

## Praise for *From Hostage to Hero*

“With this book, Sari joins the ranks of David Ball, Josh Karton, and other great nonlawyers who understand our jobs well enough to actually make a contribution to our cases and performance. Sari is a gifted teacher, and there is practical, trial-ready advice on nearly every page.”

—Rick Friedman, past president of the Inner Circle of Advocates and coauthor of *Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability*

“My experience, over fifty-five years of trial work involving well over one hundred jury trials, confirms the unique insight about the jury selection process which is so clearly outlined in this book. A lot of articles and books have been written over the years about jury selection concepts, but this is the first book I’ve read which so clearly and understandably provides accurate insight about the true precepts involved. Every trial lawyer who is involved in a jury trial should read this book first.”

—Paul Luvera, past president of the Inner Circle of Advocates and the Washington State Trial Lawyers Association

“Fear is often the single greatest reason we lose cases. Ms. de la Motte does an outstanding job of addressing the fear both we and the jurors experience. She addresses the threat response and how it affects both the juror’s brains and ours as well. We NEED to understand how the brain works in order to be successful. This book is very helpful to lawyers in the trenches. It addresses issues that every trial lawyer faces and is a must-read.”

—Dorothy Clay-Simms, author of *Exposing the Deceptive Defense Doctor*

“I first met Sari when she presented at an Inner Circle of Advocates meeting. I was impressed by her ability to simplify the difficult art of effective and authentic communication. I’ve now had the privilege of working with Sari on multiple cases and have never been disappointed by the value she adds. Effective and authentic communication, particularly in today’s day and age, is paramount. This book is a must-read for every lawyer who’s willing to invest the energy and discipline into becoming a better trial lawyer through refined, authentic, and effective communication.”

—John Coletti, member of the Inner Circle of Advocates and International Society of Barristers, former adjunct professor of Advanced Trial Advocacy at Lewis and Clark Law School

“No one has thought more about how trial lawyers can do a better job enlisting and communicating with jurors than Sari de la Motte. Her workshops on voir dire and opening statement are intense, lively, and deeply empowering. With her book, Sari has done the remarkable: she has distilled her expertise on such topics as group formation, personality types (of jurors and lawyers), trust building, persuasion—grounded in science and years of observation—and presented it all in an accessible and, yes, lively read. She is wary of one-size-fits-all prescriptions; this book will be useful for every trial lawyer, whatever her strengths, weaknesses, and experience. This is a book I will always go to as I prepare for trial.”

—Corrie Yackulic, fellow of the American College of Trial Lawyers, Top 50 Women Lawyers, listed in *Super Lawyers* for Washington 2016–2019

“When I read this book, I honestly thought it was written for me. I have certainly felt like a failure as I have lost cases and wondered why. As trial lawyers, we often hear the success stories about the seven-figure verdicts. It is reassuring and motivating to know that losing is not really failure and that many, many other attorneys are, or have been, in the same boat. In my opinion, this is a must-read for any trial attorney!”

—Debra Nelson, the Nelson Lawfirm, LLC

“The single most important decision factor for a lawyer in purchasing a book is this: does the time I spend reading it make me that much better, give me greater insight, and propel me to greater heights?”

“In this case, the answers are yes, yes, and YES. I was asked to read and review the book. Sari is a trusted friend, a nonlawyer teacher who views legal issues more in line with how other nonlawyers, like jurors, view them. I was delighted to learn more from her. But this book is so skillfully presented that I am in the process of reading it a second time. This second reading is totally selfish. It is for my clients and me.

“This is a book for all lawyers, not just trial lawyers. Any lawyer who conducts a first interview needs the techniques revealed in this book. The skills are applicable to meeting people for the first time in a way to influence them in a positive manner. Sari describes this as a process to ‘empower and encourage’ the audience (jury) by guiding them in a way that provides safety to each and forms them into a bonded group.

“For more experienced lawyers, who believe we have a decent handle on what it is we do, Sari provides details and subtlety that can be learned and applied in individual trials and to individual jurors. This is where we benefit most from her more eloquent understanding that she shares with us in a form that we can efficiently use. For less experienced lawyers, well . . . I wish I’d had the opportunity decades before now.”

—Roger J. Dodd, coauthor of *Cross-Examination: Science and Technique*, board-certified civil trial specialist for more than twenty years, and listed in *Super Lawyers* for both Florida and Georgia

“I’ve tried over 250 jury cases, so you could argue that I don’t need to read any more ‘how-to-do-it’ books on trial advocacy. But after reading *From Hostage to Hero*, I realized there is still more to learn. This book is a masterpiece on how to overcome your fear in the courtroom and help jurors to do the same. I am a better trial lawyer for having read it. Bravo to Sari de la Motte for helping trial lawyers enjoy ourselves and our work more!”

—Randy Kinnard, member of the Inner Circle of Advocates and past president of the Tennessee Trial Lawyers Association

“Sari expertly combines the many years of training and practice I have personally experienced through her coaching into one book. If there is just one thing that you take from Sari and her book, it’s that you must focus on yourself to become a great trial lawyer. If you only focus on the jurors, you are missing the bigger picture. Sari will show you what you are really communicating to jurors (you may be surprised) and cautions trial attorneys to turn the camera on themselves before attempting to understand the body language of jurors. Read the book! Sari will teach you how to look at yourself and your jury in an entirely different way.”

—Tom D’Amore, past president of the Oregon Trial Lawyers Association and recipient of the Arthur H. Bryant Public Justice Award

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# FROM HOSTAGE TO HERO

CAPTIVATE THE JURY BY SETTING THEM FREE

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SARI DE LA MOTTE



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ISBN: 978-1-941007-91-4

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Managing Editor: Tina Ricks

Production Editor: Travis Kremer

Copyeditor: Patricia Esposito

Cover Designer: Alexandra Starkovich

Original Interior Template Design by Laura Lind Design

Interior Layout by Travis Kremer

Printed and bound in the United States of America.

Printed on acid-free paper.

*To any lawyer who has ever felt “I am not  
enough,” this book is for you.*

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# PUBLISHER'S NOTE

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This book is intended for practicing attorneys. It 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. Readers should also 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.

