

Achieving credibility in voir dire: Honesty is the best policy

By Olivier Taillieu

My 16-year-old daughter doesn't take no for an answer very easily. She is, what you would call, prone to argue, frequently trying to turn a "no" into a "yes." When this happens in front of other people, her efforts will usually prompt the following comment: "I bet you're going to be a great lawyer when you grow up!" This is a familiar trope. I would wager that most non-lawyers out there imagine that trial lawyers largely practice the art of changing people's mind. I once believed the same thing. They couldn't be more wrong, certainly when it comes to voir dire.

FEELINGS, NOT FACTS

Study after study on decision-making teaches us that humans make decisions based on how they feel and then tend to listen to the facts that validate those feelings. This principle forms the basis for the concept of confirmation bias, which is the tendency to interpret new evidence as confirmation of your existing beliefs or theories. If you don't believe me, try

changing someone's mind about who to vote for; or which religion to observe.

So what does this have to do with voir dire? Well, everything. The first thing this tells me is that any attempt to change anyone's mind through so-called "conditioning" on voir dire is as futile as trying to nail Jell-O to a wall. Even if the concept was sound, there is neither enough time nor enough opportunity to do so. Unconcerned about changing anyone's mind, I can then focus on what jury selection is really about: removing the proverbial bad apples from the jury pool—primarily those whose mind I will never change no matter what the evidence shows and secondarily (if for some reason I run out of challenges) those who by their very nature have enough leadership ability to spoil the rest of the batch.

LEVERAGING LIKEABILITY

So how do I do that? An important step in getting people to identify their own biases against your case is to first get them to be open with you. The term "bias" itself has a negative connotation and people may not necessarily be all that forthcoming about willingly sharing these with a total stranger. This is where rapport, trust, and likeability come in. Much has been written about the concept of brutal honesty, but if personal experience tells me anything, I tend to be brutally honest with the people I like and would rather offer platitudes to those I don't. The same concept applies here.

So how to you get a room of strangers to "like" you in under 5 minutes flat? You

may think some of that is just innate and can't be taught so what's the point? And to some extent you might be right. But, again and again, though, studies that have broken down the concept of "likeability" reveal a few patterns. For example, likeable people tend to be honest, dependable, fair, and importantly, attentive to what others say—they listen. And for the purpose of jury selection, that's enough. We're not building life-long relationships, we're just creating enough of a safe space for people to share their true feelings about a distinct set of issues in our case.

HONESTY IS THE BEST POLICY

So, let's talk about honesty. And the first question you need to ask yourself here is "am I being authentic?" Gerry Spence can pull off the "country lawyer" routine despite having amassed great wealth as a trial lawyer because it's authentic. Keith Mitnick can talk about BBQ sauce and cherry pies in his trademark southern drawl because it's authentic. Nick Rowley can show up in court with a three-piece suit (sans belt) and cowboy boots and you just buy it because it's authentic. They are not playing a persona; it's who they really are.

I can't do any of these with any sense of credibility. I am not now, nor was I ever, raised in the country or the south. I don't wear cowboy boots to the office, and I rarely don a three-piece suit. That's just not me. Trust me. I tried and it doesn't work. First, it's transparent and people pick up on it. Second, it's just not comfortable—it's an act. Forget everything you believe



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trial lawyers should look like and sound like and find the best authentic version of yourself and have *that* person show up to court on day one. Arash Homampour has a full sleeve and a neck tattoo, and he is collecting eight figure verdicts on a regular basis. He's authentic.

Second, be honest about your case during mini opening. (Pro tip: always ask for a mini opening pursuant to CCP § 222.5(d).) This serves two purposes: Credibility and issue identification. This is your first opportunity to present a brief outline of your case and highlight your "problems," not your strengths. This method has the added benefit of following one of my core beliefs in life for managing expectations: under-promise and over-deliver. My typical mini opening will introduce the parties, discuss the general nature of the case, and then discuss potential issues like, delay of care, lien treatment, large non-economic damage request, etc. I will then end my mini opening presentation by telling the prospective jurors that I am looking forward to discussing these issues with them during jury selection.

Talking about the problems of your case in mini opening also tends to defuse whatever the defense says next. Imagine this scenario: I get up for mini opening and give the prospective jurors a glowing description of my case. Some jurors may actually think it's a pretty great case. Then the defense gets up and discusses all the problems in my case. How credible do I now sound? How much trust have I lost? Every aspect of a trial is like a brick in building a wall of trust and it starts the

second you walk into the courtroom on day one.

PRESENCE MATTERS

We've spoken about credibility in appearance, credibility in messaging, and now I want to address credibility in non-verbal messaging. The way you operate in the courtroom says something about you. Are you organized? Are you familiar with the rules and can you navigate them seamlessly? How personable are you with the court staff? I very much view the inside of a courtroom the same way that I view my own office. This is where I do my work and I act as such. The more comfortable I feel, the more I am attuned to comfortably express my thoughts, feelings, and ideas to the jury. That's another way of describing "presence." Presence comes from believing and trusting your own story and being in the moment and aware.

