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Encouraging Fairness from the Bench

Cathy E. Bennett*

During a recent lecture to the National Association of Women Judges Conference (NAWJ) in Minneapolis, I asked the judges in attendance what made them want to be judges. Responses included "wanted to mediate," "like observing," "mentored into it." They were not the same answers I hear when dealing with men who become judges. One woman, however, said that after twenty-five years as a criminal lawyer, "I really wanted to be the one who made the decisions, and I very much enjoy being the authority figure." An honest confession had been made: the power of being a judge is enjoyable.

For any judge, male or female, this sense of power can be exhilarating. Yet along with this sense of exhilaration comes some degree of discomfort. One woman judge indicated that the reference to power as opposed to authority made her uncomfortable. "I don't like to communicate in terms of power. I think I'm an authority. I'm comfortable with that. Power has a different connotation to me."

As more and more women move to the bench they often experience changes in their lives that make them feel people view them differently. Some of these differences (and I think men who are judges or who are married to judges would probably agree with my sentiment) occur when they don those honorable, annointed robes. In many instances, female judges encounter a lack of acceptance from their male peers and lawyers, and they run headlong into people who begin judging them.

Women are judged much more harshly than their male counterparts. More burdensome standards are put on women judges. There is a heavy "should" bag carried around by women judges.

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They hear things like, "There aren't very many women judges appointed, Julia, and unless you do things like they have been done around here in the past, there probably won't be any more women judges or as many women judges as we have now." And Lord knows there are so few women judges to begin with. But there is the burden—"If you don't do it my way, you're not doing it right."

Law school did a very, very bad thing to many judges in this country. It told them, and many bought it I might add, to think, *not* feel. Law school preached that thoughts are the "appropriate" way of dealing in the courtroom; it warned that feelings do not have any place in judicial proceedings. Male and female judges ought to rethink what they consider "appropriate" in their courtroom and inject a dose of sensitivity into the environment. Such an infusion would be a welcome addition to the sometime sterile atmosphere of a courtroom.

My thoughts concerning feelings and emotions have their roots in early American writing. I was reading the Constitution a couple of days ago, and it talks about the inalienable rights to life, liberty, and the pursuit of happiness. It seems that the folks who struggled over this document two hundred years ago realized that feelings were appropriate in the operation of the government. We must continue to remind ourselves that compassion, sensitivity, and intuition should not be stricken from the courtroom, despite the pressures derived from one's peers or the length of the docket.

When I started as a jury and trial consultant twelve years ago, I was hired to observe judges in trials. Lawyers would call me up, and I would go sit in the courtroom and watch a judge operate before it was our turn to go to trial. I would observe the judge's verbal, as well as nonverbal, communication style. Simple things like rocking in the chair for one judge might have meant, "Okay, this argument has been going on so long, you'll get one more minute and I'm going to cut you off." For other judges the nonverbal "about to cut you off" meant twirling around in the chair and putting up a barrier of an arm and a leg: the fence. That sort of looking over the shoulder like, "Okay, buddy, here it comes."

This work sparked my interest in the dynamics of the bench and how they affect the courtroom. One result of this interest has been a compilation of post-trial interviews with hundreds and hundreds of jurors. Both my observations and my research have led me to the conclusion that the judge continues to be the most powerful person in the courtroom.

Some judges may try to dismiss this label or minimize its importance. Some might like to soften the term by saying, "I'm

merely an authority figure doing my job, following the law. I'm trying to be fair . . . trying to be a mediator." Yet jurors take their cues nine times out of ten from the person on the bench. Any attorney knows if she gets into a match with the judge, the judge will win—especially when there is a jury in the box. The judge is going to win.

The lawyer who deals with a judge as a human being as opposed to a manipulator is a lawyer that is going to get further with a judge. This is the lawyer who brings in the other side's lawyer and says, "I want to talk with the judge." This is a lawyer who comes into a judge's chambers and says, "We are not communicating. You are getting the best of me. I'm scared of you right now. I feel like I'm trying to make my record and you are not letting me make it. Your Honor, what can we do because I don't want to do it out in front of the jury."

