***“Finding the Golden Retrievers”: Jury Selection From the Ground Up***

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# A JURY CONSISTS OF TWELVE PERSONS CHOSEN TO DECIDE WHO HAS THE BETTER LAWYER

***Robert Frost***

*DO YOU LOVE IT OR HATE IT???*

*Extreme Lawyering:* Scary *and* Exhilarating

Unpredictable Unstructured

Requires More of Oneself

Presents Great Challenges: Be Effective, Do It Well Permits Greatest Personal Creativity, Resourcefulness Chance to Directly Connect With People

Relaxed (?) Period Before Formalism, Real Conflict Chance for Small Talk?, Humor?

## (Some) Stated Purpose(s) of Jury Selection

* 1. Learn enough about the panelists to intelligently exercise your peremptory challenges.
	2. Develop a sufficient record to support your challenges for cause.
	3. Preview the good and bad news about the case, and see how the panelists react to it.
	4. Preview your theory of defense, and see what the panelists think of it.
	5. Personalize your client with the panelists who will eventually become your jurors.
	6. Develop your credibility, establish a rapport with the panelists who will eventually make up the jury.
	7. Make a proper record/keep sufficient records to defeat prosecutorial Batson challenges

*[NOTE: THIS OUTLINE DOES NOT COVER BATSON]*

* 1. Make the appropriate record where Court limits or interferes with your *voir dire.*
	2. Neutralize Panelists’ Negative Beliefs, Build Positive Attitudes???
	3. Promote World Peace?

## Stated Purposes Measured Against the *Reality* of Jury Selection

Jury Selection is really about *getting* information and *giving* information.

Do You Need to Make A Choice About Which Purpose to Pursue?

Learn What the Panelists *Really Feel*, Predict How They Will/Should

*Behave?*

OR

*Educate Jurors* About the Case (Not vice versa)?

*IN REALITY:*

Often severe time and/or content limitations. Questions yield limited and unreliable responses:

-Answers less reliable as you get closer to actual, personal issues

-Pressure to on panelists to give socially acceptable answers in an artificial, foreign, public setting:

the “Called on in Class” Syndrome: say as little as possible, what the teacher wants to hear

*POSSIBLE SOLUTION?*

Are You Better Off *Giving* Information (=*Advocacy*) Than *Getting*

Information (“WitchHunting”)?

*Advocating* May Be Better Than “Witch Hunting” Because It Does Not Matter Who Is Picked If They *All* Heard the Message?

*POSSIBLE SYNTHESIS?*

Get only as much info as you need for Batson-proofing peremptory challenges and developing record for cause,

THEN, advocate your head off the rest of the time?

## IIA. How to Choose from the Different Approaches

How to Decide Which Purpose(s), Approach(es) for the *Voir Dire*?

*\*\*\* IT ALL DEPENDS ON YOUR THEORY OF THE CASE/THEORY OF DEFENSE* (Duh)

Preparing and Executing an Effective *Voir Dire* Presupposes a *Fully Developed Theory*:

You Should Have a Clear Idea of Your Opening Statement, Summation and

the Points to Develop With Each Witness

Otherwise, Process May Be Reduced to Directionless, Boring Questions and Small Talk

## Limitations/Obstacles in Jury Selection

* 1. Insufficient time for questioning.

People v. Jean, 75 N.Y.2d 744, 551 N.Y.S.2d 889, 551 N.E.2d 90 (1989)

15 minutes for first two rounds, 10 minutes for the third okey-doke BUT People v. Steward, 17 N.Y.3d 104, 926 N.Y.S.2d 847, 950 N.E.2d

480 (2011)

5 minutes per round not enough (even where Court supposedly conducts ‘extensive voir dire’ on it’s own)

E.g., Attorney (Exasperated): “Ten Minutes! Last time we tried a case together it was fifteen!”

Judge (Smirking): “I’m getting more federal every day!” [True Story]

* 1. Unworkable size of the panel to be interviewed.

People v. Serrano, 7 N.Y.3d 730, 818 N.Y.S.2d 175, 850 N.E.2d 1151

(2006)

44 panelists ‘in the box’ fine and dandy.

The “Moonie Wedding,” “Speed Dating” theory of voir dire.

* 1. Substantive restrictions:

a. People v. Boulware, 29 N.Y.2d 135, 324 N.Y.S.2d 30, 272 N.E.2d 538

(1970): Questioning narrowly restricted to panelists’ ability to fulfill statutory juror qualifications.

