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Jury selection – the new paradigm

HAVE VOIR DIRE TRADITIONS BECOME ANACHRONISMS? AN ARGUMENT FOR HAVING A SEPARATE ATTORNEY CONDUCT VOIR DIRE BEFORE YOU PRESENT YOUR CASE

The law, because it venerates precedent, is full of anachronism. There are so many time-honored traditions that no longer seem to have real purpose, or sensible justification.

Take federal diversity jurisdiction as an example. The founding fathers, in Article III, Section 2 of the U.S. Constitution, provided federal courts with jurisdiction over cases between citizens of different states. They were concerned that a citizen of one state, hauled into court by the citizen of another, might face discrimination by that state court. This concern made sense in the 18th century when it took days to travel from one state to another, and weeks for letters to arrive. But does it make sense now? When communication is instantaneous and business is conducted face to face over video internet connections, can we really say that a defendant from one state will suffer discrimination in the court of another?

Another anachronism is the prohibition of the golden-rule argument. By this time-honored rule, lawyers are, for no good reason in my view, prohibited from presenting argument in the precise manner jurors will decide the case. Cases, in California and in other jurisdictions, provide precious little analysis of the prohibition, and no case explains how jurors can go about making an "impartial" assessment of the value of pain without considering what pain means to them. (See, e.g., *Horn v. Atchison, Topeka and Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 609; *Loth v. Truck-A-Way Corp*. (1998) 60 Cal.App.4th 757, 765.)

Then there is the anachronism of having the same lawyer who conducts voir dire in a civil case be the one who presents the evidence and the closing argument. I call it an anachronism because so many civil trials today involve more than one trial lawyer for a single party – generally a lead and a second chair. This is a function of the complexity and cost of the modern civil jury trial. But it is an anachronism for a more important reason. It is better, in my opinion, for the lawyer who actually tries the case to be different from the lawyer who selects the jury.

Jury *de*selection is messy and treacherous

It is a truism of modern trial practice that the better name for jury selection is jury *de*selection. We are not there to select the jurors who'll be good for our client's case. We're there to identify and deselect the ones who won't be.

Nor is there any point in trying to "educate" the venire panel about the themes of our case. "Preconditioning" jurors is a myth. Yes, Code of Civil Procedure section 222.5 describes an improper question in voir dire as one "whose dominant purpose, attempts to precondition the prospective jurors to a particular result, [or] indoctrinate the jury, . . ." but jury consultants don't believe it's worth trying. (One of the members of the working group of judges and lawyers tasked with the drafting of section 222.5 before it was submitted as Assembly Bill 3820 in 1990, reports that judges in the group insisted this language be inserted despite argument from lawyers that indoctrination by voir dire is a myth.) No matter how persuasive, charming or skilled the lawyer may be, he/she cannot change a lifetime of acquired bias by asking one or two questions in the space of two minutes.

The primary objective of the process is to find out as much as possible about the venire panelists so that we can, in the words of Code of Civil Procedure section 222.5, "intelligently exercise both peremptory challenges and challenges for cause." Generally, we have very limited time to do this, and when we are denied our request to administer a jury questionnaire, we probably don't have enough time at all to learn who is really predisposed against our client's case. The procedure therefore requires nearly immediate penetration into the personal beliefs of the panelists.

This means it may be necessary to intrude, somewhat boldly, into private matters. And this intrusion occurs in an unusual and unfamiliar setting for the panelists, in front of a crowd of strangers. Most jurors have never been asked to answer personal questions in front of sixty strangers. For many of them the process is unnerving or downright embarrassing.

The potential for embarrassment or humiliation in voir dire is treacherous. We must find out who harbors bias, but we risk alienating jurors when we do so. A juror unhappy with his/her performance under questioning may acquire a bias against the examining attorney and hold a grudge against that side of the case for the rest of the trial. Even when the questioning attorney has done nothing to elicit resentment, if the court decides to jump in and ask its own questions that embarrass or humiliate, that unfortunate scenario may be associated with the examining party.

How many times have we had the experience of wishing the court would stop with its inquiry? The jury selection process is unpredictable. We have no control over what will be said, who says it, and the direction of the conversation.

