Chapter 1

The Forty-Four Most Common Blunders of Jury Selection

"The efficiency of our jury . . . system is only marred by the difficulty of finding twelve men every day who don't know anything and can't read."

– Mark Twain

TRUDGING BACK FROM COURT, AFTER DEFEAT IN A JURY TRIAL, wildly in search of some explanation other than my own inadequacy, I have often thought of the old saw, "the case was decided thirty years ago." Yes, that's it: not even the devil or Daniel Webster could have rooted out the prejudice of "that jury." But, wait a minute. My victorious opponent also selected that jury. Was the enemy wiser than I? More astute in challenging? More able to indoctrinate? Is there an art to selecting a jury? Educated by that most masterful of human teachers, DEFEAT, let us try to identify the most common and egregious blunders of jury selection in those jurisdictions where the lawyers conduct the voir dire themselves.

1. ***Insulting the Jury.*** Mr. Barrister makes his magnificent statement to the jury. He then loftily inquires of Mr. Meek, juror number one, "Do you understand?" The implication, of course, is that any failure of understanding is of necessity due to the limited mental capacity of the juror. Mr. Meek is insulted. Mr. Barrister is insulting. A mere touch of humility would have corrected the question to, "Have I made myself clear?"

Other outstanding advocates of our generation will inquire of some fifty-year-old gentleman, "How long have you been a messenger?" It might be preferable to ask the juror about the nature of his work so that he can protect himself in the language he chooses. We never know exactly when a juror makes his or her decision. But it would appear questionable to start by insulting the juror.

2. ***Talking Too Much.*** Mr. Advocate pours forth words in a greater flood than Niagara Falls. Mr. Cynical, juror number two, is intensely suspicious. He sees the lawyer as a salesman. Why say one word more than necessary? It has been suggested that no lawyer should ever say one word in any trial without a reason. It can make us more interesting. The jurors will begin to await our statements.

3. ***Succumbing to the Itch to Be Brilliant.*** Mr. Luminous of the office of Vanity, Fair and Pride loves big words, adores legal jargon and asks complicated questions. Mr. Carpenter on the jury thinks this lawyer is a show-off. He thinks the lawyer is trying to trick him. He thinks if the lawyer had a good case, he would talk simply and fairly. Yes, humility is the trial lawyer's best friend.

4. ***Failure to Follow the Principle of Identification.*** Simply stated, it means we should seek jurors who identify with us and our clients. We should reject jurors who identify with our adversaries. When the occupation of Juror Jones is the same as that of our Client Smith, it is to our advantage. If the juror lives in the same area where our client lives, it is another advantage. We even like jurors who have the same first name as we do. Anything which tends to make them identify with us is, in the ordinary course of human events, helpful to our side. There are exceptions to every guiding principle, but here is a starting point that will ring true more often than not. One remembers hearing of a famous criminal trial involving celebrated defendants. Psychological studies were supposedly employed to help identify the ideal jurors who would help these defendants. The jury was selected along the lines suggested by the studies. When chal-

lenges were exhausted, an alternate juror was selected who did not fit the pattern established by the psychological study. This juror was a successful man—an executive. The study had suggested that people of a lower economic status would be more favorable to the defendants, who were very successful men of national standing. During the trial, the alternate came to sit on the jury in chief. He dominated deliberations. He favored the defendants. There was a defendants' verdict. The psychological study was wrong. The principle of identification proved its value.

5. ***Failure to Challenge the Array.*** The panel walks in. You once read that it's impossible to judge a book by its cover, but you are crushed by what you see. You are defending a client accused of assaulting a little old lady, and everybody on this jury looks like a police officer. Listen carefully. Your opponent may be carried away. Note every word that may have prejudice in it. Accumulate them, and remember the ancient Ciceronian rule of jury selection: when all is lost, challenge the array.