* + 1. Prohibition from discussing the facts of the case too closely. (“Don’t brainwash the jury/preview/try your case in *voir dire*,

Counsel!”)

* + 1. Specific factual limitations.

(“Whatever you do, don’t mention the war!”)

* 1. Limited Number of Challenges: Really a *De-Selection* Process
	2. Judicial/Prosecutorial Interference With Exercising Challenges: Batson
	3. Juror Boredom.
	4. Judicial, Prosecutorial Objections and Interference.
1. Preliminary screening:
	1. Judge’s introduction to case: type of case

accusation, date, location parties

potential witnesses anticipated length of case

* 1. General questions to entire panel.
	2. Solicitation of panelists who are unable to serve.
	3. Preliminary legal instructions, group questioning about ability to follow law
1. Seat panelists in jury box for particularized questioning.
2. Use of Juror Questionnaires: The Devil is in the Details (naturally!)
	1. When are they filled out by panel?

At the outset of jury selection? Beforehand?

* 1. What are the Mechanics?

When are the questionnaires disclosed to the parties?

Is there sufficient time to analyze them?

* 1. Who prepares the questionnaire/How are they prepared? Do they use a standard form?

Is there any defense input on content?

* 1. Are the questionnaires used by the panelists in the jury box?
	2. Are there problems with the Content?

-Too many questions?

-Too much information to process easily?

1. Use of Individualized/Sequestered *Voir Dire*?
	1. Does the Court give Instructions about panelists giving answers privately?

Are they effective?

* 1. What are the Mechanics?

-Where do the panelist give their answers?

In Chambers? In the hallway? In a stage whisper in the Courtroom?

-Who does the questioning?

-Will the Court tolerate slowing down the process?

* 1. Is there Private Questioning of Individualized Panelists About Sensitive Subjects?

Generally? *After* Overall Group Questioning?

1. Is there Private Questioning of Individualized Panelists About Sensitive Subjects? (Continued)

Due to Panelists’ Response(s) Calling for Private Inquiry? (Juror: “They’re all *GUILTY!!!*” Wasn’t the rest of the panel irreparably *tainted*?) [Also True Story]

1. Should you Work It Out With Court Ahead of Time? Procedure, scope, subject matter

How to avoid “Contaminating” the Entire Panel?

1. Get the “Scouting Report” on the Judge Ahead of Time
	1. His/Her/Its Preferred Procedure
	2. Imposition of Time, Substantive Limitations
	3. Should You Ask the Judge Directly?

CAVEAT: May eliminate your “plausible deniability”

(“I’m sorry, Judge. I didn’t know that you don’t allow the lawyers to *hypnotize* the panelists! Sheesh, go figure!”)

Some Judges go over the ground rules at the outset — and then

*STOMP* all over you when you violate them.

* 1. Ask Colleagues? Watch Other Cases? Read Transcripts?

## General Principles

* 1. **Know Where You Want to Go (Don’t Waste Precious Time)**
		1. Listen to the questioning by the Court and prosecutor.
		2. Make (preliminary) assessments about which panelists need to be spoken with, and about what: For example,

Do you need substantive follow-up questions?

Do you need follow-up on background/pedigree information? Do you want to clarify facial expressions, body language, or non-verbal reactions to previous questions and

comments?

* + 1. Consider the panelists’ backgrounds and answers as stepping stones for particular questioning:

E.g., people who know cops, crime victims, teachers, health care workers

## Get Right to It (Avoid Lengthy, Boring Introductions)

* + 1. Sets a Proper (Efficient, Juror-Considerate) Tone
		2. Keeps the experienced jurors (who have been through it before) from tuning you out.
		3. Saves Precious Time
		4. Sharpens the Focus of *Voir Dire.*
		5. Use “Small Talk” *Sparingly* and *Judiciously*. (Don’t trivialize the process.)

## Try to Eliminate “Non-Answers” (Head the Evasive Panelists Off at the Pass)

* + 1. Discuss Your Assumptions About the Panelists: Tell them you will assume without asking them, that:

\*They will be scrupulously fair and impartial

\*They will follow Court’s instructions

\*They will wait to hear all evidence before deliberating/deciding case

* + 1. This Technique Allows You to *Gently* Reject “Non-Answers” and Requires the Panelists to Answer *Your* Question.

