## Praise for *Don't Eat the Bruises*

"*Don't Eat the Bruises* offers trial attorneys the fruits of Keith's spectacular career. Full of great analogies and helpful tips, this tasty treat will ensure that you remove all the spoiled and bruised parts of your next case—leaving you with a case that is fresh, crisp, and deliciously effective."

—Brian Panish, member of the Inner Circle of Advocates

"He got seven-figure verdicts, then eight-figure verdicts. They just keep coming, and I have had a front row seat for twenty years. He has a secret sauce that he has bottled just for us with this book. Try it. You'll like it."

—John Morgan, founder of Morgan & Morgan

"Keith is a lawyer who can try any case, big or small. He got on my radar screen by being cutting edge. He's smarter than the average bear."

—Don Keenan, author of *Reptile*

"Keith Mitnik's *Don't Eat the Bruises* is destined to be a masterwork in the pantheon of trial practice literature. It's a must-read, must-use, must-reread manual on the righteous fight!"

—Russ Herman, past president of the American Association for Justice and past president of the Roscoe Pound Foundation

"I am a warrior—a trial lawyer. My arena is the courtroom. This book is a must-read for anyone who aspires to be a real trial lawyer."

—Geoffrey Fieger, legal defense for Dr. Jack Kevorkian, star of the Fox series *Power of Attorney*, winner of the largest single-injury verdict in the country

"I clerked for Keith while I was in law school. Listening to him lit a fire in me that will never be extinguished. Reading this book is the greatest gift young lawyers will ever give themselves."

—Alex Brown, attorney at Morgan & Morgan

"Warning—reading this book will make you want to try more cases! Mitnik has shoehorned decades of experience into deceptively simple strategies for any personal injury case—big or small. This book is for any lawyer ready to turn down the insurance company's next low-ball settlement offer and seek justice in a courtroom."

—Tim Semelroth, past president of the Iowa Association for Justice and president-elect of the Iowa chapter of the American Board of Trial Advocates

"Keith Mitnik is an 'in the courtroom' trial lawyer. He is encouraging us all to realize we can be the same. This is going to be my firm's new handbook!"

—Paul Byrd, past president of the Arkansas Trial Lawyers Association

"*Don't Eat The Bruises* is the A-to-Z guide on selecting a jury and trying a case. After reading this book, I incorporated Keith's strategies into my practice and I will never pick a jury the same way again."

—Jon Peeler, 2014–2015 president of the Tennessee Association for Justice

"Keith Mitnik's book is a must-read for any aspiring personal injury attorney and for more experienced trial lawyers. Mitnik is the finest civil trial lawyer to present cases to the jury in trials over which I have presided."

—Judge Alan Dickey, retired circuit judge of the 18th Circuit of Florida

"Keith lives in courtrooms. His ideas on jury selection, opening, and burden of proof are original, practical, and usable in your next trial."

—John Edwards, US senator, presidential candidate, Democratic vice-presidential nominee, trial lawyer

"Keith's ideas are fresh, exciting, and powerful. This is a truly exceptional book for trial lawyers of all skill levels. People will be talking about this book for a long time."

—Lisa Blue, past president of the American Association for Justice

"I have known Keith Mitnik for one thing—going to trial. Keith has condensed his years of experience into a readable and informative book that will benefit every trial lawyer."

—Ronald E. Johnson, Jr., president of the Kentucky Justice Association

"Unlike approaches that require attorneys to cram evidence into a one-size-fits-all template, Mr. Mitnik's framework can be integrated with any case's nuances. This innovative approach will change the way you try cases."

—Brad Bradshaw, Ph.D., jury consultant and author of *The Science of Persuasion: A Litigator's Guide to Juror Decision-Making*

"*Don't Eat the Bruises* is the best book on trial advocacy you will read this year. I guarantee it will wash the bad taste of opposing counsel's shenanigans right out of your mouth!"

—Charles H. Rose, III, professor of excellence in trial advocacy, director of the Center for Excellence in Trial Advocacy, Stetson University School of Law

"Keith is a killer, and his book is a compendium of killer concepts. There are brand-new ideas borne of painstaking devotion and remakes of tried and true techniques that shine as new. For years I've sought and used his guidance at trial, now you can too."

—Scott P. Schlesinger

"Keith Mitnik is the kind of down-home trial lawyer who comes along once in a lifetime. He doesn't just try cases, he knows how to teach trial lawyers to win."

—Bob Kelley, member of the American Board of Trial Advocates, and listed in *Best Lawyers in America*

"I was lucky enough to have Keith teach me how to become a lawyer right out of law school. The lessons in this book armed me with the confidence to try any case. His methods allowed me to become one of the youngest board-certified civil trial lawyers in the history of Florida."

—Mike Morgan, attorney for Morgan & Morgan

"After seven years of practicing law without Keith's concepts, I began learning and implementing them. Shortly thereafter, I obtained a $2.9 million verdict that would not have been possible without Keith's teachings."

—Alan Stagmeier, attorney for Morgan & Morgan

"As a jury consultant who works all over the country with some of the best lawyers in the business, I can tell you Keith Mitnik is one of those rare talents that comes along every decade or so. If Mitnik wrote it, you would be wise to read it."

—Dr. David Illig, litigation consult and witness communication specialist, Portland, Oregon

"I was fortunate to learn Keith's techniques right out of law school. I went from a 'baby lawyer' to a real threat. I've tried eighteen cases to verdict in four years and only lost one. I credit much of my success to Keith's systems. The best part is it works on all cases, not just the big ones."

—Matt Morgan, attorney for Morgan & Morgan

# Don't Eat the Bruises

## *How to Foil Their Plans to Spoil Your Case*

Keith Mitnik


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ISBN: 978-1-941007-40-2

Library of Congress Control Number: 2015955349



Managing Editor: Tina Ricks

Production Editor: Travis Kremer

Interior design: Laura Lind Design

Jacket design: Miroslava Sobot

Copyeditor: Patricia Esposito

Proofreader: Erin E. Davis

Indexer: Lucie Haskins

Printed and bound in the United States of America.

This book is printed on acid-free paper.

*To my wife, Gwen, who spends endless hours brainstorming with me and sharing her uncanny insights. Her burning desire for me to stand up against injustice adds fuel to my relentless fire. She is truly my muse.*

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# Acknowledgements

In addition to thanking my wife, Gwen, for knowing where commas are supposed to go and for providing me so many gems during preparation for trials that I could fill a treasure chest with them, I want to thank a few others who have added greatly to the development of this book, the processes contained in it, and the opportunity to use them.