Many of the cases described in this book are actual cases, and the names and other identifying details of participants, litigants, witnesses, and counsel have been fictionalized except where otherwise expressly stated.

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# FOREWORD

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by Randi McGinn

If I was limited to one word to describe Sari de la Motte, that word would be *indomitable*. The miracle of this book is that this Finnish Force of Nature is willing to help you become indomitable too.

With deep insights from her study of nonverbal communication and years of working with some of the best lawyers in the country, Sari has correctly concluded that when it comes to forming a connection with the jury, any problems lawyers encounter are not in the stars (or the jurors we complain about), but in ourselves. As only someone outside the legal profession can do, her book holds a mirror up to the way we practice law and helps us become better communicators in the courtroom.

Are you afraid of stepping out on the tightrope of *voir dire*, where you ask questions without the “net” of knowing what wild answers may come from potential jurors? This book will not only teach you how to overcome your fear, but also how to become the jury’s guide and guard in the jury selection process.

Groups and teams don’t form on their own without guidance. Do you know how to build the jurors you select into a team? Sari shows you how to become a facilitator and invite the jury to commit to the judicial process and the good work they can do when they combine to speak as one.

How do you get the jurors on your side and committed to the justice you seek in your case? In this book, you will learn the way to bind the jurors to you and your case through the art of storytelling with passion and teaching the jurors what they need to know.

In the end, you will learn how to lead the jury to action. Sari’s techniques for closing argument show you how to encourage and empower the jury to follow you to verdict.

In addition to all of these invaluable lessons, all punctuated with real world examples, Sari provides guidance on how to carry yourself and move in the courtroom. She answers the question plaguing all young lawyers (and, if we're honest, some experienced lawyers too), "What do I do with my hands?" She talks about which gestures open a relationship with your audience and which gestures reflect your command of the room and the issues in the case. Take them. Use them. Practice them. It will improve your comfort level in the courtroom.

This Queen of Communication is a great gift to the legal community. She knows things we don't know or have forgotten. How lucky we are that she has written this invaluable book. How lucky you are to have purchased it.

# ACKNOWLEDGEMENTS

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I would like to acknowledge the following people who made this book possible:

Rick Friedman, who was the first lawyer standing in line to talk to me after my presentation to the Inner Circle of Advocates. Rick sent me his book, *On Becoming a Trial Lawyer*, which was the first plaintiffs' lawyer book I ever read. I was forever changed. Without his support and mentorship over the past several years, this book would not have been possible.

Randi McGinn, my most favorite speaking partner of all time, who helped immensely with the chapter on closing and most graciously wrote the foreword for this book.

John Coletti and Tom D'Amore, clients who trusted me to help them prepare for trial and allowed me to highlight those cases in this book.

Aaron DeShaw of Trial Guides, who has supported the project from the beginning.

Tina Ricks and Travis Kremer, my editors, for their excellent edits, advice, and moral support throughout the entire process.

My assistant Kristi Foster, who handled my nightmare schedule as I attempted to write and see clients at the same time; you are a gift.

My best friend Rachel who helped me brainstorm ideas, read every draft, and has offered insight and advice not only on this book, but throughout my entire career.

Erin Donley for providing the name of the book. I'm forever grateful.

My husband Kevin. Kevin, you are the reason I am allowed to do the work that fulfills my life's purpose. With you handling things on the home front, I was able to bring this book out of my head and onto the page. I love you.

And finally, to all the trial lawyers who have ever sat in one of my seminars, attended one of my classes, or hired me as a consultant. I've learned from each and every one of you; this book would not have been possible without you.

# INTRODUCTION

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## Why you Need This Book

In 2008, a desperate yet determined trial lawyer contacted me. He had read an article in *The Oregonian* about my work.<sup>1</sup> In the article, I discussed nonverbal strategies that helped people in the corporate world have better interactions with colleagues and staff. After the article ran, I thought I'd hear from executives wanting to polish their presentations or managers aiming to motivate their employees. I never expected to hear from an attorney. Yet here he was, asking for help. "I have to pick a jury Monday morning. Can you read their body language and help me decide who to kick off?"

For a moment, I wondered if I was crazy to consider his request. Sure, I'm an expert in nonverbal communication, but I teach my students to focus on their own communication instead of attempting to read others. I *hate* all the gimmicky body language stuff that promises the ability to "ferret out a liar" or "build instant rapport." I knew my techniques were a slam dunk in the boardroom, but I was curious to see how they could apply in the courtroom. I decided to find out.

I showed up Monday morning as requested. I found a seat where I could observe the jurors, but once voir dire began, my attention kept getting pulled back to the attorney. *Why was he staring down the jurors like that? Didn't he see how the jury was responding to his questions? Who wrote these dumb questions anyway?* My frustration continued to grow as the morning wore on. Watching the jurors was pointless if the attorney continued to communicate so ineffectively.

When we broke for lunch, I knew I had to say something. I hesitated because I wasn't sure if he could handle the truth bomb I was

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1. Mark Graves, "Vital Signs of a Young Regional Company," *The Oregonian* (August 23, 2008).

about to deliver: if he wanted to become a better trial attorney, he would have to change *himself* instead of attempting to read the jury. I went ahead and broke the news to him. I explained if we continued to work together, he would indeed grow his understanding of the jury, but I would primarily work with him. Was he willing to look at himself instead of the jurors? Turns out he was. He won that case and many more.

That day was a turning point in my career. I realized trial attorneys were willing to try anything that could help them win over a jury, and I was amazed by your power to create meaningful experiences for jurors, gain justice for your clients, and create social change in the world. I was hooked. I slowly morphed my practice to focus on courtroom communication. I now specialize in helping trial attorneys all over the United States communicate with jurors.

Trial work is hard. You put up your own money and risk not getting it back. If you don't carefully evaluate each case before taking it on, you're looking at months if not years of headache and financial loss. You work with clients who have the audacity to think you're not doing your job correctly, and you have to deal with opposing counsel who make every interaction a drawn-out nightmare. You take depositions and handle discovery. You hire experts and prep witnesses. You create an opening and a closing, prepare for voir dire, and outline your direct and cross-examination. In addition, this fight isn't fair. It's David versus Goliath. If you're a criminal defense attorney, the other side has the entire police department, state, and in some cases, the federal government working against you. If you're a plaintiffs' attorney, the other side has unlimited resources, money, and time.