“You remember that I already told you that I fully accept that you would/would not do that. But I am really interested in how you would answer the question I asked.

## Create a Safe Environment for the Panelists to Engage in a Dialogue With You

* + 1. Tell Them the Good News: No Law Requires Panelists to Be Jurors in *YOUR CASE! –* Panelists Are Only Required to Answer Questions Honestly

There are many other cases in the Courthouse to serve on, if not selected for your jury

(Dorito’s Commercial: “Eat All You Want, We’ll Make More”)

* + 1. Process is Not a Matter of Qualified versus Unqualified Candidates: You are Looking for Panelists Who Are the *“Best Fit”* for Case

Among Many Qualified Candidates

E.g., Panelists May Feel More Comfortable With One Capable Baby Sitter, Doctor over others. In the same way, the selected panelists May Be a “Better Fit” As Jurors

– They Themselves May *Feel More Comfortable* Sitting on Another Case

* + 1. Liberally Use Self-Disclosure to “Break the Ice”
		2. Be Considerate of the Panel (What Goes Around Comes Around) Remember that the Balance of Power will switch to the Jurors after

*Voir Dire —*

*Your* Control of the Process Lasts Only *Until* the Decision Makers Are Chosen – *And They Know It*

(The Audience Makes the Performance Meaningful)

* + 1. *DEFEND* the Panel From the Court and Prosecutors Powerful Way to: Win Friends,

Create Sympathy, Empathy

Get Benefit of Doubt From Jurors

*Especially Where* you know that the Court/Prosecution Will Be on Your Back During Trial

* + 1. *BE GENUINE!!!* Don’t Be Obsequious--Everybody Hates a Suck-Up
		2. Explain that it is Better for Panelist to Be Honest in *Voir Dire,* Than to Struggle With Issues by Himself/Herself Later During Trial or Deliberations

The Court and attorneys may be able to answer questions, clarify issues and resolve problems during the jury selection process

## Don’t Embarrass the Panelists Or Put Them on the Spot

* + 1. Frame Questions to Avoid Asking Panelists to Disclose Embarrassing Personal Details.

You are not interested in *Who,* but the *What*:

Whether the Panelist knows *Anyone* in the particular situation/with that particular problem/who had that particular experience:

So, you do not ask Panelist to specify the person they are discussing: e.g., “Do you know *of anyone* who . .

* + 1. Should You Allow The Panelists to Opt Out of Difficult Questions? (You Can Certainly Draw a Substantial Adverse Inference Against

Them for Their Unwillingness to Answer)

* + 1. Ask If Other Panelists Feel Differently/Have a Different View of Subject NOT Whether They Disagree With Another Panelist

## Try Not to Repeat Yourself Or Others

* + 1. Ask the Entire Group, Where Possible.

Then, You Can Get More Specific in Questioning Individual Panelists.

* + 1. Where You Must Repeat Yourself, Explain Why.
		2. Be Sensitive to Panel’s Learning Curve: If They Get It, Move On (You Can Even Ask Them, If You Need to Check)

## Take a *Genuine* Interest in the Panelists’ Answers (Or Don’t Bother Asking the Question)

* + 1. Don’t Ask “Stock Questions.”

They rarely yield useful information. They are clearly and obviously “canned.”

The Panelists may have heard them before.

* + 1. Ask Follow-Up Questions about the Panelists’ personal information.

Shows that you are listening

* + 1. Give Affirmation for Panelist’s Answers (even the “Bad Ones”) Facilitates the Discussion (from that Panelist and the others)

## \8. General Procedure and Mechanics

1. Reassure Jurors About You (or Your Client) Taking Notes About Them and Their Answers.

(Maybe ask Client not to take notes)

1. Discuss Use of Your *Voir Dire* Notes.
2. Mispronouncing Names:

Try the Hardest One at the Outset.

1. Act As Though You Control the Process.

E.g., Help everyone, Direct traffic, Thank discharged Panelists loudly

1. Involve Your Client Where Possible? How?

BUT: Panelists may be nervous about being identified or unduly scrutinized by the Accused

1. Be Honest About Process: Maybe Not the Most Riveting Part of Trial???

You May Not Want to Promise Boredom, but --

Your honesty may engage the Panelists who have previously been through *Voir Dire*

1. Promise to Be As Efficient As Possible.

BUT-- Panelists Will Hold You to That Promise If You Make It!

