What Planet Are Your Jurors From?

By Maureen McLaughlin
Trial Consultant

Introduction

The potential jurors file into the courtroom and take their places on the wooden benches. From the defense table, the attorney looks out into the audience, hoping to see encouragement on some of the faces. There is a young Hispanic woman with drawn and haggard features, who looks like she came directly to court from working the night shift. A big Caucasian man in a suit sits red-faced and stares straight ahead, his arms drawn across his chest, while his neighbor to the left, an older African-American woman, clearly shows signs of discomfort. To his right, a young Asian-American student sits oblivious to the older man's disapproval. He is too busy craning his neck, trying to get a better look at the defendant's face.

Most of the time, the trial attorney is so preoccupied with last-minute trial preparations that he or she does little more than barely notice the jury before voir dire begins. Once in awhile, though, a shift in perspective occurs. Looking out across the crowd, a slight feeling of queasiness and alienation may arise. More than one defense attorney has looked at a panel of prospective jurors and thought, "What planet are these people from?"

Jurors, too, may feel alienated. For the most part, courtrooms are cold and impersonal places. The process is alien in the extreme: one does not usually stand when a figure in a black robe enters a room. There may be other strange little rituals that set the jurors apart from those in front of the bar. For example, in some courts in Tennessee, the bailiff starts the day with a speech that ends with, "God bless this honorable Court, and God bless the State of Tennessee." As soon as the bailiff says "God," the judge, courtroom personnel, and attorneys bow their heads and leave them bowed until the bailiff says "Tennessee," at which point their heads snap back up in unison. Knowing when to bow one's head sets the professionals apart from those in the audience.

All of the courtroom personnel may look foreign in the jurors' eyes, but defense attorneys look the most alien of them all. Although the judge is an imposing figure, sitting above everyone else on the bench, he or she is the source of authority and usually seeks to befriend the jurors. Media stereotypes lead jurors to see prosecutors as protectors of the public interest. In voir dire, when jurors are asked how they view the prosecutor's role, many times they answer, "To convict people and send them to jail." These jurors have no notion that justice may involve acquittal instead of conviction.

Much media misinformation also leads the public to view defense attorneys as slick shysters, seeking freedom for their clients. Criminal defendants are looked down upon as preying upon innocent people: in the most extreme cases, they may be viewed as monsters.
The purpose of this article is to examine the factors that distance the criminal defense attorney from the jury and to suggest some strategies for a counterattack. In areas where there is no perceived strategy, awareness of the problem may at least lead to a heightened sensitivity and greater understanding of the problem.

I. Human Nature - The Final Frontier

In dealing with juries, it is easy to get so caught up in the minutiae of the process that the defense forgets to look at the big picture. Much more than the view from the defense table, the big picture encompasses the vast world outside as well as inside the courtroom. In the context of jury selection, lessons in human nature are viewed from the twin perspectives of how they apply to the defense attorney as well as how they apply to the jury.

Lesson One: <u>Our Lives Consume Us</u>
The lives of people who are not somehow involved in the legal system move them into different orbits than lawyers and defendants. Jurors are much more concerned with how they are going to pay their bills and care for their children than they are with the scope of a jury trial. Since jurors are not typically involved in the criminal justice system, their ideas about the system are derived primarily from the media and from the personal experiences of people they know who have been involved in the system. The depth of juror misunderstanding about their role in the system, their duties and responsibilities, is awesome.

Much of the misunderstanding comes from the skewed portrait of the legal system as portrayed by the media. This topic will be discussed in detail below. At this point, it is sufficient to say that outright misinformation and partially correct information (disinformation) color the venire person's view of the defense and make the defense's burden heavier. The defense has the opportunity to educate the venire about the important role the juror plays in the system. It is also imperative that potential jurors are given the opportunity to discuss their misgivings about the legal system, this particular case, crime in general, and any other problem areas that would preclude their service on the case.

Lesson Two: <u>Your Case Is Not Our Problem</u>
Every competent defense counsel cares about his clients and cares about his cases. After spending days, weeks, months, or even years preparing a case for trial, it is difficult for an attorney to put enough emotional distance between himself and his case to be able to see the what the case may look like to uninvolved people. One aspect of this is that jurors come into the courtroom not knowing about the particular case and not caring about it. For instance, the attorney may know that the client is a good-hearted individual who tries to assist in his defense to the best of his ability. In so doing, counsel has begun to care for the defendant, and to see him in such glowing terms that he loses sight of the fact that the defendant is on trial for shooting and killing a police officer.

As a rule, jurors either do not understand the legal system or know just enough to form wrong ideas about criminal justice. Most potential jurors will hear the indictment of someone accused of killing a police officer and assume that the defendant is a "cold-blooded killer." Skilled advocates understand the need to concentrate on uncovering the weaknesses in the case that can feed the jurors' misperceptions. By finding ways to address the weak links and working to re-educate the jury, a stronger defense will be forged.

Lesson Three: <u>We Seek the Familiar</u>
We human beings are more comfortable with people who look like us, dress like us, and sound like us. A person whose racial or ethnic background is different from our own may make us uneasy. Social status may be conveyed through the way a person dresses: wearing a tailored suit gives a different sense of class standing than coming to court in blue jeans and a T-shirt.

There are three main applications of this rule in the courtroom: first, jurors are going to gravitate towards others who share their racial/ethnic/social class characteristics. Second, jurors find it easier to convict defendants with whom they feel they have nothing in common. Third, the defense attorney needs to be aware of the impact his or her comportment has upon the jury.