Once you're in trial, however, a new battle begins. You now face a hostile audience who views you and your client with suspicion. The outcome of your trial is determined by this cranky group of people plucked from their everyday lives and dropped into the middle of a courtroom against their will. You must convince these people of the validity of your case and the compensation your client deserves in a short period of time.



And not only are jurors cranky, they're in many ways unqualified! You've spent considerable time with your client, witnesses, and the facts, but the jurors have no context, understanding, or knowledge. It took you months to understand the complexities of your case, but you only have a few hours to teach it to the jurors. And—except for opening—you won't be the one doing the teaching.

Outside of court, people tasked with making crucial judgments and decisions are usually highly qualified. Take the Olympics, for example. Olympic judges are often retired athletes or former coaches who are trained, ready, and alert when judging competitions and determining a winner. And although winning a gold medal can make a tremendous difference to an athlete's career, we can all agree a verdict for the plaintiff carries much more weight. But in trial, a group of *amateurs* determine the outcome. It's no wonder more and more attorneys choose to settle cases instead of bringing them to trial. Why take the risk?

And yet every day in courtrooms across America, attorneys continue to show up, clients in tow, prepared to present a slew of facts and witnesses from cases they've worked up for months, if not years, only to face a group of hostile people who view them with suspicion if not outright contempt. Over and over, I've watched attorneys struggle and fail to create rapport in an attempt to gain a juror's trust. Months of preparation slip down the drain as the attorney tries to bring jurors on board, only to hear the verdict and realize they've failed to connect with the jury. It's heartbreaking to watch and excruciating to experience.

After my first experience in court, I was shocked. I knew most people thought jury duty was about as fun as getting a root canal, but until I witnessed it firsthand, I had no idea how many people attempted to slither their way out of jury duty and how this negatively affected the attorneys and their clients.

I set out to understand why juries were so hostile and how attorneys could turn this around. I was determined to fix this communication dilemma. I read everything I could and observed as many trials as possible. Everything I read about trial technique focused on how jurors

make decisions, how to identify biases, how to deal with conservative-leaning jurors and the problem of defensive attribution.

And more books hit the market all the time. One book suggests lawyers learn to speak to a juror's reptilian brain; another reminds them to be human. Another book teaches attorneys how to use theater techniques, and yet another suggests they learn the Zen approach. It is all really great stuff, but I felt something was missing.

That was when I realized no one was addressing the elephant in the room: **jurors are hostages**. Trial kidnaps jurors and demands they participate in a process they don't understand nor believe in. Discussing juror decision-making, ways to deal with tort reform, or the newest technique on how to handle defense arguments puts the cart before the horse: if jurors don't want to be there, everything else is moot. The most important thing jurors do at trial is make a decision. But because trial forces them to participate, jurors feel and act like hostages, which means *until they commit to you and your case*, any decision they make is one of self-protection. Whatever decision buys their freedom the quickest is the one they'll choose, and, unfortunately, this is rarely good for the plaintiff.

Many of you are frustrated, and rightly so. You became a trial attorney because you believed you could affect change by engaging in this work. But after toiling away for years at this job, you now feel the opposite; you feel powerless. The unfairness of the system has taken its toll. The losses have chipped away at your confidence. You may feel as though you are a prisoner, locked into a battle you're not even sure you believe in anymore. It's so easy to look for someone to blame, and let's face it, the jurors make an easy target. They make this job so tough; they're out to get you; they'll take any chance they can get to destroy your case. Why just the other day, a lawyer in Nebraska posted to a listserv about a juror who blew up his entire case . . .

Sound familiar?

As difficult as it is to accept, here's the truth: **jurors are *not* the enemy**. They are ordinary people who desperately need you to show them how to be heroes. They're confused, scared, and angry. They've

been inconvenienced and forced to participate in something they view as a colossal waste of time. Jurors don't want to be there and have zero interest in you or your case, yet they have no choice! Like it or not, they must remain. **Jurors are hostages.** It's up to you to set them free so they can choose to take heroic action for you and your client.

But wait a minute. Hero? Who asks jurors to become heroes?

You do.

**A hero is someone who chooses to take selfless action that benefits others.**

Isn't this what you ask jurors to do? To take action that benefits you and your client, but does nothing for them personally? (At least nothing that is immediately apparent?) But here's the problem: jurors cannot take heroic action until they freely choose you and your case.

Heroes *choose*. They don't have heroism forced upon them.

For example, imagine the building across the street from your office is on fire. A woman holding her crying baby stands at an open window as smoke pours out. She screams for help. A man walks by on his way to work and hears her screams. He drops his laptop bag and springs into action. He crawls up the fire escape, putting himself in grave danger as he reaches for the baby. He grabs the baby and brings it to safety as the firetruck arrives and helps save the woman. He is a true hero.

Contrast that story with the following: The same building is on fire. The same woman and baby need help, but this time, a man with a gun points it at a bystander and forces the bystander to climb the fire escape to help the woman and her child. Is the act still heroic? No. Even though the bystander's actions were identical, his actions are only heroic if he *chooses* to take heroic action versus being forced to do so.

You might think, "What's the difference? Either way he saved the baby." True. But trial doesn't work this way. You can thrust a decision on the jurors, but you can't point a gun at their heads, forcing them to vote your way. It's not until they willingly choose to take action that their verdict becomes heroic.

**"But how do you get jurors to take action?"** Great question. That's what this book is all about.

In this book, you'll learn how trial activates a juror's threat response and how you can turn that around. You'll learn why jurors hate the "hobby" question and why so many of your attempts at building rapport and trust backfire. I'll introduce you to the concept of permission and why gaining a juror's permission is more important, at least initially, than trust. You'll learn why nonverbal intelligence is essential in order to increase permission with jurors. Finally, you'll learn the four steps you must take to help jurors move from hostage to hero.

