

Vwah Deer? . . . Vore Dire? . . .  
??? . . . Jury Selection!!!

By:

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"Yay, tho I walk thru the Valley of the Shadow of Death, I shall fear no evil; for I am a trial lawyer, a gladiator in a suit, a warrior for justice, an advocate who goes to battle on behalf of those who cannot fight for themselves and it is I who should be feared in this valley."

Brian L Mincher

I wrote that myself, but the feelings exemplified by the quote I owe to many sources of inspiration, far too many to list here. If you are able to do so, say that or something very similar to yourself before you step into your next court room. If this type of warrior mentality doesn't come naturally to you, spend time around people to whom it is second nature and become infected with their courage and enthusiasm until it is second nature to you as well.

Develop that edge. Develop your inner predator. Develop your inner protector. If you can't, then please do us all a favor and refer your trial cases to someone who does have that in his or her DNA.

How many trial attorneys are excited about Voir Dire/Jury Selection?

How many more are terrified?

How many are past that crippling fear, but just don't have a real good feel for what they need to do in order to conduct an effective Jury Selection?

This paper and presentation is intended to change your outlook on Jury Selection if you fall into any of the classic categories laid out above.

I want you to look at Jury Selection for what it is. An opportunity for you to:

1) Make the jury realize that there are varieties of dangers in their community. My very first question to every jury on every single PI case is the following: "Who here would like the world to be a safer place?" And make them raise their hands if they agree, <--this is going to be a real time saver, and you should use the trick of getting folks to raise their hands if they agree with \_\_\_\_\_ during the entirety of jury selection. After everybody raises their hands, ask them to put their hands back down (or better yet, gesture for them to put their hands down) and then ask "Who would prefer the world to be a more dangerous place?" And then, invariably, I have to follow up with "No takers? Not even one?" After which we congratulate them on being in one of the special locations, in a special time, and with a special task which can and actually will have an impact on how safe or dangerous the world is that they and their children live and work in every day.

We follow this up with asking the group whether they feel safer on the road today or whether they felt safer on the road 20 years ago. When they answer, either way (and it doesn't matter what they say, it's all useful) you ask them why they feel that way, and the answers are often gold. . . GOLD JERRY! GOLD!!!

Now we are off on the right foot. We are talking about dangers to the community, dangers to each and every person in the room, dangers all of the people they know and love are facing. We want jurors to be focused on the defendant's bad acts, the dangers of this world, and how they can actually do something about it. I think of this notion as getting the townsfolk together to form a posse. We want this jury to be like an old west posse of people who care about protecting themselves and those they love, and this is an achievable goal. Far too many Plaintiff's attorneys spend their time trying to get the jury to identify with and feel sorry for their client. This is a huge mistake. Nobody cares about your client. Nobody cares about you, either, by the way, so get used to that notion, too. . . But everybody cares about themselves, everybody cares about their friends, and everybody cares about their families, and dangers that they face, real and perceived.

2) Make the potential jurors realize that you, the Plaintiff's lawyer, are the person to whom they should be listening for important facts about the case. This is done by simply knowing your case and client as well as you possibly can. Be prepared. Go in with a plan. Be respectful of the jury's time, and tell them everything they need to know which you're allowed to tell them, and never ever ever bore them or beat them up with repetitive or irrelevant info. If you are on top of

things, and you have your act together then you should be able to establish yourself as an honest person who will tell the jury the straight skinny. You get to go first, this gives you a huge advantage in getting the jury to look at YOU as their guide, as opposed to the Insurance Company Black Hat at the other table. Whomever the jury decides is their proper and appropriate guide is going to win a lot more often than otherwise deserved based on the facts of any given case. This isn't a magic pill, tho; if your case facts suck, or your client is a liar, then you aren't going to win a bunch of money just real often.

3) Make the jury realize that the Defendant should be, and if justice prevails, will be, held accountable for violating safety rules that all of us who have been thru Driver's Ed have known for years, and that the Defendant knew or should have known.