When a lawyer treats a judge as an equal, on a human to human level, a judge is more apt to be responsive. Women judges, moreover, are more responsive to such behavior because they have learned to react that way to people. I wish more men were raised to react that way. Listening, I think it is called. One female judge described the developing process between the judge and lawyer by saying: "In chambers, barriers break down. I'm a judge trying to do a job. He's a lawyer trying to do his job. If he has a problem, I want to deal with it. You can break down the barrier, I think, in a neutral setting, if the lawyer is not trying to thwart my authority."

When we play the games that the courtroom encourages, we are really distancing ourselves from truthful findings. When a lawyer pushes a judge to the point of thinking, "By God, I am going to show you who's in charge here," the players depart from the original script. Men and women find themselves getting away from who they were before they went to law school, before they became lawyers, before they became judges. Like actors, judges can get into heavy makeup, and suddenly the mask gets so thick, and the expectations so deep, that judges begin to believe in an unnatural role.

Judges can be more effective human beings if they do not deny their feelings. As much as we wish the law dealt with the emotional level of a case, by and large it does not. Laws seem written to discourage one's sensitivities. For a judge to remain in touch with emotionally charged issues, she must bring her own set of awareness and feelings into the courtroom. Unfortunately, even a client can discourage such interplay. One woman judge described how troublesome it can be to remain sensitive:

It appears that the emotions are put through a strainer, and the strainer is the procedures, the roles, and the rules of evidence. . . . The whole courtroom situation is set up to try to block those emotions. For instance, after a rape occurs there's a tremendous explosion of emotion. By the time the case comes to trial, the rape victim has put up so many psychological blocks to keep back her pain while testifying that you get a victim on the stand who looks nothing like you would think a rape victim would look.

Everyone in the courtroom, including the judge, has a perception of what occurred. The lawyers and their clients are present: in a criminal case the accused and the alleged victim, in a civil case the defendant and the plaintiff. When a jury files in, additional perceptions come into play. Out of these perceptions comes a feeling, and from that feeling flows either an action or reaction. Each person's perceptions, actions, and reactions contribute to the courtroom dynamics. The judge has the best vantage point in the courtroom. She can observe these dynamics better than anybody else. As a jury and trial consultant, I try to read the actions and reactions of the various participants. Judges must also be sensitive to these dynamics.

Naturally, forces outside the courtroom have an impact on my work. I was distressed to read and hear the reports of what our chief law enforcement officer recently said about the presumption of innocence. Given the foundations of our country's legal system, it is shocking to hear this man say if a person is a suspect, he probably did something wrong. Putting his perceptions aside, I would like to tell you what the research indicates about the presumption of innocence. The data I am going to present are the result of approximately fifty-five surveys where 400 to 450 people are interviewed per survey. In addition, persons in my company have interviewed several thousand jurors after trials and I have personally conducted about 1,000 post-trial interviews of jurors. The results of these interviews are also included in the following statements.

Persons interviewed tell us the following about presumption of innocence: in a typical criminal case (nonviolent breaking and entering—a television set or hub caps) if the law enforcement officer saw fit to apprehend someone and the government goes to the expense of prosecuting, sixty-five percent believe the person did it without hearing one word of evidence.

Now, what does that mean? That means these persons believe indictment equals guilt. It means the word of a law enforcement officer is much more credible to a juror than a lay witness. Outside the courtroom, jurors say they believe the word of a law

enforcement officer over that of a lay witness. If one of the parties does not take the stand in the courtroom, the same principle applies, even if his deposition is read in. He loses credibility with the jury—sixty-five percent are ready to believe the worst.

So far I have discussed jurors' reactions in cases where no one has been hurt. Property has been stolen, but people have remained unharmed. Now, let us add alleged violence: assault and battery, rape, attempted murder, and other cases where someone has been injured. As if in protest, our statistics jump up. Seventy to seventy-five, possibly eighty to eighty-five percent of the persons surveyed presume guilt.