But in order to be successful, you need to understand something very important. **You're a hostage too.**

I am not a lawyer, but I work with many of you. Since I see your work from the inside, the difficulty of your job is crystal clear to me, and it's often hard to witness. Trial exacts a steep price, and many of you are weary from paying it. But one of the biggest prices you pay is remaining a hostage. Sure, you're not forced to be there. You choose (for the most part) which cases to bring to trial. You even choose your clients. You're not a hostage in the sense jurors are—kidnapped by a system that requires them to participate, like it or not. But you are a hostage in one real sense: **you're a hostage of fear.**

Fear of losing. Fear of screwing up. Fear of, yes, the jurors themselves. Fear rules most of the attorneys I know on one level or another.

The outside pressure of trial is one thing, but the inside pressure can be even worse. Worry about whether you're doing it "right" can consume you. No one teaches you how to be a trial lawyer. It's an "educate yourself" situation. How good you are depends solely on how much effort you devote. You are responsible for training yourself, but that in itself starts a cycle of self-doubt: Who do you listen to? Every new trial technique that debuts touts it's the answer you've been looking for. *Here's* why you weren't winning before! You didn't try this technique. Never mind that the new technique only works because it's authentic to the creator and not to you. When you try it at your next trial and it doesn't work, you further chastise yourself for not being "good enough." So you continue to search for the next new thing.

And let's not forget that even though you've entered into this work to help people, you're viewed by society as a pariah. To many people, you're the reason our insurance rates are through the roof. You're the reason upstanding men and women leave the medical profession. You're called "scum" because you're trying to make a buck off of someone who got hurt, and in most cases, jurors don't even think the people you represent *are* hurt. A few arrogant jerks in your industry perpetuate these stereotypes, yet you are not one of them.

It's no wonder that the rate of depression, suicide, divorce, and alcoholism among attorneys is through the roof. The stress of this job can be unbearable. Trial lawyers come into my office having slept only a few hours and struggle to keep their eyes open during sessions. I often order meals while we work because the attorneys have barely eaten. Many attorneys I know have been married two if not three times. Several have missed their kids' milestone events due to trial, like the first day of school, graduation, and even weddings.

There's so much at stake. So much to lose. Your reputation is on the line. **But fear is deadly.** It's what's holding you back, and until you conquer it, you'll never be able to help jurors move from hostage to hero. To win over the jury you must first free yourself.

It's time to remember and claim the incredible power you have. This book will help you learn how. Who do people call when they need help? Lawyers. Who advocates for those who have been hurt? Lawyers. Who stands between us and corporate greed? Lawyers. You hold people responsible for their behavior. You are, quite literally, heroes to people who need help and have nowhere else to go.

I didn't always think this way. Before I began working with trial lawyers, I held the same cynical views that several jury pools do. I'm not proud of these beliefs, but if I'm being honest, I held these misconceptions because they are universal criticisms of your industry. It wasn't until I worked on the inside that I realized attorneys were doing life-changing work that not only affects the lives of those who have been hurt, but society at large.

Over the years, I've heard inspiring stories about why my students and clients became trial lawyers. Some of you have said it was because it allowed you to right a wrong. Perhaps you had a parent or friend who was victimized by the law, a company, or another person. Others have said you were drawn to fight for the underdog. Many of you are natural leaders, so trial law felt like a good fit. At a young age, you sensed your ability to affect change and sought where you could make the biggest impact. And let's face it, there are probably some of you who got into this work because you thought it would be like *Law and Order*. The glamour and drama are undoubtedly attractive, but as you quickly found out, it doesn't look the same in real life. Above all, most of you got into this work to help people.

You *can* fall in love with this work again. When you release your fear and focus on helping the jurors release theirs, that's when things begin to shift.

This book is not going to sell you a new technique. Ultimately, it's going to release you from self-doubt and second-guessing so you can own your power and set the jury free. Until you claim your own inner freedom first, the jury will always be your nemesis. They will continue to act as a group of hostile prisoners forced to decide something urgently important to you, your client, and the community. But when you see the jurors as hostages, innocent bystanders who are bewildered and scared and looking for a leader, your experience in the courtroom will change. By reading this book, you'll learn how to release your fear and focus your sights on the real enemy. You'll learn how to convey meaning and purpose to the jury so they'll wake up and want to actively participate. You'll learn how to nonverbally communicate your leadership so jurors will follow. And you'll learn how to inspire jurors to act so they can help your client and become heroes themselves.

If you've ever felt alone with your feelings of failure, defeat, or fear, you are not alone. Almost every attorney experiences defeat, but most keep it under wraps because they want to appear at their best. By purchasing this book, you refuse to surrender to mediocrity. I hope the challenge that lies ahead excites you, because it will not only help you in

court but increase your ability to be a leader, parent, friend, coworker, partner, and respected member of society.

It's been over a decade since I worked with that first attorney, and I am still honored to have this somewhat unusual career. Over the years I've become known as the "Attorney Whisperer." I've spoken onstage with Rick Friedman, Roger Dodd, and Randi McGinn. I've spoken at Bill Barton's Bootcamp, and Bill has been a guest on my stage at events here in Portland. My articles have been published in several state association magazines around the country. I've spoken for the Inner Circle of Advocates, a membership-only group of the top one hundred trial attorneys in the United States.

I am an expert in nonverbal intelligence and body language, and my classes for attorneys consistently sell out. Trial attorneys like you fly from all over the United States to gain this insight for themselves. I learn from every one of my students through our client sessions, seminars, and classes. Because of you, I am passionate about writing this book. I see your pain, and I acknowledge your need to find a way out of the madness.

I've had so many requests over the years to put the tips and techniques I've used with my students into a book. That book now rests in your hands. Inviting the jury to actively choose you and your client will change everything.

I applaud you for taking this journey. Not everyone is willing to look at themselves; it's easier to continue searching for the next "formula." Trial work is personal work. It requires you to look for understanding deep inside yourself before you can understand the jurors in front of you. I'm thrilled you're willing to take this next step.

Are you ready to learn how to captivate the jury by setting them free? Good. Let's get started.

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# PART ONE

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PREPARING FOR  
YOUR MISSION



# We Have a Hostage Situation

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Imagine for a moment you've been forced against your will into a room full of strangers. You're told you must wait. For what, you're not sure. You don't know anyone in the room or the people who have taken you into their custody. As the hours wear on, you grow weary and hope this will be over soon. But just when you think you can't wait anymore, you are hustled, along with the others, to a different room. Now the interrogation begins.