1. Acknowledge/Involve the Panelists Remaining in the Audience: Involve Them in Hypos?

Turn to Them, Look at Them (Don’t Just Give Them Your Back)

1. Avoid Punctuating Your Questioning With “O.K.”

You May Provoke Objection/Judicial Interference

Suggests that you are Either Verbally Checking Off Mental Point On Your List, Or Signals Change of Subject

1. Tell Panelists About Your Time Limitations; Apologize If You Can’t Speak With All of Them

Lets you subtly remind them that it’s the *judge’s* idea, not yours.

1. Take Note of Which Panelists Associate With Each Other

Do You Want to Keep the Set? Split Them Up? Double Down?

1. ***CAREFULLY* Ask About the Law**
	1. Ask How the Panelists Will *Feel* About (Using/Applying) the Legal Principles.
	2. Ask Whether the Panelists *Would Have Difficulty/Problems* With the Legal Principles.
	3. *Make the Situation Concrete*: How the Panelist Would *APPLY* the Principle

When Sitting As a Juror in the Case.

E.g., “Suppose you have been selected as a juror in this case, have heard everything and are in the jury room deliberating, . . .”

* 1. Do *NOT* Ask Whether the Panelist Will Follow the Court’s Instruction About the Legal Principle.

Unless You Absolutely Have to With Boulware-Crazed Judge

You KNOW What the Answer Will Be.

It Only Tips Off the Court/Prosecutor to Rehabilitate the Panelist.

* 1. “Un-Rehabilitate” the Panelist: After Court Extracts Panelist’s Promise to Follow the Law:

Ask Panelist If Doing So Would *Still* Be Difficult Or a Problem, then Would They Be *More Comfortable* On Another Case?

* 1. Don’t Poach on the Court’s Turf: Do *NOT* Start Off With, “As the Judge Will Instruct You . . .”

You’re Only Begging to Get Cut Off

(Also Avoids the Unanswerable Cosmic Judicial Question:

“If You Do My Job, What Will I Have to Do During the Trial?”)

* 1. Translate the Legal Principles Into Lay Terms (Another Way to Avoid #9(f) above)

E.g., Ask specific questions about “Defending Oneself” instead of whether the Panelist understands “Justification”

1. The Burden of Proof Never Shifts to the Defense

Even If the Defense Puts on a Case And/Or the Defendant Testifies The Prosecution Case Must Support Charges Beyond a

Reasonable Doubt

An Unpersuasive Defense Case Does Not (on Its Own) Support Conviction-

BUT -- DO NOT EVER Put It That Way:

(Don’t get potential jurors thinking about such horrifying things)

1. The Presumption of Innocence

(Better Phrasing: Legal Assumption That the Accused Is Not Guilty? That the Defendant is Merely Accused?)

Exists Throughout Every Moment of the Entire Trial Goes With Jurors Into Deliberations

In Some Jury Instructions: The Starting Point for Deliberations

(“You must begin by saying that the Defendant must be innocent . . . “)

*\*\*\*CONCRETIZE the CONCEPT*:

Means a Juror Cannot Decide Guilt in Mid-Trial Merely Because (Seemingly) Persuasive Prosecution Witness(es)

No “Knockout Blow” On Cross-Examination Unpersuasive Defense Witness [God Forbid!]

(Any time where Juror Reaction: “Looks bad for the home team!”)

Have Panelists Consider *Why* They Can’t Prematurely Decide Case

(Why they “Can’t turn off TV sets/stop listening and tune out then?”)

-Witness May Contract Self/Be Impeached/Lose Credibility

-Another Witness May Contradict/Impeach First One

-Other Evidence May Render Witness’ Testimony Irrelevant

-Strong Defense Case Is Presented

-Realization That Witness Did Not Prove All Necessary Elements

\*\*\*Have Panelists Promise to Remind Selves Not to Get Carried Away When They Hear Seemingly Strong Evidence of Guilt

1. Must Prove All Elements Beyond Reasonable Doubt (Better Phrasing: “Elements”=Essential Ingredients?)

Proof of Most, But Not All Elements Insufficient to Convict Examples: Missing Essential Recipe Ingredient, Essential Part for Model, Piece of Furniture, Electronic Device,

Computer

1. The Jury Is the Sole Fact finder and Decision Maker

*No One Can Tell the Jury How to Find Facts, What Facts to Find, Or What Verdict Should Be Reached.*

Especially Valuable Where: Hostile Judge, Prosecutor

Emotionally Charged Atmosphere

Allows You to Enlist Jury to Your Side (“You and Me Against the World”)

1. Charges Are Merely *Accusations;* Trial is Accusation Versus *Denial* Different from Real Life — Where There’s Smoke Does Not Mean

There’s Fire

Confront Panelist’s Ordinary Reaction to Begin the Educational Process: “When you walked into the courtroom just now,

how many of you thought, ‘I wonder what he did?’”

