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The law governing juror qualifications

A LOOK AT THE QUALIFICATIONS FOR JURORS AND AT PROPER CHALLENGES, PARTICULARLY LANGUAGE-BASED CHALLENGES

There is so much riding on a trial that jury selection begins before anyone calls the case for a readiness conference or its assignment to a trial department. There will be many subjects to read and refresh about before the first word is spoken to members of the venire, but knowledge of the rules and legal limitations regarding a party's ability to select a fair and impartial jury are vital so that whatever situation presents itself, and however capable or crafty the trial court or your opposite, you will be able to act quickly; on your feet in the heat of the trial.

Moreover, while there are distinct styles and methodologies for voir dire that look to expose and emulate traits or characteristics, like the "Reptile method," for example, a firm grasp of the legal issues the judge or your opposite will use to blunt your progress is the best kind of preparedness.

Our responsibility to clients includes selecting the best possible jury for their cause, which includes not only a methodology for selecting good jurors, but one that eliminates so-called, "bad jurors"; those whose views clash with your client's and disagree about the application of law to the facts of the dispute.

The elimination process begins with the qualifications of a person to serve as a juror. If the prospective juror is not disqualified from service, participation turns on whether good cause can be developed to excuse him or her for legal reasons that are articulated in statute and Rules of Court.

Barring disqualification or excuses for hardship, counsel must use a peremptory challenge if any are available to preserve the client's record for possible appeal. If there are no peremptory challenges, counsel must express dissatisfaction with the jury panel as constituted and request additional peremptory challenges or risk waiving the issue on a subsequent appeal.

It bears pointing out that once a jury is impaneled or sworn, voir dire may not be resumed. Therefore, in a bifurcated case, counsel must voir dire on liability *and* damages, even if the focus is on the former for the first phase, and not the next or last, as with *trifurcation*. (*Bly-Magee, Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, 324-325.)

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How to intelligently exercise peremptory challenges and challenges for cause

Section 222.5 of the Code of Civil Procedure provides in pertinent part,

> To select a fair and impartial jury in civil trials, the trial judge shall examine the prospective jurors. Upon the completion of the judge's initial examination, counsel for each party shall have the *right to examine*, by *oral* and direct *questioning*, *any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause*. During any examination conducted by counsel for the parties, the trial judge should permit *liberal and probing examination calculated to discover bias or prejudice* with regard to the *circumstances of the particular case*. The fact that a *topic has been included in the judge's examination should not preclude additional non repetitive or non-duplicative questioning* in the same area by counsel.
>
> (Emphasis supplied.)

Section 225.5 also provides, "The trial judge *should allow a brief opening statement by counsel for each party* prior to the commencement of the oral questioning phase of the voir dire process."

The statute also directs that,

> The scope of the examination conducted by counsel shall be within *reasonable limits* prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial *judge should consider*, among other criteria, any *unique or complex elements*, legal or factual, in the case and the *individual responses or conduct of jurors* which may evince *attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limit shall not be imposed in any case*. The trial judge shall not establish a blanket policy of a time limit for voir dire.

Section 222.5 was recently amended:

> The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an 'improper question' is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. *If a questionnaire is utilized, the parties should be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences. To help facilitate the jury selection process, the judge in civil trials should provide the parties with both the alphabetical list and the list of prospective jurors in the order in which they will be called*.

(Emp. on Recent Amendment.)

In *Rousseau v. West Coast House Movers* (1967) 256 Cal.App.2d 878, counsel were invited to submit *written questions* to the trial court which conducted the entire voir dire. Rousseau did not object or submit any questions. Neither did he object to jury selection as it was conducted by the court. When he did not prevail at trial, his objections to jury selection were deemed waived. No surprise there. The judge may drive the car, but if the lawyer sits idly by, white knuckling it or looking at the scenery, instead of back-seat driving when the court errs, there will be an accident. The lawyer in *Rousseau* should have requested the opportunity to orally voir dire the jury on qualifications, implied and actual bias and barring that, made a record about the questions he wanted to ask.

The place to raise issues demonstrating the complexity or sensitivity of the case, parties or some of the witnesses, is in the trial brief. One section of the brief should touch on the questions counsel would like the Court to discuss and develop with the venire. This is the time to touch on general juror qualifications, discuss interpreter testimony, felonies and other issues in the case that should be discussed with the panel.

