

**Creating An Environment Where Jurors Want To Tell You Their
Secrets**

The Cocktail Party Approach to Jury Selection

©Richard Kammen
KAMMEN AND MOUDY
135 N. Pennsylvania St.
Suite 1175
Indianapolis, Indiana 46204
317-236-0400
Richard@kammenlaw

It is hopefully true that all criminal defense lawyers know how to have a conversation. Indeed, criminal defense lawyers are quite capable of meaningful conversations. We have such conversations with friends and professional associates. They have them with clients and witnesses during pretrial interviews. On occasion, criminal lawyers have meaningful conversations with police officers and judges. Sometimes we have them with our families. Clearly, we are, as a group, capable of important, sensitive conversations in virtually all circumstances, professional and social.

However, what ideally is nothing more than a structured conversation, jury selection, has been transformed, unnecessarily by many of us into a ritualized, stilted, lecture/cross-examination which has little positive communicative impact and may have a very negative personal impact.

When the principles and attributes of successful conversation are analyzed and applied to jury selection, it is obvious that the following rule applies:

Conduct your jury selection the same way you would conduct a conversation with individuals you meet at a cocktail party and want to get to know better.

THE PRINCIPLES OF CONVERSATION

Before discussing the application of this rule, it is important that we understand the principles of conversation. There are several things that can hinder effective communication. It is equally true that certain universal requirements exist in, and are necessary in order to have successful meaningful communication.

One of the most significant impediments to meaningful communication is social distance. Loosely defined, social distance is the perceived gap in "status" between the participants in a conversation. The gap may be one of imagined differences of social status. An example of this is the social distance between almost all federal judges and everyone else.

Perceived differences in economic status, education or anything else may also create social distance. Social distance may be explained as anything that makes us insecure when talking that people who we believe to be "better" or more important than us. Experience and research experience tell us that it is difficult to have an open conversation with one with whom we do not feel at ease. Because of the increased social distance between a juror and a judge, voir dire performed by a judge often reveals very little important information. The lesser status of the lawyer ideally enables the jurors to feel more empowered and thus more likely to verbalize their thoughts and concerns.

Before any conversation can be successful, rapport and trust must be established between the participants. The level of rapport and trust necessary to have a successful conversation can vary, but there must be some of each. It is difficult to freely share meaningful information with an individual whom you do not trust. The intensity of the information that you share will be generally dependent upon the level of trust.

Robert Carkhuff, a clinical psychologist who researched these issues for many years, has developed five rating instruments to measure what happens in a conversation. The interviewer variables are *empathy, respect, congruence and concreteness*. The interviewee variable is *self-disclosure*. What Carkuff's research reveals is the necessity of interviewees to feel **accepted**, listened to, and equal to the interviewer in order for them to self-disclose their **actual**, as opposed to public, personal identity. In other words, if there is no trust and rapport, if the interviewer is perceived as an authority figure, the interviewee's self-disclosure, i.e., the willingness to share significant information about him or herself, drops significantly. The more authority, the less rapport and trust that the interviewer confers, the lower the self-disclosure.

Thus, the lawyer who acts like a lawyer; pompous, full of him or herself, using lots of legalese will impress other lawyers, but is unlikely to elicit genuinely honest information. The lawyer who is opinionated and judgmental, who seeks to bend jurors to his way of thinking will get the "right" answers, answers that will promptly be forgotten by the jurors when they enter the jury room.

We know from our day-to-day experience that one of the greatest bridges to trust between strangers is **honest self-**

disclosure. Honesty is generally required in order to avoid being labeled a phony. The willingness to appropriately self-disclose, psychologically demonstrates a significant degree of trust, which in most circumstances will be reciprocated. For example, to share with a stranger a fact that "I have two children" is not particularly remarkable. To share in appropriate circumstances, with the same stranger the fact that one of the children is handicapped or otherwise disabled, addicted to drugs or in prison invites a response that may be judgmental but most likely will make the hearer willing to discuss similar sensitive issues. By inviting such a response, the speaker displays trust that either he/she will either not be unfairly judged and that the response will be honest and genuine.