TWO EARS, ONE MOUTH—ACT ACCORDINGLY

Which leads me to the next and final point: Likeable people listen to others and make them feel heard. The added benefit here is, obviously, that the more they talk the more you find out. I have a general rule of thumb when doing voir dire: If I'm talking, I'm losing. Although most of us have a very high opinion of our oratory skills, voir dire is not the time for us to talk. Every minute I speak is a minute of information that I lose with the prospective jurors. This is particularly important in cases where the

court has imposed some time restriction on my voir dire.

I usually start with follow up questions from the judge's inquiry. These allow me to form particular bonds with specific jurors and dig into some of the topics they already mentioned when answering the judge's questions. I will generally start with the person whom I think is most likely to be unsympathetic to my case because they are likely to open the door to negative feelings about at least one issue in my case.

From there, I will often find segues into some of the more general questions that I have for the entire panel. For example, a standard question asked by judges is whether anyone was ever involved in a similar accident or a lawsuit. A particular juror may express a negative view of personal injury suits if they have been sued for a personal injury claim before. If that's the case, I will ask the entire panel "who else feels that way, even if just a little bit?" This is powerful because the negative "feeling" is not one that I suggested. It comes from another juror and thus will be received with more openness and credibility and is more likely to elicit honest response. It's a lot easier for a juror to agree with another juror than with the stranger in the suit. Make sure you follow up with everyone who raises their hand, even if they hesitate.

The skill at play here is listening and really hearing what they are saying. And not only listening to the verbal responses, but also the non-verbal ones. I will often ask a question to a panel and ask for a show of hands, to see if someone hesitates. If my head is buried in my notes and thinking

about the next question, I am likely to miss that. For that reason, I always have (1) another person taking notes for me and (2) real time court reporting of voir dire.

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Having someone else taking notes allow you to be open and engaging with the juror who is talking. It allows you to pick up on non-verbal cues and makes it easier to actively listen. You will be surprised how easy it is to get into a conversation with that person uninhibited by your notepad or post-it notes. It leads to follow up questions and can help you establish trust with that juror; enough trust that when you ask them if they can be entirely impartial, they feel safe in saying “no.”

I will typically have anywhere between five and eight general topics to cover, often inquiring from several angles for each topic. In dealing with non-economic damages for example, I will ask about multimillion dollar verdicts, the concept of money for pain and suffering, the concept of caps for particular injuries, etc. Again, each time a juror expresses a negative view about any of these topics, I will ask the entire panel if someone else feels that way, even if a little bit.

Some judges use what’s called the “six pack” method for jury selection—meaning that each attorney first gets to ask questions to the 12 jurors in the jury box plus six more usually seated in front of the box. Generally, you will spend a lot of time on the first 18 and find yourself running out of time once more jurors are seated in the spots vacated by those struck for cause. For those new jurors, I will usually refer to a negative comment made by a previous juror and ask them if they agree or not, even if a little bit. This tends to (again) remove me from the equation and speed

the process along, which at this point everyone usually appreciates.

RALLY THE TROOPS

One important point: When a juror expresses a negative view about one of the issues in the case, and that negative view is based on their own personal experiences, I will generally try to get them to agree that at least as to that issue only, they may not be “entirely impartial.” This is where the real time transcript becomes key because if that juror agrees, it mirrors the language of CCP 225(b) which states that a juror is properly challenged if they demonstrate “[a]ctual bias” which is defined as “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with *entire impartiality*, and without prejudice to the substantial rights of any party.” (Emphasis added.) Nothing beats a word-for-word transcript when time comes to challenge jurors for cause. Memories fade and opposing counsel and the judge will often have a different recollection (remember confirmation bias?) but the transcript does not lie.

Even if you do not succeed in getting all the cause challenges that you believe you are entitled to, this process will tell you who will not be a suitable juror for your case and allow you to make educated choices when challenging peremptorily. One last piece of advice—never rely on stereotypes, whether generational, gender (or gender identity), ethnic, racial, sexual orientation, socioeconomic, or any others. People tell you who they are, you just need to listen and act accordingly.

IN CLOSING ...

Entire books have been written about jury selection and this article does not even begin to address all of the intricacies of that process. What I hope it does, however, is impress upon you the necessity of, and some tools for achieving, trust and credibility early on in the process. I would encourage all of you to be yourselves, open, vulnerable and authentic as you endeavor to pick your next jury. And most importantly, try to have a little fun. Yes, the stakes are high but the more you enjoy the process the more comfortable you will be and the better you will do. ■