### **Jurors want something from you that most lawyers aren't giving them.**

They watch TV shows and movies about lawyers and trials, and they don't have a realistic outlook on trials, but you have to do as much as you can to give them a little bit of what they want/express.

### **And what they want is story.**

We as a species have been sitting around campfires and telling stories for at least the last couple of hundred thousand years. Those stories which stick in the consciousness tend to have some fairly basic elements. Humans tend to care more about stories which have an easily identifiable hero, but they absolutely MUST HAVE a villain for the story to matter.

Who is Luke Skywalker without Darth Vader?

And who is more of a Darth Vader than somebody who?

- a) knew a safety rule, such as yielding right of way when turning left and then
- b) actively decided to violate said safety rule which then
- c) causes harm to a member of our community that could have been any one of us? ? ?

Oh yeah, there is an answer to that. . . More of a Darth Vader is someone who did all that, and then comes down to the courthouse and either denies causing a crash which he or she clearly caused, or wants to deny someone they hurt the medical care, etc. they deserve after having caused that harm. If the jury realizes this and comes to the conclusion that the Defendant has made them angry or scared for the safety of them and their loved ones, then you are well on your way to a win, and maybe even a pretty big one relative to your facts and damages. Every big verdict I've ever pulled in or seen pulled in by others that was big relative to the facts/damage model involved a case with a bad guy who was easy to hate. Find your case's Darth Vader and expose him/her to the jury, keep the focus of the trial on Darth's bad actions.

4) it is also crucial to address any weaknesses or problems in your case, and let's face it, there is a very high % chance that there is one or more weaknesses with your case or you wouldn't be trying it. (Low impact PD photos, client with lots of history of similar incidents/same or similar injuries in the past, criminal history, etc. . . )

Whatever the issue of concern is in your case, or whatever the issues (plural) are, the problems are going to be handled better by you than your opponent. Be aware of the concept of "pulling their teeth" and address all the concerning issues yourself during jury selection. If you have a case where there is little to no visible PD, then you better believe that's going to be one of the major areas of attack for the Black Hat (Insurance Defense Lawyer = Black Hat) so you better find out how jurors feel about that subject. Some of them you might be able to re-direct if they don't have real strong opinions, but others you are simply going to identify as people on whom to use your pre-emptories, or if you are good or lucky, they'll let you know the jurors on which to try and strike for cause. Everyone who has made up his/her mind ahead of time should be struck for cause. Everyone who cannot follow the judge's instructions should be struck for cause. Get the problematic people who aren't going to be good jurors for you the chance to strike them out themselves for cause. They very often will if you give them enough rope.

For example: Potential Juror #13 has a hot sports opinion (HSO) about low impact/car wrecks/trial attorneys/chiropractors, or whatever other issue which gets presented. Ask #13, after they have fired off this HSO if they feel strongly about it (they will feel strongly most of the time, or they wouldn't have gone to the trouble of speaking up) and then it's a very simple exercise to walk them down the primrose path of getting them to say that this opinion is strongly held, and with just a bit of massaging, they will very often wind up saying that they feel so strongly about \_\_\_\_\_ that they will not be able to follow the law/judge's instructions, and then you just saved yourself another peremptory.

5) explain legal concepts - such as burden of proof, proximate cause, etc. always make sure to explain legal concepts in such a way that a child can understand them, or you will lose. Best way to do this IMHO is to re-frame things into a rules violation situation (Reptile/Keenan&Ball style) because this is simple, it is effective and it speaks to the parts of the juror's brains that Plaintiff's Attorneys want to reach.

Talk to jurors about whether any of them have dangerous jobs (you should already know which potential jurors are big rig drivers, electricians, forklift operators, heavy equipment operators, etc. . . ) and get the jurors who answer that they have a dangerous job to talk very briefly about some of the dangers of their job.

Then ask them if they have safety rules in place at work.

Ask them why those safety rules exist.

Ask them what happens when someone violates those safety rules.

Ask them if they recognize that safety rules exist for drivers on Texas roads.

Ask them what happens when people violate those safety rules.

