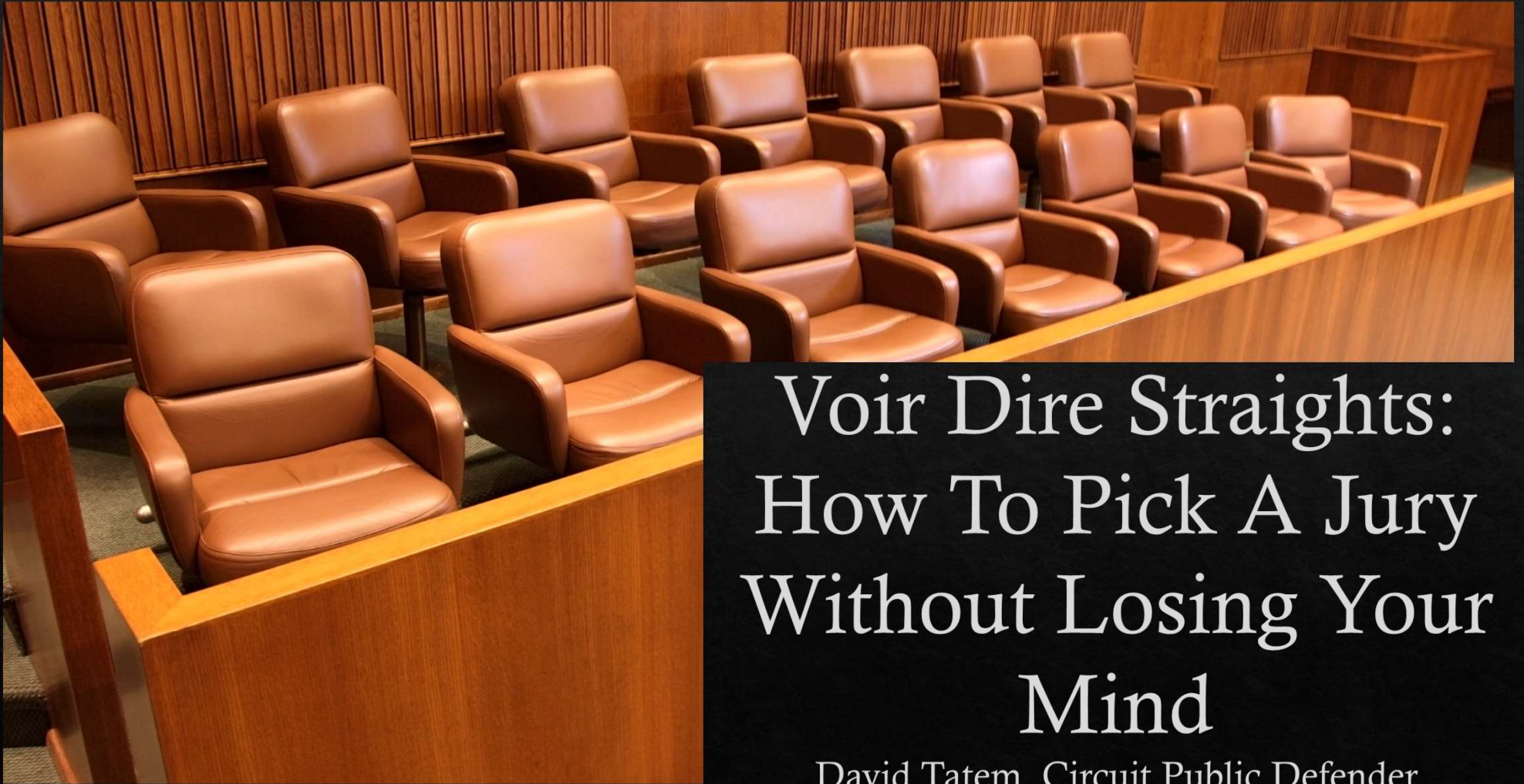




Voir Dire Straights: How To Pick A Jury Without Losing Your Mind

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"You shall take all juries committed to your charge to the jury room or some other private and convenient place designated by the court and you shall not allow the jurors to receive any books, papers, nourishment, or hydration other than water, or to use any electronic communication device except as directed and approved by the court. You shall make no communication with the jurors nor permit anyone to communicate with the jurors except as specifically authorized by the court. You shall discharge all other duties which may devolve upon you as bailiff to the best of your skill and power. So help you God."