Jurors walk in, take a look at who they believe is the defendant, and say, "Boy, that woman looks guilty. Whoa. I can tell by the look in her eyes." Many times they have chosen the lawyer, not the client, as the presumably guilty party. In surveying jurors post-trial in cases involving sexual molestation, the jurors walk in and say, "That looks like a guy that would diddle with kids." I do not care if he is good looking, groomed, and in a suit. "Saw it in his eye," they will say, "I can tell. He must have done it." No matter what the person looks like, when an accusation of being a child molestor is put on a person, the jury thinks he looks like one. We are talking seventy-five, possibly eighty-five percent of those surveyed.

Add publicity to a case and the picture becomes even grimmer. How many people, when they read Son of Sam was arrested or when the Hillside Strangler was arrested in Los Angeles, picked up their newspapers and said, "I presume this guy is innocent"? Jurors are not alone in their presumption of guilt.

In addition to jurors' perceptions of the judge and the accused, the full picture requires consideration of how jurors perceive themselves. First, let us consider the juror's vulnerabilities in the courtroom. When a judge asks someone to talk in front of strangers, she is confronted with the number one fear in America today: the fear of public speaking. Why is that? Any time someone gets up in front of a group of people they do not know, there is a fear of failure: fear of not measuring up. There is no one alive who has not been afraid she will be unable to say what she wants in a way that will be acceptable. The fear of rejection can be a powerful, negative force that can only be broken down by compassion and thoughtfulness. When I was introduced at the NAWJ conference, I sat there thinking, "Gee, what a nice introduction I am getting. Thank goodness someone is giving me a nice introduction. I really hope they like me." No matter how strong and pow-

erful any of us have become, in our own minds we still fear rejection.

So, what does that say about a juror's willingness to be honest and open in the courtroom? The research is in and no one has disputed it. One out of three jurors admitted during post-trial interviewing they intentionally lied during voir dire—intentionally.

Now some judges might say they don't believe jurors are just sitting up there trying to lie. In most cases, no, they are not sitting up there trying to lie. Some jurors realize if they say they have a dying grandmother at home, they could get excused for hardship. There are few people capable of that. By and large, the reason we don't get the honesty we would like is because jurors are afraid of public speaking. A judge asks, "Is there anything about this case that makes you feel this may not be right for you?" Jurors know if they say no a judge will pass on to the next juror. Who serves on juries in your typical federal case? Those who finally serve are typically the ones who did not open their mouths, the ones that hid in the group.

Jurors will cover up; sometimes they will not tell you the truth. This happens because jurors fear someone will discover they are not as good as they would like to be.

This fear of failure has been building since they received the notice to appear for jury selection. Many of them drive downtown to a courthouse they have never seen. As they drive around clutching their subpoena with its unfamiliar address, they are scared to death they will be late. Finally, they arrive at the jury room and are assigned a number.

Once they are herded into a courtroom filled with strangers, many are attracted to the most verbal in the group. Into this category fall the characters who have been on jury duty before. We all know the folks that have been on jury duty are the calm and collected ones that sit back with an easy smile and say, "Let me tell you how it is done around here." They start shepherding everybody around, telling them what to do, and giving out all kinds of "helpful," but often false, information. Then all of a sudden they are brought into the courtroom to sit in a group, a blob.

A judge or lawyer then begins to ask some of the most closed-ended, meaningless, useless questions. They say things like, "Ms. Smith, this is Tom Jenkins, and he's on trial for murder. Do you have any negative feelings about black people?" I live in Houston, Texas, about thirty miles from Pasadena, one of the homes of the Klan. Yet I have never heard a juror answer yes to that question when asked in that manner. Why would they answer that ques-

tion no, even if they know the honest answer is yes? Jurors are not idiots, and they know the right—the accepted—answer to that question is no.