\*\*\* Remind Panelists that the Law Elevates the *Denial* Over the Accusation: Presumption of Innocence

Must Be Completely Removed Before Conviction

1. “I Have to Hear *Both Sides*”: What If the Defendant Does Not Testify?
	1. Reassure the Panelists: They Will Indeed *“Hear From Both Sides.”*

Opening Statement

Cross-Examination of Every Prosecution Witness Defense Case (If Any)

Summation

\*\*\*Promise Panelists That They Will Know *Exactly* What the Defendant/You Are Saying About the Case

(Of course, be sure that you *keep* the promise!)

f. “I Have to Hear *Both Sides*”: What If the Defendant Does Not Testify? (Continued)

* 1. Rephrase the Question: “It’s Not a Matter of Whether You Will Hear From Both Sides; It’s *Whether You Have to Hear the Defendant’s Side From Him or Her Directly?”*

## What NOT to Ask About the Law

* 1. WHY Elicit Panelist’s Promise to Hold Out?

Panelist Hears: “I Expect to Be On the Minority/Losing Side,

*HELP!!!*”

Why else would you be trying to *prevent* a verdict?

In Reality: Virtually *ALL* Such Promises End Up Getting *BROKEN!*

* 1. *General* Discussions About the Presumption of Innocence, Burden of Proof, Equal Competing Inferences

Elicits socially acceptable but tactically worthless answers Goes against peoples’ *Real* Attitudes

Based on complete lack of knowledge or understanding of Arcane Legal Terms

Suggests Defense Will Be in Trouble

(Lack of Confidence in Merits of Your Case)

\*\*\*Jurors Don’t Care About Burdens, Inferences, Procedures: They Want to Do the *Right Thing*

## Be Creative in Looking for Challenges for Cause

*ANYTHING* That Interferes With the Panelist’s Ability to *LISTEN*, *REASON* Or

*DISCUSS*

* 1. Inability to Concentrate on Case

-Preoccupation With Personal, Business Problems

-Illness, Use of Medication Affecting Senses, Doctors’ Appointments

-Panelist Is Active Caregiver for Child, Ill or Elderly Person

-Substantial Upcoming Work or Personal Project

-Heavy Workload

E.g., Student, Night Job

-Religious Holidays

-Personal Plans

## Be Creative in Looking for Challenges for Cause

* 1. Problems in Deliberating

Poor Understanding, Command of English (Discuss this *VERY* tactfully!)

Inability to Maintain Own Opinions in Deliberations Youngest Juror, Shy, Too Soft Spoken

(Undue) Deference to Juror With Particular Experience Juror As *Expert*

(“When EF Hutton Speaks, Everyone Listens”)

* 1. Do NOT Give Away Challenges Once You Get Them

RESIST the Urge to Summarize: “So What You’re Saying Is . . .” “In Other Words . . .”

May Cause Panelist to Retreat From Specific Position May Tip Off Court or DA to Rehabilitate

## Some Basic Considerations in Questioning

* 1. Have Court Do Pedigree Questioning of the Panelists

Unless You Want Your Adversary to Get Chummy With the Panel (“Getting to Know You”)

Find Out What the Judge Usually Asks:

You Could Ask Him/Her/It to Customize/Add/Eliminate Some of the General Questions

* 1. Avoid Meaningless Personal Questions

Focus on Panelists’ Personal/Professional Details That Have *Some Bearing* On Issues in Case

* 1. Your Questions Tell Panelists About Your Case

Should Be Able to Answer: “What Is He/She Looking For?” “What Is He/She Driving At?” (It’s *Advocacy*, remember?)