The Show Starts When You Get Into Your Car



- The jury is watching and judging you
How you treat people
parking
Walking into the
courthouse
Talking with the State
Texting/Scrolling through
your phone



Jury Selection Can Be Overwhelming

Cause challenges and peremptory strikes are not instruments of inclusion

They are tools ELIMINATION which empower you to send a candidate home rather than offering him/her a seat in the box



By focusing on good
or neutral
candidates, you
effectively put
bullseyes on the
backs of your best
jurors



Then, a moderately caffeinated
prosecutor will know whom to
strike and how to strike them

Building Rapport is helpful, but is not the primary goal

- Deselection requires that you treat candidates with respect
- That you not try to convince them their views are wrong
- This type of respect tend to generate more trust and rapport much more than trying to push them to think differently
- Deselection requires
 - Listening respectfully without judgment
 - Builds authentic rapport with all candidates and models what you will ask of the jurors who are sworn

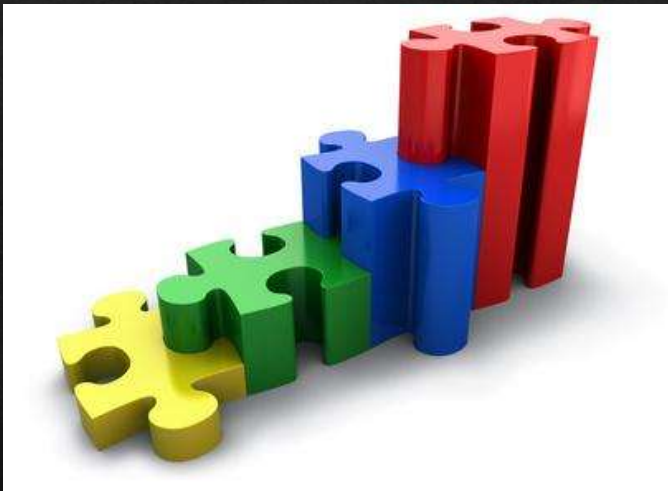


You are not going to change their minds

- Seeking to understand, not persuade
- Contamination
 - People come into jury selection as fully formed human beings who are not going to change their view because another juror holds a different view



Four Step Outline



1. (Before Trial) Identifying the values that stand in the way of any juror being open to your theory of the case (TOC)
2. (Before Trial) Framing questions that a juror with those values would really *want* to answer (red meat questions)
3. (During Voir Dire) Asking those questions in a completely non-judgmental atmosphere which includes a.) speaking in the language of the hater, b.) conveying that you are not judging them; and
4. Listening very closely to the words of, and observing the body language of, potential jurors so that you can use that information to justify challenges for cause and, where these challenges fail, exercise peremptory strikes

Disclaimer: Yes, not every Circuit works the same way, but hopefully one or two of these rules will benefit your practice.

#1: The Nike Rule

- No substitute for getting up there and doing it
- There is nothing more you can do to be prepared for this moment

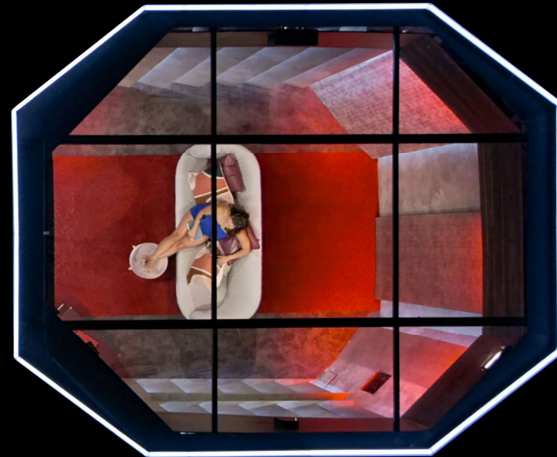
JUST DO IT.





