

# The "In the Moment"



PHOTO © L. JOANE GARCIA-COLSON

## Approach to Voir Dire

JOANE GARCIA-COLSON, TLC '96 AND FREDILYN SISON, TLC '00

### INTRODUCTION: THE IMPORTANCE OF VOIR DIRE

When lawyers are asked in which part of a trial a case is won or lost, many will point to *voir dire*. And those who do not believe *voir dire* to be the most important aspect of their case should turn in their bar cards **now**. It is the jury that decides what the verdict will be, whether an accused can go home today or whether an injured child is made whole again. Skeptics will point to the judge as the source of power in the courtroom, arguing that the judge controls the trial, decides what evidence gets heard, and orchestrates the mood of the proceedings. In some courtrooms this may be true, but he<sup>1</sup> cannot go into the jury deliberation room, discuss the evidence and come back to the courtroom with a piece of paper that determines whether justice has been done.

It is your job to make certain that each juror brings your case, not the prosecutor's or the insurance defense lawyer's, with him inside that room. It is your pri-

mary responsibility to ensure that the jurors take the most favorable impression of your client into the jury room. The jurors must become your surrogates in that room, your allies who will advocate for your client. The "in the moment" approach is the best way to accomplish this goal.

If you rely on the traditional method of jury selection, you may win some cases. But it is dated and ineffective. The old approach teaches one-size fits all. We learned the traditional method in the few trial advocacy classes we had in law school or from one of the many books that spell out the questions to ask potential jurors in any particular case. The traditional method is also refined from our own experience through trial and error, often hindered by the stifling local practices of a particular judge or jurisdiction. Our primary objection to the traditional method is that its sole function is to ferret out the jurors that are least likely to be favorable to the case rather than find those who will embrace your client and lobby on his behalf.

Many lawyers rely on jury consultants to

help them design profiles of the perfect juror instead of discovering the person most perfect to argue for your client. This is inherently problematic. What happens when your highly paid jury consultant identifies your perfect juror as an African-American woman struggling to support two kids and you have a panel of all white jurors? Designing a profile leads only to stereotyping people with little regard for their life experiences. The traditional method also stifles the most important aspect of jury selection: communication. With a set of list of questions from your consultant, you are quizzing the panel instead of talking with them, really getting to know who they are and how they will respond to your case. Why are you relying on your head rather than your heart during the most important part of your case? The answer lies in our training.

### HOW WE LOST OUR HEARTS

Law school teaches us to think like lawyers. Well, they should, shouldn't they? But three years of Socratic method has resulted in what we only half-jokingly refer to as the "cement-head." As law students, we are drilled to analyze, use

"intellectualisms," apply the law and use logic to make rational, well-reasoned decisions. "Listen to the head, ignore the heart. There is no place in the law for feelings." The problem with this training is we become one-dimensional. "Authoritative personalities...[like most law professors and judges] fear the threat that comes not from idea, but from emotion. Those in power never want us to feel."<sup>2</sup> That is because feelings are the motivation of action and people in charge want obedience, not independent action. Those most successful at shutting off their emotions become the students who are highly sought after by the large law firms that represent corporate America. Some become law clerks to powerful and prestigious judges. Others opt to be district attorneys or deputy attorney generals. Unfortunately, those who practice in the opposing arena—public defenders, legal aid attorneys, employment attorneys and personal injury lawyers—suffer a similar fate. But there is hope.

Thinking like a lawyer is the problem that must be overcome in order to be successful at jury selection. After all, juries do not rely so heavily on logic or intellectualisms to make their decisions in a case. They rely on their feelings, what is in their hearts and what their gut instinct tells them is right. They know where justice lies. The very idea of justice is profoundly imbued with emotions. Most trial lawyers expect jurors to set aside their feelings and follow the law. How often, however, does this happen? When the jurors adjourn to the jury room to deliberate, they know in their hearts what the right outcome should be. They turn to their heads only to justify or rationalize the decision they "feel" is correct. So, why do lawyers approach jury selection from an analytical, cold, rational perspective? Because that is what we always have been taught. Our hearts have been disconnected from our heads. This article will present a new, more human feeling based approach to jury selection. Its aim is to undo what has been taught.

It proposes to attach your lawyer head to your human heart. And it begins with the exploration of your own personal feelings.