Even if there is little that can be done to change a particular characteristic, there are ways to mitigate its effect upon the jury. If the defendant seems threatening because of his size, normal human interaction with him may make him seem more like a regular person. If the attorney has an unfamiliar accent, making a small joke about it at her own expense may set jurors at ease. The appropriateness of any effort to reassure jurors should be based upon the context in the courtroom at the time. As in other areas of life, timing is everything.

Lesson Four: <u>We Feel Threatened by People Who Are Not like Us</u>

This is much more than just the flip side of seeking the familiar. Feeling threatened automatically makes people defensive and emphasizes the "otherness" of those not like them. From the safety of their living rooms, many people watching the evening news on television receive the message that they are being barraged by violent criminals, even though, in reality, the rate of violent crime in their area is falling.

In the courtroom, as these people assume the role of potential jurors, the alien quality of the judicial process makes them uncomfortable and unsure of socially acceptable modes of behavior. Prosecutors make ideal authority figures because the prosecution's theory of the case is more likely to readily conform to the stereotypical visions of the criminal justice system that the media foists upon jurors on a daily basis.[1]

It becomes incumbent upon the defense to overcome the jurors' wrong-headed thinking and to provide them with new models for thinking about fairness and justice. This is one of the most challenging parts of defense work. It is also one of the most rewarding.

Lesson Five: <u>Negative Energy Feeds on Itself</u>

It is lots more fun to be angry than compassionate. When surrounded by other people who are also angry, irritation can build to outright fury in no time. Prosecutors seek to find and build upon anger in jurors because an angry jury is a convicting jury. That is why prosecutors leave the victim's bloody clothes in front of the jury box in a murder trial. That is also why they call the victim to the stand at the beginning of their case. Many times, prosecutors seek to distance the defendant from the jury by referring to him or her in indignant tones as "<u>that</u> man" or "<u>that</u> woman." In the most extreme cases, the prosecutor may try to refer to the defendant as an "animal" or "scum."

Anger, like fire, is easiest to extinguish when it is in the beginning stages. Some objections made by the defense may defuse the prosecutor's ire by interrupting the rhythm. Other objections, such as objecting to the bloody clothes being placed in front of the jury box for the second day in a row, serve to educate the jury about prosecutorial machinations. Defense attorneys also have an opportunity to act, in contrast to overbearing prosecutors, by treating witnesses and the Court with respect and consideration. Counsel can fight like hell and still come across to jurors as reasonable people by modulating both their voices and their arguments to fit the situation.

It may be necessary to address the potential for anger in closing argument. Simply addressing the situation, that jurors are being called upon to be angry with the defendant, may lessen the

pressure. In this instance, the defense needs to provide the jurors with a more positive solution to the case.

Lesson Six: <u>We Do Not Like To Look At Ugly Things</u>

When a juror looks at a defendant, he may see someone who is physically unattractive, with a bleak life history, accused of committing a distressing crime. These things are hard to look at, especially when combined with the other harsh realities of life which many defendants face: being poor, mentally challenged, or otherwise dispossessed.

The best place to face ugly issues is head-on in voir dire. Whether a home invasion, drug sales, guns or DUI are at issue, these areas need to be thoroughly explored during the jury selection process. Informing the jurors in advance gives them a chance to prepare for difficult evidence and lessens the shock value of potentially worrisome evidence.

Lesson Seven: <u>Simple Answers Are More Appealing</u>

Prosecutorial arguments are inherently more appealing to jurors because they involve one primarily simple concept: the defendant committed the crime because, unlike you and me, he is a bad person. He is evil, he is mean, he is stupid and above all else, he is bad. This simple-minded approach is strengthened by media influences, which shore up the "sound bite" mentality of simplistic thinking.

The defense rarely has the opportunity to provide the jury with meaningful solutions to the case in such an "easy-to-swallow" format. By definition, real life is messy, convoluted, and confusing. The prosecutor's simple answer serves the purpose of distancing the juror from the defendant (i.e., he is bad, you are a good, law-abiding citizen). The defense has to appeal to the jurors' curiosity, intelligence and integrity to urge them to look beyond the easy answers to get to the truth.[2]

II. The Media-Polluted Atmosphere

According Advertising Age, 97 million US households had at least one television by 1996.[3] This translated to roughly 98% of U.S. households owning at least one television at that time. Of all forms of media, television certainly predominates in its handling of misinformation and disinformation about the criminal justice system.

Many books and articles have been written about the influence of television on the psyche of both adults and children. The National Cable Television Association has funded a study entitled National Television Violence Study for the years 1996[4] and 1997.[5] Their findings form a fascinating - and horrifying - picture of the effects of television violence. In the first year of the study, 57% of the programs coded for their content contained some violence. In the second year, 61% of the coded shows had violent content. According to the study, premium cable channels, movies, and drama series are more likely to contain violence. About one-third of the violent programs for both years contained nine or more acts of aggression.