You start to sweat as new captors grill your fellow inmates. You're not sure what's going on, and you hope they'll leave you alone. As you squirm in your seat, anxious about being the next victim to be questioned, one of the captors sets his sights on you. As the questions come at you like machine-gun fire, your mind goes blank: everyone is watching, and you've forgotten what you were going to say. Your face gets hot, and your collar gets tight, as you stammer and stumble over your words, hoping you get it right.

You notice the captors have let some hostages go. You hope if you can come up with the right thing to say, they'll let you go too. You try

to mimic the ones who were able to break free, but a person wearing a black robe sitting up high lectures about your duty to remain. You're shamed for your pathetic attempt at escape.

Several hours pass, and you're now tired and hungry. You also have to go to the bathroom, but it's clear you can't just stand up and leave. Suddenly the person wearing the black robe allows you to take a break, but warns you not to talk to anyone. You and your fellow hostages awkwardly stand in line for the restroom—doing your best to avoid eye contact. You're lucky to get the last cup of weak coffee from the machine when suddenly you're pulled back into the interrogation room only to learn you've been "chosen." You can leave, they tell you, but you have to come back every day for three weeks. Your mind races as you think about how you'll cover shifts at work and who will pick your kid up from school. As you contemplate your captivity for the next three weeks, the person in the black robe commands you to stand and raise your right hand. You're forced to swear to do your best at a job you never chose to do.

## Jurors Are Hostages

Jurors, for all intents and purposes, are hostages. They are forced to participate in trial. Sure, there are rare birds who look forward to serving, but this is not the norm. For most people, receiving a jury duty summons is worse than receiving an unexpected bill in the mail. There's a great scene in *How the Grinch Stole Christmas* starring Jim Carrey where he's in the back room of the post office. To screw with the townspeople, who he hates, he throws mail into the mailboxes. With each person, he calls out, "Jury duty, jury duty, jury duty, blackmail, pink slip, chain letter, eviction notice, jury duty."<sup>1</sup> To the average person, jury duty is as bad or worse than being blackmailed, fired, or evicted!

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1. Ron Howard, director, *How the Grinch Stole Christmas*, Universal Pictures, 2000.

There are several reasons most people resent being summoned to jury duty, some more obvious than others. First of all, jury duty is a supreme inconvenience. No one enjoys having their day or week interrupted, especially when that interruption means having to miss work or family time. Many of us willingly put up with demands on our time when it benefits people we love, such as parents who drive their kids to and from piano lessons or soccer practice. But jurors are asked to give up time for something they don't value. Most jurors lack faith in our justice system. They see the system as broken and corrupt and view jury duty as a waste of time.

In addition, at least in civil cases, you're arguing over money. It's considered shameful to discuss money in our culture. People don't want to talk about it, much less make decisions regarding it. And it also feels impossible. Jurors don't know how much money a missing leg is worth, much less a life.

And let's not forget, jurors distrust lawyers and view you as the downfall of society. Jurors don't want to spend time with you. It makes sense, then, why jurors hate being called for jury duty: their schedule is disrupted, for reasons they don't value, by people they don't respect.

But this is just the tip of the iceberg. There is a much deeper reason for why jurors hate jury duty, a reason most trial attorneys have never considered, and which most jurors themselves fail to recognize.

## Jury Duty Activates the Threat Response

Humans are wired for survival. In 1915, Walter Cannon coined the term *fight or flight response*, which describes the state most of us find ourselves in when facing danger or stress.<sup>2</sup> Here's how the threat response works: It starts with the amygdala, a small almond-shaped group of nuclei in

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2. W. B. Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage: An Account of Recent Researches into the Function of Emotional Excitement* (New York, NY: D. Appleton & Company, 1915).

the brain. The amygdala, actually, the amygdalae, since there are two, are responsible for brain processes like memory, decision-making, and emotion. When you're faced with danger or stress, the amygdalae send a message to your hypothalamus. The hypothalamus is also part of the brain and links the nervous system to the endocrine system. The hypothalamus initiates a variety of processes that allow adrenaline to be released into your bloodstream, sending blood quickly to your limbs in case you need to fight or flee. That adrenaline also increases your heart rate, giving you a burst of energy so you are ready to defend yourself.

This is helpful when you're in real physical danger. That increased shot of adrenaline helps to fight off an intruder or to run away from a bear. Without a tangible threat, however, this process can be activated simply because you *feel* under attack. This threat response negatively impacts a juror's decision-making capability.

You need jurors to listen. You want them to understand. You hope they like you and your client. But ultimately, the one thing jurors must do well is *make a decision*. Hostages, however, tend to make terrible decisions, at least when it comes to looking out for anyone other than themselves.

## Brain Threats

Trial activates the threat response in the brain. When jurors feel under attack, they go into survival mode: they look for a way out. If no way out is present, they choose one of two options: fight or freeze.

Being selected for jury duty introduces a host of threats for the potential jurors:

- coming to an unfamiliar and, in some cases, scary-looking building
- conversing with unfamiliar and, let's be honest, sometimes scary-looking people

- sitting in uncomfortable chairs, drinking unappetizing coffee, listening to uninteresting facts, and taking unappealing action
- speaking in public about private things, things they don't want others to know about, much less say out loud
- enduring weeks of trial without any say in the matter

David Rock, author of *Your Brain at Work*, identified five domains of social experience that, when threatened, can activate the survival instinct in the brain. He organized these five domains into what he calls the SCARF Model:<sup>3</sup>

**S** for Status

**C** for Certainty

**A** for Autonomy

**R** for Relatedness

**F** for Fairness

The brain perceives a decrease in status, lack of certainty, removal of autonomy, absence of relatedness, and feelings of unfairness as threats. **Jury duty threatens jurors in each of these areas.** Due to these threats, jurors feel like hostages and cannot make good decisions.

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3. David Rock, *Your Brain at Work: Strategies for Overcoming Distraction, Regaining Focus, and Achieving All Day Long* (Collins Business, 2009).

## Status

*Status* is defined as rank or position. Quest for status can be seen across several species; from humans to animals, status is something organisms recognize and strive toward.

