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Jury selection for the 21st century

A PRACTICAL, COURT-FOCUSED LOOK AT HOW YOU WILL SELECT A JURY AND WHAT YOU CAN AND CANNOT ACCOMPLISH IN THE PROCESS

It is commonly reported that 70 percent of the jurors have made up their minds by the end of opening statements. However, what the research really shows is that most jurors are predisposed to one side or the other by the end of jury selection. They will view either the plaintiff's or the defendant's evidence in the light most favorable to that side by the time the jury is seated.

This predisposition is not a result of "indoctrination," "pre conditioning" or "clever lawyering." In fact, most often, just the opposite is true. By the time voir dire is completed, many lawyers have gained little useful information about the jurors and have not done much to convince the jurors or the judge that they know what they are doing.

The "conventional wisdom" for years was that certain stereotypes were favorable to one side or the other. For example, engineers are favorable to the defense. However, research has demonstrated that it is the life experiences that each juror brings with them to the courtroom that predisposes jurors to receive information in a certain light.

Confirmation of prior beliefs

Jurors focus on information that confirms their beliefs and discount information that does not fit their expectations. We all tend to see what we believe as opposed to believe what we see, which may explain why eyewitness testimony is often unreliable. Jurors accept information that confirms what they already believe, and doubt or reject what is inconsistent or at the very least view the contrarian information as ambiguous at best. Facts supportive of already held beliefs are readily accepted and non-supportive facts are ignored, forgotten, or marginalized.

Jurors, just like everyone else, organize their knowledge, beliefs, theories and expectations around their life experiences. When they have a new experience, such as serving on a jury, jurors use their past experiences and the belief system by which they have judged those experiences as a framework for perceiving the evidence and statements made during the trial. If jurors expect a party to behave in a certain way and the party does not, then the jurors believe the party acted improperly. The same is true of events: they should unfold in a way constant with past experiences.

The selection process

The approach to today's jury selection is threefold: 1) Identification of the court's time, process and substance voir dire limitations; 2) Identification of those prospective jurors that have to be challenged; and 3) Utilization of the legal standard for challenges for cause.

Long before the day of trial, find out the trial judge's views and local rules on jury selection. You need to be planning your jury selection well before you arrive for trial. Actually observing jury selection in another case before your trial judge is highly recommended.

The questions you need to find answers to are:

- What areas of the county are the prospective panel members drawn from? If the court doesn't know, talk to the jury coordinator;
- How many prospective jurors will be called up from the jury room;
- What are the court's usual trial hours and how does the court handle time qualifications, juror hardship excuses? Caveat: don't stipulate in open court before the court inquires whether counsel will stipulate;
- Does the court use a 6 pack, 12 pack, 18 pack? Where is juror number 1 seated;
- How much time will the court spend and what areas does the court cover with the panel;

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• How much time does the court allow for attorney questioning;
• Will the court allow a questionnaire? If so, will the court randomly pre-select the first group of jurors to be questioned so that the questionnaires can be reviewed;
• What questions does the court consider improper;
• How many peremptory challenges are there per side; and
• What standard does the court use for challenges for cause; when does the court want them made; and who goes first?

Areas of county for juror draw

The areas of juror county draw may be generally useful. You can get a feel for the demographics by looking at voter registration and some marketing studies. Some consideration to challenging the entire panel as a whole pursuant to section 225, subdivision (a) of the Code of Civil Procedure might be given in particular venues with a documented history of adverse verdicts. These venues are well known to the bench and trial bar. In fact, judges in these venues keep a list of verdicts which they use as a settlement tool. Such a challenge should be raised before challenges to individual jurors since it is based on information available well before the panel appears for voir dire.

A challenge to the entire panel must be in writing and set forth in detail the basis for the motion. Reasonable notice is required to all parties and the jury commissioner. The most common challenge is improper selection such that there is no representative cross section. The reality is that frequently jurors with life experiences more aligned with plaintiff's interests are not represented in the panels. This might be an area where a joint research project would be helpful.

Number of jurors called from the jury room

Generally speaking, approximately 35 prospective jurors will be called to the court room. It is good practice to stand when they are brought into court, and to turn to observe them in a natural, neutral manner, making eye contact. Be sure that clients and any support staff are not in the areas where they will come into contact or be intermingled with the panel.

Court trial hours/time qualifications/ juror hardship excuses

You have to know how many hours and minutes your trial court will have for your trial. There is a world of difference between 8:30 a.m. to 4:45 p.m., five days a week (6 hours, 15 minutes per day/31 hours, 15 minutes per week) versus 10 a.m. to 4 p.m., four days per week (5 hours, 15 minutes per day/21 hours per week.) Universally, trial courts have one 15-minute break in the morning, take lunch from noon to 1:30 p.m. and have one 15-minute break in the afternoon.

Due to heavy individual calendars (caseloads of 600 to 700), a number of courts must start their trials mid-morning after law and motion/status conference calendars and end their trials by 4 p.m. in order to prepare for the next day's cases that aren't in trial. Some courts, given their caseloads, don't run trials five days a week.

Shorter day equals longer trial

The shorter the trial day, the longer the length of the trial estimate. Therefore, the court with the shorter trial day is predisposed to look for ways to reduce your trial by cutting voir dire, witnesses called, examination of witnesses, opening statements and closing arguments.

After consulting with counsel, the court will have an estimate of the time the trial will take to give to the jurors. *Never exceed the amount of time or the date the jury has been promised the trial will be concluded.* Jurors don't want to be in court, inconvenienced, missing time from work, being unable to live their normal lives, stuck with strangers in a strange place.