Haphazard, Throwaway Questions Cause Confusion, Boredom,

Distrust

* 1. Questions Should Relate to Your Theory of the Case, Drive Your Central Theme(s)
	2. Trying to Divine Panelists’ Non-Verbal Cues? Body Language Is Deceptive: May Simply Be Nervousness Over Public Questioning, Anxiety Over Being Chosen

## Some Basic Considerations in Questioning

* 1. *KEEP YOUR MESSAGE SIMPLE*

Do NOT Give Too Much Information

*Voir Dire* is NOT a substitute for

Coherent, Fully Developed Theory of the Case Coherent, Fully Developed Theory of Defense Appropriate Opening Statement

Discuss 2-3-4 Principles *AT MOST*

Repeat Principles With No More Than 2-3 Panelists *At Most NOT* Every Panelist (Repetition Devalues Meaning)

* 1. Do Not Let Familiarity With the Material Breed Contempt, Dull Your Presentation

Remember: Your Material is *FRESH* to the Panel, Even If You’ve Done It Hundreds of Times

* 1. Use the Language That Gets You Closest to Where You Want to Go --

Use Terms of Art and Judge’s Favorite Phrases to Avoid Objections or Interference

Track Language of Jury Charges? If important to case

If in semi-coherent English (Otherwise translate for panel)

## Making “Contracts” With the Panelists

* 1. Just How Effective Are Panelists’ “Promises” to the Lawyers REALLY? Panelists Promise Because:

Put On the Spot Want to Be Liked

Shuts Up the Lawyers

* 1. “Calling in Your Markers” During Trial Can Sound Whiny? (“You *Promised* Me . . . “)

Maybe Only Use Sparingly? For “Big Ticket Items?”

* 1. Better Formulation: Not “Will you promise *me/ my client . . .* ?”,

but “Can you promise all of us, *but mostly can you promise yourself*

. . . ?”

1. Make Injuries Seem *“Worse”* Than They Are? (“Is Anyone Squeamish . . . ?”)

Discuss Injuries in Graphic Terms to disqualify sensitive or squeamish jurors

May also de-sensitize jurors to inflammatory aspects of injuries

1. Isolate Each Negative Piece of Evidence and Ask Whether It Alone Would Require Conviction

Gets Panelists to keep a slightly more open mind about each piece of evidence

Prosecutors are rarely smart enough to respond by asking about the evidence in combination

1. Ask Panelists to *VISUALIZE* What You’re Discussing/What They’re Talking About

\*\*\*People Think *Visually*

\*\*\*”Can You *PICTURE/SEE* (*Envision)* A Situation Where . . . ?”

\*\*\*Most Vivid, Memorable Way to Have Panelists Think

1. Use Clarifying Questions

To check your understanding of panelists’ answers To show Panelists you are listening

To empower Panelists by investing their opinions with importance

1. “Prime the Pump”: If Panelists Can’t/Won’t Answer Your Question, Suggest an Answer

You can then ask their opinion of your suggestion, then ask them to come up with others

(Shows you are willing to “play the game” with them)

1. Use *Simple* Hypotheticals ONLY Use only a few key facts

Expressed in Simple, Declaratory Statements with Question at the end

Can quickly describe scenario

1. Use Concrete Examples for Concepts
2. Ask Panelists for Specifics, Concrete Examples What Kind of Problem Will You Have? About What Subject?

How Would It Work?

1. Ask Panelists for Specifics, Concrete Examples (Continued)

Makes panelists concretize their ideas, feelings

You get much more information from panelists that way Most Powerful Question: “Can you give me an *EXAMPLE*?”

1. The “I’ll Try” Syndrome: *Gently* Explain to Panelist Why That Answer Is Unacceptable

Example: Doctor Before Operation, Pilot Before Landing Plane (“Will I/we be OK?” “I’ll Try”)

Need Assurances On “Big Ticket Items” – Otherwise Panelist May Not Be Perfect Fit for Case

May Just Be Panelist’s Way of Speaking

1. *“Q: Does He Discuss His/Her Work With You? A: No, Not Really.”*

Does He/She Talk About People He/She Works With?

Does He/She Talk About Funny/Unusual/Sad Incidents That Happened At Work? (“Wait Till You Hear This One . . . “) Maybe Don’t Call Them “War Stories?”

Do You Ask Him/Her About Whether Things That Happened on TV or in Movies Occur in Real Life?

Does He/She Tell You About Insider Lingo/Slang? Has It Given You an Insider’s View of Subject?