One of the most important parts of the study concerns fear effects. In Volume 1 of the report, a summary on fear effects appears as follows:

> "A very high percentage (73%) of the violent scenes do not show the perpetrator being punished for committing violence. This has implications for the learning of aggression, as noted above, but it also has implications for fear effects. Research indicates that viewers shown violence that goes unpunished are significantly more likely to become anxious and possibly fearful. Viewers are also more likely to be frightened by television violence against innocent victims. Our study reveals that 44% of violent interactions are classified as justified. Conversely, 56% of violent interactions are unjustified. Although justified violence may increase learning effects, unjustified violence potentially increases fear effects. A majority of violent interactions also involve repeated acts of behavioral violence. As noted above, viewing extensive violence is likely to lead to desensitization. It is also likely to increase fear effects - at least in the short term. Because most violent interactions (57%) involve repeated acts of behavioral violence, there is substantial likelihood of pervasive fear effects.
>
> Only 8% of the programs in our study that include violence could be classified as "real life" events - that is, events that truly happened in the real world. A substantial proportion of the programs (43%) fall into the fictional category, which includes programs that portray events that are at least possible in real life. The combination of these two categories (resulting in a total of 51%) offers a better indication of the amount of violence that appears realistic. *When violent programming is perceived as realistic, it heightens the risk of a fear effect on the audience* (emphasis added).[6]

This author's translation: if potential jurors are watching "Cops" and "America's Most Wanted" on a regular basis, they will probably be on the defense strike list.

In addition to "true crime" television series, cameras are now allowed into courtrooms on a regular basis. Since the gavel-to-gavel coverage of the O.J. Simpson trial, televised trials have left skid marks on the back of the American legal system. Unlike in the real trial where the focus is on the participants' roles and functions in the courtroom, televised trial coverage emphasizes "factors external to the individual, perceived by others and used to determine motives and values. Television personalizes whenever it can by attaching concepts to individuals."[7]

A perfect example of this is the trial of Rick Tabish and Sandra Murphy, convicted of the murder of Murphy's former boyfriend.[8] Early in the trial, the co-defendants, who were also lovers, were caught on camera sharing an intimate glance. Court TV took this picture and made it the predominate image for the rest of the coverage of the trial. It appeared as the on-screen graphic to identify the case and was also used on the Court TV web site.[9] A glance that lasted two seconds became the enduring visual theme of the trial.

Along with televising trial coverage on newscasts, "true crime" shows, and extended periods of actual trials, news stations are branching out and showing streaming video from inside the courtroom over the Internet. This makes it possible to show gavel-to-gavel coverage of a trial without commercial breaks. In Nashville, Tennessee, NewsChannel7 broadcast gavel-to-gavel coverage of a trial, with talk show co-hosts receiving critiques of the witnesses, lawyers, and judge over the telephone during breaks.[10] They also talked to the victims' families and interviewed jurors post-trial. The television newscasts contained only sound bites, while the Internet version contained the full interviews.

Although the burden of proof is quite specific in the courtroom, in the media version of trials, the public is free to make up its mind about the guilt or innocence of the defendant at any point in the case. "Mere appearance is the degree of evidence required to sustain proof in the *televised mediated trial."*[11] If the defendant looks guilty, has committed previous offenses that the viewing public knows about while the actual jurors do not, or is being represented by an attorney who needs a haircut, the public is free to decide his guilt.

The implications for juries in real trials are serious. If future members of the venire watch courtroom dramas and televised trial coverage extensively, they are liable to expect the trials in which they are called as jurors to correspond with the "virtual reality" of the trials they have seen on television or over the Internet. The author cannot help but wonder: if people become habituated to making up their minds about guilt or innocence on a whimsical basis in televised trials, how will this habit carry over into actual trials? Also, as the viewing public watches more and more about forensic evidence and testing, crime labs, and expert witnesses, what kind of effect is this going to have in the courtroom?

Books could be written on the effects of television watching - and now Internet exposure - on the jury. Spending the time to do some research into the television shows that jurors are watching is time well spent. Although many lawyers have at least a superficial idea about the message being promulgated by shows like "Cops," "America's Most Wanted," and "Unsolved Mysteries," how many attorneys have ever actually taken the time to watch "Touched By An Angel?" If certain television shows come up in voir dire over and over again, the defense needs to have at least a general idea of their content. The most important question to ask is: will watching this television series support stereotypes of the criminal justice system that may be injurious to my client and myself?

Aside from television, jurors are being exposed to a wealth of other media. Books may provide the scariness of FBI profilers like John Douglas, known for such titles as, Mindhunter: Inside the FBI's Elite Serial Crime Unit, Anatomy of a Motive: the FBI's Legendary Manhunter Explores the Key to Understanding and Catching Violent Criminals, and Journey into Darkness. Douglas was the first to make the American public aware of FBI profiling techniques. His books are written with Mark Olshaker in a dramatic style that is sure to augment the fear factor in just about anyone.

Douglas' success as a true crime writer buttressed the literary careers of other members of the original FBI profiling team, including Robert K. Ressler, author of the highly popular Whoever Fights Monsters: My Twenty Years Tracking Serial Killers for the FBI, and I Have Lived in the Monster: Inside the Minds of the World's Most Notorious Serial Killers. Both Douglas and Ressler make frequent reference to Dr. Park Dietz, one of the prosecution's favorite profiling psychiatrists. Dr. Dietz has yet to write his memoirs, but frequently appears as a witness for the State in high-profile criminal trials.