#2: The Blind Date Rule

- ◇ People don't like lawyers very much
- ◇ Specifically, people that act like lawyers
- ◇ Don't label yourself as Big Important Attorney
- ◇ No lecturing
- ◇ Listen to the jurors
- ◇ Yes and No questions can feel like an interrogation/cross examination
- ◇ Open ended questions more comfortable
 - ◇ To include over exclude
- ◇ Fact questions that lead to feeling questions
- ◇ Maybe begin by sharing something about yourself on the issue



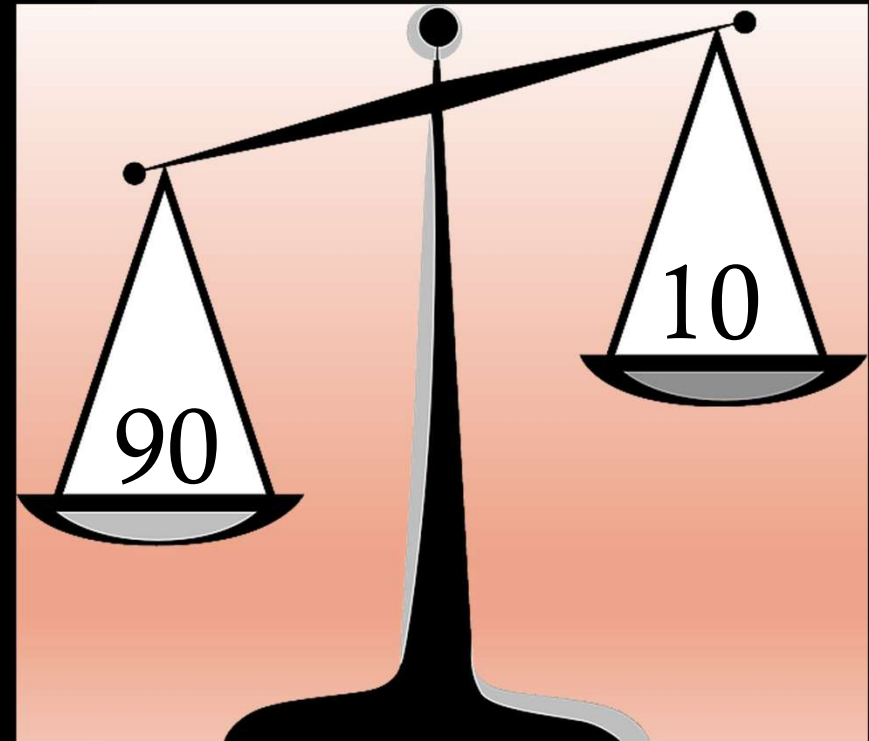
#3: The Shrek Rule

- It is better to get the unpleasant information or frightening ideas out in jury selection
- Let the jurors reveal them instead of concealing them until deliberation
- Rather than shutting down unhelpful view from a potential juror, draw that person out.
- Actively listen, thank them, and ask how many others agree



#4: The 90/10 Rule

- Let the jurors talk 90% of the time
- Jurors will like you more
- Or dislike you less
- Judge will be more reluctant to limit your time
- Get them talking and keep them talking



#5: Athens Bar Rule

- Talk to the jury like you would talk in a bar
- Don't use lawyerly words
- Voir dire= jury selection
- Credibility = Believability
- If the panel thinks that you think you are better than them, they will punish you
- Don't grovel
- Treat them like equals whom you need to like and understand you



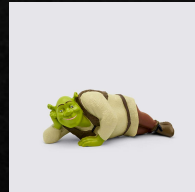
#6 Improv Rule

No Scripts

- You don't show-up to a blind date with a list of questions
- Helps you listen to the answers
 - Example, lost family member to a drunk driver/called 911 to report family death
- Most trials boil down to a few issues
- Make a list of a few subjects you want to discuss

Don't Block

- "Yes, and..."
- Don't take an idea and negate it
- "Anyone who doesn't testify must be guilty."
 - Don't argue, deny, or block
 - "How many of you feel the same way?"
 - "Do any of you feel differently? What experiences led you?"