Then dovetail this into how the Texas Rules of the Road (and that's what it's called, by the way, look up ss 535 C) lay out the standards expected of reasonable drivers on Texas roads. Then get

them to realize that a violation of these safety rules/rules of the road IS EXACTLY what is meant by someone failing to drive as a reasonable driver would be expected to drive, and BAM!!!, you have just broken down a legal concept into language everyone can understand, and that everyone can even get excited about.

6) Empower the jury. This is probably the most important thing you can do if you want to get a good verdict out of a car wreck case. Jurors are quite literally Everyman and Everywoman, and guess what? Joe and Jane Sixpack don't get to have nearly as much power as they'd like over their day to day lives. They have a wife or husband who has a lot to do with how they live their lives, they have obligations to children and aging relatives, they have bills, they have a boss, they have everything in the world that all of us have hanging over them, and most of the time they have to do what others tell them to do.

When you let potential jurors know that they alone, if they are lucky enough to get on this jury, get to make the decisions on what is presented in open court, whether they want to make their world a safer place (see how that keeps cropping up over and over?) by rendering a meaningful verdict, and that people just like them are the reason that Ford doesn't make a Pinto anymore, that PG&E isn't dumping chemicals into the California water supply, Feds aren't doing Tuskegee type experiments; or any other example you want to use of when lawsuits changed the behavior of a big powerful company or government - anyone that jurors in your jurisdiction are afraid of/mistrustful of. Oh, and if you don't know. . . Ask them! Everybody mistrusts some groups, mostly big business and government seems to be the best examples in Texas.

And you must, must, MUST (giving a nod to Lisa Blue here) let the jury know in the process of empowering them, as well as when you are arguing the case, that the jury ALWAYS has a choice. Jurors can decide however they want to, based on the evidence as given to them from the witnesses and the exhibits. This is an important psychological little bugaboo (technical term, I know) of the human mind, and when you let people know that they have a choice, they will go with the choice you want them to pick far more often than if you simply tell them that they must do this, that, or the other based on the evidence, the law, or what have you.

Few people like being told what to do, but most people feel very good about picking the rather obvious choice when given the option to do otherwise.

7). Get rid of the jurors who are bad for your case. Most people go about this in the wrong way from what I've seen in over 100 jury trials I've conducted over the past nearly 2 decades.

Most lawyers ask potential jurors "Can you be fair?" and also ask them "Can you be reasonable?". . . They say that there are no dumb questions, but these might just be an exceptions to that rule, and here's why:

Everybody and I mean EVERYBODY thinks of themselves as being fair and reasonable. There are leaders of terrorist groups right now that would cut the head off of every person reading this given the chance, and they think of themselves as both being fair, and reasonable. So what are you getting out of asking if they can be fair? Nothing, not a thing, and you've wasted valuable time, and gathered no new information of use in deciding who to kick off your jury.

So, what do we do?

We decide what kind of jurors we want, and much more importantly, what kind of jurors we don't want, and then ask questions to identify who belongs in each group.

A) We don't want jurors who are going to be overly difficult to convince. . .

B) We don't want super conservative jurors who don't think that anyone deserves any \$ for pain and suffering. . .

I think we can all agree on these, right?

So what do we do about it?

We ask the two best questions I've ever heard for getting rid of bad jurors:

A) "Judge \_\_\_\_\_ will explain to you that we, as the moving party, have the burden of proof, and that we must prove our case to you by a "preponderance of evidence" which just means that we have to prove each element of our case by a standard of "merely more likely true than false" (and then do the powerful scales of justice hand gesture, tipping the scale only slightly) , who in the jury would require more proof than that for the Plaintiff to win?"

An amazing amount of the potential jurors will say that no matter what the judge tells them, they are going to hold the Plaintiff to a higher standard than the law requires before they are going to be able to find for the Plaintiff/against the Defendant. And now you simply ask the rest of the panel if they agree with or disagree with the first person, get all those juror numbers down, and you just got rid of a ton of people who are terrible jurors for a Personal Injury Plaintiff.