Other than the "profiling community," many psychiatrists and psychologists have taken up second careers writing about their exposure to the criminal mind. Just about the driest book on this subject, written by Herschel A. Prins, has one of the more intriguing titles: Will They Do It Again?: Risk Assessment and Management in Criminal Justice and Psychiatry. Dorothy Otnow Lewis weighs in with Guilty by Reason of Insanity: A Psychiatrist Explores the Minds of Killers. Along with her partner, Dr. Jonathan Pincus, Dr. Lewis is exploring organic bases for violent behavior. In a slightly more thrilling vein, Drew Ross has written Looking into the Eyes of a Killer: A Psychiatrist's Journey through the Murderer's World.

There are many mass-market paperbacks with similarly titillating titles. Two of the most irresistible are The Mad, The Bad, and the Innocent: The Criminal Mind on Trial by Barbara Kerwin, and last but not least, Robert I. Simon's Bad Men Do What Good Men Dream: A Forensic Psychiatrist Illuminates the Darker Side of Human Behavior.[12]

Among all of the mental-health-professional-turned-crime-writers, one of the most intriguing is Dr. Robert Hare. His brainchild is a supposed condition called psychopathy that describes a vaguely bad psychological state not listed in the DSM-IV. His book, Without Conscience: the Disturbing World of the Psychopaths Among Us,[13] contains a handy psychopathy scale that the reader can use to measure whether his landlord, significant other, or mother-in-law suffers from psychopathy. Additionally, Hare has authored versions of his scale that may be used on persons as young as 13 years old, and the Hare PCL-SV (Psychopathy Checklist, Screening Version) that is beginning to be used in Human Resource circles.

According to nearly all of these "true crime"/pop-psychology hybrids, criminal defendants are monsters. Socio-economic or racial issues may pop up in their pages from time to time, but in the main, the man or woman behind the bars is made to look sub-human and incapable of change or remorse. Jurors are reading these books. Criminal defense attorneys need to pay attention to this phenomenon.

There is another type of reading material that also deserves note. Hagiographic, or end times, literature exploded on to the scene at the end of the twentieth century with the publication of the Left Behind series by Tim LaHaye and Jerry B. Jenkins: Left Behind, Tribulation Force, Nicolae, Soul Harvest, Apollyon, Assassins, The Indwelling, The Mark, and The Desecration.[14] The series is described thus on its web site, "The best-selling end-of-time fiction series tells the riveting stories of people who, after the rapture of the church are *left behind* to experience the tribulation and other events prior to Christ's return to earth. With the prophetic teachings of the Bible as the background, this dynamic apocalyptic fiction has captured the imaginations of millions."[15]

The characterization of millions of readers is not an exaggeration. These books are pertinent as part of the discussion here because jurors are reading them, and the series is rife with ultra-

conservative ideas. The anti-Christ takes over the world shortly after making a speech at the United Nations. There are many exciting scenes involving various emissaries of the New World Order. As a humanist, the anti-Christ pushes for all religions being combined into one group with a very hazy belief system. Being an apocalyptic tale, non-believers are stricken with excruciating sores administered by tiny dragons with human heads, plagues, fires from heaven, the death of half of all life and vegetation, and other tortures. This writer was left with the impression that two of the main messages of the series are that any agent of the government may be a representative of the anti-Christ, and people must take responsibility for their lives or they are going to burn in hell. To a juror who has read this series uncritically, what must the defendant in a criminal trial look like?

There is not the space here to go into newspapers, radio, and the Internet. It is safe to say that newspapers sell more copies when their stories have attention-grabbing headlines. Murder, theft, or a big DUI car crash sells more papers than a report from the FBI that violent crime is dropping. The "if it bleeds it leads" mentality carries over into other media. While it is still important to know if jurors are listening to rightist mud-slinging talk radio shows, other forms of media have gone to such extreme lengths that the talk shows almost seem tame by comparison.

In the next few years, questions about the Internet will become a standard component of publicity and media questions in voir dire. Web sites in honor of crime victims are still relatively rare, but there are more of them every day. Thanks to a group of Canadian death penalty abolitionists, many inhabitants of death rows across the country have their own web pages, although the inmates will never see them. As video streaming technology improves, it is going to become possible to see what is going on anywhere at any time, through the eyes of anyone with the expertise to point a camera and upload streaming video to a web server. The Internet is going to make inroads into our thinking about the criminal justice system in ways that are impossible to envision at this point in time.

All media have both strong and weak points from the point of view of jury selection. Television may bolster the fear factor and feelings of aggression in some viewers, but it also makes it possible for an illiterate plumber to become skeptical of experts on DNA analysis. Fear mongering books written by psychiatrists may lead some people to see psychopaths around every corner, but others, like Dead Man Walking[16] by Sister Helen Prejean have had a profoundly positive influence on jurors' views of condemned men. End times literature may bolster the fear factor in one person while heightening the importance of the concept of forgiveness to another. As a part of their voir dire preparation, it is crucial that defense attorneys become aware of what the potential jury members are reading, listening to, and viewing.