#7 The Therapist Rule

- Jurors decide cases based on facts or feelings?
- Feelings!
- Jurors decide cases based on their gut
- Then, they look for intellectual reasons to support their emotional decisions

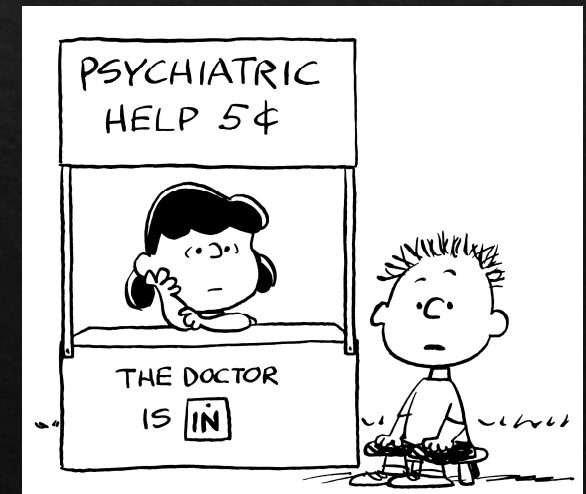
Bad Question: “[Proposition you would like the jurors to accept.] Who disagrees?”
“I take it by your silence that you agree.”

Better Question:
“What do you think about [issue]?”

Even Better: “How do you feel about [issue]?”



How does that make you feel?



#8 Beer Pong Rule

- The ball is always in play
- “How many of you agree with Mr. Smith?”
- Who disagrees with Mr. Jones?”
- Mr. Jones, how do you feel about what Mr. Smith just said?”
- Ms. Underwood, I see you shaking your head, what are you thinking?
- “Who thinks it’s time to move on to another topic?”
 - Work with jurors not against them



#9 Gerry Spence Rule or Playing Doctor

- I'll show you mine if you show me yours
- How to get jurors to talk about things and open up



1. Identify those matter(s) that trouble you about the case;
2. Explore your personal feelings about the matter(s) that trouble you;
3. Determine why you are troubled;
4. Share your feelings about the matter(s) with the jury;
5. Invite the jury to share their feelings about the matter(s) with you;
6. Accept (honor) the gifts the jury gives you;
7. Continue to share your feelings and invite the jury to share theirs.

#10 Stick with the group Rule

- Stay with the group
- You are an outsider
- Hopefully the ADA acted like a big important lawyer
- Expects more of the same from you
- When you find some allies, don't spend all your time with them
 - The State will strike them first
 - You will end up 12 jurors that have not talked and you know nothing about



#11 Bring A Friend Rule

- The more eyeballs the better



#12 The Atticus Finch Rule

- “Stand up, your father is passing.”
- Be the lawyer they want to stand up for



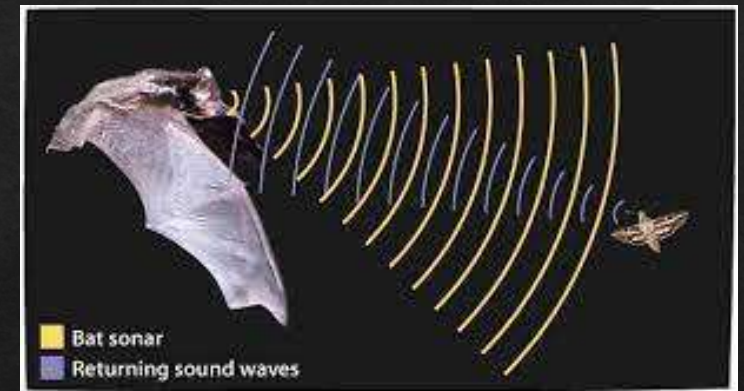
#13 Bat Rule

Question

Then

Listen

Questioning while thinking
about the next question loses
out on opportunities



#14 Herd Rule

- Do any of you _____” versus “How many of you _____”
- Second one presumes that are some people who _____ and more likely to get responses
- If you want to find as many people as possible ask “ How many of you agree with Ms. Smith that Fred is probably guilty?”
- If you want people to say nothing ask “Do any of you agree with Ms. Smith that the government should be held to a higher standard than beyond a reasonable doubt?”
- The herd wants to blend end and not be cut from the herd.