We have found in our research that what someone does for a living is no longer relevant as far as their attitudes about issues. It is more important to ask people's attitudes about the issues and about feelings and biases they may have formed. The American Indian Movement trials, for example, flooded Minneapolis and the Dakotas with publicity. Russell Means and Dennis Banks, leaders of the American Indian Movement, were household words. Yet fifty-six percent of the people, when asked in the courtroom, "Have you heard anything about Russell Means or Dennis Banks?" said "no." It was impossible not to have heard about the case during that period in history when it was front-page media every day.

Jurors continue to answer no when they mean yes because the questions are phrased poorly. They bore the jurors to death and condition jurors to not be honest. One of my favorite non-questions is, "Will you put the burden of proof on the State?" Again, the juror knows the right answer is yes.

Post-trial, jurors ask me, "Ms. Bennett, what did she mean by 'burden of proof'? What did the judge mean by that?" But in the courtroom they rapidly learn when such a question is asked, the correct answer is yes. The jury becomes like the little hula dolls in the back of cars with the nodding heads.

Here are a few more questions I really love: "I trust from your silence you don't have any feelings about that issue?" Or, "Seeing no hands, I assume you don't have any reaction to what I just read to you or said to you." Another favorite is, "Can everybody here be fair and impartial?" Why not say, "If there's any reason why you can't be fair and impartial, come on up here. Show everybody how biased and partial and unfair you are. Leave all those other fair people back there in their seats with mouths closed. Come forward and tell us at the bench what you are." Rare is the juror who responds to such a question.

In the same category falls the question, "Does anyone have any strong feelings of such a nature that he would find it impossible to put those feelings aside and judge only the evidence given from the stand?" Let me describe a trial that happened eight or nine years ago. A woman named Susan Saxe was on trial in Boston, charged with killing a police officer while robbing a bank. At the time she was apprehended, public recognition of her name, according to our surveys, was higher than that of John Mitchell

when he went to trial in Washington, D.C. She had been in the Boston papers for six years.

We were in the third day of jury selection, and the judge was doing all the questioning. Juror after juror said they could be fair, they did not have any opinions, and they did not have any biases. Nancy Gertner, who is a marvelous lawyer, was in her first murder trial. I said, "Okay, Nancy, you have got to stand up and make the record again." "Your Honor, I request the right to ask this juror some questions," she said, "because your questions have not reached the bias and prejudice of this juror." Finally, the judge became irritated and said, "Go ahead. One question."

Nancy asked one open-ended question. "Ms. Smith, it would be highly unusual to have lived in Boston as many years as you have lived here and not heard something about Susan Saxe in the last six years, especially if you have a television or even occasionally read the newspapers. So, it's okay if you have heard something." The juror, who had been on the stand telling the judge she had not heard anything, said, "Well, Ms. Gertner, I really haven't heard anything about this case other than the fact she went in the bank and killed that police officer. That was just terrible, wasn't it?"

The juror in Susan Saxe's trial is one example of what I see frequently in court. I am generally in courtrooms three weeks out of four. I make my living observing jurors. I guarantee I will see—or have already seen—more jury trials than most trial lawyers will ever see because I only go to court when juries are being questioned. I see, almost on a daily basis, jurors who do not give information to poorly phrased questions.

Jurors' actions are similar to normal human behavior. If someone is asked a leading question, and he wants to please the interrogator, he will give an answer he thinks they want. If he does not want to please the interrogator, he will do something else in response to the question. Most jurors want to please the judge. And they want to please the lawyers as well. More importantly, jurors want to take care of their own fears and uncomfortable feelings and their own integrity. They want to be seen as someone who is in control. Unless questions are asked in a warm, compassionate, understanding way, jurors will not be open and honest in the courtroom, not because the judge does not want them to be, but because they do not know how.

The courtroom is not the jurors' environment. It is the environment of judges, lawyers, and jury consultants. Most jurors have not been called upon to make a public speech since high

school. Most of them hated it then, and they do not like it any better when they are asked to talk about sensitive issues in front of a group of strangers. Unless an environment has been assembled that encourages openness, jurors will grab the safest lifeline they know—conformity. It is up to the bench to distinguish her court and say, “The only good juror is the open and honest one. It is okay if you have feelings and prejudices and biases. We all do. Everybody has something they are not comfortable with. So it is okay to communicate in my court.”