To John Morgan, a one-of-a-kind visionary who has changed the way injury law firms are built and are able to thrive in spite of powers that strive to make it so no one but the wealthy have access to the courts. His relentless passion to stay two steps ahead of heavy-handed insurance companies and big business bullies has blazed a trail into the twenty-first century, leading the way to meeting places where those who have been wronged can continue to find those of us who have been called to stand up for them. The coming together of what he keeps designing universally and what I keep designing in courtrooms works like alchemy—it has made all the difference for me, a truly golden opportunity.

To Ultima Morgan, John's wife and the other Morgan of Morgan & Morgan—as John says, she is the smart one. She is a voice of reason, a guiding light, and John's closest confidant. She read the original draft of this book and added to it meaningfully.

To Scott Weinstein, who not only heads our mass torts/class action department, but keeps everything running smoothly as the global managing partner of Morgan & Morgan. He made the time in his ridiculously frantic schedule to proofread my manuscript and provided his unique insights.

To my partner in the tobacco wars, Greg Prysock, who not only manages our Jacksonville office, but also manages the day-to-day operations of our tobacco division. He and I have walked shoulder to shoulder into trial together to face down the most formidable litigation machine in history. Together, we have beaten them, sometimes twice on the same case when it came back on appeal because they didn't like the way we beat them the first time around.

To my partner, Zander Clem, who has tried so many cases with me that resulted in seven- and eight-figure verdicts for clients who desperately needed that kind of justice, that it would sound like bragging if I were to list them all. As a past president of the Florida Justice Association, he is a true believer.

To other partners of mine who have spent much time in trials with me achieving extraordinary results for our clients, due in large part to their remarkable talents, such as: Nick Panagakis, Sean Shaughnessy, Greg Francis, Clay Townsend, John Dill, Bryan Smith, Brian Vigness, Louis Defreitas, Donny Owens, Jason Miller, Grant Kuvin, Russ Artille, David Henry, and many others.

To Mike and Matt Morgan, John's sons, who started the youth movement in our law firm that has added an infusion of talent and energy that is striking—the sky is the limit for this group. I call them the "Young Guns." It started with the original members—the Morgan boys, Alan Stagmeier, Alex Brown, Drew Felix, Tyler Everett, and Rick Bates—and is growing, not just in numbers, but in skills and hunger. We meet every month and it is one of my greatest joys—they are the future.

To my mentors: John Robertson, Hubert Williams, and later, Fred Peed. I cannot quantitate the value of what I learned from these giants of the central Florida trial bar. It was their passing of the torch to me that moves me to want so badly to pass that same torch on to others.

# Publisher's Note

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

The cases described in this book are composites, and the names and other identifying details of participants, litigants, witnesses, and counsel (other than the author of this book) have been fictionalized except where otherwise expressly stated.

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# Introduction

## Why Listen to Me?

When I go to a seminar, the first question I ask myself is: why should I listen to this person? When I give seminars, the answer to that question is this: I am fortunate to be the senior trial counsel for the largest personal injury law firm in America, Morgan & Morgan. We have departments to handle every aspect of contingency fee plaintiffs' cases, general personal injury, medical malpractice, product liability, mass torts, commercial contingency, and so on. My job is to try cases of all kinds for the firm. When cases do not settle, I join forces at trial with the lawyers who handled the case from the beginning. This means I am in trial all the time, usually every month and sometimes two or three times a month, on all kinds of cases. This variety of experience gives me a unique perspective as to what tactics are currently in vogue with defense lawyers. The defense playbook is surprisingly consistent from lawyer to lawyer, and they all seem to use the same strategies du jour. By trying so many cases, I get a front row seat to what the defense bar is up to at any given time. Trying so many cases informs me so that I can develop countermeasures for their gimmicks.

More importantly, trying so many cases gives me abundant opportunities to try out new strategies aimed at maximizing the likelihood of getting just results for our clients. I am an inventor and strategist at heart. When I am not in trial, much of my time is spent working on new ideas and refining existing ones. When I had my own small, boutique firm, three trials a year was the norm. Since joining John Morgan's firm as a partner and senior trial counsel seventeen years ago, I go to trial more times in a month or two than I used to in a whole year. That allows me to promptly try out new ideas, figure out which are keepers, fine tune them, and discard the ones that seemed better on the drawing board than they proved to be in actuality. In the old days, many months would often go by before I'd get the chance to try out a new concept. I had to wait so long to field-test any refinements that I would lose momentum. Since accepting John's offer to join him and oversee trials, I have had the ability to generate feedback very quickly. The result is a dynamic process that has allowed me to amass an extensive array of strategies that effectively thwart defense efforts to derail justice. This book contains the keepers I've compiled over many years of pursuing fair results for people who deserve nothing less.

Part of my job also involves teaching. I conduct regular in-house seminars, both for highly experienced lawyers looking for the latest developments and for what we call the Young Guns, a group of exciting, extremely talented trial lawyers new to our firm and early in their careers. I also give seminars outside of the firm, teaching these methods to other plaintiffs' lawyers around the state of Florida and the country. Feedback, from having done this labor of love for a long time now, confirms these systems really work and you can easily plug them into any case. Time and again I get emails or phone calls from lawyers who report how they implemented these strategies at a recent trial with great results and how excited they are to use them again. These lawyers cover the whole spectrum of experience levels.

For less experienced trial lawyers, I have a special place in my heart. When starting out, I was blessed with a remarkable mentor. I feel it is part of my calling to pass the torch of knowledge he gave me on to others, just as he took the time to pass it on to me.

I know what it meant when my mentor gave me the foundation for success, which I could then mold and adapt to my own personality and my own particular gifts so that it eventually became something all my own. My learning process is much like that of professional musicians who talk about their musical influences: they craft their own music and perform their own concerts, but recognize traces of others who touched them in a profound way early in their development.

For highly experienced lawyers, my goal is to suggest new approaches that can be grafted onto the branches of those oak trees that have already grown into something majestic.

Any way you slice it, this stuff works. Using these principles, I have averaged at least two verdicts per year of $1 million or more over the last ten years, well over twenty verdicts total, seven of which were eight-figures in the last five years alone. More importantly, I have tried trials involving car crashes, together with lawyers in our firm, where the injuries were herniated discs or similar harms, helping jurors see past defense shenanigans and return just verdicts that were far greater than the unfair amounts offered in settlement by insurance companies trying to shortchange our clients. Such cases, which do not have catastrophic injuries, are often the most difficult in which to obtain full justice. The methods laid out in this book are designed to shine in that environment, where it is otherwise easy for the defense to hide truth in the shadows they purposely cast.

## What's in It for You?

Those who are already top-notch trial lawyers may ask, "What's in this for me? I have my own way of trying cases that is working just fine." Those who do not try a lot of cases may ask, "Why would I bother reading a book about trials? I don't go to trial very often. This is for lawyers who spend significant time in front of juries."

