues and not fighting losing battles.

F. Values and principles that support a defense verdict as being the morally right thing to do. Take the high ground.

G. Power language instead of abstract and conclusory language.

H. Context to make the defense plausible.

I. Problem-solving for the jury.

J. Simplification in the form of labels, characterizations, and summaries.

K. Appropriate emotion and emotional themes.

L. Story, arguments, attack, themes and other emphasis devices are dealt with below as other components of the powerful case.

XII. THE STORY OF INNOCENCE

A. The story of innocence is an important part of the finding and building of the powerful case.

B. The story of innocence is on the basis that the defendant is innocent, not that the prosecution has failed to prove elements beyond a reasonable doubt.

C. The jury is interested in whether the defendant is actually guilty, so the defense attorney is on the same page with the jury when the attorney is arguing innocence rather than the legalism of reasonable doubt. Just the simple change from arguing innocence rather than reasonable doubt wins substantially more cases.

D. The credible story is not just a statement of facts. It deals in motives, relationships, what causes what (cause and effect), etc., all fitting together so as to be within the schemas of the jurors and is a believable version of what happened consistent with innocence.

E. The story of innocence is complete to the extent that, if true, the defendant is actually innocent. In most criminal defense stories, there is doubt, but nothing to make the defendant actually innocent.

F. The story may be very simple and very short. It may be the story of Ms. Jones' being mistaken in her identification of the defendant as perpetrator, the police jumping to a conclusion as a result of sloppy investigation, the obtaining of a false confession, etc.

G. Even though this paper is not about storytelling in the sense of delivery, the preparation phase should include developing visual and other sensory language.

H. Stories are composed into focuses (detailed scenes) and transitions. Consider composing focuses (word pictures) on each of the crucial contested issues (CCIs).

I. Above all, the story of innocence must tell the jury why Johnny is charged and in court when he is actually innocent.

XIII. THE POSITIVE CASE

A. The positive case directly or indirectly proves the defense idea of how matters occurred consistent with innocence. It is self-defense, consent, false confession, etc.

B. Gather all facts, inferences, and devices that proves the positive part of the case.

C. On cross-examination, give special attention to getting favorable facts from the witnesses.

D. The positive case can be made in story or argument form

IV. ARGUMENTS AND ARGUMENTATION

A. Arguments and the skill of argument are, in the opinion of the author, the most powerful tools for winning criminal cases.

B. Arguments go to, focus on, and win the central issues of the case.

C. Arguments are not just statements of position or storytelling; they are arguments, a very different animal.

D. Argument is a hard-hitting statement of the argument-point, followed by the marshaling of evidence and reasoning that supports that point.

E. Preparation of arguments before trial is necessary to framing the issues and maximizing the gathering of evidence supporting the arguments during the trial, especially in cross-examination.

F. To find what arguments to make, one must list the crucial contested issues (CCIs). The concept of CCIs is vital to trial lawyering. Arguments are prepared on the lawyer's side of each crucial contested issue.

G. Much of preparation is tightening so as to concentrate firepower and emphasis. The concept of CCIs makes possible a focus and concentration (concentrated fire) on a very few issues with power and at the same time avoids that which is extraneous to the determinative issues.

H. Each argument is a separate unit and not contaminated by other arguments or the extraneous.

I. The standard organization for an argument is: (1) statement of the point, (2) support making the point, and (3) closing the point.

J. Juxtaposing supporting evidence increases power of the point several times over, making them power points.

K. Prepare the arguments with power language during preparation. Do not leave power language to be left to "just happen" during trial.

XV. ATTACK

A. Attack is a powerful weapon in winning the criminal case.

B. Storytelling is not attack and attack is not storytelling. The storytelling method leaves the prosecution largely undamaged and the result is like two ships passing in the night.

C. Attack is understanding the prosecution case and destroying, damaging or at least minimizing that prosecution case.

D. Knowledge of criminal case subject matter (described above) is essential in formulating the attack on points in the prosecution case or the prosecution case as a whole.