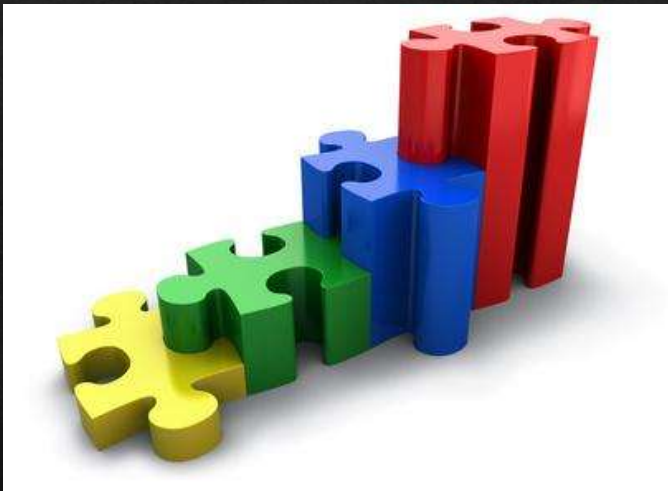


#15 The Marathon Rule

- Save something for the end
 - Judge might cut you off
 - Have some lawyerly yes or no questions prepared
 - How many of you have been witnesses in criminal cases?
 - How many of you have close relationships with police officers?
 - Judge is used to hearing those questions and can buy you more time
-
- Jury runs out of steam
 - Prepare your ending
 - One unifying question to ask the whole panel
 - All jurors to agree
 - “Raise you hand if we can all agree to wait until all of the evidence is in before deciding the case?”



Four Step Outline



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4. Listening very closely to the words of, and observing the body language of, potential jurors so that you can use that information to justify challenges for cause and, where these challenges ²⁷ fail, exercise peremptory strikes

Theory of the Case

- Theory: Our core story of innocence, reasonable doubt, or lesser culpability consistent with:
 - The facts beyond change
 - A fact which you cannot change no matter what you do through investigation, expert testimony, or any other means
 - The law
 - Supported by evidence

The story should generate an emotional response which, ideally, flows from the values of your jurors

To find the story, consider the tools of storytelling including timelines, character, motivation, and key moments.

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Theme

Support your story with a theme or themes- words, phrases, images, or refrains that resonate with and open the minds of the jurors to your story.

Examples:

- Fractions of a second to decides (self defense)
- Blood is thicker than water (family covering up for family member)
- The strong prey on the weak (gang members lying about a non-gang member)





The Six Legal Defenses

- It didn't happen
- It happened, but it wasn't me
- It happened, but it wasn't a crime
- It happened, I did it, but it wasn't *this* crime
- It happened, I did it, it was the crime charged, but I am not responsible
- It happened, I did it, it was the crime charged, but so what?

Example Theory

Jack should not have been in the The Bluffs turf that night if he valued his life. When two men jumped from an unmarked car dressed just as he was- baggy dark jeans and a hoodie- he had fractions of a second to choose between his life and that of the two men pointing Glocks at him who, he later learned, were police dressed “for the hood.”



Identify the Haters

ID the conscious or unconscious biases (attitudes, values, or opinions) that would undermine or stand in the way, cause a juror to resist or be closed off from your TOC