I'll answer the second question first by suggesting that this book may change the fact that you do not try many cases. Increased confidence and comfort about going to trial will likely lead to more trials.

The satisfaction of trying a case, and trying it well, feeds confidence, igniting a desire to do it again soon, and then again.

Let me share with you the experience our firm had with frequency of trials. John Morgan is a visionary who has developed systems for running a PI firm like no other. I oversee trials; he oversees everything else. John Morgan and I discussed motivating our lawyers to try more cases. Some tried a lot of cases, others few. John came up with the idea that PI lawyers who did not try three trials a year would have their bonuses significantly reduced. The idea was to create a firm that tried more cases than any other. He did not want his firm to ever become a settlement clearing house.

Not that settlements are a bad thing. In many cases a settlement is the best thing for the client, as long as the settlement is fair. John was convinced that settlement values would go up for our firm's clients if the insurance companies knew we were trying cases all the time. He is always tracking trends, and average settlement values are no exception. Once the three-trial rule went into effect, our average settlement value nearly doubled. It worked!

Something else happened: lawyers who otherwise would have resisted going to trial were now chomping at the bit to go. Rather than trying the minimum three trials a year, lawyers were keeping a tally and competing to try more than others. One lawyer would say, "I've tried three cases and it is only July"; another would say, "That's nothing. I've already tried five." People were feeling the pride of being real trial lawyers and the satisfaction of pursuing justice in front of jurors, instead of the same old insurance adjusters. It was fulfilling. The more they went to trial, the more their confidence soared. I gave the initial booster shot by teaching the systems contained in this book. After that, the desire to go to trial just took off.

Even for cases that do not settle, these techniques have significant value. Defense lawyers and insurance companies know the difference between cases that are being prepared for trial and cases that are being prepared for settlement. Just as they offer more for cases that go to trial, they offer more for cases that are worked up as if they were going to trial. Following these principles will mark a case, in the eyes of the other side, as one that ought to be taken seriously.

As for the accomplished trial lawyer, who could just as easily be the one writing a book or teaching a class, what does this book have to offer you? I promise, there are treasures in it for you. Many of those who attend my seminars around the country are lawyers who already have impressive trial résumés. They take components of the overall system or particular strategies and inject them into the body of their own work. I hear back from these lawyers all the time about how the strategies worked like a shot of adrenaline. Outstanding trial lawyers regularly report that they "love this stuff" and remark on how well the strategies work for them.

The systems in this book were designed to give a framework that can be applied across the board to any kind of case and any level of experience. I often say, "These are systems that simply work." It is not just a slogan—it is the truth. The systems are not hard to apply, but, boy, do they work. They are not beneath the trial pro who is already highly skilled in the courtroom, but just the opposite. These strategies are designed to provide a potent accompaniment to any lawyer's existing repertoire. Nor does implementation present a daunting task for those less experienced; they are designed to be user-friendly. These systems simply work.

## What Does "Don't Eat the Bruises" Mean?

I was pacing in my office, preparing for trial, and eating an apple that had a couple of bruises on it. I nibbled all around the bruises, eating everything but the bad parts. When I was done, all that remained were the bruises. Those mushy, brown leftovers reminded me of how defendants try to spoil the fruits of our cases by exploiting bias, taking things out of context, and overemphasizing imperfections at trial. The act of making careful adjustments to avoid rotten parts so I could savor all that was good caught my attention. I realized it painted a vivid picture of something near and dear to my heart.

For years I have been developing, fine-tuning, and teaching a system designed to preempt the defense from pulling off injustices.

This book is a product of a lifetime spent in courtrooms, coming up with battle-tested strategies. I very much want to share this body of work with those who struggle against opposing forces that have become less and less interested in the truth.

The global goal of this system is to gut the defense's case while trying yours. Any time we rebut a defendant's evidence, we run the risk of conceding that the case is about their issues. On the other hand, to ignore the defense arguments means to appear to have no answers to them. The strategies in this book will allow you to dismantle the defendant's case from within the framework and themes of your case. You do not have to retreat, nor let them define the issues, to expose fatal flaws in their case.

When I was growing up, there were three great NBA teams: the Showtime Lakers, who played little defense but won with dazzling offense by simply outscoring opponents; the Bad Boy Pistons, who weren't pretty to watch but won by playing brutal defense; and then the Michael Jordan-led Bulls, who artfully scored at will while frustrating other teams to tears with a smothering defense built around catlike quickness and seamless precision that looked more like an extension of the offense than a separate phase of the contest. They all won titles, but Chicago's Bulls capture the essence of what I am about to lay out for you.

Sports analogies may sound cliché, but they actually tell us much about how jurors will react at trial. Everyone wants to have a team to root for or against. This desire goes back to our tribal beginnings when it was *us* against *them* for survival. In modern times, sports and politics prove that tribal mentality is alive and well. Trials, in particular, pique that pick-a-side penchant.

People align themselves with teams for a variety of reasons. Preexisting connections or familiarity is one of the biggest reasons. If a team is from your hometown or your alma mater, you cheer them on. If a team is a rival, you hope they lose no matter whom they're playing.

Jury selection is largely about dealing with this aspect of fan dynamics. Someone who has been sued before is likely to relate to and pull for the defense. Those with strong feelings against personal injury suits are likely to see your side as villains to root against.

Obviously, those who come to the stadium already wearing your opponent's colors have to go. The first section of this book, dedicated to voir dire, provides systems to identify these opponents and make sure they don't end up keeping score like Soviet ice-skating judges in the Olympics who wouldn't give Americans a good score even if the skaters cut diamonds on the ice.

Once you have eliminated the prospective jurors who came to court already in the defendant's corner, you are left with people who are temporarily teamless. I say temporarily because human nature is such that these jurors will not remain neutral for long.

In the sports world, the phenomenon of settling on an interim team that a person would otherwise have no interest in is called "adopting a team." If there is no one to pull for, the contest is far less interesting. Pleasure comes from having an emotional stake in the outcome. Having a stake makes us feel like we are part of the process and makes it matter.

This is why office pools are so popular. Most matchups in the NCAA basketball tournament involve teams the audience has no relationship with. Yet, we call it March Madness because of its mass appeal, driven in large part by people adopting teams in brackets. Cinderella teams also boost interest. They come out of nowhere and give universal hope to all underdogs.

The principles behind people's attraction to underdogs apply in courtrooms as well. Remember all those times the defense counsel made a big production about the horrible disadvantage they were at because we, as prosecutors, got to go first? They were not just wasting time. Rather, they were trying to cast themselves as underdogs so jurors would be drawn toward them.

Another factor that can influence temporary team selection is the appeal of mascots and attractive uniforms. It sounds trivial, but it's true. Think of the Oregon Ducks with their alluring array of getups or FSU's horse and flaming spear. Now, think of that sinking feeling you get when the defendant in a medical malpractice case looks like he is straight out of central casting. Your gut is telling you team colors and mascots matter.