For example, perhaps you've heard the phrase *pecking order*. This description is, unfortunately, literal; chickens will peck each other in a battle for status. It's how chickens govern the flock. Several animal groups have established hierarchies and dominance structures as well. This is often tied to survival: the higher an animal's status, the better access it has to food and location in the pack (for example, being nearer to the outside makes an animal more susceptible to an attack by a predator).

Just like animals, humans are hardwired to care about status. For thousands of years, status was linked to the availability of resources that helped us survive. But outside of basic survival, receiving admiration and approval from others is something we all crave. For much of history, status was determined via our reputations; how others perceived us determined our worth.

When joining an unfamiliar group, people face a potential threat to their status. In a group of strangers, no one knows the "pecking" order. Who's the leader? What is my rank? How am I perceived? Not knowing can cause tremendous stress, and stress has a negative effect on decision-making, the one thing you need jurors to do and do well.

The language you use in the courtroom can also threaten people's sense of status. When jurors don't understand the words or phrases you or others use, it threatens their status. ("I don't understand that word; I must be stupid!") Even speaking to a person of higher status can activate the threat response. Judges carry the highest status in the room. They address the jury first. Merely having to listen to the judge and answer questions can feel threatening. I've seen many jurors stutter and appear out of breath when having to speak to the judge. Many jurors actually shake!

Not only are jurors in the dark about their ranking and how to gain status, but the process itself also threatens whatever status is up for grabs. Jury selection puts jurors on the spot. It requires that they share their most personal thoughts, feelings, and experiences in front of total strangers. Jurors worry they might reveal something embarrassing. Maybe they are ashamed of their job or their marital state. Perhaps they hold views that aren't popular. This fear activates the survival response.

On top of that, answering these questions in front of this group of strangers requires speaking in public—a number one fear for most people. Death is number two. (Number two!) Comedian Jerry Seinfeld once remarked that the average person would rather be in the casket than giving the eulogy at a funeral.<sup>4</sup> Joking aside, most people fear public speaking. But why? Why is public speaking so scary? **It threatens status.** Our status or rank is important both societally and professionally. We all want to be admired and respected, which is why public speaking is scary for most people. Public speaking has the power to embarrass and humiliate us in front of others, which can lead to a decrease in status.

Most people can avoid public speaking, but not jurors. Participation in jury selection requires it. In fact, jurors are *forced* to speak in public! The moment potential jurors open the envelope to find a jury summons, their threat response is activated. Status is on the line.

## Certainty

I hate surprises. Surprise guests, surprise bills, even surprise parties. The thought of a bunch of people jumping out and yelling “surprise” as I walk into a room gives me heart palpitations. Surprises are the worst. Much to my dismay, my husband *loves* surprises and for many years would set up a date night where he didn't tell me where we were going or what we were doing. He'd tell me to get dressed and act secretive

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4. Jerry Seinfeld, *I'm Telling You for the Last Time*, performed by Jerry Seinfeld et al., Broadhurst Theatre, New York, NY, aired August 9, 1998, on HBO.

and impressed with himself, and I just wanted to sock him in the face. I *knew* he was trying to do something nice, but I hated it. What am I supposed to wear? Will there be walking involved? Do I need a light or heavy coat? Who's watching the baby? As we drove to wherever we were going, I'd get crankier and crankier. And even if the surprise ended up being something enjoyable, the anticipation was torture. My husband no longer attempts to surprise me because he knows it causes me stress.

Turns out, there's a reason I hate surprises: lack of certainty activates most people's survival response. Unfamiliarity of any kind is often threatening. Our brains are wired to view unfamiliar people and places with suspicion. If we don't know what's going on, it feels unsafe. Until we can determine something isn't threatening, we assume it is.

From the moment jurors enter the courthouse, they lack certainty. They don't know where to go or what they're supposed to do. Once they figure it out, they have to sit and wait, and waiting also increases the threat response: What are we waiting for? How long will we have to wait? Where will they take us after this? What happens then?

Once in the courtroom, lack of certainty continues to threaten the jurors. They have the least amount of information in the room. You, opposing counsel, the judge, hell, even the court reporter, all know more about the case than jurors. Jurors know next to nothing. This lack of information activates the stress response not only due to the resulting uncertainty but also due to the threat to status. Typically, whoever has the most information has the highest status. The government, for example, uses the phrase *need to know* to describe sensitive information. Only people who have high security clearance and rank are allowed to "know." Everyone else is on a need-to-know basis.

During jury selection, you ask questions, and everyone in the room knows why you're asking—except the jurors. You expect potential jurors to share their experiences, insights, and personal opinions when they have no idea why you're asking in the first place. Jurors feel like they're the only ones who aren't "in" on the inside joke. It's no wonder it's so difficult to get jurors to talk.



For example, have you ever been working at your desk when your paralegal pops his head in and asks, “Are you free Wednesday afternoon?” If you’re like me, I always respond, “Why?” I don’t want to commit to anything until I know what it is. Jurors feel the same way. And yet you force them to answer questions without telling them why you’re asking. Being put on the spot and asked to speak in front of a group without context is scary. At the very least, lack of certainty creates resentment, but lack of certainty also activates the survival response.

Jurors don’t know how the jury selection process works; the average Joe thinks lawyers get to pick who they like and get rid of those they don’t. Think about that for a moment: jurors don’t understand a process that has the power to affect their lives for a number of days, weeks, or even months. And even if jurors do understand the process, they still face the uncertainty of waiting to see if they are chosen to serve. Lack of certainty is present throughout jury selection, down to the smallest details. For example, in most cases, *jurors don’t even know when lunch is.*

Lack of certainty forces jurors to view you, the process, and their fellow jurors as threats until proven otherwise.

## Autonomy

Have you ever been trapped in an elevator? The doors close, and the elevator car slowly descends when all of the sudden it stops between floors—jostling you and your fellow riders. After a few nervous giggles, someone attempts to hit a few of the buttons, but nothing happens. They start punching the buttons a little harder. Nothing. Your heart starts to race, and you begin to sweat. You feel totally helpless. How are you going to get out of here? What if the elevator belt snaps and you plunge to your death? What if . . . Whoosh! The elevator starts descending again, stopping at the first floor, and the doors open. You let out a big breath, not realizing you’d been holding your breath almost the entire time. You think you should start taking the stairs.