B) "Judge \_\_\_\_\_ will give you the law that will tell you what elements of damages must be considered by the jury, and I've noticed that very few people have any issue with someone trying to get their medical bills or lost wages back (look at the jury to see if they agree or disagree on an individual basis as you say this) but some higher number of folks have a real problem with awarding someone \$ for pain and suffering, mental anguish, those sort of intangibles. . . Is there anyone here who simply could not award \$ for pain and suffering, no matter what the evidence shows?"

Again, you will get a surprising number of people who simply will not follow the law, and will tell you that directly. Then ask for a showing of hands on who agrees with the first person, write down who answered this way, and in a very time efficient manner you have eliminated a great deal of bad jurors.

You can add some teeth to this tool by altering the question/following up with asking the potential jurors if they could award some very large dollar specific amount of money if the evidence supported it. "Mrs. Juror #10, if the evidence supported it, could you find an award of \$350 Million?" Or "Mr. Juror #8, if the evidence supported the finding, would you have a

philosophical problem allowing a verdict of several billion dollars like what was found against the tobacco industry years ago?"

When asking the jurors these disqualifying questions, be sure that you get them to say they feel strongly about these things, and that they felt that way yesterday, and that they will feel that way tomorrow; which should prevent Black Hat from rehabilitating a bad juror.

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Tips, tricks and random thoughts:

You want the potential jurors talking more than you are during jury selection, which can be a shock to people who like to talk so much like trial lawyers do; but we must let them talk and truly "actively listen" to them, in order to find out what they think, help identify problem jurors, and so forth, and to establish that all too crucial rapport with the jury. If you look them in the eyes when you address them, smile a lot and repeat back some of their words to them as you follow up on their questions you will be well ahead of the game of active listening and far ahead of the majority of your competitors and all but the very most talented of your adversaries in Black Hats.

Fight for extended time for Jury Selection. Judges try to limit you, and some of them are going to restrict you to 30 minutes, but fight for extended time in every court every time. And then make good use of the time you are given. Judges often restrict the time of Jury Selection/Voir Dire due to having had to sit thru so many long, boring, and terrible Voir Dires, but you won't be long and boring now, and you have lots of good techniques to get thru this process efficiently and as Judge Eric Moye likes to say "with all due alacrity" which is appreciated by both the Court and the potential jurors. (Insert cites here for cases supporting extended/unlimited Voir dire) \*\*\*\*\*

Don't be afraid of anything about your case. Deal with your bad facts first, and explain how they are in fact either neutral facts, or even good facts. It's amazing how much people will believe you if you simply say things as if you truly believe them. For example: We had a case go to trial in Collin County early in 2015. Yes, dreaded and feared Collin Co where nobody can get any money out of a jury. Land of the super conservative juror. Everybody there is white, and rich, and educated, often in middle to upper management and ownership. . . They aren't going to give you guys any money up there. . . Jeez Oh Man! You don't even have a big impact (PD was negligible) and you've got a guy who goes in to see doctors about his bad back every year or two going all the way back to the 1980's! You might as well drop the case. . . Your guy over treated. . . Sheesh, you have \$30K in touchy feeley soft tissue treatment and a couple of injections. . .

Any of you guys and gals hear that kind of stuff about your cases?

Yeah, us too, we get it all the time.

Snake Farm offered us all of \$4,700 to settle the case, and laughed in the face of our Stower's for their \$50K policy. . .

So what did we do?

Take the paltry \$4,700 and try to get the providers to take little to nothing on their bills, get the client to take a few bucks on the theory that a few bucks are better than no bucks? ? ?