A good jury selection elicits ugly themes

A thorough and effective jury selection exposes the defense-oriented jurors to the plaintiff, and plaintiff-oriented jurors to the defense. If the plaintiff's voir dire was good, the lawyer was able to elicit from one or more panelists the statement of bad themes for the plaintiff's case. A recent voir dire in a wrongful death case I monitored provides a good example:

Attorney: Ms. Smith, in this case if you find the defendant responsible for the

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accident, you'll be asked to arrive at a dollar amount the defendant should pay for the death of the plaintiff's mother. Are you comfortable with that task?
Panelist: I don't know. I'm not sure that I'm comfortable with the idea someone should get money because their family member died.
Attorney: Why do you feel that way?
Panelist: I don't think people should get money for a person's death.

At this point the panelist has revealed herself to have a bias against a general damage award in a wrongful-death case. This is not a good juror for the plaintiff. The plaintiff's lawyer could have stopped the inquiry at this point, resolved to excuse the panelist with a peremptory challenge. But peremptory challenges are precious. Why waste one on a juror that could probably be challenged for cause? The attorney in this case did the right thing. She followed up with this inquiry:

Attorney: So, are you saying that you have a moral belief against money being given to others for the death of a family member?
Panelist: I don't know if I'd call it a moral belief.
Attorney: But wouldn't it be fair to say that if the Court asked you to participate with the other jurors to determine how much money should be awarded for the death of the plaintiff's mother, you don't think you could do that?
Panelist: Yes, that's fair.

Now the attorney had established a challenge for cause, and saved a peremptory challenge. In fact, the attorney's attribution of the panelist's position as a "moral belief" was a wise approach because if the panelist admitted this, granting a cause challenge would be required. (See Code of Civil Procedure section 225(b), describing challenges for cause.) As it was, the lawyer got the panelist to admit she wouldn't be able to follow the court's instruction. This was the right way to handle the situation, but there's a problem.

The plaintiff's lawyer would soon present her opening statement. In that statement she would assert that the defendant caused the death and is responsible for the harm it has caused. She would soon ask the jury to award millions of dollars for the death of a beloved family member. Yet here she was, at the beginning of the case, stating a defense theme – a meme if you will – "There is a moral objection to the giving of money for a person's death." The plaintiff's own lawyer, by speaking this meme, had given it legitimacy! She's the same lawyer, who, at the end of the case, would be trying to convince the jury of precisely the opposite meme – that the moral thing to do is to require the responsible party to compensate the injured party for the loss.

A pinch-hitter for jury selection alleviates these problems

When the lawyer who conducts the voir dire is different than the lawyer who presents the evidence and argues the case, the problems inherent in jury selection are minimized. This is especially true if the jury-selection attorney leaves the case after jury selection. I am not suggesting that the jury-selection lawyer pack up his bag and walk out of the courtroom as soon as the jury is sworn. But if that lawyer isn't involved in the trial after that day, no one on the jury will think it odd. Jurors, even jurors who are lawyers, have no expectations about the division of labor between trial lawyers. By the time the evidence is in full swing the jury-selection lawyer has been forgotten. There is little or no contradiction in the language of the trial lawyer because she never uttered and gave credibility to contrary themes discussed in jury selection.

Some might object that it would seem weird for one of the trial lawyers to be absent from the case after jury selection. But only lawyers would find this weird, and only because they have never done it. Jurors, on the other hand, have no such expectation. "That guy" who did the jury selection is gone now. He did his job. The lawyer who has presented the case has the jury's attention, and he/she has had a consistent approach from start to finish. The more the lawyer who presents the case can be separated from the jury selection, the better.

The time to establish a relationship with the jury is in opening statement

Thirty years ago, before social science research and the experience of thousands of focus groups revolutionized trial work, lawyers were taught to "establish a rapport" with the venire panelists in jury selection. Typically, lawyers asked jurors for assurances:

Can you assure me, Ms. Smith, that you will keep an open mind, and judge the case on the basis of the evidence, and not on what you may know from outside the courtroom?

Can you assure me, Mr. Garcia, that if you find the defendant responsible for the plaintiff's injuries, that you will participate with the other jurors to determine what sum of money will compensate the plaintiff for those injuries?

Can you assure me, Ms. Lee, that you will apply the preponderance of the evidence standard that the Court will instruct, and not the criminal standard of proof beyond a reasonable doubt?