### THE GERRY SPENCE APPROACH TO VOIR DIRE

In addition to forming a group<sup>3</sup> with the jury, the goals in jury selection should be to make a human connection with the jurors, get to know the potential jurors as people and let them know you as a person, and to discover how they think and what they feel about the issues in the case. In doing so, we should seek to *include* rather than *exclude*.



Mike Strain, TLC '95 demonstrates the TLC Voir Dire Method in Hunt, Texas.

Since 1994, the Trial Lawyers College<sup>4</sup> ("TLC") has been teaching a new approach to *voir dire*, one that focuses on inclusion and group formation and is patterned on the approach TLC founder Gerry Spence has employed in over 40 years of practice. Spence is a master of *voir dire*, who seems to effortlessly connect and bond with jurors, even those who appear to be initially opposed to his clients or the issues in the case. Somehow, and magically, Spence is able to habiliterate the jurors most lawyers would excuse and convert them into allies. Spence actively interacts with his panel, inviting them to participate wholeheartedly in the process. He shares with them his feelings, which encourages them to be more candid, open and generous with their attitudes. He engages them. Fully. Emotionally.

Genuinely. Hence, the magic.

Spence's approach starts with the lawyer's feelings about the case, especially those aspects of the case which generate the emotion of fear, the feeling that lawyers who are afraid of their feelings tend to steer clear of. Once the underlying basis for each fear in the case is discovered and explored, effective *voir dire* can take place.

In the early years of TLC, it was difficult to explain, yet alone teach what it is that Spence is able to do. Though he and his staff at TLC were able to demonstrate the approach, it had not been adequately deconstructed to allow any of us to write about it. The approach has been refined over the years and in 2000, the steps that Gerry Spence takes in the jury selection process were identified. These steps are:

1. Identify the issue;
2. Feel the issue in yourself;
3. Share your feeling(s) about the issue with the jury;
4. Invite the jury to share their feelings about the issue with you;
5. Accept (honor) the gifts the jury gives you; and,
6. Continue to share your feelings and invite the jury to share theirs.

Each step is discussed in detail below.

#### **Identify the Issue**

Although "in the moment" *voir dire* relies on one's spontaneity, preparation is the key to successful jury selection. "In the moment" does not mean flying by the seat of your pants. Rather, it is an effort to be present in the moment after much preparation instead of focusing on the next item on your jury questionnaire.

Preparation to conduct *voir dire* starts with the identification of the issues in the case that concern you. Ask yourself, "What scares me about this case?" or "What is deeply concerning me?" First and foremost, listen to your heart. Issues are born of our personal experiences and are not just based on what we have read

or heard. When our gut or heart causes us to be afraid of something, there is most often a personal explanation or reason for our fear. The key to effective *voir dire* is to not only identify the issues, but to engage in the self exploration necessary to find out why the issue is of concern. This requires preparation and a willingness to confront your own demons.

**Feel The Issue in Yourself**

Once you have the *what*, you need to determine the *why*. Why are you concerned about this particular issue? What is it about your personal experiences that flames this fear? Before you go to the jury with the issue, you must first discover and understand why the particular issue troubles you. Avoid intellectualizing your reasons and instead, turn inward and examine your personal feelings about the issue. It may not come to you right away, so spend time with the fear; sooner or later, the answer will bubble to the surface.

You will not be able to effectively *voir dire* the jury on any issue until you have identified your own feelings about the issue and explored them thoroughly. For example, in a case where race is an issue, you might articulate your concern as a fear that the jury will pre-judge your client because of the color of his or her skin. Now that you have identified your fear, you need to look inside yourself to determine and explore why you are afraid the jury will prejudice your client. An intellectual response is one such as "Here in the South, there are a lot of prejudiced people and I am afraid that you will look at my client and assume he's guilty because he is black." Hit a jury panel with a statement like this and they are likely to feel judged by you and get defensive. Reverse roles with them: how would you as a potential juror respond to such a statement? You want to stimulate conversation and openness, not stifle it. Prejudgment does nothing but shut people down, and you will end up with hostility and anger.

To effectively *voir dire* the jury on race, you need to go beyond this superficial rationale and share the underlying rea-

sions for your fear with the jury. You can do that only if you first discover what in your personal experience or background causes you to be afraid that the jury will pre-judge your client or color. Are you yourself prejudiced? Do you prejudice people based on their color or appearance? Have you ever been or felt prejudged? Are you prejudging the jury? Did you pre-judge your client? Perhaps you have had a bad experience with a person of color. Maybe you have treated one badly in the past and feel guilty. What you discover about yourself in your exploration is the starting point for your *voir dire*. The next step involves risk.