Of all the threats jury selection creates, the threat to autonomy is the biggest. Autonomy is the ability to make decisions and act freely without restriction. When our freedom is threatened, the threat response gets activated. When we're held captive, we're unable to keep ourselves safe. We're at the mercy of the person or thing that's captured us.

Several studies have been conducted relating to autonomy or, more specifically, to the restriction of one's autonomy. Researchers have found that lack of autonomy leads to uncontrollable stress, cognitive decline, and even premature death.<sup>5</sup> Autonomy is essential for human beings. People hate being forced to do anything, much less attend jury duty.

As humans, we must have independence and freedom in order to thrive. But at its most basic level, autonomy is the primary way in which we keep ourselves safe. Our ability to make decisions allows us to control dangerous or potentially dangerous situations. We want the option to leave situations where we feel uncomfortable, in case they become unsafe. When our autonomy is restricted, we feel trapped, like a caged animal. This is extremely threatening in any context.

Jurors lack autonomy. We force them to participate. Jurors cannot choose to opt out of jury duty and, if chosen, trial. (At least not without severe consequences.) That's not to say they don't try. Autonomy is hardwired; watch any jury selection and you'll see nearly 50 percent of the pool, if not more, attempt to regain their freedom. Over the years, I watched potential jurors try to get out of serving, and it used to anger me. I silently fumed and thought, "We can't expect our jury system to run with only unemployed and retired people filling the seats! Where's your sense of civic duty?" But now I get it. Most people value civic duty, but they value their freedom more.

When autonomy is threatened, as it is for jurors, the *fight-or-flight* response gets activated. When jurors are in *fight-or-flight* mode, they are in *survival mode*. What this means is jurors are looking out for

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5. Steven F. Maier and Linda R. Watkins, "Role of the Medial Prefrontal Cortex in Coping and Resilience," *Brain Research* 1355 (October 2010): 52–60, <https://doi.org/10.1016/j.brainres.2010.08.039>.

themselves; they aren't thinking about you or, more importantly, your client. They are looking for a way *out*.

You ask jurors to take action: to right a wrong, to make something right, yet it's easiest to do nothing. This is especially true when a juror is in fight-or-flight mode. Not to mention that even before asking jurors to do these things, you ask them to answer questions, pay attention, engage with you and the witnesses, and then engage with one another. This is nearly impossible when jurors feel trapped.

Loss of autonomy wreaks havoc on a juror's ability to be present and empathetic. And yet what's the number one thing jurors have to do? Make a decision! Doing this under stress rarely results in a good outcome for your client. Active, engaged juries drive up verdicts.

## Relatedness

Humans have a deep need for connection. Humans feel safer in packs: Perhaps that's due to the days when humans lived in caves and belonged to clans. If members were removed from their clan, there was very little chance of survival.

You've probably heard the adage, "There's safety in numbers," but groups can also feel very *unsafe*. Unless the group includes people who know and trust one another, groups can be threatening. Why? Absence of relatedness ties into our other fears. Status is up for grabs. (Who's the leader? What's my role? What if I look stupid in front of all these people?) There's no certainty. (Who are these people? What are the rules of this gathering? How does this all work?) Autonomy has been removed. (I don't want to be here with these people! I don't know anyone! How do I get out of this?)

In addition, a gathering of individuals does not constitute a *group*, not a formed one, anyway. Until and unless a group is formed, jury duty is just a bunch of strangers who don't know one another, you, opposing counsel, or the judge. Most people wouldn't attend a cocktail

party with a bunch of strangers, much less jury duty where they're required to answer personal questions in front of people they don't know.

But won't being together make jurors feel related to one another? No, not unless someone helps the group form. Group formation, as you'll see later in the book, is essential for strengthening relatedness and safety in juries.<sup>6</sup> You can form the group through specific non-verbal techniques, like getting jurors to look and talk to one another. But left to their own devices, jurors don't talk to one another. In fact, jurors are specifically asked to *not* talk to one another, at least about the case. But that's the only thing they have in common! So what do most jurors do? Avoid eye contact and conversation. The group, then, remains unformed.

Relatedness helps us feel safe. What's the one thing most of us do when faced with a scary situation? Ask someone to go with us so we don't have to face it by ourselves. Jurors aren't allowed to do this. Jury duty forces them to "go it alone."

The absence of relatedness is one more way the trial process activates a juror's threat response.

## Fairness

The entire jury selection process feels unfair to jurors. They have to be there. They have to speak in public. They don't know anyone. They don't know how the process works. They may not get paid. They may have to find childcare they can't afford. They'll probably miss their son or daughter's baseball game. Being gone from work will tick off their coworkers and possibly their boss. Jury duty feels incredibly unfair, which the brain, again, perceives as a threat.

But how does perceived unfairness activate the threat response?

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6. See chapter 11, "Form the Group."

Fairness, by definition, means everyone is treated the same. Although all eligible Americans can, and most likely will, get called to serve as a juror, that isn't much of a consolation for the juror who's been called to jury duty *today*. To *this* juror, on *this* day, jury duty seems unfair and unreasonable. All others get to go about their merry way, but this juror is stuck in the courtroom, losing time with family, losing time at work, and losing money.

Let's face it: serving as a juror *is* a hardship. It's a sacrifice jurors don't willingly choose. Not only has their autonomy been taken away, so has their time and money. Threatening someone's ability to make money, take care of their family, or go to their job, activates the survival response.

And as I've mentioned before, jurors don't believe in the process. They don't think it's fair. Read any of the online comments accompanying a news article about a lawsuit that's been filed (on second thought, don't), and you'll see most people think the court system is broken, that lawyers are all liars and manipulators, and that plaintiffs are just trying to get rich. The average juror thinks the entire legal system is rigged. And here's the problem with this viewpoint: believing the system is rigged makes jurors resist engaging in the process at all. If the process is unfair, what's the point?

When status, certainty, autonomy, relatedness and fairness are threatened, the brain feels under attack. Several social interactions could threaten maybe one or two of these areas. A toast at a wedding, the inability to understand a medical bill, a family obligation they resent, having to attend a networking event, or getting passed over for a promotion are all things that can activate the survival response. But what situation puts all five areas directly under attack? *Jury duty*.