The revelation that one of the teams plays dirty can yet again influence people's choices. That is why during opening we vibrate

with anticipation to tell the jury that the defendant was caught not telling the truth in his records or in his deposition. The underlying significance of such a revelation is that most Americans don't like dirty players. The more you can vilify the defense in opening, the more likely jurors will pull for them to lose. More importantly, you must make damn sure the defense cannot turn your side into the bad guys or gals. Everyone has heard the old adage "cheaters never prosper."

Much of what will be covered in the chapters ahead was born out of an acute awareness of these team-oriented dynamics, particularly the first two foundational sections that deal with voir dire and opening statement, respectively. After that, the rest will fall into place.

Juror studies tell us that minds are made up very early in the case. Given our tribal nature, this should not surprise us. No one wants to sit in an uncomfortable seat at the stadium to watch a game when you could care less about the outcome. People will go through a subliminal process of picking a favorite team and will usually do so close in time to kickoff or tipoff. Doing so makes people feel like part of the event, making it worthwhile to suffer through the discomfort of public seating and to justify the sacrifice of time watching others go at it.

You can bet those jurors sitting in the uncomfortable bleachers of your arena will likewise pick a side to root for or against early on. The systems that follow are designed so you don't end up getting booed or facing a cheering section for the defense, but rather so that it becomes clear quickly that your side is the one worthy of support.

To put yourself in that position, you can't hide in the comfortable blind spots created by the good parts of your case. You have to be willing to stare at the scary parts too, things that could result in a loss. You have to turn the case around in your mind's eye, seeing it as a whole, blemishes and all. Then you must prepare in such a way that the defense is left wondering—where did the bruises go? The ones they were planning to force-feed you.

## Parts of This Book

Trials fall into four big parts: voir dire, opening, evidence, and closing. This book tracks these four sections.

- **Part I** is about using voir dire to cut out the worst bruise of all, jury bias, so you can have a truly fair trial. You will learn to accomplish this in a lightning-quick way that consistently works and is easy to understand.
- **Part II** is about using opening for more than just telling your client's story. It is about systematically taking away the defense's favorite facts in every case, without making excuses or feeling like you are defining the case the defense's way. You'll do this by putting everything in a context that makes it clear your client is right and the defense is wrong, dead wrong. The defense's case is based on taking things out of context. You will learn to disarm their case while laying down a rock-solid framework to construct your case around. You will do this by using just-right, handpicked, powerful words and recognizable phrases, and by asking winning question to ensure you come out of opening ahead and have the means to stay ahead through the end.
- **Part III** is about the evidence phase, where you will see how to carry the momentum of opening through direct examination and cross-examination, while holding the defense at bay.
- **Part IV** is about using closing argument to bear fruit to the end. It is about ways to pass the torch to good jurors to continue your work in deliberations. It is about ways to fully expose the defense's relentless efforts to take things out of context. It is about ways to get jurors to understand the righteousness of damages as an American remedy, the consequence we have chosen as a civilized nation based on the concept of justice. It is not about how much someone is going to get; it is about how much was taken and what is the fair value of what was lost. It is about ways to tap into

the full power of analogies after understanding the scientific importance they play in how we communicate.

- **Part V,** the final section, is about a brand-new way to use the civil burden of proof. I call this a bonus section, because it doesn't fit in any one part, but spans the whole trial. I included it in its own section because it is that important. I have come up with a lot of good ideas in my thirty-plus years of trying civil cases at an extraordinary pace, and this is one of the best, I promise.

## You Don't Have to Be in Trial to Benefit

While this book sounds like it is all about trials, this system will end up changing the way you work up your cases. You'll find yourself viewing bruises differently during discovery. You'll start to relish taking them away by using these same strategies earlier in the process. Your settlement values will go up when the defense sees you systematically cutting away those parts of your case they were so excited about—or at least cutting them down in size.

Your cases will never be perfect, but you can do something about defenses built around unfairly exploiting the imperfections.

## Paring It Down

The gist of this book is to find systematic solutions to problems that exist, in one form or another, in every case. Like bruises on otherwise good apples, these blemishes can end up festering and ruining the whole case if we don't deal with them deftly. What follows are cutting-edge ways to rid your cases of unwanted soft spots and make sure what you serve up is firm and ripe for justice. Hence the title of the book, *Don't Eat the Bruises*.

# PART I

## *Jury Selection: Cutting Out Bias*

# 1

# Getting Rid of Bias Lightning-Quick

*If you want a fair contest, don't ask a biased person to judge the outcome. Eliminating biased decision-makers can be easier said than done, until now.*

## What Makes This System Different?

One of the hottest topics now in seminars and books is voir dire. Voir dire is the most important and one of the most difficult parts of trial. If you end up with jurors whose lips curl in disdain when they hear what kind of case you're bringing, you're in trouble. If you end up with jurors who come to court with views that align with the defense, you're in trouble. If you end up with jurors who think your case is just a money grab, you're in trouble. The problem is too many people have just such feelings and either don't want to admit it or, at least, don't want to admit those feelings will affect their impartiality. As a result, those of us who represent the injured are focused on addressing the challenges of seating a fair

and impartial jury in new and better ways. Collective wisdom is where the answers lie.

I have read many books on voir dire and have come away impressed with the ideas others have developed. You may be asking yourself: why bother reading another book that covers voir dire? What does this book bring to the table that is unique and worthwhile?

First of all, the systems in this book go far beyond voir dire. They present a framework for the entire case and new ways to take strength away from the defense. But the voir dire part itself is unlike other first-rate resources out there because of the speed in which the approaches I explain allow you to cut out bias. Many other approaches are extraordinarily effective if you have time. They often provide you with ways to really get to know your jurors (which is of huge importance), ways to get basic concepts favorable to your case introduced in voir dire, and good ways to tackle bias.

My system was born out of the frustrating fires of situations where bias ran rampant and time ran short. The more I can get to know potential jurors and see them interact, the better. However, if I have the miserable choice between getting to know the jurors better or getting rid of bias, I choose bias elimination. Some judges simply will not give you the luxury of having enough time to do full justice to both.

I have come up with a system that allows you to identify bias and establish grounds for cause very quickly. Despite the speed of this process, you are still assured enough time to gather essential information about the panelists so you are not flying blind. Sometimes you learn through further questioning that someone who gave answers that would allow you to strike them for cause is actually someone you want to keep for other reasons. When that happens, you keep your challenge in your pocket. Just because you created a record of bias against your client doesn't mean you have to exercise your challenge.