Thus, rapport and trust are built in part by, honest self-disclosure about attitudes, fears, feelings, and life experiences. Acceptance, lack of judgment, courtesy all play by the interviewer all play an additional role in this process.

The final requirements to a successful conversation hopefully are obvious but must be restated: one ingredient is that both participants actually listen to what the other is saying; and the another is that both participants want to know what the other has to say, i.e. that the conversation be a dialogue and not a speech. A third requirement is that the parties speak in language that both understand. Thus, when a lawyer "cross examines" the jurors, uses excessive legal terms, or otherwise tries to show that he/she is better than the juror, the jurors will often "shut down". Revealing little of use. Moreover, when the lawyer asks questions that seek to learn information obliquely, a mixed message is received by the jurors. Hence an important rule: Ask the question you want answered.

We signify, in the typical conversation, a willingness to engage in a dialogue by what we lawyers call open-ended questions. Open-ended questions are nothing more than a question such as, "What do you think about X?" or "How do you feel about Y?" or "Please tell me what you think about Z." An open-ended question does not provide any clue as to what the "correct" answer is. Indeed, in "real" conversations there is no correct answer other than the honest one.

Such questions signify a willingness and, indeed, a desire to learn the other person's views. If accompanied by an appropriate time to await an answer, a response is almost invariably forthcoming. Thereafter, we typically use *reflection*, *clarification*, and *concreteness* both to insure that true communications are occurring and to signify that we are listening.

Reflection is nothing more than sending the jurors words back to him or her. Thus, a lawyer might have say to a jury "I'm hearing you say that you think that

George W. Bush was a great President; can you tell me why you think that?"

Clarification is simply that. The art of determining with certainty what a juror is thinking or whether or not there is a subtext to the jurors statement. Clarification occurs when the following is asked. "Please you tell me why you think that Dick Cheney is such a good vice president?"

Concreteness is demonstrated by questions such as, "It appears that you believe that anyone can be vice president; Is this what you believe?"

Questions such as this tell the other party to the conversation that we indeed are listening to him or her and want to know more about their views. When our questions are accompanied by appropriate non-judgmental verbal and non-verbal reaction, (possibly difficult in the example) rapport and trust increase correspondingly.

In our day-to-day lives, we intuitively sense nonverbal reactions. The look, the raised eyebrow, the inappropriate shrug or nod, are among the many nonverbal signals that effective trial lawyers use that tell them whether they are communicating with a juror and whether what the juror is saying, truly reflect his views .

The foregoing principles apply to every successful conversation no matter what the setting. Yet, in the court-room, lawyers often reduce jury selection to a babble/lecture/cross examination, ignoring these principles completely. This happens for several reasons: Lawyers are taught about their alleged need "to dominate", to control the court room, and to avoid bad answers. This is true in cross examination, it is absurd in the context of jury selection.

How can we truly get to know people if we are afraid of what they may tell us about themselves? If we encourage people to hide their thoughts and ideas, through our attitudes, the form of our questions, or our demeanor, how can we best exercise our strikes? Obtaining accurate information from jurors, even if its information we would rather not hear, is the heart of good jury selection.

The Dynamics of the Courtroom

Jurors are obviously nervous when they first come to court. To most people, court is not a place they seek to

go. To the average citizen, only bad things happen in court. The average person knows that when you go to court, you may not get to leave, that you may be in custody. Thus the prospective juror's first goal when summoned to court is to leave, quietly and quickly, without drama or embarrassment.

Additionally, most people are afraid of public speaking. This fear affects prospective jurors' willingness to speak in groups. Most people tend to follow the crowd when they are placed in a group situation. Few people willingly express themselves in the uncomfortable and sterile environment of the typical courtroom. Much more often people, due to their anxiety, embarrassment, or fear, tend to withdraw and give patterned, non-expressive and possibly false answers. False answers are usually (but not always) not due to any malicious desire to be dishonest, but are the result of the natural inclination to say as little as possible publicly and to give socially acceptable answers to strangers.

These dynamics are often not addressed by judges and lawyers as they all too frequently conduct jury selection in legal jargon. Jurors may often pretend to understand such jargon, but many studies demonstrate that they truly do not. Further, when little is done to make the prospective jurors comfortable, and when the principles of good conversation are not utilized, meaningful communication is difficult, if not impossible.