III. Seeking New Worlds in the Courtroom Galaxy

Anyone with experience trying criminal cases knows that the structure of the trial and the order of the presentation of evidence make a difference in how the jurors view a case. The defendant sits mutely, a *tabula rasa* upon which the jurors may write their concerns. The more serious the crime, the more liable they will be to think that the defendant must have done something, or he would not be in court.[17]

Jurors are liable to fall prey to what psychologists have long called "the fundamental attribution error." This concept says that people may misperceive events, "providing causal explanations for the behavior of others in largely dispositional or personal as opposed to situational or contextual terms."[18] A recent article in the New York Times described research done in this area to examine the differences in perception between Asian and American societies. When the two groups were given papers to read concerning nuclear testing by the French in the Pacific and told that the writer had had "no choice" but to write the paper, both the Korean group and the American group erred in thinking that the writer believed what he had written. However, when both groups were asked write papers themselves on the identical subject, the Koreans then felt that the writer did not believe in the topic and had been forced to write the paper. The Americans, on the other hand, became stronger in their opinion that the writer believed in the topic.[19]

The implications of this research for jury work are evident. This "tendency for people to explain human behavior in terms of the traits of individual actors, even when powerful situational forces are at work"[20] explains the argument prosecutors make over and over again. "Some of you (jurors) had a bad childhood, but you didn't turn to a life of crime." This type of argument is very powerful because simplistic thinking is seductive. It bolsters the juror's positive self-image, while distancing the juror from the criminal defendant.

There are many other ways that jurors feel distancing in the courtroom. The language of the law is a big one. At times, jurors need someone to translate legal language into something non-lawyers can understand. The attorney who seeks to act as translator will be perceived as a friend of the jury.[21] One of the most pertinent areas with a need for translation is in re-interpreting jury instructions. Countless studies have shown jurors either must struggle to understand jury instructions, or dismiss them out of hand entirely. In his closing argument, a skillful trial attorney will find ways to explain basic concepts of law in a way that makes sense to the jurors.

In many trials, one attorney has effectively used the image of the presumption of innocence as being like a suit of armor that clothes the defendant. Each time the prosecution proves a piece of its case, a piece of armor is knocked off. If at the end of the State's case that armor remains, the jury must find the defendant not guilty.

Another attorney tells the story of eating sugar out of the sugar bowl as a child and spilling it on the floor. When his mother asked him if he had been in the sugar bowl, he tried to deny it. His mother knew better, though, because she could feel the sugar crunching under her feet. He goes on to say, "the presumption of innocence is like that sugar. Even if you can't see it, you can *feel* it, and you *know* it's there."

At least some of the jurors may feel distancing from the defendant because of his or her race. It is comforting to think that racial problems of the past are behind us. However, this is not the case. It is incumbent upon the defense to remember that jurors may not be comfortable with people whose skin color is not like their own. Bridging the race gap is a tremendously difficult, although not impossible, job for the defense. The goal is to supercede the race issue by emphasizing our common humanity.

In general, there is a larger goal as well: to educate the jurors so that they may think in new ways about what is really fair and what justice really means. The defense has to convince the jury that justice can be served by acquittal as well as conviction, or by finding that the defendant deserves a lesser punishment than the maximum. Defense counsel have to learn to think outside the jury box, i.e., to think of jurors as whole people rather than one-dimensional characters who are either "good" or "bad" for the particular case. Counsel may then have an opportunity to connect and communicate with the twelve multi-faceted individuals seated in the jury box.

IV. Shortening The Parsecs From The Jury Box To The Defense Table

The attorney's commitment to his client is the most important factor. If counsel does not care about the client, why should the jury? This commitment is reflected in many ways: the way the attorney communicates with the client, the respect the attorney shows towards the client in talking about the defendant in court, the level of preparation that has been made in the case. All of these things show that what happens to this defendant matters. Jurors do an excellent job of sensing whether or not an attorney truly cares.

Trial preparation is a key factor as well. Jurors appreciate lawyers who do their jobs in a competent and professional manner. An attorney who is tied to his notes is more likely to be seen as under-prepared. Visual and audio-visual aids are a definite plus, as long as they are neatly done. Prepare. Then prepare more.

It also makes a difference if the juror perceives the defense attorney as fighting hard for his client. Fighting hard means different things to different people. To one person, making objections will be taken as a sign of fighting hard. Jurors do not mind objections, as long as the objections make sense. To another, witness examination may be key. When the attorney makes the salient points with the witness and sits down rather than floundering about in a disorganized fashion, he scores big points with the jury. Fight hard. Then fight harder.

In terms of both caring and fighting hard, it is not just what is said, but how it is said that makes a difference. Sometimes tone of voice conveys more about what one means than what one says. As actors in the courtroom drama, attorneys have the opportunity to convey every emotion from contempt to respect through their tone of voice. Seasoned courtroom veterans know that varying voice volume and tone underscores the importance of key points and keeps the jury interested in the proceedings.

Although different attorneys have different styles, and different situations call for different modes of action, in general, juries appreciate good manners in the courtroom. In post-trial interviews, it has been the author's experience that jurors remember small acts of kindness, like a cup of water given to a coughing witness. It is possible to fight like hell and still come across as a civilized person. There is a Latin proverb, "*Ponderanda sunt testimonia, non numeranda*," (All testimonies aggregate not by their number, but their weight).[22] The demeanor of everyone at the defense table is a form of testimony to the jurors, and the quality of those interactions makes a difference in how heavily they weigh the words of the defense.

A part of establishing a real connection with the jurors is to look at the process of jury selection and the trial itself through the eyes of a juror. From the perspective of the jurors, when they are called upon to answer questions, they are speaking for the first time, even though the attorney may be asking the questions for the fiftieth time. Each opportunity to interact with jurors is a precious one. There are any numbers of mental tricks attorneys can use to keep from becoming bored with the jury selection process. For instance, before asking any questions, look at the juror and think, "This is the most fascinating person I have ever met." Affirm that the juror has a fascinating life story. If there were unlimited time and opportunity, we would discover that everyone has a story worth hearing.