Getting rid of bias quickly protects you from seating jurors who are partial to the defense, particularly in those frequent situations where you have a panel smack full of biased jurors and don't have enough peremptory challenges to cover them all. With the ideas

presented here, you will have at least enough time left to learn key things about people on your panel, such as who are the leaders.

If you have a judge who respects the process enough to give you ample time, then this system works wonderfully together with some of the other methods out there. The sooner you get done with the bias part, the sooner you can get on to other smart ideas suggested by other authors.

You will see, at the end of this section, that I have an alternative way to start the process, one that is designed to get to know the jurors better on the front end, if you have a judge who is not pressing you unreasonably for time. I include it at the end because I want to first show you the lightning-quick bias elimination steps before getting into variations.

## What Makes This System Tick?

The most offensive bruise of all is jury bias. Most defenses are tailor-made for those people who do not trust or approve of lawsuits. The defense counsel will fight as if his or her life depends on keeping those biased jurors. This intentional struggle to impanel unfair jurors is an affront to our fundamental belief in fair trials, and we must excise it before it ruins the entire case.

It is no secret that the biggest obstacle to a just verdict has become biased jurors. The incessant, insidious drumbeat of "frivolous lawsuits" and "runaway verdicts" has taken a toll. Hard economic times have compounded the problem and added other hurdles. Many jurors now worry about harming an American company that provides jobs. The number of bitter jurors has risen (jurors who are struggling, who are angry, and who view lawsuits as bailouts for other sufferers while no one is bailing them out). The daunting reality is that we rarely have enough peremptory challenges to ensure a fair jury. Mastering the art of securing challenges for cause has become essential to plaintiffs' lawyers.

Prospective jurors, and often judges, do not appreciate the subtle, yet influential, workings of bias. They overestimate people's ability to separate personal beliefs and opinions from the

decision-making process, and they mistakenly believe right will always trump leanings. They think that case specifics will win out over general preconceptions ("I may not like your case, but I will find for your clients if you convince me they are deserving. So what's the problem?").

The reality, as we all know, is that bias can skew the fairest person's judgment. It is a powerful, invisible force that infiltrates and subverts the justice process like a sleeper agent. For example, a Romney supporter who saw the final presidential debate in 2012 would say Romney beat Obama hands down, while an Obama supporter would say, "You're out of your mind. Were you watching the same debate as me?" Both would admit bias existed, but neither would likely admit their conclusion was based on it. They would argue that cold, hard facts led to a correct result.

The same phenomenon happens in lawsuits where the outcome is driven by evaluating the believability of competing witnesses, particularly expert witnesses. A juror who starts out with feelings against your type of suit is likely to find a defense witness more persuasive, since he aligns with that person's internal compass. After returning a defense verdict, that same juror would likely be convinced that bias had nothing to do with it. He could take and pass a lie detector test on that point. Such is the stealth of juror bias. If asked, after the fact, about any potential role bias might have played, the juror would likely scoff at the suggestion; pride would get in the way. No one wants to admit he is not the master of his own mind.

The opportunity to explain the potential impact of bias occurs at the front end, before jurors make up their minds, when there is still time for a conscientious person to opt out. Even then, it is a challenge. The affected ones typically have a hard time seeing themselves as unsuitable and will naturally resist the notion. To make matters worse, the opposing side will have a hard time accepting the elimination of their ringer jurors and will strategically resist. The judge may join the resistance movement when it becomes clear that the court will have to summon another panel.

Some panelists are too rigid to ever admit their preconceived feelings could influence them, no matter how or when you present

the question. Sadly, there are also those who set out to sabotage tort cases. No approach will get either of these types to acknowledge anything sufficient to establish a cause challenge. Thankfully, usually only a few of these biased panelists appear on any given panel. Hopefully, you have enough peremptory challenges to cover them. The remaining panelists who shouldn't be deciding your case typically are decent people who want to do the right thing. For them, it is imperative you have a plan that maximizes the chances of getting challenges for cause granted.

## Making a Bias List

Before trial, make a list of potential bias subjects. Go through the process of thinking, "If I were to lose this case, what would be the reasons?" Include general bias areas, such as the type of case you are bringing (personal injury, medical malpractice) or pain and suffering damages. Then add case specific concerns (the plaintiff was not wearing a seat belt, the plaintiff was on a motorcycle, and so on).

The bias list is based on common sense. Ask yourself, what parts of my case are likely to cause a significant number of people to have a bad taste in their mouths? Here are some examples of bias topics together with a brief description of the underlying concerns that could create problems for your case.

- In a car crash case, one of the most threatening areas of bias is general distrust of personal injury cases—expectations that plaintiffs will exaggerate their injuries, mixed in with suspicion that your client sees the crash as an opportunity to cash in, rather than an unwanted intrusion thrust into his or her life.
- In slip and fall cases, many people feel it's your clumsy client's own fault. She should have been looking where she was going, they would say, and now she's trying to pass the blame off onto someone else.
- In motorcycle crash cases, bias often pops up based on bad experiences with bikers aggressively darting in and out of traffic. Motorcycle cases can also trigger strong reactions

about assumption of risk for being crazy enough to drive on the road with cars and trucks, completely exposed. Throw no helmet into the mix and you'll have a bias riot on your hands.

- In whiplash cases, many on the panel will be thinking, "fraud alert!"
- In medical malpractice cases, the primary danger comes from the misconception that lawsuits like yours are the reason people can't get a good doctor for their family.
- In all injury cases, pain and suffering damages are at risk for bias from anti-lawsuit propaganda that has too many people thinking it's about profiting from tragedy.

The following are other examples of bias hotspots:

- Wrongful death damages: all the money in the world won't bring them back.
- Large verdicts: they hurt us all.
- Consortium claims: claiming injury by a spouse is overreaching.
- Comparative negligence: you didn't protect yourself, so don't blame others.
- Vicarious liability: they didn't do anything wrong.
- Lawyer advertising: you can't trust ambulance chasers or their cases.
- Sympathy for defendants: they didn't mean to hurt anyone.
- Resentment over jury duty: bitterness is a poison pill.
- Plaintiffs who do not speak English: you live here; learn the language.
- Clients who have a felony conviction: you're not worthy.
- Clients who were drinking at the time of the crash: you've got to be kidding me!

## Case Example: Drunk Driving Plaintiff

This last extreme example of bias illustrates just how well this system works. Following is a real case I tried where our plaintiff was admittedly driving drunk at the time of the crash in which she was hurt. If my approach could tackle that bias, no bias was too big for it. So I am going to jump ahead to give you a taste of just how good this method is at cutting bias bruises out, even the really ugly ones. Then, I will get back on track and go through the steps in logical order.