E. Examples abound of the attacks necessary in criminal cases. In case a prosecution witness' testimony, if true, convicts the defendant, the witness and/or the witness' testimony must be attacked. If the prosecution's case based on eyewitness identification, eyewitness identification evidence and/or the witness must be attacked

XVI. DEVELOPING POWERFUL THEMES

A. Themes are ideas that are repeated during the trial and often are the most powerful part of the case.

B. After the story of innocence is developed, themes will derive from that story of innocence.

C. The central overriding theme is that the defendant is innocent.

D. Making the failure of the prosecution to prove each and every element beyond a reasonable doubt the central theme results in few acquittals for scientific and pragmatic reasons.

E. The central theme of innocence (and all other themes) needs careful attention to come up with a precise powerful wording fitting that particular case as to how the defendant is innocent.

F. Supporting themes must be developed to back the central theme.

G. The power of themes, because of repetition, comes from the fact that ideas expressed just once are not likely to be remembered in the jury deliberation room. Expressing an idea only once is like hitting a nail only once. It must be hit several times to drive the nail and the idea home.

H. Themes serve several purposes in creating the powerful case:

1. The case organized around themes is coherent, consistent, and integrated. Most criminal cases have only ad hoc points and arguments.

2. Themes simplify a case.

3. Cases with themes are easily remembered by the jurors.

4. Themes are a great rhetorical device furnishing power to the case.

5. Variations of themes (never inconsistent) give even more power.

I. Examples of themes in criminal cases:

1. They have the wrong man.

2. They jumped to a conclusion.

3. There was a rush to judgment.

4. The police did not do their job

5. Things not done.

6. He had no choice.

7. He is ____ , but he is not a murderer.

J. Emotional themes are at least as important.

1. Fear

2. Fear of convicting an innocent man.

3. Sadness

4. Remorse

5. Any other emotion.

K. The following sections contain suggestions for fully developing themes and the other ideas which powerfully win cases.

XVII. DEVICES FOR EMPHASIS

A. The central points must stand out and be remembered by the jurors. The way to accomplish this is with emphasis, which must become an important part of the trial lawyer's repertoire. Various devices and techniques are available.

B. The point is the unit of discourse in every part of the trial. At every moment the lawyer must be aware of the current point. This greatly helps eliminate that which is not making the point.

C. Points must be streamlined so that the point is hard-hitting and understood as a point by the jury. That which supports a point must be juxtaposed succinctly into a bullet point. Most points are more like pillows than bullets.

D. Power language and rhetorical devices furnish many emphatic devices. These are set out more fully and specifically in the closing argument outline, but need to be part of the preparation phase in building the powerful case.

XVIII. THE SYSTEM FOR PRODUCING POWERFUL IDEAS

A. The trial lawyer must have a system of tools for producing the powerfully persuasive and therefore winning criminal case.

B. The yellow pad method of preparation cannot produce the strongest case.

C. Creative thinking in producing case-winning ideas is vital.

D. The IdeaBook is the systematic method of writing and organizing those ideas as they occur.

E. The computer can be used to produce and record the ideas. What is important is having a system.

F. A possible system of building tools is outlined below in more detail.

XIX. TOOLS FOR BUILDING THE POWERFUL CASE

A. The first tool is creative thinking or brainstorming.

1. The emphasis on legal analysis often prevents creative thinking.

2. Brainstorming is a form of creative thinking with two very significant requirements.

a. The goal of creative thinking is to develop as many hypotheses, theories, interpretations, inferences, explanations, and other ideas as to how the litigated event occurred, as possible - the maximum number of ideas.

b. Evaluation of ideas must be done but postponed, or such evaluation will hinder the free thinking necessary for maximizing the number of ideas.

3. Creative thinking or brainstorming must be approached with determination to find every useful idea, and an optimism and belief that the process will indeed produce useful ideas. Let the imagination run wild in producing ideas that may win the case.

4. The depth produced by creative thinking will more likely result in truth by unearthing many ideas which are at first not apparent.

B. The *IdeaBook* is the second important tool and is the place where ideas produced by the creative thinking or brainstorming process are immediately recorded.