You Notice When People/TV/Movies Get It Wrong

1. Co-Counsel Cases:

Decide *Up Front* If You Want to Be Identified With the Other Defendants

If Not, Don’t Visibly Cooperate With Them in Front of Panel (Don’t Prove the Conspiracy Through the Attorneys’

Behavior)

Maintain Physical, Rhetorical, Intellectual and Emotional Distance

Don’t Publicly Speak for Group, Either

“Co-Counsel” Should Be “Lawyer for Co-Defendant” If Joint Defense, Divide Up *Voir Dire* Material?

Work Out Process for Jointly Exercising Challenges

1. Should You Ask About Defendant Not Testifying? Defendant’s Prior Record?

What Does This Get You?

Hard to Do Well

Invites Galactically *Huge* Juror Speculation

Sets Negative Filter for Jurors to Process Information At Trial?

Does It *Really* Elicit *HONEST* Answers?

1. Explore the Panelists’ Experience At Group Decision Making Have Panelists Describe Experiences/Problems

Do They Occupy Supervisory Roles?

Do They Make Decisions by Consensus/Committee in Work or Personal Life?

1. Jury Decision Making As “Important Life Decision”

Said to Show that they Can Use Everyday Tests and Techniques Asks Panelists to Reach Verdict With *Same* Care As “Important Life

Decision”

BUT -- Subjected to criticism lately — People make personal decisions on whims, emotions, without sufficient information, etc.

\*\*\*SO: Tell Panelists that They Should Use *As Much Or More* Care . . .?)

1. Explore the Panelist’s Individual Decision Making Process

Have You Ever Made Up Your Mind Right Away, Without Knowing All the Details?

Was it a good or bad decision? Why?

How did the missing details figure into whether it was a good or bad choice?

Did you have to change your decision later? Why?

Would you (or a close friend or loved one) say that you are willing to reconsider once you change your mind?

Have you ever changed your opinion about a strongly held belief?

About What/ Why? How Did That Happen?

Relate the answers to these questions to: Keeping an open mind

Listening to all the evidence

Not deliberating until the evidence is in, summations given and jury instructions delivered

1. Explore the Panelist’s Individual Decision Making Process (Continued) Relate the answers to these questions to:

Group decision making process in deliberations

1. Does the Panelist Need (Expect) Perry Mason Before He/She Can Decide Case?

“If At the End of the Case, You Only Have Facts That Don’t Add Up or Prove Anything, Contradictory Details, Or Things That Don’t Make Sense, Will You Have Trouble Deciding Whether the Prosecution Has Proved the Accusation Beyond All Reasonable Doubt?”

“In Other Words, Do You Need Perry Mason to Make the Real Perpetrator Confess (“I did it, I did it, and *I’m glad!*”), Or to Show *Who Really Did It* ?”

1. “Call Your First Witness” in Jury Selection

If Panelist Has Experience Relevant to Issues in Case (e.g., false accusation/arrest, seen real criminal activity, witnesses police brutality, etc.) Have Him/Her Tell the Entire Group All About It before the Prosecution Gets Him/Her Off the Jury

1. Panelist “Expertise”

Panelist Can Use Life Experiences, Even Specialized Ones, to Help Decide Case?

\*Very Active Controversy Over Use of Juror Expertise Must Accept Translation Even If Knows It’s Wrong BUT-Why Not Bring Particular Knowledge to Bear in

Discussions With Other Jurors?

First, Decide Whether Specialized Knowledge Helps or Hurts Your Case

Then, Decide Whether to Raise It Develop Cause Challenge

Get Assurance Not to Discuss With Other Jurors Otherwise, “Call Your First Witness in *Voir Dire*” (See 15(q)

above)

1. Prior Jury Service

Pay Attention to Panelists Who Served on *Hung Juries*

Likely Endured Much More Acrimonious Deliberations Subjected to Haranguing, Allen/”Dynamite” Charges From

the Court

May Well Have Bad Taste in Mouth for Future Jury Service

## Specific Techniques

1. Prior Jury Service (Continued)

Alternates on Prior Juries: How Did They Feel About Not Deliberating?

Felt Cheated Not to Be Able to Vote Paid Less Attention Because Alternates

Ask About Court/Lawyers’ Reactions to the Verdict

“Did the Judge Say Anything About Your Verdict Besides Thank You For Doing an Important Civic Duty?”

