

HOW TO PICK A JURY

BY LARRY FLEISCHMAN, PIMA COUNTY SUPERIOR COURT JUDGE (RETIRED)

In 1985, I was a young and very inexperienced trial judge in Pima County when fate and the court calendar bestowed on me a four-month construction defect jury trial. The plaintiffs were 200 homeowners and the defendant was a national home-builder. They were both stuck with the problem that the homes had been built on the sort of shifting soils that are now well-known in the desert but much less so back then. It was a case that was going to be tried and that was the end of that.

Problem was, I knew almost nothing about what I was doing and no one in the courthouse could ever remember having a trial lasting four months. Believe me, I know, because I asked the lions of our court about how the hell I could get enough citizens to leave their lives for four months at the princely rate of \$8/day. The lions - the Hannah's and Buchanan's of my court - just shook their heads, allowed as to how they were glad it wasn't their problem, and suggested I speak quickly and be prepared to make a run for it at a moment's notice.

We knew we were going to need a honking big venire panel and we didn't have a courtroom big enough in Pima County Superior Court to accommodate such a large crowd. So arrangements were made with the Federal District Court to use their main courtroom. We set aside a week to pick the jury, and even with that didn't know if we had allotted sufficient time.

Come the day of the trial, I dressed in my finest and hoped my robe would hide my running shoes. My bailiff, Plato Watson, had been working for 20 years for the Royston's and probably that day regretted ever having heeded my pleas to come work for me when the twins retired and by some fluke of the universe I got the job. But Plato was at his very best that day, damn near the only man I would trust with the task ahead.

We had almost 200 people milling in the courthouse lobby when I came out, introduced myself and the lawyers, and said that we were now going to take a field trip down the street to the Federal Building, where there was a courtroom waiting that could accommodate us and we could begin the business at hand.

We then left the courthouse, Plato leading the way and me trying to stick in his shadow. All of us - jurors, court staff, lawyers, reporters - made the walk down Congress Street and into the Federal Courthouse. Traffic stopped in all directions for us, people marveling at the sight of a distinguished, graying African-American man leading the multitudes and wondering what the hell the kid in the sneakers was doing following him in a long black robe.

After everyone was seated, for the first and only time in my life I entered into the immensity of a judge's bench in a Federal Courthouse. Everywhere I looked was marble, and wood, and oh my God look at all of these people! Poor, unsuspecting people, plucked from their everyday lives, and not a one of them wanting to be sitting there. Nobody had said a word to them about what was going to happen but you could tell they knew they were in for some trouble. And they also knew that I was the guy responsible for dishing it out.

It started out well enough. I again introduced the lawyers, the staff, and Plato, who received a warm round of applause. Any hope that the applause was even tangentially related to me was dashed when I thanked them for the hand clapping only to be met with stony silence, as if people were just itching to tell me what they thought of me for putting them in this mess. I hadn't even gotten to the part about how long the trial would last and they were already suspicious and hostile.

In such situations, I'm the sort of person who tends to shake their leg a lot. A lot of people do it. I tend to favor the left leg, probably because I'm left-handed. It's a great way to dispel nervous energy, and Lord knows I had a surplus on board that morning. I had just finished telling them what the case was about and knew I needed to now get to the nitty-gritty about how long I expected them to be with us. In the back of my mind I sensed my knee bumping against the expensive wood underneath the bench, but there were acres of marble and wood between me and anyone who could see what I was doing and anyway I had more pressing matters to deal with.

I was just launching into my speech about the Constitution and the importance of jury service (culled from some late-afternoon talks with my colleagues and an extremely intensive review of 12 Angry Men) when from every possible portion of the courtroom there came people. Very serious-looking people with earpieces wrapped around their heads and suspicious bulges beneath their too-tight sports coats. From every nook and cranny they came. From the back, from the front, through doors none of us even knew existed. I looked out at the crowd. All I could see was a forest of O's - of two wide open eyes and a wide open mouth.

It was fun focusing on specific people. One gentleman looked like a relative of the guy in Munch's "The Scream." Another lady's eyes kept darting to and fro as her brain tried to comprehend what she was seeing. I probably could have fugued out forever had I not heard a gentle "harumph" at my side and a sotto-voice agent asking me - "Judge?? Everything ok?? You've been pressing the panic button for five minutes already and we thought there was a revolution going on in here."

It then dawned on me that there must have been some new-fangled (for 1985) security system underneath the throne I was sitting on and I must have been pushing it. Not that I admitted to such clumsiness.

No, in an almost inaudible whisper, I told the officer everything was fine and they didn't need to be bothering with us anymore.

They disappeared as quickly as they had come. Silence ensued. All you could see was the sea of totally-rattled jurors and all you could hear was the laughter of the agents down the hallway. No time like the present, so I told the jurors that the trial would last for four months and did anyone have a problem with that? More silence. I'm not sure, but I swear I could hear in the back the agent who had spoken with me re-enacting the scene to the Federal judge's staff. Finally, an elderly lady gingerly raised her hand. "Yes m'am?" asked I, dreading what was about to come. "Judge, I have a dentist's appointment two months from now," the lady said in a quavering voice, adding quickly - "but I could change it if you want."

To make a long story short, the arrival of the mounties had so freaked out the citizenry that we had a trial panel picked in two hours. We didn't have any witnesses set for a week, so we sent everyone home and spent the next few days in what was the first mediation I ever did.

At the end, we emerged with a settlement that became a national model for settling cases of this type at that time. And I discovered a calling in mediation.

Without my nervous knee, however, none of it would have happened.

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