1. The *IdeaBook* is loose-leaf with size suitable to the lawyer (9 1/2" x 6"is suggested) and organized by dividers reflecting subject matter and phases of trial. Suggested divider titles follow

a. To Do - Planning
b. Law and Legal Theories
c. Facts - Fact Issues
d. Ideas
e. Discovery Planning
f. Opposing case
g. Strategy
h. Jurors Perspective
i. Analysis - Decision Making
j. TOC, Detailed Development
k-o Case-Specific Dividers
p. Story
q. Arguments
r. Feeling, Emotion, Equity
s. Rhetoric - Language Devices
t. Finishing Touches
u. Voir Dire - Jury Selection
v. Opening Statement
w. Prosecution Witnesses
x. Defendant's Witnesses
y. Closing Argument

2. As one brainstorms the case or otherwise generates ideas, the ideas (themes, stories, inferences, power language, etc.) are immediately briefly written in the appropriate division of the *IdeaBook*.

3. As new ideas occur, these new ideas generate still more new ideas and the thinking gets deeper and closer to the truth.

4. The important idea here is to creatively and actively think about the case and to have a system for immediately recording the ideas.

C. Another useful tool is the *Workbook* in which various tasks, such as doing chronologies, extracting nuggets from materials, analyzing for impeachment, etc., can be carried out.

1. The *workbook* is loose-leaf and serves to keep all work on a subject together. Dividers are titled to suit the lawyer's purpose.

2 Important also is a method of organizing materials so that they may be found immediately during trial. Organize by purpose of the materials in trial.

3. The important idea is to have a system and organization. Consideration should be given to using the computer in organizing the case. The lawyer should be constantly alert to creative ideas for organizing the case.

XX. PUTTING THE POWERFUL CASE TOGETHER INTO FINAL FORM

A. With all the listed materials and ideas gathered, it is now time to put the case together in final form.

B. Many attorneys have a formula for putting together a case. They do the case close to the same every time. Instead, the structure should be tailored to the individual case. One case may have a strong component of storytelling. Another case may depend more on argument. Attack can even be the almost total way of trying the case. The lawyer's judgment, using the Persuasion Method , determines what is most powerful.

CONCLUSION

It is the purpose of this paper to suggest the importance of systematically building the case with story, powerful themes, and argument with persuasion as the guiding star. It is when the possible methods suggested here are used that the case is powerfully persuasive and wins.

OPENING STATEMENT AS STORYTELLING

By

Stephen C. Rench

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OPENING STATEMENT AS STORYTELLING

I. THE IMPORTANCE OF OPENING STATEMENT

A. Opening statement is powerful opportunity to:

1. Start the defense case powerfully; no perfunctory opening statement.

2. Set up the entire trial.

3. Furnish a defense lens through which the jury can view the evidence as it comes in.

4. Keep the jury from quickly reaching a tentative decision for the prosecution. If the jury does so, it becomes difficult to dislodge that decision. Psychology (although a soft science, a science nevertheless) backs this analysis. Studies show that the jurors' opinions after the opening statement becomes the verdict 75% to 80% of the time. Science says that after a tentative decision is reached, confirmation bias causes people to view new evidence in a light that confirms the original decision.

5. Win the battle of the great issue of how the event happened by picturing our defense in living color by making a word movie of our defense happening.

6. Make use of a powerful persuasive device—the story.

7. Tell the story of innocence and our defense.

II. DO NOT USE THE STANDARD INEFFECTIVE METHODS OF OPENING STATEMENT

A. Argument is not permitted in opening statement and is not nearly as effective as storytelling. Some advocate that one "argue as much as you can get by with." What happens is that there is objection and the judge rules against counsel communicating to the jury that counsel's method is improper—a bad start and loss of credibility with the judge and jury.

B. The jury, having yet to hear any evidence, is not ready for argument and resists hard persuasion. Cognitive psychologists are clear that hard sell too early is not as effective as more neutral statements. One should let the facts argue for you.

C. The "legal lecture" does little except show that one is a lawyer and does little to persuade as to the facts.

D. Some do opening statement by making a series of conclusory statements that are various iterations of the defense. Lawyers must understand the distinction between stating conclusions and stating a point and immediately following the statement of the point with proof of that point.

E. Some repeat over and over "You will hear that…" followed by some point. Just leave out the "you will hear that" and tell the story of our defense.