“Did the Lawyers Tell You Anything That Substantially Changed Your View of the Case/Your Verdict?”

May Help You Skirt Around Judge’s Prohibition Against Panelists Revealing their Verdict in the Prior Case

BUT May Disclose Whether Panelist Contaminated by Conversations With the Lawyers About

Evidence Not Disclosed At Trial Defendant’s Criminal Record Or Bad Acts Plea Bargaining History in Case

\*\**BE VERY CAREFUL* about Probing Remarks/Information That Radically Changed Panelist’s View of Case/Confidence in His/Her Verdict:

Don’t Contaminate Other Panelists

1. Ask Panelists to Look At Your Client

“Can You Look At Mr. Jones and See Him As . . . ?” Merely Accused? Falsely Accused?

Innocent (?) Innocent Victim (??)

A Member of the “People of the State of New York”

*\*\*\** If Panelist Can’t Look At Client, You May Not Want Him/Her On Jury

*BUT: FIRST--*Make Sure That Your Client Is *AWAKE*, On Best Behavior [Again, A True Story]

## Finish BIG

Have A Strong Closing Question Ready When Court Says Your Time Is Up

(Don’t just meekly say, “O.K.,” and slink back to your table)

Ask Something Allows The Panelists to Relate Positive Information, Or Something that They Can Wholeheartedly Agree About/Say “Yes” To:

“What Qualities Will Make You a Good Juror?” “Why Do You Want to Serve on this Jury?”

My favorite: “I have one more question, which may summarize all the things we’ve talked about:

Can you promise us-me, Mr. Defendant, (the judge and prosecutor)-that if you are selected for this jury, you’ll give Mr. Defendant a *FAIR SHAKE* in this case?

Because that’s all we can really ask, isn’t it? You can? Well then, thanks so very much for your time!”

## A Few Miscellaneous Factors in Selecting the Panelists

* 1. Just How Useful Are Projected Juror Profiles?

The Real Panelists Never Match Up to Them Anyway

* 1. Cause Challenges: If Court Isn’t Granting Them, Aren’t You Just Telegraphing Your Peremptories?

E.g., Denial of Challenge to Panelist Who Wouldn’t Read Questionnaire in Front of Defendant!!! [Heavy Sigh-True

Story Again]

* 1. Don’t Worry, Be Happy: It’s All Witchcraft Anyway

Everyone Has Been Dead Wrong About Panelists Who Were Selected

* 1. Unless You Have Unlimited *Voir Dire*, We All Resort to Stereotyping Eventually--

Just Be Aware of What Stereotypes You Are Using, and How You Use Them

* 1. Once You Have Selected the Jurors, *DON’T SWEAT IT*

Forget It and Move On

## VI. A Few Miscellaneous Factors in Selecting the Panelists

* 1. Compromising On Alternates: Each Side Gets One of the Panelists Challenged by Their Adversaries

ONLY if you get *the FIRST ALTERNATE*

(and it is unlikely that you’ll get to the second alternate)

Be Sure That You Propose Compromise FIRST (with your panelist as the First Alternate)

Saves the Court’s time, keeps the Judge from getting Cranky (maybe)

* 1. Should You Use Jury Consultants? Have Others Observe the Questioning Useful to Have Observer Seated in Audience Among the Panelists, Where

Possible

BUT -- Do They Need to Be Professionals?

(Do you have money that you don’t know how to spend?) What Do They Know That *You* Don’t?

# \*\*\*BE HONEST, HUMBLE, STRAIGHTFORWARD

***\*\*\*TALK LIKE A REAL PERSON***

***\*\*\*DON’T SOUND LIKE A LAWYER***

***\*\*\*SHOW AN INTEREST IN THE PANELISTS***

***\*\*\*BE SELECTIVE ABOUT WHAT YOU DISCUSS***

***\*\*\*PREVIEW ONLY THE FEW MOST IMPORTANT ASPECTS OF YOUR CASE***

***\*\*\*BE YOURSELF (FOR GOD’S SAKE!)***

***BE THE VERY BEST YOU THAT YOU CAN BE***

***“If the Trial Is Theatre, Your Client Can’t Afford to Have His/Her Star Get Bad Reviews”***

***LISTEN TO WHAT THE PANELISTS TELL YOU***

*(AND THEN LISTEN SOME MORE)*