6. ***Failure to Assert a Challenge for Cause.*** In ancient days, the English crown had unlimited peremptory challenges. You do not. You cannot afford to be lazy. If Mr. Equivocal, a prospective juror whom you despise, is on the fence, at least appeal to his fairness. "Sir, considering that the parties have waited some years for their day in court for a completely impartial jury, you will of course tell us, will you not, if you have any doubt at all—won't you? Please! Please?" When that fails, you will, of course, use a peremptory challenge.

7. ***Stupidly Using Your Last Challenge.*** You have one challenge remaining. You are reasonably satisfied with all the jurors, but you have a mild doubt about Mrs. Bland. You use your last challenge. You are suing an automobile manufacturer. On comes Mr. Big, president of a manufacturing company. He insists he will be fair. The Judge, whom you see quietly in chambers, tells you that you do not have a challenge for cause. Oh, Death, where is thy sting?

8. ***Stupidly Not Using Your Last Challenge.*** The jury is satisfactory, except for one person. You represent a teacher who claims she was wrongfully dismissed. On the jury is Mr. Dean, a principal of a school who has had vicious disputes with many teachers over the question of tenure. He has been glaring at you and your client during jury selection. You have one challenge remaining. However, you once went to a seminar where somebody said, "Don't use your last challenge." You do not use your last challenge. That juror kills you. You lose the case. You took the advice too literally.

9. ***Keeping the Expert Juror or the Take-Charge Juror.*** You have the burden of proving a chemical reaction occurred. Mr. Chemist has four degrees in the field. He will, of course, have to demonstrate his erudition by showing how you failed to prove the chemical reaction. He will awe the other jurors. RULE: *Take no expert unless you are positive your evidence must prevail.* This is also true for Ms. Ringleader. If you believe you have a fair cause, you really don't need the assistance of Mr. Domineering. Maybe the art of jury selection is avoiding the strong juror who will oppose you.

10. ***Sleeping During Jury Selection.*** There are many ways to sleep during jury selection. Some do it by constantly taking notes. Some by talking to other lawyers during recess. Better to observe the juror when he takes his seat. Mr. Military walks briskly. Mr. Clerk, hesitantly. We learn much by the way jurors dress, the faces they make and at whom they smile. Some say you never know what a jury will do; we reply: it is our job to know what a jury will do. A grand time to watch jurors is when your opponent is speaking. Is Ms. Susceptible in love with my opponent, Mr. Tall, Dark and Handsome? Challenge! Challenge!

11. ***Not Establishing Your Credibility.*** Mr. Weasel, a lawyer, says something to one juror but tries to change it when he speaks to another juror. He has weaseled. His credibility may be irrevocably lost. You, the trial lawyer, are the chief witness for your

cause. You will say more on behalf of your client than any witness. If "character" is the chief quality of the advocate, not one word must ever be devious.

12. ***Not Sounding the Theme.*** Mr. Pointless talked at length but the jurors don't recall what he said. He never made a point. As in music there is a grand line, so in every lawsuit there is a theme. You are defending a medical doctor charged with malpractice. Your defense is that your client used her best judgment. You have but three opportunities to address a jury directly in a trial: jury selection, opening and summation. It is an irretrievable loss of one of your opportunities not to sound the theme of "judgment" no matter how subtly during voir dire. Repetition is a valid tool of persuasion. *Make your point.*

13. ***Overstating the Case.*** Mr. Blunder represents Ms. Devastated, who has lost an eye and a leg. She was standing on a sidewalk when Mr. Drunk, the intoxicated defendant, drove his car onto the sidewalk. Mr. Blunder pours it on. He pounds the jurors with all the facts. Defendant's attorney, Mr. Crafty, merely says: "Will you keep an open mind?" Jurors must say yes and they say yes. The "oomph" is gone. Many jurors outraged at defendant's drinking have excused themselves. All Mr. Blunder had to say is: "We claim a significant injury due to defendant's negligence." Let Mr. Crafty, defendant's attorney, sit on the horns of the dilemma. If Crafty says nothing in jury selection, plaintiff's opening will be an atomic explosion. If Crafty admits the serious injury and the drink, (1) he will have to struggle awkwardly with his words, (2) plaintiff's attorney's understatement will enhance plaintiff's attorney's credibility, and (3) the jury will surely believe it if Crafty has to admit it.