III. THE LAW OF OPENING STATEMENT

A. The scope and manner of opening statement is, in general, within the discretion of the court and reversals of the decisions of the trial judge are rare.

B. The function of opening statement is to give the judge and jury a preview that will allow evidence to be put into perspective as it is admitted. The statement should be of the facts and reasonable inferences from the facts that are expected to be admitted. The permission for reasonable inferences is extremely useful in using story as the great device in opening statement.

C. Evidence the admissibility of which is questionable should not be mentioned in opening statement or should be cleared with the court prior to opening statement.

D. It is also permissible in opening statement to set forth the issues of the case.

E. It is a great idea to have cases or a brief on what is permitted in that jurisdiction.

IV. SETTING UP THE TRIAL WITH OPENING STATEMENT

A. Opening statement properly <u>sets up</u> your case for the entire trial:

1. Opening statement frames the issues.

2. Opening statement defines the characters involved.

3. Opening statement humanizes the defendant and the defense.

4. Most importantly, opening statement is the opportunity to paint in vivid, detailed terms how it all happened consistent with the defendant's innocence. How it all happened is the first big issue for the jury and opening statement is the chance to win that issue.

5. Opening statement applies your strategic thinking for winning the case.

6. Opening statement allows strategic concessions to be built into your case.

7. Opening statement is the opportunity to provide the jury with all the information you desire them to have.

8. Opening statement provides the opportunity to establish credibility as the truth-seeker and not just as a hired gun.

9. Opening statement provides the context (the lens) for the jury to view and interpret the evidence as it comes in. Studies show that jurors' opinions after opening match the verdict 75%to 80% of the time.

10. Opening statement provides the opportunity to communicate a vast amount of information to the jury in a story form that is most readily understood, remembered, and believed.

B. Opening statement must be carefully prepared and constructed so as to have maximum effect in reducing the impact of the prosecution's case and for having evidence interpreted from the standpoint of the defense position.

C. The great device for accomplishing the objectives of the opening statement is the story and the great skill in winning opening statement is storytelling.

V. THE STORY: A GREAT TRIAL PERSUASION DEVICE.

A. Cognitive psychologists, persuasion experts, outstanding trial lawyers, and writers on trial advocacy all recognize the value and power of the story.

B. The story is a must in the repertoire of the trained trial advocate.

C. The most extensive study of what determines verdicts in trials shows that judgments are based on the story arrived at by the jury and the choice between the competing stories of the prosecution and defense. *Reconstructing Reality in the Courtroom.*

D. The story unifies the facts by showing the connections between the facts and cause and effect, character, motivations, relationships, emotions, etc. The unity makes the story easily understood, remembered, and believed. The story fits it all together.

E. We see, hear, tell and read stories every day and cognitive psychologists go so far as to say we are "hardwired" in the use of stories. When we use the story as a device we are on the same page as the jurors in using the story device. Each of us is already familiar in everyday life with using stories and, indeed, is a storyteller.

F. The story has superiority as an organizing, memory and persuasive device and is an important tool in the Persuasion Method of trial persuasion. The author has found it most useful in the winning of criminal cases.

VI. PREPARE THE CASE BEFORE PREPARING OPENING STATEMENT

A. The opening statement story must tightly follow the prepared case.

B. The gathering of facts, brainstorming for ideas, interpretation of facts, strategies, and even ideas for closing argument must precede preparing the opening statement story.

C. See outline entitled "Building the Winning Criminal Case" for all that must be completed before preparing the opening statement.

D. If the overall case is prepared, it is now time to find and build the opening statement story.

VII. FINDING AND BUILDING THE OPENING STATEMENT STORY

A. The model for the opening story is the model for movies, novels and professional storytelling. We are essentially going to do a movie of self-defense, voluntary sex, false accusation, misidentification, etc. not just by saying it was such but by playing it out. Our difference from playing it out in a sequence of pictures is that we must do it in words and images by painting word pictures.

B. Organization and structure. The structure of the storytelling opening statement is that of a play or movie: scenes, which you may prefer to call chapters. For example, in a self-defense case, you may paint the defendant being peaceful, no aggression; the next scene the now-deceased becoming angry and aggressive; the next scene the defendant trying to avoid trouble but there is no way out; the next scene defendant shoots because he has no choice. All of this is painted in visual language so the jury sees this as the way it happened. There is something indelible once the jurors see these word pictures and this is supported by several psychological studies.