Communication is something that must be practiced with the intensity that an effective pianist or dancer or artist puts into his craft. It is a skill everyone tries to master with varying degrees of success. Unfortunately, if one forgets to practice being an effective communicator, she becomes clumsy and less effective.

Numerous avenues are open for judges to practice their communication skills. Many have friends or acquaintances in fields involving interviewing, communication, or psychology, who could offer their talents. Judges can ask someone to observe what they are doing from the bench: how they ask questions or how they communicate nonverbally. There is no need for a judge to become a casualty of the bench because she allows others' expectations to mold her positions. Judges can also look to peers and their own organizations for support and encouragement.

I had an unsettling experience that demonstrates the communication problems which exist in a courtroom. In a recent trial, a judge sat back in his chair and looked up at the ceiling when our client was on the stand. Until then he had been listening and watching observantly. The jurors were more busy looking at the judge's nonverbal reaction to the client than listening to the client. They were intrigued with the judge's reaction. I even saw a couple of jurors nudge each other, indicating, “Hey, the judge doesn't buy this.”

I encouraged the lawyer to make a record. The lawyer agreed and obtained permission to approach the bench. “Your Honor, your nonverbal language is implying to the jury that you don't believe my client. Your back is to him. You are looking at the ceiling. You have a grimace on your face.” The judge's response was that he had something in his eye. His actions had been misread. The judge was not turning his back on our client. He was not looking at the ceiling to be offensive; he was doing it because his eye was bothering him and he was trying to ease his discomfort.

When the lawyer requested he say something to the jury, the

judge did the right thing. He said, "I have something in my eye. If any of you assumed I was not paying attention or listening to what has been going on here, I have been, and I apologize if I was not communicating clearly."

In addition to increased sensitivity to the courtroom environment, I suggest judges allow lawyers to conduct voir dire. I am a firm believer in a lawyer conducting voir dire for two reasons. One, it gives her less to complain about because she is able to voir dire her own jury panels. More importantly, she gets more information because there is less social distance between the jurors and the lawyer, and the end result is a fairer trial.

From interviewing judges, talking with lawyers, and doing seminars, I have found one reason judges cut lawyers off during voir dire is that lawyers bore judges to death trying to manipulate the jury into liking them, as opposed to asking questions that require the juror to talk. I suggest judges tell lawyers to come up with ten questions that are open-ended and allow them to ask those questions. When lawyers ask good, open-ended questions, even federal judges that have been on the bench for decades say, although they initially resisted such questions, they now find the voir dire interesting. Why? It is because jurors are often more interesting than people who have been brainwashed by law school.

Lawyers want to conduct voir dire because it is an opportunity to develop a relationship with the jurors. One judge recently commented that the use of voir dire for this purpose becomes the primary aim, and only obviously prejudiced jurors are weeded out. Judges who request lawyers voir dire with open-ended questions will meet both objectives. An attorney who asks questions that require jurors to talk and then listens attentively will develop a good rapport with jurors. The open-ended questions will also elicit straightforward answers which reveal juror prejudices.

A judge can, however, ask jurors questions that will gauge more accurately their appropriateness for a particular jury. The examples that follow cover a wide range of scenarios that confront judges daily.

Burden of proof. "When someone is brought to trial by the government, be it state or federal government, many jurors believe she must have done something or we wouldn't be here: many believe the government wouldn't be spending all this money bringing someone to trial if she were innocent. Yet our law says that you should presume someone to be innocent. What that means is that you should believe they are innocent.

"I would like to ask you, Ms. Jones, what do you think about

that? When you came in here and you heard the indictment read, what happened in terms of your thinking? I want you to be honest with me. Tell me whether or not you could really believe this person is innocent, at this point in time, given the fact that the government has spent all this energy and time to bring someone to trial. Please be honest because in my courtroom the only good juror is the open and honest one.”