People who hold those biases are haters

For example

Biases against theory

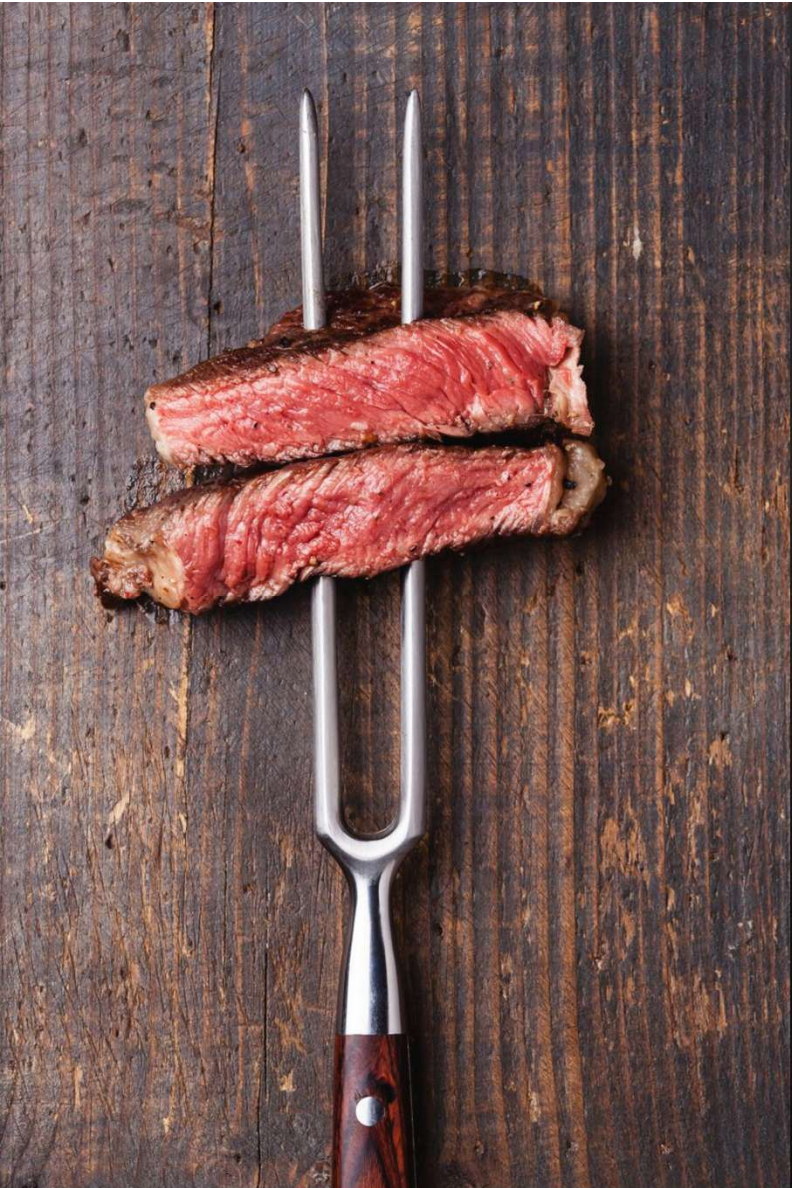
“Prosecutor would never call an informant to testify unless s/he was 100% certain the informant was telling the truth”

Bias against client, including implicit racial bias

Bias about you

Biases about best sources for proof

“experts will say anything because they are being paid”



Red Meat

Find questions that haters really want to answer as opposed to one that might appeal to you or someone who shares mindset and communication style

Several categories of questions

One back up if it flops

Go for visual, easy, and short questions

Go for visual, easy, and short questions

Undocumented client-

“how many believe that people who come to this country should cross the border the right way?”

Criminal legal system/Tucker Carlson

“isn't it true that these days crime is out the roof because the police have their hands tied behind their back?”



Choose the Frame of your question

Two Common Types:

1.) Skewed Survey

“How many of you feel that the system makes it too hard for the police and the prosecutors to do their jobs?”

2.) Spectrum

“Some people think we are lucky to live in a country with constitutional rights. Many others feel that we have gone too far to protect the rights of criminals. How many of you feel the latter? That we have made it too hard for police and prosecutors to do their job?”



Language of the Hater

If possible, use the language that your strikes would use

This can be hard, but is useful in conveying that you will not judge

“How many of you feel that someone who comes to our country should learn to speak English?”



Inner Oprah

Create conditions to let the hater feel comfortable expressing hateful attitudes without feeling judged (Shrek Rule)

Open ended questions (Herd Rule)

Active listening (Bat Rule)

Do less talking than you think (90/10)

Repeat a few words (don't put words in their mouth!)