The use of "mini opening statements," is controversial but is clearly authorized by section 222.5. On the one hand, it provides an opportunity to briefly summarize the best and/or worst aspects of your case as you assess the venire. On the other, equal time is afforded your opponents. By the time all sides sit down from their 3-5-minute mini opening, the jury could already be so confused about what happened that the plaintiff's attorney is branded a liar and facilitator for fraud before jury selection has started. That creates a very stiff gradient. Of course, the opposite is also true. However, that is why some still prefer the trial court reciting a brief and neutral statement of the case, and then let the court's voir dire begin.

Qualifications to be a trial juror

Code of Civil Procedure section 203, subdivision (a) provides that all persons are eligible and qualified to be prospective trial jurors *except*, ¶ 1 Persons who are *not citizens* of the United States; ¶ 4 Persons who are *not resident of the jurisdiction* where they are summoned to serve; ¶ 5 Persons who have been *convicted of… a felony*, and whose *civil rights have not been restored*; ¶ 6 Persons who are not possessed of *sufficient knowledge of the English language* (excluding physical disabilities regarding communication and mobility).

These are the *only disqualifying factors* for jury service. (See also, Code of Civil Procedure § 228, subd. (a) [challenges for *general disqualification* may only be based on the want of qualifications prescribed by the code or the existence of *any incapacity* which satisfies the court the prospective juror is incapable of performing jury service without prejudice to the rights of the challenging party].)

How well does the juror speak English?

The most common disqualifying factor lawyers encounter in urban areas and Southern California courtrooms is a prospective juror's inability to communicate in English. (Code Civ. Proc., § 203, subd. (a)(6).) That phenomenon may occur because other disqualifying issues are handled by Jury Commissioners

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before prospective jurors are assigned to trial departments, but it is important to develop a facility for how this should be dealt with in the courtroom.

Many trial judges in civil cases gloss over English proficiency in the interests of expediency, or to assuage the sensibilities of others on the panel, even as they allow otherwise incompetent jurors to sit on cases – your client's. Judges are elected officials after all, and many are sensitive to the fact they could be criticized for concluding heavy accents and a limited vocabulary equate to incompetence as a juror. "If they know English well enough to live and function in the *community*, they can serve as jurors," or so it has been said.

But that well-intended sentiment becomes extremely problematic even without ethnocentric bias, because in Los Angeles, where 224 languages are recognized, if a juror does not understand English for communication *with other jurors* – who have their own communication baggage – comprehending the evidence coming in at the usual pace of a trial, comprised of testimony and documents and colloquy, will be the least of your troubles and next to impossible. The worst scenario is that the juror does not participate in deliberations, gets steamrolled by those who do have facility for English and goes along with it, or gets it *wrong* and pushes the "error" in deliberations.

It does not seem prudent to take the chance that "leaders," or "Alpha-jurors," will advocate for your side in the deliberations so the non-participating juror does not really matter. The better any juror can understand what is being said around them, the better they will function as part of the jury. The point being that challenges for cause based on a prospective juror's inability to speak or understand English should be taken very seriously and employed aggressively.

This is common sense and completely neutral, unlike systematic challenges based on gender, race or other recognized groups. If common words, expressions or phrases have no real meaning to a prospective juror (e.g., idiomatic speech, slang, colloquialisms), poignant testimony could be missed or overlooked, or foment distraction, and essential elements of the case deemed unproved. Obviously, that would have a negative influence on the outcome of deliberations and the dispute for your client. Thus, for example, "*rules of the road*," a colloquialism, could be a meaningless exercise for those who have no real education, familiarity or level of sophistication in English (or who do not drive) – and yet they could be easily overlooked.

Speaking through interpreters

Making sure that all jurors can understand each other well enough is about the only insurance lawyers have at their immediate disposal that the panel will understand the testimony and evidence during deliberations. Removing jurors who cannot communicate meaningfully in English removes a liability or distraction that would interfere with the flow of information, even if that would not become overt or apparent until a later time: deliberations.

No doubt, in some cases, the use of interpreters by parties or witnesses could make this examination of the venire awkward. However, if the court does not take up this mantle after a reminder, such as citation to section 203, it is important to stress that the parties or witnesses will be speaking through certified court interpreters to make certain that words are not confused in testimony under oath. In so doing, the interpreter removes a distraction even as it introduces another.