14. ***Disclosing Significant Weaknesses.*** Mr. Innocent, your client, has a criminal record. Nothing is said about that in jury selection. On cross-examination, your opponent, Mr. Relentless, pursues your client devastatingly with his criminal record. The jury is shocked. You see your cause and fee flowing down the

drain. Why didn't you say during jury selection: "My client, I want you to know, committed some indiscretions at a young age (it's always at a young age) for which he paid the penalty exacted by the law. He now has a case that is in no way related to his past. Can you give him a fair trial?"

15. ***Not Objecting to "Just Because."*** Mr. Ploy likes to do more than disclose and defuse the weaknesses in his case. He likes to literally obliterate them. He usually starts with "just because." "Just because my client, who had five martinis on an empty stomach, and went through the red light when he was in a drag race at eighty miles an hour before he hit the child on the sidewalk, that is not something you would hold against him, is it?" Please wake up, my friend, and object. It is indeed the jury's role to hold some sins against some people.

16. ***Failure to Embrace the Law.*** Bill Blunder, plaintiff's attorney, says nothing about the law. Ms. Moses, defendant's attorney, embraces the law as if she were on Mt. Sinai. The jury clearly understands that the law favors the defendant. **MORAL:** *Embrace the law, whether you love it or not.* If you don't, your opponent will. Of course, if there are aspects of the law that are, shall we say, at odds with your view of the case, you can speak more softly and with less gusto.

17. ***Not Practicing the Art of "What's Left in the Back Anyway?"*** You've been selecting a jury for three hours. The jury is reasonable. You have a doubt. You excuse two jurors. In walk Mr. Awful and Mr. Worse. You die. You hadn't studied what was left. **MORAL:** *Try to know what's left.* If their names were called out when they entered, jot them down. Study them as they walk, talk, act and respond. How are they dressed? Watch them while you're selecting the jurors-in-chief. Have you noticed whether those left think your opponent is a humorous fellow or an annoying show-off? It is idle indeed to keep searching for the Holy Grail of the unattainable perfect jury when what is in the box is

better than what is left. This requires the use of judgment. Jury selection in truth is really jury rejection.

18. ***Not Confronting the Ugly Juror.*** Mr. Misanthrope, a member of the jury panel, is glaring at everybody. He has announced that the lawyers don't know what they are doing nor are they fair. He does not understand why we have to have lawsuits. He doesn't understand why we need juries. The other jurors look at him uneasily. Ms. Polyanna, plaintiff's lawyer, tries to placate him. Why bother? While normally we avoid offense to any prospective juror, there are times for us to assert candidly our displeasure. We have every right to tell him that the parties to this lawsuit have waited for years for a jury to resolve the dispute. Jury trials are the alternative to the use of force. Without further ado, you can tell him his attitude is not acceptable and that you excuse him. While you perhaps have been more harsh than usual, what has happened? You have enhanced your credibility. Trial lawyers need not be obsequious.

19. ***Failing to Unmask the Sneaky Challenger.*** Mr. Sneaky slips the slip to the clerk. The juror is excused. No one knows by whom. The antidote: in your loudest trial lawyer's voice, ask the clerk, "Whose challenge was that?" This ploy and counterploy have been going on since Demosthenes wowed the Assembly in Old Athens.

20. ***Not Letting the Juror Talk.*** Mr. Big Mouth loves his voice. He asks only leading questions. The juror merely nods yes or no. Mr. Big Mouth wouldn't know whether he had Einstein or Frankenstein on the jury. **Moral:** *Let the juror talk.* Ask "What do you think?" rather than "Do you think. . .?"