Mike Strain, TLC '95, shares his feelings about an issue in the case during his demonstration of the TLC Voir Dire method.

**Share Your Feelings About the Issue With the Jury**

When you stand before a jury, it is not enough to simply talk about your fears. Far too often, lawyers who have been to TLC or to a regional seminar begin their *voir dire* by saying something like "I am afraid that..." or "I have a fear in this case that you..." While it is important to disclose to and share your fears with the jury, it is equally, perhaps more important, to be "in the moment." Gerry Spence is a master of spontaneity. This is the key to his effectiveness. When he stands before the jury he pauses, turns inward and asks himself "How am I feeling right now in this moment?" He gets in touch with what he is feeling in the here and now. That is where *voir dire* begins, in the moment. Once he is tuned in, he begins by sharing a part of himself that is connected to the issue that he is concerned

about. He is open to wherever the jury panel takes him. Spence easily follows the jury no matter where the conversation leads. There is no response that scares him; in fact, he welcomes jurors who take opposing views. He is "in the moment" and spontaneously responds to the information given him. "Spontaneity is a readiness of [Spence] to respond as required. It is a condition—a conditioning—of the subject, a preparation of the subject for free action."<sup>5</sup> By being in the moment, not tied to a script or a plan to manipulate a certain result, Spence easily responds to the information and feelings shared and expressed by the potential jurors.

One cannot, however, be in the moment and able to respond adequately without the preparation described above. Prior to stepping into the courtroom Spence has identified the issues in the case that trouble him and has engaged in the self-exploration necessary to determine his feelings about the issue, enabling him to effectively disclose to the jury the truest part of himself from where such fear comes and to honestly respond to the feelings shared by the jurors about the issue. It comes easily to Spence because of the number of years he has spent honoring

his craft. But his fluidity is a result of his acceptance of what others are sincerely willing to share with him.

When the judge calls upon you to begin your examination of the jury, take a moment and tune in to yourself. How are you feeling right at that moment? If you are excited to finally be in front of a jury, say so. If you are feeling anxious, do not hide that feeling from the jury. If you do not want to be there, take a risk and tell that to the jury. Remember, the magic mirror is always at work. It is likely that if you are feeling anxious, someone on the panel is feeling similarly. If you think back to your first exposure with psychodrama,<sup>6</sup> how often was it that you identified with the protagonist after they shared not only what was on their mind but how they were feeling about it? When you relate or identify with another person's feelings, it brings you closer, makes

you more connected. In terms of group formation, another goal of the jury selection process, this is vital. We tend to gravitate towards and choose to be around those who are like us, who share and relate to our feelings on various issues. With whom do you prefer to be; someone you share common experiences or someone you do not relate to or even begin to understand? Do you trust people who share no part of themselves? Revealing something personal about ourselves allows others to be open and connects us with those with whom we are sharing. Showing your vulnerability increases your credibility.

You may not always need to disclose everything about why you are afraid or concerned about a particular issue but you definitely need to understand why the issue troubles you. Self-exploration and the willingness to be in the moment are the keys to effective *voir dire*.

**Invite the Jury to Share Their Feelings About The Issue With You**

Before a juror will feel safe or trust you enough to open his soul to you, you must expose yours to the jury. Gerry Spence, when speaking to groups about *voir dire*, shares a story from his boyhood when he was ten years old and went with his friend Buddy Taylor and two ten year old neighbor girls into the garage. The boys knew there was something different about girls and they were curious. Intuitively, Gerry knew that he wouldn't discover the difference by just asking, so he offered "I'll show you mine if you show me yours." He follows this same principle in jury selection.

This willingness to expose yourself to the jury is essential to forming a group with them and to building trust and credibility. Once you have "shown them yours," it is time to invite the jurors to share with you their feelings on the issue. You will be surprised at the willingness of potential jurors to open up and honestly talk with you about the issue. Once you have laid the groundwork and set the example, they will follow suit.