Depending on the interpreter, the emotional content of the testimony can be lost or distorted when it does not come directly from the witness, but where precision can make the difference between the eighth and ninth vote, the lesser of two evils is the interpreter's accuracy. This presents an opportunity for counsel to introduce and justify the use of an interpreter in court and why the client/witness requires one. The emphasis is *accuracy* in expression; overlooking shortcomings in education or in the client's or witnesses' *Americanization*. But simply because your client or other parties will use interpreters is no reason to back-off the requirement that jurors have sufficient command of the English language to qualify.

Until the issue becomes an anachronism with universal (wireless) real-time digital interpreters, it is incumbent upon the examining lawyer to develop an adequate record about the prospective juror's lack of fluency if the court will not take the initiative. Asserting sidebar challenges for cause that the juror has a "thick accent," and "misunderstood several questions – which had to be rephrased x-times – during voir dire," is probably *not nearly* enough to make the case for disqualification based on an English language *disability*.

However, this line can be developed sufficiently to justify challenge for cause in a respectful manner and tone by identifying the English-challenged juror's primary language, making inquiry about his or her English education, its use at home, the frequency it is written or read in business or social settings, and his or her proclivities toward social and business relationships with people who share the same primary language – to the *exclusion* of those who do *not*. This is enhanced by the long-standing nature of the residency.

One obvious, if somewhat extreme, example of the above would be the man living in, say, Little Armenia, in the *heart* of Los Angeles, and from the day he arrived with his parents, he lived and worked in that district, alongside people who spoke Armenian, patronizing shops and other stores with a decidedly Armenian clientele so that, for the most part, no other language was heard or spoken. He listens to Armenian radio channels and watches Armenian television. He dated and married an Armenian of the same ilk, worshiped in an orthodox church for Armenian families, and it becomes quite apparent one can live virtually their entire life in Los Angeles without having much contact with Anglo or other ethnic "outsiders," as it were.

Despite the absence of any physical barriers, this is a common theme from Little Tokyo to Chinatown and beyond in Los Angeles. In certain pockets of the county, English signs are hard to find if they are even present. To the world, the prospective juror is a resident

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of Los Angeles, California, but because he speaks, reads or writes virtually no English and understands even less without significant assistance, he is *not qualified* to participate on a California Superior Court jury. That is *not* a judgment against the juror, it is simply a fact about communication.

If a prospective juror has significant difficulty speaking English or provides physical cues that she or he does not understand what is being said, even after living in "Los Angeles," for 10, 20 or 30 years or more, focus voir dire on *how much* of the Court's voir dire the prospective juror understood by way of a *percentage*, and do the same about whether the prospective juror understood the answers of others on the panel.

If the prospective juror cannot provide a percentage or any assessment of what they understood, res ipsa loquitur, it speaks for itself. The inability to communicate in words and numbers should be sufficient to disqualify the prospective juror. If the estimated percentages seem too high – too high to make the appropriate challenge for cause – simple questions to the prospective juror about what other prospective jurors said in their responses should be the focus of counsel's inquiry.

Picking up on what other jurors said, in open-ended questions, will probably give the examiner (and court) the best sense of whether the prospective juror is actually following what is going on in the courtroom. If a prospective juror cannot recount any of the answers or explanations, like a deer in the headlights, it may be at considerable odds with the percentage that was ascribed by the prospective juror before inquiry was made, supporting a cause for challenge the juror is not qualified. Variations on that theme will become apparent for arguing disqualification.

One might consider avoiding asking prospective jurors who are language-challenged how well they understood the particulars of the court's voir dire. This may be counterintuitive, but judges generally speak clearly and articulately, using simple terms, and they are seen as authority figures so it is a natural human impulse to focus greater attention on what they are trying to communicate. Even if the words were not understood well or at all, the prospective juror is working hard enough to "get it." Put another way, if a prospective juror fails the court's voir dire on the basis of English proficiency, it is very likely they are barely conversant in English.

A prospective juror working hard to understand what is being said is a luxury afforded the court and other authority figures, but generally not others, including forepersons and other jurors, witnesses and, of course, the lawyers. Once it becomes clear that the judge is simply an umpire during a civil trial, it is likely that someone who is not proficient in English will not pay attention at the same level or intensity; the authority is not a central figure in the case.