C. Our defense is played out in storytelling mode.

D. Possible building blocks of the story.

1. The undisputed facts

2. The interpretation of the facts. In most cases the vast majority of facts cannot successfully be disputed. It is the interpretation of the facts which can be successfully disputed and is the heart of many successful defense cases.

3. Themes and supporting sub-themes.

4. Context and setting. For example, the bar being a pickup bar makes it likely there was a pickup.

5. State of mind and motivation. Non-criminal states of mind and motives make it unlikely that there were criminal acts.

6. Concessions to make the prosecution facts undisputed and thus to lessen their effect.

7. Facts that indirectly support our points.

8. Humanizing and building character.

E. The story is detail- dense. Every detail that makes our point is considered, although some may be withheld strategically for use later in the trial.

F. Point development is a most useful concept to apply in constructing our story. Our lawyer tendency is to state our point or defense in conclusory terms in various iterations. Point development requires the point to be made in concrete detail.

G. Achieving unity. Unity is an important goal. Our story must be coherent, internally consistent and complete. All parts, including the building blocks mentioned above, must fit together tightly with and enhance the other parts like threads in a tapestry.

H. A further benefit to this detail- dense, coherent story approach is that studies show this type of story is more believable. The story is not ambiguous, general and conclusory.

I. The experience of the author in trying cases is that the jurors' seeing in their minds' eyes the defense in action makes a major lasting impression, winning the important issue of how the event happened, and bottom line wins cases.

IV. THE STORYTELLLING SKILL AND HOW TO DO STORYTELLING.

A. Opening statement is most powerful when done with storytelling. Writings by experts, scholars, trial lawyers and trial organizations (ABA, AAJ, etc.) are virtually unanimous in saying that opening statements should be storytelling. A list of trial advocacy books and articles advocating storytelling as the opening statement method would cover many pages. Unfortunately, they do not adopt the story and storytelling techniques of dramatists and professional storytellers.

B. Storytelling is a skill which few lawyers have learned or mastered as part of their trial advocacy repertoire, but a skill that is crucial if we are to actually win cases. The basics are easily learned if we let ourselves get out of lawyer mode, for our human selves have told and heard stories our entire lives and, indeed, are hardwired to do so. How we do opening statement storytelling is outlined below:

C. The language of storytelling is visual language.

1. Lawyers speak in lawyer language—legalese, generalities, conclusory language—analytical and non-visual. This is <u>not</u> the language of storytelling.

2. Storytellers (lawyers in opening statement) speak in visual language, painting word pictures and images so that the jurors see what is happening in their minds' eyes. Experts on writing and speech express this idea as "show, don't tell." The jurors must see the action, the scene, and whatever else is necessary to the point in concrete detail in living color.

D. Dramatize for emphasis. Dramatizing is the process of focusing on a matter providing more and more detail that is relevant and supportive of the point you are making. To show that someone was drunk, don't just say they were drunk, describe their stumbling, the odor of alcohol, the slurring of speech, the messed-up clothes, etc. In self-defense cases, show the concrete details of why the defendant had to shoot. Movies model how to dramatize.

E. The mode or tone of the storytelling lawyer in opening statement should be that of one telling a story objectively over a cup of coffee.

F. The model for lawyers doing storytelling opening statement is that of professional storytellers. Programs of National Storytellers Network and its local affiliates in each state are game-changers in demonstrating storytelling. Google "storytelling" for program information and live examples. Also google TED talks for examples closer to storytelling in co urt. YouTube and sources listed in the bibliography are also excellent for this purpose.

G. In addition to the dramatized scenes (chapters), there are transitions, furnishing information to the jury, visual aids, and telling the jury that at the end of the trial you ask that _____ (the defendant) be found not guilty because he is not guilty.

CONCLUSION: Opening statement, being the very first part of the actual trial, is crucial in setting up the trial and the defense position. The storytelling opening statement that is detail-dense, tightly structured, and painting word pictures goes a long way toward winning the battle of how the event actually happened. The story with storytelling is the way these things are powerfully done.

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