No. We tried the case against an In-House Black Hat in CCAL #2 in front of a judge who let the pics showing no damage in <-- over our objection, let in talk of all the priors to client's back, (sounding familiar to anyone?) and knowing this prior to the beginning of evidence as we did, we attacked those two in conjunction by getting out in front of it/pulling OC's teeth on these issues. I told the jury right up front that they are going to be hearing about a fragile back'd man who has a history of problems going back 30 years. That there are lots of folks out there just like him, who may be walking or driving around as fragile as they could be. That this is, of course, why the TX Legislature has made laws about safe following distance, and requiring proper lookout, etc. That the pictures showing low to no visible PD make sense precisely, and only, because of the history of a bad back (eggshell spine theory). We were up front that this was not the sort of impact that we'd expect to hurt a robust individual. That the dirt dug up by OC would prove that our client was not the robust individual he might appear, but was, in fact, a Fragile Freddy with documented spinal injuries which makes him highly susceptible to injury even in a low speed affair like we appear to have here based on the pictures. We owned what most people would think of as the bad parts of their case, turned those weaknesses into a strengths, and ended up walking out of there with a verdict after costs and interest were factored in of just over \$82K. There is no way we'd have had such a result if we'd have been embarrassed about the "weak" facts of our case.

Be bold and up front and honest with the jury. It matters. I let the jury know that we are here seeking money damages early in the jury selection process. Often times I'll note that if we had the option, we'd all prefer to simply go back in time and make sure that this accident never occurred, and then we'd all be square, and as perfect or imperfect as we were before this crash happened. But they don't sell tickets on a time machine, so we can't the down here suing for that. Money damages, crass tho that may be to some folks (always be respectful of people who honestly hold an opinion that isn't good for you) is all that we have in order to try and make people whole. Sometimes people's violation of The Rules of the Road cause terrible injuries and death, and sometimes we are forced to ask a jury to allow a very large verdict or a very small verdict, depending upon the damages done.

Anchoring - if you can figure out a way to get a juror talking about big numbers, no matter what those numbers are, they will mess around and give a bigger verdict than they'd otherwise have done. It doesn't matter if the numbers don't have anything to do with money, FWIW, I like to use population numbers either in the metro (about 6 million) or TX (30+ Million) or US (350+ Million) and you can weave such things into your presentation with just the tiniest bit of creativity. For example: "By show of hands, who knows how many people there are in the Dallas/Ft. Worth Metroplex?" Pick on one who seems confident, and boom, you are anchoring people to big numbers in a very subtle way, and you are easily transitioning into talk about how many of those 6 million drivers follow the Rules of The Road all the time, vs some of the time, and then pull defense's teeth about how reasonable drivers will sometimes make a

mistake, you can't let them have that, you have to establish that all 6 million Metro drivers, or all 35 Million TX Drivers or all 350 Million US Drivers all have an obligation to follow the Rules on following distance, paying attention, yielding left turns, etc. . . Every time. Not most of the time. Every time. Ask the jury if they have to stop at red lights. Then ask them if they have to stop at all of them, or just some. Ask them why it's important that we follow these safety rules, etc and you have just anchored in some big number discussion with questions about jurors attitudes towards reasonable driver standards and kept the focus on Defendant's conduct, which is where it should be.

Don't believe what the Black Hat is saying about your case. Too many times I've seen lawyers go try their case as if they are embarrassed about their case facts. Juries see right thru this. Whatever your case is about, it's what it's about, whatever its worth, it's worth, but all of those cases are opportunities for the jury to be the vanguard of their community, and given the right approach, all cases are big cases, they are all a big deal, they are all about safety, they are all about following the rules, or breaking rules, and consequences. . . Remember even the most conservative jurors, heck, especially the most conservative jurors are the biggest proponents of rule following and accountability.

Ask jurors about if they have been in a crash. Get them talking about it. Some of them have been in a crash. If they haven't, expand your question to include family members and friends. Get them to talk about their experience, ask them how they felt about the various things that happened along the process, and if and when they tell you how they settled the case with the Defendant's insurance company, ask them what they would have done had they not been able to resolve it that way? You are baiting them to say that they, the potential juror, would come down to the courthouse and sue, and if they don't jump on it, ask them directly if they might find themselves sitting at a table next to someone like you. If they wouldn't be willing to bring a suit, then they aren't going to be good for your case, and if they would, then they are, as a general rule. Additionally and occasionally, you'll end up getting the panel to realize that even tho you can't talk about it, this is an insurance case, and the reason we are all down here is that the Ins Co or the Defendant has been unreasonable.