21. ***Not Having a Plan.*** Mr. Witless has no plan. He asks questions in a haphazard sequence. He has not thought out which jurors would be good or bad. Why give yourself that disadvantage? A few minutes with a colleague in the office talking over the jury selection will make you more confident when you arrive in

Court for jury selection. The main purpose of preparation has been to find your theme. Now you should plan to sound that theme. You should not disdain a checklist or a written order of sequence. You need not use it, but it will be there as a guide. We all have lapses of memory. An example of a possible sequence for an attorney who speaks first might be: (1) introduction of the parties and the attorneys; (2) whether the jurors know the parties or the attorneys; (3) the nature of the case; (4) whether the jurors know something of the witnesses or the issues of the case; (5) an exploration of the bias of the jurors; (6) whether there are any disqualifying facts; and (7) a conclusory statement. An example of a possible checklist of questions concerning bias and disqualification might include questions dealing with the following: (1) prior jury service; (2) the schooling and place of birth of the juror; (3) kinship, friendship, knowledge or financial interest as to any party, attorney, and maybe certain witnesses; (4) the marital status, including the number of children, of the juror; (5) the employment of the juror and the juror's family; (6) whether there was any prior experience with the kind of litigation which is presently before the court; and (7) a review of the juror's former and present residences. Obviously checklists are to be used selectively and without any stereotyped rigidity. Great advocacy can arise only through the use of imagination. However, imagination seems to function better when the advocate has a well-planned conception of the approach to be taken.

22. ***Fighting with Your Opponent.*** Mr. Pugnacious, along with some of our other friends at the Trial Bar, has perfected the art of enticing you into an unseemly dispute. He knows you have the better of the case. He wants a personality contest. **MORAL:** *A soft word turneth away wrath.* Keep your eye on the target. You have the better case. Be wary of dueling with an opponent known to have the fastest tongue in town.

23. ***Not Fighting with Your Opponent.*** Mr. Pugnacious has gone too far. He believes that a trial lawyer is one who appears on the surface to be a perfect gentleman, but underneath should

have the corrupt heart of a riverboat gambler. He has this time thrown the gauntlet down and you cannot ignore it. Some snide remark about your position, which would rob you of any chance to win, has been made. You may feel that wit alone or a ruling by the Court is insufficient to deflect the remark. Then tell him off. You are not there merely to assert your position intellectually, but, if necessary, to protect your client by whatever honorable combat is required.

24. ***Not Getting the Other Side to Challenge the Juror You Despise.*** You are low on challenges. You hate juror number three. Walk up to him. Pretend that you love him, smile, get along beautifully, and hope that you confuse your opponent into challenging that juror.

25. ***Canonizing the Juror You're About to Excuse.*** You have made the firm decision to excuse juror two. For heaven's sake, don't keep asking her whether she can be fair and wonderful and decent in this case. She will, of course, say yes. When you excuse her, the other jurors will look at you curiously for letting St. Joan go.

26. ***Failure to Use Voir Dire as an Instrument of Persuasion.*** Mr. Laconic asks a few questions of each juror about their background. He then sits down. He never conveys any viewpoint about his case. Persuasion in jury selection is subtle and if overdone, it is clearly improper, but obviously we are always trying to influence. That is the role of the advocate and the jurors understand. Some lawyers believe that persuasion is the only purpose of jury selection. They say that human beings are so utterly unpredictable that the use of challenges is an empty gesture. You might just as well take the first six or twelve. While that philosophy is rejected by the bulk of trial lawyers, we are nevertheless reminded that the alternate purpose of jury selection—to convey our viewpoint—must never be ignored. For example, if you are a plaintiff in a personal injury case seeking a substantial award, you must ask the jurors whether they could make a sub-

stantial award. Many jurors have read critical reports in newspapers and magazines that verdicts are too high. You must explore whether each juror has an open mind:

> *"If after you hear* ***all*** *the evidence from the witnesses and the law from the court, you are convinced that the plaintiff should recover, would you be willing to vote for the plaintiff even if that evidence indicates in all fairness that there should be a substantial award?"*

You can then add quite properly that you regret talking about damages at this early point in the case. You know that they have not heard a word of evidence and may resent talk about money, but you can also quickly explain that this is the only opportunity you will have to explore the subject with them.