It takes a great deal of energy throughout the day to understand what is being said or presented, or argued about, when it is not your primary or second language. Attention spans are getting shorter all the time, and even if some English-challenged jurors manage to keep up during the court's voir dire, it is a near certainty an unqualified juror (because of language) would not be able to keep up the pace of high-level comprehension during the trial when the evidence is coming in – generally with pace.

That is not to say the language-challenged juror is shirking his or her responsibilities, but rather, that the energy required is too great and the tasking becomes unreasonable for the juror, the jury and the parties, seriatim. That is why a fair sample of the language-challenged prospective juror's ability can be gleaned by how well he or she understood the conversation that was occurring with others.

Therefore, when assessing the venire for language ability, more likely than not, a more accurate assessment of a juror's proficiency will come from using conversations with other prospective jurors as tools or benchmarks with the language-challenged prospective juror. Succinctly, if a prospective language-challenged juror can accurately comment about other jurors' expressed sentiments without leading questions, that juror will not be excused for cause – not unless hardship is established or some other capacity issue.

Apart from language ability, inquiry should be made of the court about screening for conviction of a prior felony and proof that civil rights have been restored by formal decree. There are good reasons to inquire about a prior felony conviction on the venire, especially if one of the witnesses or parties in the case has a prior conviction and the issue of his/her truthfulness is raised with a CACI No. 211 credibility instruction from the court. The trial court should make that inquiry to avoid any suggestion of partiality one way or the other by counsel. If counsel is relegated to make this inquiry, it might be helpful to phrase the inquiry whether anyone who has been convicted of a felony has not had their civil rights restored by formal decree. That makes the record one needs to preserve the issue, and it will not require humiliating a prospective juror, who has had their civil rights restored.

Excuses from jury service

If a "bad juror" cannot be disqualified, one should consider developing one or more of the "hardship excuses" that are enumerated in the California Rules of Court. Rule 2.1008, subd. (b) provides, (1) No class or category of persons may *automatically* be excluded from jury duty except provided by law. (2) A statutory exemption from jury service must be granted only when the eligible person claims it. (3) Deferring jury service is preferred to excusing a prospective juror for a temporary or marginal hardship. (4) Inconvenience to a prospective juror or an employer is not an adequate reason to be excused from jury duty, though it may be considered a ground for deferral.

Subdivision (c) provides, "All requests to be excused from jury service that are granted for undue hardship must be put in writing by the prospective juror, reduced to writing, or *placed on the court's record*. The prospective juror must support the request with facts *specifying the hardship* and a statement *why the*

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circumstances constituting the undue hardship cannot be avoided by deferring the prospective juror's service."

Subdivision (d) provides the bases to excuse a prospective juror for undue hardship: They include:

- No reasonably available public or private transportation to court;
- Having to travel an excessive distance (defined as 1.5 hours or more of travel time) to court;
- Extreme financial hardship;
- Undue risk of damage to the juror's property;
- A physical or mental disability that, although does not disqualify the juror, would subject him or her to undue risk of physical or mental harm;
- A personal obligation "to provide actual and necessary care to another, including sick, aged, or infirm dependents, or a child who requires the prospective juror's personal care and attention," when no reasonable alternative is available.

The California Supreme Court has been extremely "lenient," when it comes to trial courts summarily discharging prospective jurors for extreme hardship. So long as the trial court exercises its discretion in an even-handed and neutral manner, it may essentially line people up at a lectern and inquire of a brief factual basis for their reasons before discharging them. This constitutes a preliminary pre-screening that produces no harm or prejudice. (*People v. Burgener* (2003) 29 Cal.4th 833, 862.)

Challenges to jurors

Section 225 of the Code of Civil Procedure provides that a "challenge" is "an objection made to the trial jurors…" There are three kinds. The first is an objection to the "trial *jury panel* for *cause*." This must be presented in writing, served on the jury commissioner and "plainly and distinctly state the facts constituting the ground for challenge," *before* the panel is sworn. The second challenge is to a prospective juror for cause, including general disqualification, implied bias and actual bias. The last is a peremptory challenge to a prospective juror.