Our client was well over the legal alcohol limit at the time of the crash; there was no getting around that nuclear-charged fact. On the other hand, she was driving in her own lane and going the speed limit when the defendant, in a clunky, rust-bucket truck, pulled smack out in front of her from a side street. A big clump of overgrown shrubs blocked our client's ability to see the truck until it pulled out just a few feet away from a poorly lit side street. The best the defense could come up with from their accident reconstruction expert was one second to slam on her brakes, before impact, just enough to argue the booze was relevant. We fought to keep it out, but the judge ruled, before trial, that it was coming in. The truth was, drinking had nothing to do with this crash, but getting jurors who would be open to such a conclusion was daunting.

Here are the questions I designed for that monumental task:

Q: How many of you feel that if someone gets behind the wheel of a car while drunk, turns the key, drives down a public road, gets in a crash, and gets hurt, he or she should not be able to recover money in a lawsuit, no matter what the evidence shows as to whether drinking had anything whatsoever to do with the crash?

Q: How many believe that, as a matter of principle, the person should not be able to recover?

As you can imagine, lots and lots of people acknowledged feeling this way. Fortunately, we had a good judge who kept striking

them and bringing up more jurors. It took four panels to seat six jurors. There was nobody left to act as an alternate.

The result was a seven-figure verdict with zero comparative negligence on the plaintiff drunk driver. The verdict was righteous to the bone, but unimaginable minus this process of culling through prospective jurors who would have acted like an angry mob waiting to chase my client and me out of the courtroom with pitchforks.

## Back to the Bias List

Now let's get back to where we left off: creating a bias list. Here is an example of the process of bias spotting being applied to a particular case I tried, one that was far less daunting than the drunk driving plaintiff case.

It was a car crash case without a lot of visible property damage, resulting in a herniated disc. We were suing the parents of a teenage driver, as the owners of the car. The defense hired a private detective to get surveillance, which showed nothing contradictory to our client's testimony, no smoking-gun bad evidence. The only problem with the film was that our client just didn't look all that hurt because you couldn't see neck pain on a video.

My pretrial bias list included the following:

- General feeling against personal injury lawsuits
- Feelings against pain and suffering damages
- Feelings against the idea that someone could be seriously hurt if there was not a lot of visible property damage
- Feelings against suing parents for their teenager's driving
- Feelings of suspicion that can arise from the mere existence of surveillance films, even when they don't show any exaggerating or faking

Pretrial bias lists lay the foundation for what is to come once you get to trial and crank the system up in voir dire.

## The System Mainframe

1. Educate the jury about the power of bias.

   You will accomplish this goal in a snap by using an everyday analogy that brings home the unintentional, yet significant impact bias can have on the most fair-minded and strong-willed people when they are put in the position of judging a contest and have some leanings against one side going into it. Once the potential jurors on your panel understand that the influence of bias is not a sign of weakness or unfairness, but simply a product of being human, the steps that follow will flow smoothly.

2. Identify potentially biased panelists.

   After you've done your analogy-based education, the next step is to use questions you prepared before trial to identify people who may have bias in areas contained on your pretrial bias list. An example would be, "How many of you have feelings against personal injury lawsuits? How strong are those feelings against personal injury lawsuits on a scale of one to ten?"

3. Establish grounds for cause challenges.

   After identifying panelists who have feelings against the type of case you are bringing or aspects of it, then you have to find out which of those people have feelings that rise to the level of true bias. You must ask carefully worded questions (which you have designed before trial) to establish cause under the law of your venue. In this step the adage "words matter" is of utmost importance. You must pick words that provide a path of least resistance and which are wrapped around the law on challenges for cause.

Step one, the analogy-based bias education, is what you do at the beginning to create the right mindset for steps two and three (identifying and eliminating bias). From then on, you are able to repeatedly apply those next two steps (identify, eliminate) to each of the items on your bias list until you have covered all of

the bases and have put your client in the best position to get an impartial jury.

We will walk through the steps of this process in a way that ends with you *getting it*, not just reading it. My aim is not to share only *what* I do, but *why* I do it, so you can make it fit your personality, your style, yourself. As I explain my goals, my thought processes, and my struggles going from the drawing board to the courtroom with this system, you will be able to own it, run with it, even improve on it. The system works best when it comes from your heart, not my pen.

Once the core concepts are laid out, my hope is that everything will fall smoothly and comfortably into place. In time, my words will fade into echoes of influences and something that is your own will take over. I know this from years of getting feedback from lawyers who have attended seminars where I have shared these same methods.

## What You'll Learn in Part I

Every step of the way will be covered in the chapters to come.

In chapter 2, "Educating Jurors about Bias," you'll learn how to come up with lightning-quick ways to educate jurors about the powerful influence subtle bias can have on all of us. For most on the panel, giving an analogy will be like turning on a light switch. When potential jurors understand the effects of bias, they are much more likely to recognize and acknowledge the impact their own predispositions may have on them.

In chapter 3, "Identify Those at Risk for Bias," you will be shown how to seamlessly transition from that meeting of minds on how bias works into identifying those on the panel who are at high risk for being biased.

In chapter 4, "Establishing, Expanding, and Fortifying Cause," I will show you how to establish cause, without having to pull teeth, on those who are biased. It is amazing how much better the honor system called voir dire works once this foundation of understanding is laid. I will also show you ways to use group dynamics

to accelerate this process of gathering and eliminating bias. You don't have to reinvent the wheel with each panelist. Once someone has modeled the integrity of admitting their bias and its potential impact on them, other biased jurors will be more comfortable acknowledging the same.

In chapter 5, "Nuances and Common Complications," I'll cover common bumps you will face along the road. There will be biased jurors who resist the natural flow of this process. I will show you how to deal with them.

In chapter 6, "Identification and Cause Questions for Car Crash Cases," chapter 7, "More Identification Questions and Cause Questions," and chapter 8, "Identification and Cause Questions for Medical Negligence Cases," I'll give you lists of bias topics that show up repeatedly and describe how I deal with them. There is no reason for you to make the same mistakes I've made along the way while developing things that I now know work. I'll give you the end products—the keepers, not the flops nor early prototypes. Then feel free to tinker with them, or build your own with the same aim in mind.

In chapter 9, "Wrapping Up Bias," I'll provide additional key pieces, such as safeguarding your cause challenges and explaining your honorable intentions to the Court if friction arises. I will also lay out for you an alternative way to begin this process, if you have the luxury of a little more time, one that will help in the overall gathering of information to better understand the people on your panel. I'll also cover things like how to use catchall questions to make sure you aren't missing any bias; how to protect your challenges from defense attorneys who cling to bias like a stolen life raft and will try desperately to "rehabilitate" biased panelists; how to reach an accord with judges who may become agitated when the number of valid cause challenges start to mount; and when not to ask questions about bias areas.