# Jurors Are Not the Enemy

Who is the enemy at trial? When I ask that question in seminars, I inevitably get a room full of attorneys shouting, “The jurors!” But jurors are *not* the enemy, and if you continue to view them this way, you’ll lose more than you’ll win.

You want an enemy, and jurors are an easy target. But jurors, as you’ve just seen, are hostages. They’re forced to participate in a process that makes no sense to them and, in their minds, has nothing to do with them. And yet you stand in front of this group of people during jury selection, scanning their faces, thinking, “Who here is out to get me?” while telling them you hope they can trust and believe in you.

What a load of bunk. I’m not buying it, and neither are the jurors. They know you’re looking for who to kick off and have zero interest in who they are as people. They see this performance for what it is: a show, a big fancy production with a familiar villain they see every day on TV and the movies, a person who acts like a friend but is really the enemy. You say, “I’m here to lead you out of this mess,” when what you’re really doing is getting ready to shoot any hostage who dares to disagree with you.

Harsh? Maybe. But nonetheless true. **You believe jurors are the enemy.** In your mind, they’re the problem with this entire process. You don’t trust them.

Now I’m not suggesting you accept everyone on the panel and ignore problem jurors. But you must change your mindset, because that has the power to change everything.

Expect jurors to kill your case, and they will. Focus your hatred and fear on them, and they’ll return the favor. Dan and Chip Heath, in their book *Made to Stick*, write that people respond to a message in the same way it was delivered.<sup>7</sup> Deliver something aggressively, and you can bet the listener will respond in kind.

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7. Chip Heath and Dan Heath, *Made to Stick: Why Some Ideas Survive and Others Die* (New York: Random House, 2010).

Perhaps you've heard of the now famous study where researchers told teachers that certain students in their classrooms were destined to succeed based on the results of a bogus test. Two years later, when they went back to check how the students were faring academically, they were astonished to find the IQ of these students had gone up, even though nothing had changed except the attitude of the teachers toward the students. Treating the students as though they were exceptional allowed them to become exceptional.<sup>8</sup>

The *rule of expectations* says people behave the way we expect them to. For example, in seminars, I ask attendees to introduce themselves to someone else. After a rousing few minutes of introductions, I ask the group how many people introduced themselves with both their first and last names. Usually half of the room raises their hands. I then ask how their partners responded. In nearly every case, their partners also introduced themselves with first and last names. I then ask the other half of the room how their partners responded. As expected, their partners used only their first names when introducing themselves. People follow the path you set out. Which path do you want jurors on? The path that leads them out the door, or the path that leads them to a verdict for your client?

Think of it this way: Pretend you need a new paralegal at your office. You write an ad and, in it, give the job description, discuss the qualifications needed, and list the benefits. But as the applications start to come in, instead of looking for the best fit, you furiously go through the pile looking for the bad applicants. You look for misspelled resumes, gaps in work history, and lack of relevant experience. **This makes zero sense.** If you're looking to hire someone who will help you advance your goals and grow your practice, you should look for the *best* possible candidate, not the worst one. Of course you won't hire candidates who aren't a good fit, and I'm not saying you keep bad jurors on your jury or ignore they exist. But instead of worrying about who you want to kick off, start thinking about who you want *on*.

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8. Robert Rosenthal and Lenore Jacobson, *Pygmalion in the Classroom: Teacher Expectation and Pupil's Intellectual Development* (Crown House, 2003).

## You Attract What You Focus On

If you want justice for your client, you must assemble an army of soldiers who will go to battle for you. Because that's what jurors do, don't they? They continue the fight *you've* started. It's your job to give them the tools, but first, you've got to get them to sign on to your mission and willingly join your team. This is the exact opposite of looking for who to kick off and then making do with whoever is left.

**You attract what you focus on.** Want bad jurors? That's what you'll get when you focus your *voir dire* on finding the bad apples. Want willing soldiers who will go to battle for you and your client? Start looking for them and they'll show up.

## Change Your Mind

Once you understand and accept that jurors are hostages, you can show them the way to freedom. Jurors don't realize they can choose to become heroes and take selfless action that benefits others. They simply see jury duty as an inconvenience. It's up to you to show them that they have a choice and that choice could *change someone's life*. Instead of remaining powerless, jurors can choose to join together and fight for what's right. How often are we afforded that opportunity in our day-to-day lives? You must show them the incredible power they have, but to do that you must first understand their captivity.

Later in the book, you'll learn my step-by-step method for moving jurors from hostage to hero. You'll learn specific communication techniques that will help you create safety for jurors, engage them with you and the material, and communicate that you're the leader they need. But the first step is to change your mind about jurors.



## ACTIVITIES TO PRACTICE

1. How have you viewed jurors up until this point? Can you try seeing them as hostages in desperate need for someone to show them the way? Visit your local courthouse sometime this week. Take a seat in the back and watch jury selection from this new perspective. You'll be amazed at how different the experience feels when you see the jurors as innocent victims desperate for a rescue.
2. You might also think of times where you felt victimized by forces outside of your control. Think back: Where have you felt your status was on the line? Perhaps it was the first time you had to speak in front of your class in law school. Maybe it was the first time you agreed to deliver a CLE. What was that like? How did you feel?
3. What about times where you felt uncertain? Have you ever attended a class where instructions were unclear? Attended an event where you were unsure where you were supposed to go or what you were supposed to do?
4. Has your autonomy ever been threatened? Where in your life have you been forced to participate in something you couldn't get out of? Put yourself there now. If you had to make a decision from that place, what kind of decision would you make?
5. Have you ever had to attend an event where you didn't know anyone? Perhaps you moved to a new town and had to start from scratch—meeting neighbors, hiring new employees, finding a new church. What was that like?
6. Finally, where in your life have you faced unfairness? How did you handle it?

You have an incredible opportunity to work with, instead of against, the jurors once you identify with their plight and change how you view them. Setting them free begins with changing your mind about who they are and the challenges they face.

Before you learn how to free the jurors, however, we must first look at how to free someone else.

You.