Section 226 provides that a challenge to an individual juror may only be made before the jury is sworn. Challenges to an individual juror may be made orally or in writing, and no reasons need be provided for (available) peremptory challenges, which the court has no discretion to overrule. Challenges for cause must be exercised before peremptory challenges. The defense exercises its objections for cause to individual jurors before the plaintiff.

Section 227 provides that challenges for cause are taken in the following order: (a) to the panel; then individual jurors for, (b) general disqualification; (c) implied bias; and (d) actual bias.

Section 228, noted above, limits *general disqualification* to the, (a) "want of any of the qualifications prescribed by this code… ," or (b) the "existence of *any incapacity* which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party."

The second tier regarding challenges for cause is implied bias, "a presumption of bias that could not be overcome by a finding that the prospective juror could be fair and impartial." (*People v. Ledesma* (2006) 39 Cal.4th 641, 669.) Implied bias is established if the prospective juror is a blood relation within the fourth-degree of any party or officer of a corporation which is a party. Implied bias is also established when any witness, or "the parent, spouse or child," of any number of parties to various relationships, including "principal and agent," and "debtor and creditor," is a litigant. (Code Civ. Proc., § 229, subd. (b).)

Implied bias is also established if the prospective juror served as a trial or grand juror in a civil or criminal action in a previous or pending trial between the same parties (*Id.*, subd. (c)), or has any pecuniary interest in the subject matter (other than one as a citizen or taxpayer). (*Id.*, subd. (d).)

In civil cases, the more frequent implied bias challenge is against the prospective juror who expresses, "an *unqualified opinion or belief* as to the merits of the action that is founded upon *knowledge* of its *material facts* or some of them." (*Id.*, § 229, subd. (e).) It is also established when a prospective juror displays the existence of a state of mind evincing *enmity* against, or *bias* towards, either party. (*Id.*, subd. (f)). "Enmity," can range in meaning from, "hostility," to "hatred." "Bias," means anything from "partiality," to "prejudice."

Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (*Id.*, § 225, subd. (b)(1)(C).) The Supreme Court has held that, "If the facts do not establish one of the grounds for implied bias listed in that statute, the juror may be excused for 'actual bias' if the court finds that the juror's state of mind would prevent him or her from being impartial." (*People v. Ledesma* (2006) 39 Cal.4th 641, 670.)

If counsel finds that, after all of the for-cause challenges have been recorded and peremptory challenges exhausted, the jury is still unfair and biased against the client and cause, a request for additional peremptory challenges must be made to preserve the appellate record for error. (*People v. Ledesma,* 39 Cal.4th at p. 671.)

A trial court's ruling in denying a for-cause challenge to a juror is reviewed for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1199.) "We generally defer to the trial court's assessment of the juror's state of mind on appeal, particularly where conflicting or ambiguous answers were given on *voir dire*." (*People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

Determine if a prospective juror will follow the law

Reviewing cases on jury selection and challenges for cause, it is remarkable how jurors are surveyed for their willingness to enforce the criminal law, especially in death-penalty cases. The jurors are examined about their willingness or not to weigh aggravating and

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mitigating factors (*People v. Ledesma*, 39 Cal.4th at pp. 672-675) and how a stated "willing[ness] to follow the court's instructions," has become a talisman for all but the most jaded and cynical to serve on a jury.

Civil lawyers ought to do the same thing with respect to critical instructions in the case, beyond the burden(s) of proof. Exploring the defendant's burden on defenses, highly susceptible plaintiffs, exacerbated pre-existing conditions, non-economic damages, and even life expectancy, before the jury is empaneled is the more prudent course. If special instructions have been approved, they ought to be reviewed by the panel to determine any issues about following the law. This methodology allows lawyers and the court to learn if any prospective jurors reject the concepts that are expressed. Doubtless, for many it will introduce and educate them to what must be established, and what is compensable.

Conclusion

Developing a facility for the law as well as stylistic technique during jury selection will ensure that you maximize your client's opportunity to win a fair trial. Even if you cannot have your pick of the very best jurors for the case, at least you can eliminate those who probably would hurt or not help it along to verdict. If everyone is on the same page with the evidence and if people can communicate with each other, it provides some assurance that a result will come from a concerted group effort. You can win that case because fundamentally, you are a *communicator*.

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