In chapter 10, "Completing the System after Bias," we'll round out the process with important topics such as how to fill in information gaps about individual jurors, how to head off defense voir dire tricks, how to identify leaders on your jury, and how to insulate fair jurors from falling prey to defense efforts to run them off.

In chapter 11, "Putting It All Together," I will walk you through a voir dire, from beginning to end, to show you how all these pieces fit together. It is a particularly short voir dire session, and I have redacted parts where the back and forth grows tedious. As we go through this piece by piece, I will give examples of how each segment unfolds in the free-for-all we call jury selection.

## Paring It Down

Bias is the worst bruise of all and the biggest spoiler of justice. This system will allow you to cut out bias faster than any I know of.

- Prepare a pretrial bias list of areas that concern you.
- Educate the jury about how bias works, using an analogy.
- Ask questions to identify those who may harbor bias in the areas on your list.
- Ask questions to establish grounds for cause challenges as to those who are biased.
- Repeat this identification and elimination process for items on your bias list.
- Keep reading to really *get* how all of this comes together.

# 2

# Educating Jurors about Bias

*Most people underestimate the influence of their own biases, believing case specific facts will override general predispositions. A simple analogy can instantly enlighten jurors and clear the path for the biased ones to step aside.*

Once jury selection starts, your first step is to give the panel a crash course on how bias works. If they understand bias, there is a much better chance of getting them to bow out honorably. Such an understanding is a critical early step in the process of getting at-risk jurors to self-report so the judge must remove them, thereby preserving your precious peremptory challenges.

## Analogy—a Crash Course on Bias

The quickest, most effective way to get people to understand a new or complex concept is to give them a commonplace analogy, which taps into their preexisting understanding. There are endless possible analogies for getting jurors to understand that they cannot

turn their own biases on and off like a light switch. I will give you several that work well. All of them have to do with judging a contest where the person picked to judge has feelings against one of the two finalists. Many of the lawyers who have adopted this system choose to come up with their own analogies based on life experiences. Giving it a personal touch adds to the sincerity.

Using a pie contest analogy, I'd say this to the panel:

> If we were having a competition to decide who baked the best pie, and it was down to two contestants, one with apple pie, the other with cherry, and I was picked randomly out of the audience to be the judge and it turns out that I'm not crazy about cherry pie, does everyone agree the contestants would want to know the judge wasn't crazy about cherry pies, particularly the baker of the cherry pie? Does everyone agree the only right thing to do would be for me to reveal my distaste to the contestants and let them decide what to do with it?
>
> Likewise, does everyone agree the other right thing for me to do would be to be honest with myself and not sugarcoat the potential impact my taste preferences might have on me, in spite of my best efforts to push them aside? Not that I would throw the contest for the apple pie, if it was a sorry, dried-up mess and the cherry pie was a succulent beauty, just because of my preferences. But all else being equal, when I bite into the cherry pie my lip curls up a little, no matter how hard I try. It's just the way I am wired. So, would you agree the right thing would be to be honest with myself and not sugarcoat the effect it might have on me? I might be better off down the hall judging chili, because I like all kinds of chili. This case, of course, has nothing to do with pies or chili; this is a personal injury case, and I need to know how many of you have a bad taste in your mouths about this kind of a case. How many of you have some feeling against personal injury lawsuits?

Below are other illustrations of analogies to make the same point. Feel free to use any of them as long as they feel comfortable to you. Otherwise, come up with your own. It is extremely

important to be genuine. You are meeting your jurors for the first time and cannot risk coming off insincere or too cutesy. Whatever analogy you use needs to feel real to you so it feels real to them.

- Romance novels vs. mysteries
- Romantic comedy movies vs. action movies
- Tomato vs. mustard barbecue sauce
- President George Bush Sr. being asked to judge a casserole contest where one of the casseroles was broccoli. (He did not like broccoli, so he bowed out, causing a stir with broccoli farmers.)

You might begin, for example, "I personally use barbecue sauce: I'm not crazy about tomato-based barbecue sauce; I prefer the mustard-based kind. If we were having a competition to decide who had the best ribs and it was down to two slabs, one with tomato sauce and the other with mustard sauce, and I was randomly picked out of the audience to be the judge . . ." and so on.

## Putting Bias Aside at the Start Is Not Enough

The type of analogies we just covered revolve around the idea of starting out behind. There are slightly different models I use for situations where jurors admit to being skeptical about aspects of your case, but insist they can put those negative feelings aside at the beginning of the trial so everyone starts out even. The next models focus on effects of bias later, when the roller coaster of conflicting evidence starts its up and down ride. The analogies that follow are about how jurors' preconceived expectations can give one side's proof an advantage once the clash of evidence begins, even if both sides started out even.

With this type of analogy, we are dealing with negative expectations. People who expect plaintiffs to exaggerate their injuries will

be more inclined to believe a defense built around suggestions that your client is exaggerating. People who are suspicious of medical malpractice cases are likely to find the defense experts more persuasive than the plaintiffs' experts. When someone on your panel expresses distrust about your case, but gives assurances your client will start out even, it is time to consider one of these other types of analogies.

I had to go to such a plan B not long ago in a car crash case when my mustard-based barbecue sauce story unexpectedly floundered. It is usually very effective, but not on this day.

Early in the process, an opinionated juror, who basically admitted she despised lawsuits, people who filed them, lawyers who handled them, and the horses they rode in on, set a bad precedent by saying she could put all of that out of her mind and be as fair as Lady Justice herself. I am exaggerating a bit, but not much. According to her, we would start out even since she knew nothing about the facts and would withhold judgment until she heard all of the evidence. We all knew what that judgment would be, but, by golly, she would give us the courtesy of withholding it until the appropriate time, then she'd put us out of our misery.

Not to be outdone in the race to be fairest, others followed suit. The result was a roomful of people who admitted to having very strong feelings against personal injury cases, but who would not admit we'd be starting out behind.

## Conflicting Evidence: German Shepherd Story

It was time to change direction from the starting-out-behind model to the conflicting-evidence-meets-expectations approach. I was on the third row, when yet another juror pronounced her ability to put her scorn for this kind of case aside so everyone would start out dead even.

I saw an opening and brought out my German shepherd story. It went like this:

> I heard you loud and clear that we would not be starting out behind, but let me ask you another question and explore another concern. Sometimes when a person has feelings against

a particular kind of case, with a level of skepticism or distrust, the person may be able to put those feelings aside at the beginning, but have them resurface and have an influence later on when confronted with conflicting evidence.

For example, when I was a kid growing up, one of our neighbors, who lived around the corner, owned a German shepherd. Whenever I would ride by on my bike, the shepherd would charge out, barking like a vicious guard dog, but would stop at the sidewalk that bordered their property, even though there was no fence. Every time I passed their house, I would leave the sidewalk, cross over to the grass on the far side of the street, and pedal by fast. One time, for whatever reason, he did not stop at the sidewalk; he crossed the street, knocked me off my bike, and nipped me on the behind. I was not hurt. It didn't even break the skin, but it scared me.