During the trial, this idea extends to explaining the defendant's conduct and life history to the jury. Try to place the defendant and his life in a context where he may be more easily

understood. In one trial, a neuropsychologist testified that the defendant was mildly mentally retarded. He described her mental capabilities by comparing her to a slow worker in a fast food restaurant. This characterization was easily grasped by the jurors, and assisted them in finding the defendant mentally ill. In another trial, testimony about the defendant's devotion to his family greatly impressed the jury. Testimony brought out his constant attention to the needs of his small daughter, his love for his parents, and the steps that he took to protect his family from a methamphetamine dealer who was the boyfriend of his ex-wife. The jurors felt strongly connected to this defendant by the end of the case and acquitted him of the alleged murder of the drug dealer.

In order for the jury to make a powerful bond with the client, the defendant needs to show remorse. This may be ascribed in part to the fundamental attribution error, e.g., "If I drove drunk and hit a fence, I would be sorry." Also, feeling remorse may be seen as being part of punishment. How many defense attorneys have used the line, "No one can punish my client as harshly as he is punishing himself." Especially if acquittal is a realistic option, jurors need to know that the defendant feels remorse and has taken responsibility for his actions.

V. Boldly Going into the minds of the jurors

Short of already having a personal relationship with a potential juror, asking a combination of life experience and attitudinal questions is the quickest way to get to know a person.

Life experience questions are a look into those areas of the juror's life that help to compose the map to that particular juror's universe. All criminal voir dire needs to include questions about whether the juror, any family member or close friend has ever been the victim of a crime. This is a bedrock area because it is encompasses one of the easily detectable fear factors: fear of crime based upon personal experience. If a juror has real concerns about a previous experience, ask her, "Does this experience still cause you pain?" If she answers yes, the juror should be excused for cause.

Jurors are often asked if they are related to anyone in law enforcement. They are also often asked if their children have ever been in trouble or if a family member or close friend has ever been arrested. In asking relationship questions, it makes a difference whether the juror likes the other person. Simply knowing about the relationship is not enough information.

Life experiences germane to the particular case will vary according to the evidentiary circumstances. If a potential juror were, for example, an accountant, this piece of life experience would mean different things in different cases. In an embezzlement case, an accountant would be more at ease in the financial domain and might have had experiences germane to the trial. In a murder case, though, the focus would change. When viewed as a whole person, the accountant might be seen as someone who is accustomed to looking at details and searching for mistakes. For certain types of defenses, this could be a bonus.

Attitudinal questions are an interesting way to get a juror to reveal her true emotions. In general, attitudinal questions ask the juror to explain her thinking about various questions for which there are no easy answers. These queries include personal values, current events, "hot button" issues, and famous people. Even a relatively few well-placed attitudinal questions may give a much more enlightened picture of who a juror really is and how she really thinks.

In the early days of trial consultants, one of the most cutting-edge questions an attorney could ask in voir dire was "What is the most important thing you can teach your children?" Even today, this is still an effective question because it asks the juror to look at his personal values and select one belief as being the most important. If counsel is familiar with the Bible and comfortable talking about religion, he may opt to ask, "What is your favorite Bible verse?" Some attorneys like to ask, "Who is the person you admire the most and why?" Questions in this realm are only limited by the attorney's imagination.

Current events are always a good source for attitudinal questions. Since DNA evidence has been firmly linked to the death penalty recently, it is a good area for attitudinal questions. Something as simple as, "What do you think about DNA testing in death penalty cases?" can lead to the juror's talking about his attitudes about fear of crime, knowledge of forensics, faith in science in the courtroom, and publicity in criminal trials.

In the Loc Lam trial[23], the most effective question asked was, "What do you think about the rising rates of immigration in the United States?" There the question was asked on a juror questionnaire, and jurors were further queried on their written answers in open court. Since the

defendants in that trial were Vietnamese immigrants to the United States who did not speak English, attitudes on immigration were extremely relevant. In addition, the defense learned about juror attitudes towards the U.S. government, juror friendships with people of different racial and ethnic backgrounds, perceptions of the immigration system, and foreign travel. When jurors give responses like, "We should take care of our own first," or "Everyone is welcome as long as they have a green card," it can be a revelation for the defense.

Although they may also be currently in the news, "hot button" questions cover those ethical issues that most deeply divide people. The death penalty and abortion are two of the most obvious areas. Prayer in the schools is another. Even when they are not relevant to the instant case, use a "hot button" question to reveal suspected but heretofore-buried intolerance in a potential juror.

Celebrities associated with the legal system may also be utilized in attitudinal questions to excavate intolerance. The most famous, seeming never to leave the headlines, is O.J. Simpson. If nothing else, Simpson is valuable for illustrating the chasm between the people who continue to think him actually innocent and the rest of the world. For jury selection purposes, attitudinal questions about O.J. continue to assist the defense.

Some attorneys are afraid to ask attitudinal questions because they do not want the jurors to think they are "prying," or they are afraid that their questions will be ruled out of order because of relevance. Jurors can be told that the defense is trying to get to know them as individuals, and that is why they are being asked about their attitudes and opinions. This argument can also be made to the judge: the more both sides know about a juror, the better prepared both sides will be to exercise their peremptory challenges.

In asking attitudinals, the most successful examiners adopt a conversational tone with the juror. A folksy opener like, "I'm curious. What do you think about…" is more likely to engender an honest response. It also tells the juror that the defense is interested in his personal opinions, and establishes a personal connection between the questioner and the person being questioned.