We now know such questions are a colossal waste of the limited time afforded for jury selection. These sorts of leading questions encourage the panelist to agree, even when agreement is disingenuous. You'll never learn important information about your jurors by asking such questions. Likewise, you might think it helpful to learn about a particular panelist's hobbies, interests and extracurricular activities, but engaging in small talk about such matters for the purpose of ingratiating yourself to the panelist is a mistake. (Of course, finding out about a juror's interests can reveal attitudes suggestive of a propensity for or against the client's cause. Questioning for that purpose, as opposed to ingratiation, is effective.)

Jurors are suspicious of lawyers, especially lawyers pretending to be interested in them. "Does he really think he can make me like him?" "What is he

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trying to convince me of?" These are the likely thoughts of panelists being questioned by the lawyer who hopes to "bond" with them.

There is a better way and a better time to "bond" with jurors. That is in opening statement. We know from the experience of focus groups and mock trials, where there is no jury selection, that a solid relationship with jurors can be established in opening statement. The relationship created there, as opposed to in the chaotic process of voir dire, is stronger and more relevant. There are important reasons why this is so.

First, in opening statement, the lawyer maintains complete control over the message. The discussions during jury selection are precisely the opposite of this: The lawyer wants to encourage open discussion, even an oral stream of consciousness, because this reveals the jurors' biases and attitudes. In opening statement, unlike voir dire, ugly themes can be exposed as such, rather than given legitimacy. Favorable themes will be introduced, encouraged and emphasized. Nothing the lawyer says here will contradict what he/she said in jury selection if a different lawyer handled jury selection.

Also, during opening statement, the lawyer has the complete attention of the jury. Jury selection, on the other hand, is tedious and boring. What the lawyer says to the jury in opening statement is completely relevant and important, whereas most questions asked in voir dire, especially a good voir dire, seem mysterious to panelists who know almost nothing about the case. How often have we heard people complain about the "ridiculous" questions asked in jury selection? There are no such complaints about opening statements – even ineffective ones.

A good opening convinces the jury that the case is important and just, and jurors are more likely to identify with and support the lawyer who represents the just cause.

All of these factors make opening statement, not jury selection, the place and time for the lawyer who presents the case to introduce him or herself to the jury. Opening statement is where the critical relationship between attorney and jurors begins to occur: As they meet you for the first time, nothing should interfere with their impression that you are the truth teller, that the facts of the case call out for a solution to a serious problem, and that you are going to guide them to that solution. A different relationship is established in jury selection. It's a weaker, tenuous relationship. It may even interfere with the strong relationship a good opening statement can establish.

The teaching of trial gurus David Ball and Don Keenan (the "Reptile" approach to trials) and Rick Friedman and Patrick Malone ("The Rules of the Road") advises strict adherence to case themes that encourage the evaluation of evidence from a community safety point of view. Their methods have a demonstrated record of success. They tell lawyers to wordsmith everything stated during the trial, from opening statement, through the examination of witnesses, and especially during closing argument.

While Ball and Keenan also recommend the use of specific language supporting 'reptile' themes during jury selection, they still emphasize that the objective of jury selection is information gathering, not education. Consistent with this approach, they recommend open-ended questioning that encourages panelists to give what they call "reflective" responses. They do not address the problem of legitimizing contrary themes during such open-ended discussion. (Ball & Keenan, *Reptile – the 2009 Manual of the Plaintiff's Revolution* (Balloon Press, 2009), p. 119.)

Under the Reptile and Rules of the Road approach, every word that comes out of the trial lawyer's mouth has been measured and vetted. For example, Ball and Keenan say, "Never refer to Defendant conduct as accidental, a mistake, a misjudgment, or inadvertent. Be strict about this with yourself and your witnesses." (*Ibid*., p. 53.) The awkward and often chaotic process of jury selection is inimical to this approach, and this alone is a compelling reason why the lawyer who presents the case should be a different lawyer than the one who handled voir dire.

Have your partner pick your jury. If you don't have a partner, or one with the necessary experience for the case, bring a colleague into the case for jury selection. The lawyer who presents the evidence and argues the case needs pure credibility, untainted by the vagaries of an effective jury selection.

Editor's Note: This article was first presented at the 2016 CAALA CONVENTION in Las Vegas.

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