If and when the discussion from the paragraph above causes a potential juror to ask why insurance didn't take care of this before we had to get down there, answer their question!!! Too many lawyers get this golden opportunity and let it go. I've seen it dozens of times over the past couple of decades or so trying cases, and it's one of the worst mistakes a Plaintiff's attorney can do. They panic, and turn to the judge, who will provide some canned answer about how the jury isn't allowed to take insurance into consideration, but don't let it get to the judge. You answer them yourself. Don't be afraid. You didn't bring up insurance, the panel did. All you are doing is answering their questions. When they say, why didn't insurance take care of this already? "Sometimes these things can't be worked out, and I have to come down here and bother nice folks like you to render a verdict to force people or corporations to do what we feel like is the right thing." - or something similar, can work wonders. And when you answer it this way, you've done nothing that is very likely to get you in trouble with the Court (oh, and stop being afraid of getting in trouble with the Court, when you are trying a case as a Plaintiff it needs to be YOUR Court room. You must give the Judge the proper respect due to the position, but don't be intimidated or pushed around by anyone in that room, OC, Judge, whomever. You are a

gladiator in a suit, go act like it!) and I've yet to see a mistrial over it, and the discussions with the jury that follow can be the difference on a borderline case turning into a good to very good verdict.

I've been working on the notion for a long time now that most jurors don't want to be called to jury duty. Most folks reading this won't be overly surprised by that, and it may even seem common sense, but very few lawyers go to any degree of trouble to use that fact to their advantage. Jurors come into the room angry that they are there, worried about work piling up, worried about getting their kids where they need to go, all the normal things which any of us would be thinking about if we were stuck in a box for a day or a week. . . So make sure and let them know who is causing them to be down there (hint hint, it's the unreasonable jerk at that other table, or when very lucky, it's that dastardly corporation, or insurance company which forced us to be here) and they will punish that person who caused them to be there. If they decide that person is you or your client because you are perceived as being greedy, you will be punished, but if and when the jury realizes that they are there because the Defendant did something which could have hurt anyone in the community, then you've got a reasonable shot at getting some decent money on your car wreck case.

### **Final parting thoughts are really a call to arms for my fellow warriors.**

Every lawyer reading this went to college somewhere, which puts you in a special category compared to the average person, so hold your head high, and then at some point you took the LSAT, which puts you in more rare company still, and then lo and behold you scored high enough on that test to get into law school. You survived jerk professors who seemed to really enjoy embarrassing and emotionally destroying people in that way that can only be done so thoroughly and painfully via the Socratic Method, and somehow by hook, crook, talent and hard work you graduated from Law School, which puts you in more rare territory still yet, so be very very proud of yourself, and then you passed the bar, and you got your ticket putting you in even a narrower category, and you felt like you had school behind you, your license in hand, and now you're all set. . .

And then the real learning, and the real hard work began, didn't it?

On occasion take a second to look back at everything that you went thru to even get your ticket to represent other people's interests, and reflect on how hard that work was. Reflect on how many started that journey and how few of them are now doing what it is that you do, and feel a little more proud than you did even before. Why did you go thru all that when so many others didn't? It's because you have something in you that others lack. You have a warrior spirit. I know you do, or you would not be reading this still. You have ability or you wouldn't have made it to where you are now, but ability is not enough. All your competitors and all your adversaries have ability too. But you chose to fight for the underdog. And that means fighting harder, smarter and longer than your competitors and adversaries. It means having the courage to bare your real true self to the jury, and the desire to succeed has to be so strong in you that you overcome whatever limitations that might be holding you back, which 99% of the time is fear.

Be proud of what you do, for you are a warrior for justice, an alpha wolf, pack leader in the court room, someone to be feared and respected by adversaries, trusted and relied upon by clients and colleagues. When you are called to be an advocate, in my humble opinion that is the absolute highest of callings. Attorneys fight for those who cannot fight for themselves, and we who fight for Plaintiffs are waging that war against big, powerful, well-funded adversaries, who would love nothing better than to thwart justice.

Be passionate about what we do for others. . .

We fight for those who cannot fight for themselves. . .

Be a fighter. . .

Go fight.

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