To this day, when I see a German shepherd, I think, "bad dog." And I'm a dog lover. I'm one of those people who will walk up to a stranger's dog and pet it without hesitation, except when it comes to German shepherds. With them, I back away. I know in my head that's not fair—most German shepherds are great dogs—but I can't help the way I feel.

Let's imagine there was a dog bite case where the person who was torn up by the dog said the dog bit him unprovoked, while the defense claimed the dog wouldn't bite a flea unless provoked. If it turned out the dog involved was a German shepherd and I was sitting in your shoes as a potential juror, how many of you feel I should reveal my feelings and let the lawyers and judge decide what to do with the situation? Even if I could somehow put those feelings aside at the start of the case, there would be another concern when we get into the evidence.

If all of the witnesses agreed that this dog would not bite a flea unless provoked, I'd be okay. On the other hand, if one witness said, "He wouldn't bite a flea unless provoked," and another said, "He's a biter," then I'd have trouble. Why? Because I'd been thinking all along, "I bet he's a biter." I may not have

made up my mind, but in the back of my mind, that would be my expectation of how it would probably turn out.

That's the problem with being asked to judge a disputed matter when you have life experiences or opinions that create expectations and one side's evidence tends to meet those expectations. The evidence that aligns with your prior experiences or feelings has a leg up on the opposing evidence.

Does everyone agree that if I was sitting in your shoes in a jury selection involving a German shepherd, the right thing for me to do would be not only to reveal my feelings, but also to be honest with myself and not sugarcoat how this might impact me when we reach the conflicting evidence part of the trial—in spite of my best efforts to put those feeling aside?

Now this case has nothing to do with a dog bite. This is a car crash case, but the same honor system applies. You have told me that you are skeptical of pain and suffering and think many people exaggerate their injuries in lawsuits like these. Even though we may start out even, when we get to the conflicting evidence about how bad she is hurt, we may have a strike against us. Keep in mind that we don't get to do an update session later in the case. We don't get to ask, "How are you doing with feelings that affect your assessment of conflicting evidence?" We have to cover it now; that's why we call it an honor system. In all fairness, would it be honest to say your feelings could very well come into play when we get to the clash of evidence phase, not on purpose, but as a matter of human nature?

To which the juror said,

You'd be like a German shepherd to me, and you would have a strike against you.

To which I asked,

How many of the rest of you feel like that to any degree?

Once the ice was broken, the cause challenges began to flow. Hands went up as if I were asking for volunteers for a free trip to paradise. Even the town crier who had heralded in the scary period of bias denial came clean. She said,

> Me too, you'd be a German shepherd, and it would affect me for sure.

Not to be outdone, she took a parting shot and said,

> If you'd have asked it that way to start with, we could all have saved a lot of time.

Sometimes it takes a change of pace to break through the walls of resistance that pride and bias can erect.

## Conflicting Evidence: Motorcycle Story

Another analogy I occasionally use to illustrate how bias can influence the assessment of conflicting evidence deals with something most jurors understand: motorcycle bias. I pick motorcycles to make the point because bias toward them is prevalent and people are not too shy to admit their feelings. This following analogy offers a way to tap into that powerful bias in non-motorcycle cases to help jurors understand the reach of bias in a process that presents contradictory evidence.

It goes like this:

> Some people hear *motorcycle driver* and their first thought is an aggressive driver, especially if the motorcycle is one of those foreign models that looks like a racing bike, where the rider leans forward like he's riding a rocket. If someone whose feeling is "I bet he was driving aggressively" were to sit as a juror on a motorcycle crash case, that feeling could have a significant impact once the evidence started to be presented. If there was a dispute as to who was at fault—the injured biker driving a racing-style motorcycle or the driver of a car—how would those feelings affect the juror's judgment?

> Let's say the biker testified he was driving in his own lane and going the speed limit when the defendant changed lanes suddenly and clipped him. On the other hand, let's say the defendant car driver testified that the motorcyclist was at fault for driving like a maniac, weaving in and out of traffic at high speeds. The maniac version would tend to have an edge with someone who believed most people who drive those kinds of bikes drive aggressively, since that version of evidence fits the juror's experiences and inclinations.
>
> Now, this case has nothing to do with motorcycles, but rather with a crash involving two cars. Still, the same principles apply. In this case, there is a dispute that will have to be resolved over the extent of Mrs. Dylan's injuries. You have indicated a belief that most people in lawsuits tend to exaggerate their injuries to some extent. My concern is that witnesses who claim my client was not hurt that badly may have an edge or a bit of a head start with you since their testimony will be consistent with what you would expect to hear. Not that you would do it on purpose, but unintentionally we may *end up* with a strike against us when we reach the conflicting evidence part of the case, kind of like the racing bike example. Is there a real chance this could happen, in spite of your best efforts to push those feelings aside?

Having a Plan B in place is a way to give you a second shot at biased panelists before it's too late. The options are endless, as long as they are comfortable for you and get the point across that bias is not something we can turn on and off like a light switch.

The ultimate question for you to ask, after giving this second kind of analogy, is something like this:

> Since you have a level of distrust with these kinds of cases (or have an expectation of exaggeration), my concern would be that, faced with conflicting evidence, evidence that seems to fulfill your expectations may have a leg up on evidence to the contrary, not on purpose, but as a natural consequence of your beliefs. You'd be fine if the evidence was uncontested, but in the

situation with conflicting evidence, in all honesty, your leanings may cause the other side's evidence to have an advantage. Do you understand my concern? In this honor system, would you say that is a valid concern?

## Paring It Down

- Take the basic premise of a situation in which someone is randomly selected to be the judge in a contest with two finalists, and it turns out that person has a general dislike for one side. Then create an analogy that captures the reality of how such predispositions can have an unintended, yet significant, impact on the process of assessment, in spite of that person using their best efforts to put those feelings aside.
- Use the previously prepared analogies I have described, if they feel right to you; otherwise, dig into your life experiences to come up with your own. Whether it's food, movies, books, cars, or art, the key is using something that rings true and that the panel will instantly relate to.
- Be ready to vary your analogy depending on the jury or venue. A jury in the South would relate to a rib-eating contest, while a jury in the Northeast might scratch their heads at that one. In Chicago they'd relate to deep-dish pizza versus thin crust. In Kansas it might be strip steak versus a filet. In California it could be cabernet versus pinot noir.
- Come up with versions that cover both places bias tends to rear its head:

  1. Starting out with a strike against you (as in the pie contest).
  2. Ending up with a strike when conflicting evidence comes along that meets expectations (as in the German shepherd story).