27. ***Failure to Exploit the Juror Who Is Going to Go Anyway.*** Your client sues for breach of express warranty made by a salesman. You wouldn't keep Mr. Salesman on the jury in any event. He's going to go. Why not use him to develop the proposition that even a salesman must respect the law that all products must fulfill the promises made of them. Then, at a later point, well after you have exploited him mercilessly, when all is forgotten, you will of course discreetly bounce him with an insensitivity that would have startled Caligula.

28. ***Keeping Somebody You Don't Like.*** On paper, Mrs. Perfect is perfect for you. She identifies in every way with your client. But you hate her. You don't know why. It gnaws at you. Excuse her. If you don't like her, she probably doesn't like you. GOLDEN RULE OF JURY SELECTION: *Pick not only with your brain but with your viscera.*

29. ***Treating the Sexes Differently.*** You approach the women on the jury. You ask each of them dutifully about her husband's occupation. You approach the men on the jury. You ask each of them about his occupation. You fail to ask each of them about his wife's occupation. Oh sin of sins! You have discriminated. Indeed you have. You treated the sexes differently. **MORAL:** *Be scrupulously alert to the nuances of gender.* Some female jurors do not wish to be called Miss or Mrs. but prefer Ms. The only problem is that other female jurors do not like the word "Ms." Good luck and you're on your own.

30. ***Being Timid.*** You represent the defendant. The plaintiff suffered grievous injuries from one of the defendant's employees who mugged her. The only issue is "scope of employment." Mr. Outraged looks at you when you ask whether he can be fair. He replies, "I don't know, there has been a lot of mugging in our area." You can meekly and timidly excuse the juror, which you may have to do in any event. However, this question is a great opportunity. You can state again your theme.

> *"There's no doubt, sir, that there has been much too much of this terrible crime of mugging. I can well understand why so many people are very, very upset. But the issue in this case is whether my client is liable for it. Will you give us a fair hearing?"*

You may not have defused the issue. You may never be able to defuse the issue. But you have at least addressed it without timidity.

31. ***Not Keeping a Chart of the Jurors and a Record of Challenges.*** Your opponent walks up to Mr. Hardnose. "Sir, thank you for your answers, but I'm going to challenge you." You

look at your record. Good heavens! Your opponent has already used his last peremptory challenge. Your opponent turns blue; the Court denies his application for a challenge for cause. You turn to the juror and suggest, "You can be fair, sir, can you not?" You have kept a careful record of challenges; apparently your opponent did not. You need the names of the jurors on a chart with the other information concerning their residences, their occupations, and the special facts about them. You will want to review it during the trial as you prepare to make your various arguments to them. Only the careless lawyer does not have a chart or a record of the jurors.

32. ***Continually Questioning the Juror You Love.*** You've heard enough—you love Mrs. Sweetheart. But for some reason, you are mechanically wedded to your checklist. You represent a little child. You keep asking about all her children. Your opponent, Mr. Rip Van Winkle, who up to now has been satisfied, is aroused by one of the answers. He excuses her. **MORAL:** *When you have a juror you love, do not continue with your questions until you alert your opponent to the fact that you do love the juror.*

33. ***Not Anticipating Your Opponent.*** You represent a tragically maimed child who sues the manufacturer of pajamas for failure to make them flame retardant. Your opponent will obviously hammer away at the jury that they may not award damages merely because of sympathy. Therefore, you must steal your opponent's thunder. You must tell them in the first instance before your opponent speaks that you in no way want sympathy, which the lad has already abundantly received. Of course, plaintiff's attorney is always well-advised to keep his own ears open for defendant's plea for sympathy. Sometimes counsel for the defense will suggest that his corporate client really is "just a small business." Pleas for sympathy are inappropriate, no matter from whose mouth they come.

34. ***Not Using the Motion in Limine.*** Your client has been often arrested but never convicted. Evidence or questions as to

the arrests are inadmissible. Your opponent, out of inexperience or for whatever reason, has indicated that be is going to develop that information during the voir dire. You have seen the panel of jurors arrive. It looks like it may be a very acceptable panel. You do not wish to risk anything prejudicial's being said to them. Your remedy is to apply to the Court and by a motion made in advance of the jury selection have your opponent restrained from using this inadmissible information.