Sale of Drugs. “It would be unusual in America to find any juror who hasn’t known someone, read about someone, or heard of someone who has had a bad experience with drugs. Which means that many people have strong feelings—uncomfortable feelings—regarding drugs. Ms. Smith, Mr. Jones is on trial for importing twenty tons of marijuana. What do you think about persons charged with the importation of marijuana? It’s been in the media a lot. There’s been a lot of attention paid to this subject. Please be honest. What do you think? What do you feel? What are your perceptions? Give me an example.”

Child molestation. “It would be hard, if you watch television or read the newspaper, not to be aware of the tremendous amount of publicity regarding children who have been abused and molested. We all know this to be a tremendous problem. Given all this publicity, and that Johnny Jones stands here accused by the state of molesting a child, I’m afraid that Johnny Jones won’t get a fair trial here. Tell me, please, what your thoughts are.”

While each of these examples shows one way to elicit a juror’s true feelings, all of this must be filtered through a judge’s or lawyer’s own way of asking questions. Perhaps the most difficult subject to broach with prospective jurors is racial bias. Everyone has racial biases of one kind or another—even those of us who consider ourselves to be liberal, aware, and sensitive. Whether someone is white, Black, Hispanic, Native American, or Asian, she has biases.

To delve into this delicate area, self-disclosure often helps people be more honest. A judge does not have to tell jurors what her biases are. It is sufficient to say, “I have biases, too. I don’t like them. They pop up in ways that make me feel uncomfortable, and I am trying to deal with them. Nevertheless I am aware of having biases.”

Here is an opener to assist the jurors to talk about the subject. “Now, Ms. Smith, let me ask you a question. Have you ever been in a situation where you felt someone prejudged you? It could have been in high school, or it could have been in junior

high. Did someone jump to conclusions about you? It could be in your marriage or at work. Have you felt prejudged?"

A juror says, "No, that has never happened to me." That tells me a lot more is going on there and the judge is going to have to work harder to get them to talk. There is not anyone that has lived on this earth that has not been prejudged about something.

In other words, a judge (or lawyer) must first get jurors talking about racism and prejudice and bias as they relate to other people. Then she can ask, "And how did you react? What do you think about that person behaving in that way?" The examples a juror gives can tell the judge volumes about the juror's biases and prejudices.

Once a juror has opened up about her biases, a judge or lawyer can hone in on her specific case: "We really need to just talk about this. I'm concerned because the person who is sitting in that chair is a Native American. She may not get as fair a trial from some people as she might if she were white. Do you think some people might give this woman a fairer trial if she were white? Tell me about it." The goal of asking penetrating open-ended questions is reached when a judge or lawyer hears herself saying, "Tell me about it. Give me some examples. How does it make you feel? What do you think about that?"

Open-ended questions require more than a "yes" or "no" answer. Here is an example of something I have seen trial lawyers do. I will pass them a question that says, "What are your feelings about the credibility of a law enforcement officer?" It will come back, "Do you have any feelings about the credibility of law enforcement officers?" That is not an open-ended question, just because the word "feelings" is in there. "No, I don't have any feelings about that," is a juror's likeliest response.

Over the years I have worked on a number of death penalty cases. I found when judges say, "Do you have any feelings about the death penalty?" with the exception of those who are opposed to it, most people say they do not have any feelings about the subject. Yet our research shows eighty to ninety percent of folks in this country favor the death penalty. Unless the question is asked, "What are your feelings about the death penalty?" a judge is not going to get jurors to self-disclose.

No juror wants to freely admit she is biased or prejudiced. She hopes the serious eyes in the rigid face of the judge (male or female) will not focus for long on her uneasy countenance. She might be forced to embarrass herself in front of her peers, the lawyers, and the judge. Only when a judge sets the ground rules in

the courtroom by being honest and compassionate will she be successful in any judge's ultimate endeavor: the fairest trial possible for the all parties.