Moreover, because lawyers and or judges want to "control the situation," they often ask questions designed to give a particular answer. While the answer is "the right one" it often does not truly reflect the juror's views. Rather, it reflects the juror's perception of what

the lawyer wants to hear. For example a transcript reveals the following question asked by a lawyer in jury selection:

Q: "Mrs. Jones, I'm sure that you agree with me that an accused should not have to testify, isn't that correct?"

A: "Yes"

This certainly has produced the safe answer, the one that the lawyer or judge apparently wished to hear, but do we know what Mrs. Jones really thinks about the right not to testify. Common sense tells us no.

Imagine, if we held conversations in social situations such as on an airplane, at a cocktail party or tavern the same way that we often hold conversations in jury selection. Imagine if all the people at a cocktail party sat around taking notes about what each other said. And imagine if all the questions were leading and designed to elicit only a yes or no answer. Worse, if under the guise of asking a question, we each did nothing but give monologues. In short, it would be the most boring and bizarre cocktail party in history.

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**TECHNIQUES TO HELP THE JUROR'S FEEL COMFORTABLE SHARING
THEIR SECRETS WITH YOU**

1. Speak with the juror the same way you would speak with a stranger. Be *interested* in getting to know him or her.

2. If time permits try to get to know the juror. Even if time doesn't permit, try through your questions to find out about the juror's life, family, hobbies, job, the things that are important to the juror.

3. Try to find things in common with the juror--not false things, real things. This is an important part of building rapport, and requires genuine self-disclosure. We do it every day outside the courtroom try to bring these natural skills to the courtroom when possible.

4. As a rule, only use open-ended questions. Closed questions are useful only for pinning down a challenge for cause.

5. After asking the question, wait for the juror's answer. Silence, if you can stand it will get the juror talking.

6. **Listen** and respond appropriately. Follow up on the jurors answer. "Why do you feel that way?" or "Can you tell me what makes you say what you just told me?" are among the best ways to clarify what the juror truly thinks.

7. Speak to the juror the way you would want to be spoken to; with respect, even when a juror expresses an outlandish, "know nothing", prejudiced attitude the juror

is entitled to respect. Remember, the juror probably doesn't want to be there any more than you want that juror there.

8. Look at the juror, not at notes or a list of questions. Do you have a list of questions written out before you go to a cocktail party?

9. Take No Notes-- Would you take notes at a bar, not unless you work for Associated Press or want to drink alone. Let someone else take the notes for you.

10. No lectures. You wouldn't give a lecture to a stranger in a bar, and you should rarely do it in the courtroom.

11. No legalese. We don't always understand it, jurors rarely do.

12. Most importantly, be yourself.

The above is nothing new. It may only represent a different way of thinking about what others, notably Cathy Bennett, had been telling us for years. However, lawyers often seem to believe that when they enter the courtroom they must forget the things that they have learned since birth. Fortunately, when we enter a bar or other social settings, (at least until our second drink) we recall and act upon what we know, is appropriate. So, when thinking about jury selection from now on:

Conduct your jury selection the same way you would conduct a conversation with an individual you meet at a party and want to get to know better.

A MODEL FOR STRUCTURING JURY SELECTION¹

1. IDENTIFY THE THINGS IN THE CASE THAT BOTHER YOU THE MOST
2. EXAMINE HOW YOU FEEL ABOUT THESE THINGS AND WHY THEY BOTHER YOU
3. DISCUSS YOUR FEELINGS ABOUT THESE THINGS WITH THE JURY (OR DISCUSS A PERSONAL EXAMPLE OF THESE THINGS WITH THE JURY)
4. FIND OUT THE JUROR'S REACTIONS TO YOUR FEELINGS OR THE IDENTIFIED ISSUE
5. HONOR THE JUROR'S FEELINGS
6. DISCUSS THE JUROR'S FEELINGS WITH THE JUROR AND OTHER JURORS
7. REPEAT THE PROCESS

¹ This model was developed by the Trial Lawyers College, Dubois Wyoming.