Perhaps the hardest part of this step is to remain "in the moment." Often, jurors will respond to your questions about how they feel about the issue with the very answer or attitude you are most afraid of. It is critical to accept the juror's feelings and to thank them for their honesty. *No*

*matter what they say.* After all, that is exactly what you want—honesty and openness. If you retreat to the safety of your head, your *voir dire* will not be as effective as it could or should be. You will be fighting with the jury—the very people you want to see you as a leader and wish to empower to give justice to your client. You do not want to try to manipulate a juror to see the issue as you do or to change his feelings. Arguing with a juror who has exposed himself to you and to the other jurors only operates to send a message that you do not want him to be open and honest but that you are a manipulative lawyer who cannot be trusted.

Engaging in intellectual debate with a juror is tantamount to cross-examination and will stifle the communication desired. Reverse roles with the juror who has just shared a part of himself with you and the other members of the panel and who is now, for all intents and purposes, being told he is wrong. You are likely to feel criticized, hurt, ashamed and unwilling to share the truth of your feelings or experience. This spells disaster for you and your client. If you are to form a group with the jury and position yourself as the leader, you must create an environment that is safe and in which the jurors are free to express their feelings without being made to feel guilty, ashamed or wrong.

**Accept (Honor) the Gifts the Jury Gives You**

As you will discover from going through the steps outlined above, the process of self-revelation is frightening but it brings you the result that you want: interaction, connection, and understanding. Because human experiences within our culture tend to be universal, our fears are not that different from those of others. While our emotional nakedness is discomfiting, it often can be liberating. You will see that by being open, you invite the openness of others. Listen to their feelings with your heart, not your head. Do not run from the bad answer a juror gives you; embrace it as a gift and use it to stimulate discussion amongst the panel. Thank the juror for sharing his feelings with you. Honor his honesty with sincere appreciation, even if he takes an opposite view. It took great courage to share his fear or anger, outrage or indignation, whatever he may feel about the issue and he should know how much you respect him for that.

**Continue to Share Your Feelings and Invite the Jury to Share Theirs**

Repeat these steps throughout the jury selection process. Even if there is only time to address one issue in this fashion, you will be far ahead of the opposing counsel who will, most likely, rely on the traditional method. You, however, will form a connection—a bond—with the jurors and they will see in you credibility, openness and honesty.

**CONCLUSION**

The purpose of this article is to remove "Mr. Lawyerman" from the courtroom and leave him in the hallway. Better yet, eliminate him completely from your practice. It is our intent to crush the "cement-head" created by the traditional methods of *voir dire*. Sure, we want you to think, to figure out what the case is about, to use the intellectual gifts you were blessed with. But those gifts are worthless if you are unable to connect with the jury emotionally. Feelings matter. They bridge us as human beings and are what make us feel alive. As a cement-head, you may be admired for being the smartest lawyer in the courtroom. But it is the feeling advocate who walks away with the winning verdict.

*The authors would like to thank and acknowledge John Nolte for his helpful editorial comments and suggestions.*

**ENDNOTES**

- 1 With apologies to political correctness, but with a bow to effective writing, we shall use the masculine pronoun throughout this article.
- 2 MCKEE, ROBERT, STORY (1977) Harper Collins Publishers, Inc., New York, 130.
- 3 The topic of group formation as it relates to jury selection deserves an article in its own right. An excellent source is *Group Formation in Jury Selection*, written by TLC graduate and faculty member, Charlie Abourezk.
- 4 The Trial Lawyers College sponsors a three-week college program, a Graduate Course, a Judge's Seminar and several regional seminars annually. For more information about the Trial Lawyers College, please go to [www.triallawyer-college.com](http://www.triallawyer-college.com), write to TLC, P.O. Box 548, Jackson, WY 83001 or call 307-739-1870.
- 5 "MENTAL CATHARSIS AND THE PSYCHODRAMA", GROUP PSYCHOTHERAPY, PSYCHODRAMA & SOCIOMETRY 28 (1975), 5-32. Reprinted in THE ESSENTIAL MORENO: WRITINGS ON PSYCHODRAMA, GROUP METHOD, AND SPONTANEITY, JONATHAN FOX, ed. (Springer Publishing Company, New York 1987).
- 6 Psychodrama explores the truth through dramatic action. For more information about Psychodrama, contact the National Psychodrama Training Center, John Nolte at [nptcjohn@apexmail.com](mailto:nptcjohn@apexmail.com).