Ask a candidate to explain part of answer (Therapist Rule)

Ask questions slowly

Pause between questions to :

- Be positive the juror was quite finished

- think a bit about how to answer what is left unanswered, and what your follow up will be, if at all

- Give the juror a second to relax and catch breath

NEVER INTERRUPT

Striking for Cause

1.) Some questions go to attitudes that may undermine our TOC but are not necessarily the basis for a cause challenge

many people feel that lethal violence should a last resort but could see their way to a Not Guilty based on Self Defense

2.) Other questions go to core constitutional or statutory rights and therefore to cause

A person needs some reason to overcome the client's decision not to testify

3.) Other questions which lead to cause challenges because they are extreme views on any issue



- The right to equal protection under the law
 - “Black people seem to use drugs more for whatever reason”
 - “Hispanics are really different from the rest of us”
 - “Latinos are taking our/a lot of our jobs”
- The right to remain silent
 - A view that a person who does not speak to the police or testify has something to hide
- The right to be presumed innocent
 - The view that the defense has to prove something
- The right not to be convicted until and unless the state proves its case beyond a reasonable doubt regarding every element of the offense
 - The view that the defense must prove something or being closed to a defense TOC
 - A religious view that violence is never justified or the view that the state should have the right to entrap “bad guys”
 - Some evidence rules might fit here:
 - A juror who will take “other acts” evidence as dispositive thereby eliminating an element of the offense
 - If he is guilty of selling drugs, then he must be guilty of having the firearm
- The right to confront witnesses
 - I think you defense attorneys give victims a hard time on cross so I might have a tough time listening.
 - I can't listen to you cross a child witness
- The right to compulsory process
 - You shouldn't call that person to testify- she's a victim and you make it worse

Preemptory Challenges

Should be used for people who have biases that conflict with your TOC, but not a legal right



The Pin Down For Cause

- Expressed Bias
 - Jurors must articulate or demonstrate an actual bias not merely a speculative or assumed one
- Nexus to the facts
 - The stated bias must connect meaningfully to the specific facts, evidence, charges, or collateral matter of the case
- Legal Hook
 - There must be a recognized legal basis (statutory or constitutional) to support the motion to strike for cause

1. I have the sense that you have strong feelings about this ATTITUDE [for example, being from a police-officer family, client needing to testify in his own defense; burden of proof is too high for prosecutors]– is that right?
2. You feel strongly about this, don't you?
3. I feel like I might be facing a bit of an uphill climb here given what you have explained to me, right?
4. Does the prosecutor have a little bit of a head start given your feelings on XXXX?
5. I sense that it might be a little hard to put aside completely your reactions, your experiences, your expertise, etc. – am I close?
6. Please take a moment. Can you promise that, without reservation that, you won't be affected at all by your view?
7. ESSENTIAL IN SOME FORM TO LOCK IN THE CHALLENGE: So even if the judge asked you to set aside that feeling, you might have a hard time doing that? Or even if the judge asked you to set aside that feeling, you cannot promise us for sure that you can do that?

Useful Phrases for Some Systemic Issues:

Is what you're saying that your feelings might make it hard for you vote not guilty in case like this one despite the law?

That you might feel my client might be guilty just because the prosecution has charged s/him [or if she doesn't take the stand]?

Given what we have talked about, might you feel that you might need less proof than someone else in a case like this one?

Is what you're saying that my client might have to do something in the trial because you already feel that if s/he was arrested, s/he's probably guilty?

Sounds like you might need a little less proof than someone else – is that right?

Question

Tell Me More
(Understand)

“A lot of people are saying that if you don’t testify, you’re probably hiding something”

No change because Court, Judge, ect
“Does anything change because you’re sitting in a Courtroom?”

Find their friends

What if I told you that Rule/Law in Georgia was_____. And that sounds in consistent with_____

Fix/Try to

“Willing and Able”

So even if the judge asked you to set aside that feeling, you might have a hard time doing that? Or even if the judge asked you to set aside that feeling, you cannot promise us for sure that you can do that?

And because of this, you cant swear an oath to follow the law 100% of the time in this case

Rehabilitate a Favorable Juror

These questions lead the juror to acknowledge that they can be fair and impartial.

1. You don't know my client.
2. You don't know anything about this case except what you've heard here.
3. You have an open mind, right?
4. You can listen to judge and the evidence and follow her instructions, right?

For example, "I understand that you believe that the police planted evidence on your friend, but the question is, will you be able to set aside that experience, and listen to the evidence, and apply the law that the judge will give you to the evidence you hear in court?"

Thank you