35. ***Engaging in Levity.*** You represent the little child injured at the railroad crossing, where you claim there were inadequate guards. The injuries could make you cry. Your opponent, Mr. Jolly, is the prototype of the old railroad lawyer. Paternal, wise and experienced, he engages you and the jury in light banter. All of a sudden there is a light atmosphere. By the end of the case you don't know what's happening. You lose. You've been laughed out of Court. You wrongfully engaged in levity. Your cause was far too serious to permit that kind of mirth during jury selection.

36. ***Not Engaging in Levity.*** Your case is serious. You are appropriately serious. However, something natural to the proceedings, something inherent in the juror's own statement leads you to an expression with some wit. It relaxes everybody. You are further accepted as a human being. You have, without distracting from the enormity of your cause, handled the matter tactfully. You avoided the blunder of being a constant Mr. Sourpuss. In short, this is a tightrope that can be walked only by those who possess good judgment.

37. ***Alienating the Jurors in a Strange Venue.*** You are Mr. Celebrity. You are asked to journey to a different state to participate in a celebrated case. You get off the plane and are interviewed. You say that you strongly doubt whether you can get a fair jury in this jurisdiction. You walk into the jury room. Your attitude continues. You really don't expect the jury to be fair and it shows. The jury hates you and is rooting against you. You have poisoned the waters. When one thinks the venue is not capable

of producing a fair trial, the remedy is not public insult but a discreet motion to the Court. If you lose your motion, you walk into the jury room and expect their fairness. It is elementary that we often receive from a person what we expect from a person. "I am not from your fine community. I believe that all people are entitled to a fair trial, not based on where a person's lawyer comes from." (And when toiling in foreign countries, never forget Aristotle's immortal advice: "Retain local counsel.")

38. ***Ignoring Jurors' Attitudes.*** You represent a patient who sues the local hospital and a local doctor because of claimed malpractice. There is no point in even trying that case unless counsel deals with the favored attitude benefiting those defendants. "We do not challenge the right of that hospital and that doctor to practice. We do not claim it is a bad hospital or he a bad doctor. We merely say that in this particular situation there was a departure from the required care, etc., etc."

39. ***Searching for the Rules of Jury Selection.*** There are no rules. There are only guides which supplement good judgment. Some are always in search of a talismanic device that will reduce jury selection to a rigid formula. It does not exist. Ignore articles that tell you in what case you need a juror who is an endomorph, or mesomorph, or an ectomorph or one who is brachycephalic (round-headed) or dolichocephalic (long-headed). You might as well study astrology and palm reading.

40. ***Not Being Yourself.*** Be yourself. But it's hard to be yourself. It takes experience. Willa Cather has said it is only the practiced hand that can make the natural gesture.

41. ***Not Consulting with Your Client, Who Has Attended Jury Selection, Before Saying Satisfactory.*** Let your client share in the compliment of saying "satisfactory." But don't consult with your client before challenging somebody.

42. ***Mispronouncing the Juror's Name.*** Miss Popo, she says clearly. You're not listening. You get up. Hello, Miss Popover. She hates you. **MORAL:** *Listen.*

43. ***Confounding Miss, Mrs., or Ms.*** Miss Thinlip, she says clearly. You're not listening. You get up. Hello, Mrs. Thinlip. She hates you. **MORAL:** *Listen.*

44. ***Not Suggesting Recesses.*** It is prudent to suggest frequent recesses. The jurors who are elderly will bless you.

Well, those are some of the common blunders that defeat has taught me. I'm sure there are hundreds of others that your experiences have suggested to you. I don't know whether this chapter will ever help anyone except maybe some reformer trying to abolish jury selection as a form of voodoo practiced by a dying cult called trial lawyers. But what may happen one day is that you will go to Court to try a case and the jury will vote for you. Then you will be tempted to believe, as we all do, that everything we do is perfect.