Establishing a positive rapport with the juror is much more beneficial than an alternate method far too many attorneys choose - the apology. Using an opening such as, "I'm sorry to have to ask you this" is rarely helpful. In an emotional situation where someone has been the victim of a rape or similarly upsetting event, it may be necessary to apologize after bringing up the subject and going into it at some length. In most cases, to apologize in advance for asking a question in voir dire is to telegraph to the juror that they should be upset or embarrassed by counsel's queries. In that situation, the person most likely to be blamed for any potential upset is the defense attorney. Be fearless. Ask questions first; apologize later if absolutely necessary.

Another way to keep interactions moving in a positive direction during voir dire is to use neutral terminology that allows the potential juror the latitude to answer truthfully without being tempted into making socially acceptable answers. Most people, asked if they could be "fair" in a given situation, would answer, "Yes." Although a particular juror might seem to be a bigot from the standpoint of the defense, his views seem to him reasonable and fair.

There are a number of words that could be described as "Perry Mason words." These are terms to which the juror has become habituated through media exposure. They include everything but Hamilton Burger's favorite objection, "Irrelevant and immaterial." As much as possible, try to

limit the use of these words and phrases until the time that the juror is already locked into her biased answers and the defense is ready to challenge the juror for cause.

These terms include but are not limited to the following:

- Bias
- Prejudice
- Preconception / Pre-conceived idea
- Open-minded / close-minded
- Fair
- Impartial
- Do your duty as a juror
- Consider the evidence / Without regard for the evidence
- Set aside (biases, prejudices, etc.)
- Impartial
- Follow the law

More inclusive phrases that do not as readily alert the juror include:

- Do you have a problem with
- Are you concerned about
- At this moment, do you feel that
- Do you feel like maybe you are leaning a little bit more towards
- It sounds like you have thought for a long time that
- Do you feel a little more positive about
- Is your mind pretty much made up about
- Do you have trouble thinking about
- Does it bother you to have to think

Notice that in the second set of phrases, there are no buzzwords, and qualifiers (e.g., "little bit," "pretty much," etc.) may be used to the questioner's advantage. These phrases soften the effect of biased answers by couching the level of bias in what seems to be slightly more reasonable terms. To be "a little bit" biased looks more respectable and socially acceptable than the harsher, more concrete terms laid out in the Perry Mason Words. Couching concerns about bias in softer language also shows more respect for the juror. As the old saying goes, "You can catch more flies with honey than vinegar." Similarly, it is almost always easier to remove a juror for cause by showing the juror that the defense respects the juror's right to hold his opinions, although those opinions may preclude the person from being a suitable juror in this particular case.

VI. Traveling Through Juror Dynamics At Warp Speed

In the jury selection process, much time is taken up with asking questions, rating jurors and otherwise determining their suitability for the case. Very little time is spent looking at how the jurors are likely to interact with each other in the jury room. It is not enough to look at individual suitability: the jury is going to have to act as a group, and the dynamics of the group need to be considered.

There are many ways of looking at groups. One of the most common is to look at the subgroups that are likely to form within the larger assemblage. Keeping in mind the rules of human nature, we know that people are more comfortable with others who look or seem more like themselves. Therefore, subgroups will form around racial, economic, and social class lines. If only two of the jurors are from a particular minority group, they will be more likely to work as a team. Higher status business people may tend to bond together regardless of varying racial or ethnic characteristics. People who have similar likes and dislikes may also bond together outside their demographic boundaries. For instance, if two of the jurors are knitting during breaks, or outside smoking together, they will be more likely to work together on the jury.

Without a doubt, age, race and gender play the most significant roles in juror interactions. Other factors are also very important, and commonly overlooked. Analysis of possible jury dynamics enables the defense to make wiser choices in jury selection.

In some jury rooms, a very large table is placed in a very small room. Physical proximity can heighten the impact of juror opinions. The physically largest person not only takes up more space in the jury box, but also radiates a larger presence among the jurors. Size matters, especially if there is a sizable difference in thinking among the jurors.

Other physical characteristics may also make a difference in the way that jurors interact. Jurors who are attractive may find that although they are well liked, their opinions may either be discounted or over-valued by fellow jurors. On the other hand, if a person is particularly unattractive, he may have a problem having his opinions duly considered.

Personalities come into play in the jury room. Someone who is used to selling products in the day-to-day world may find himself trying to sell the other jurors on his ideas. If the juror sees herself as a "real people-pleaser," she may find herself trying to forge alliances during deliberations. The juror's tone of voice and verbal abilities can also make a difference in her ability to sway other jurors.

Educational level may make a juror more or less persuasive. A professor may be thought to "know what he is talking about," whereas a person with less education may defer to his supposedly more learned colleagues. Where a juror sees himself in the pecking order in the jury room comes from a combination of the juror's self-image, along with the demographic characterizations he may have made about himself.

Leadership qualities may be linked to social status. A bank president probably sees herself as more of a leader, although a construction foreman actually may exercise more hands-on leadership. In the jury room, if eleven women and one man comprise the jury, the man will almost certainly be the foreperson. If the obverse were to be the case, however, the woman would not be perceived to be the leader. A higher status person may see him or herself as being

entitled to special consideration. The author recalls one potential juror, when told that she was being excluded for cause, shrieked, "But I am a DOCTOR'S WIFE!"

Jurors may also distinguish themselves by the use they can be to other jurors. Almost every jury has at least one scribe, a person who diligently takes notes throughout the trial. In the jury room, when disagreements arise, the scribe may be called upon to read back his version of the testimony. A juror who exhibits outstanding personal integrity may be looked up to as a source of strength and serenity. The juror with unabashed enthusiasm for jury service can infect the jury with an upbeat view of the proceedings.

If jury selection lasts more than one day or the parties have an opportunity to make their strike selections over lunch, try using the jury game to analyze juror dynamics. Trial consultants have been using the jury game since the early days of the National Jury Project in the 1970s. It is a deceptively simple procedure, which can provide very beneficial results.

The game works as follows: put each juror's name and rating number on a 3x5 card. Put the cards in striking order. Draw up a "best guess" strike list for the prosecution, as well as a potential strike list for the defense. Practice striking the jury, noting the strikes for both sides and the standing jurors.

When the last alternate has been noted, analyze the composition of the jury. Try to anticipate who the possible foreperson might be, and who will be leaders and followers among the group. Look for probable bonding between people who have sat together, or others who have shown an affinity for each other during the voir dire process.

Play the game several times in order to play out various scenarios. For example, what happens if the defense does not exhaust its strikes? If the defense keeps a somewhat unsuitable person in order to try to get someone who looks like an excellent juror, how is the composition of the rest of the jury affected? If the defense exhausts all of its strikes, what is the composition of the jury?

Although it is impossible to predict all of the permutations of theoretical jury selection, playing the jury game gives the defense team a head start on strategizing during the actual jury selection.

Conclusion

Even the experienced criminal defense attorney tends to view jurors through the wrong end of the telescope. Instead of expanding his view to encompass the whole person, the attorney only wants to look at the juror in the miniscule terms of whether this juror is suitable for the trial at hand. Although discovering the juror's fitness to serve is certainly the primary goal, the only way to arrive at the correct decision is to look at the broad landscape of the juror's life and the ways that his attitudes and life experiences are likely to color his view of the evidence.

Expand your horizons. Go out into the universe of ideas and influences that are shaping the juror's worldview. What planet are your jurors from? They are from the same planet that attorneys are from, the same planet that criminal defendants are from, the same planet that judges and prosecutors and police officers are from. Use this knowledge to lessen the distance from the defense table to the jury box and to establish genuine connections with your fellow explorers - the jury.

Maureen McLaughlin
Trial Consultant
P.O. Box 404
Athens, GA 30603
706-207-7194

Notes

[1] Haney, Craig, "Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death", *Stanford Law Review*, Volume 49, No. 6, July 1997, p.1459.

[2] Note: The author in no way wishes to impute that all jurors are ignorant of the system or unsympathetic to the defense. Instead, the purpose here is to keep counsel from becoming too complacent and making incorrect assumptions about the openness and fairness of many potential jurors.

[3] Advertising Age web site, http://www.adage.com August 30, 1996, Daily Deadline, "Nielsen Increases TV Households to 1.1 Million".

[4] National Cable Television Association, (1997) National Television Violence Study, Newbury Park: Sage Publications, vol. 1.

[5] National Cable Television Association, (1998) National Television Violence Study, Newbury Park: Sage Publications, vol. 2.

[6] National Television Violence Study, supra, vol. 1, p.145.

[7] Drucker, S. (1989), "The Televised Mediated Trial", *Communications Quarterly*, 37 (4), p. 307.

[8] State of Nevada v. Richard Bennett Tabish, Case No. C161663; State of Nevada v. Sandra Renee Murphy, Case No. C161663.

[9] Court TV web site, http://www.courttv.com/trials/binion/index.html.

[10] Note: NewsChannel7 televised all three capital trials of Paul Reid in streaming video over the Internet. The three cases were tried within an eighteen-month period. Tennessee v. Paul Dennis Reid, Jr. Case Nos. 97-C-1834, 97-C-1836, 97-C-1835.

[11] Drucker, supra, p. 310.

[12] Note: All of the books listed from Douglas' Mindhunter through Hare's Without Conscience were in print and available from http://www.amazon.com as of 8/17/00. Rather than overburden the bibliography, the author refers interested parties to this web site.

[13] Hare, Robert D., Ph.D. II, (1998) Without Conscience: The Disturbing World of the Psychopaths Among Us: Guilford Press.

[14] All are published by Tyndale House Publishing. For an overt exposition of LaHaye's politics, see LayHaye, Tim F. and Noebel, David A., (2001) Mind Siege: The Battle for the Truth in the New Millennium, Word Books, Nashville, TN.

[15] Left Behind Series web site, http://www.leftbehind.com/book_series.html.

[16] Prejean, Helen, (1996) Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States, Vintage Books, NY.

[17] This idea is borne out by the author's personal experience of observing hundreds of hours of voir dire.

[18] Haney, supra, p. 1459.

[19] New York Times web site, August 11, 2000 http://nytimes.com/library/national/science/health/080800hth-behavior-culture.html. Thanks, Millard.

[20] Ibid.

[21] Note: This idea comes from the author's post-trial interviewing of many jurors.

[22] Quoted in Dexter, Colin, (1999), The Remains of the Day, Crown Publishers, NY, p. 55.

[23] United States of America v. Loc Lam, Tam Tran Nguyen, Lap Van Te, et. al., Case No. 1:96-CR-161-CC.