Listen carefully to the excuses offered by the jurors for any clues about their predispositions. You know already they don't want to be there. How they phrase their excuses and their body language can be important. Wait for the court to ask for a stipulation to excuse a juror. Before you use a peremptory challenge on a juror who sought to be excused due to a hardship, see what the other side does with that juror.

Given the limited number of jurors responding to summons to appear for jury duty, the one day/one trial rule is in effect in most of California. Judges are loath to excuse jurors since there are so few.

It is harder for a juror to be excused for economic hardship with the one day/one trial rule. Larger employers pay for five days of jury service. Given budget restrictions, counties cannot afford to pay more than five dollars per day.

Seating the jurors: 6 pack, 12 pack, 18 pack, etc.

To expedite the trial and keep the inconvenience to jurors at a minimum, many courts are now conducting voir dire of not only the first twelve in the jury box but the six, twelve or even eighteen seated in the first two rows from the jury box. This has the advantage of having more prospective members of the panel stay focused on the questions and the attorneys knowing more about the replacements for the original twelve. The disadvantages are: 1) There are even more people to try to get to know something about in the already very limited time that the court has allotted for voir dire; and 2) Things move very fast once peremptory challenges start.

Part of the challenge of fast-paced jury selection is trying to anticipate how the jurors are going to relate to each other and interact. You need to know what the mix is going to be of leaders and followers; opinion makers and opinion adopters.

Amount of time the court will spend and areas covered

Some judges spend the necessary time to get to know the jurors and have them comfortable with all the upcoming phases of the trial, fully explaining the process. Watching and listening to a skilled judge do voir dire is one of the pleasures of trial work. Some of our most accomplished trial lawyers believe the

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court's voir dire presents a tremendous learning opportunity that is often missed. The lawyer is able to focus on the jurors without having to worry about the next question and/or what is being missed by concentrating on the one juror being examined.

However, many judges cover just the bare essentials of residence city, marital status, number of children, employment, prior jury service and litigation experience. Most judges defer questioning on case-related issues as they are concerned some jurors might infer the judge is biased as to certain issues.

It is the attorney's obligation to note any positive responses that need follow-up without interrupting the court. Counsel may examine on the same topics as the court as long as it is not repetitive. (Code Civ. Proc., § 222.5.)

If there is a particular area of the law that is critical in your case, it's helpful to have the court pre-instruct the jury during the voir dire. Such pre-instruction will avoid two problems: the promise of a juror agreeing to follow the law without even knowing what it might be, which is useless; and an objection from opposing counsel that you are pre-conditioning the jury or misstating the law.

If there are any particularly sensitive areas that you would prefer not to ask, ask the court to ask them.

Attorney time for voir dire

It's absolutely critical that you know exactly how much time the court will allow for you to conduct voir dire. "The scope of counsel's voir dire examination may be limited so long as counsel's right to conduct a 'liberal and probing examination to discover bias and prejudice within the circumstances of each case' *is not restricted*." (*Bly-Magee v. Budget Rent A Car Corp*. (1994) 24 Cal.App.4th 324, emphasis added.)

Section 222.5 provides that "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." Note, however, that one criminal case has held that time limits on voir dire were discretionary with the trial court finding that "use of a 25-minute examination estimate as a scheduling tool did not prejudice defendant's right to a fair and impartial jury." (*People v. Odle* (1988) 45 Cal.3rd 386, 409.)

The court system statewide summons approximately six million jurors per day. Most of the jurors serve on criminal cases or relatively "politically uncharged" straightforward civil matters that don't carry the same anti-plaintiff bias. The courts are attempting to maximize those jurors who come to court with a goal of having these jurors available for one jury selection in the morning and one in the afternoon.

Planning for voir dire in today's era of one day/one trial requires a realistic assessment of how to quickly discover the most adversely predisposed potential jurors. If you're limited to 30 minutes to question twelve jurors, you have 2.5 minutes per juror. With 18 jurors, you are limited to 90 seconds per juror. Just working through the biases against plaintiffs in any personal injury litigation, especially the "garden variety" auto case, is likely to consume more than 2-5 minutes per juror, if only to get a meaningful dialogue flowing where the jurors will be open enough in this "new-to-them-strange-environment" to express their opinions and beliefs.

Key Point: It's highly recommended that you practice getting people talking about their potentially adverse opinions and beliefs, keeping track of the time it takes so that you can present that to the court and make a record if necessary. Again, this may be a productive joint research project.

Questionnaires

Many courts don't allow questionnaires since they don't understand their benefits and/or the mechanics of using them. Questionnaires can be helpful as jurors tend to reveal more in writing, especially those that are uncomfortable speaking in group settings. The Judicial Council has a questionnaire that, while basic, is useful in personal injury cases. Discuss the use of a questionnaire with the defense. A joint request for a questionnaire has a greater likelihood of being granted.

If the court does allow a questionnaire which can be completed in 10 to 15 minutes, you will need to have a copy service standing by to make copies. Sometimes the court will grant a request for a random pre-selection of the jurors so that the questionnaires can be reviewed, which allows for a more focused follow-up examination of the prospective panel.

Questions the court considers improper

Nothing disrupts your efforts to get critical information from the jurors more than the court admonishing you that your questions are improper in front of the panel. Many courts consider improper perfectly legal questions that must be asked to discover biases against personal injury plaintiffs, primarily because they fear such questions will lead to excessive dialogue about the merits of such views. One approach that has been successful is to advise the court of your reasonable time estimate, what your goals are, and that you are not going to attempt to change anyone's beliefs, you just want to know what they are. File your brief on jury selection to educate the court in this overlooked, under-researched area.

Voir dire questions are proper to determine grounds for juror disqualification. They allow you to determine if an actual or implied bias exists for a challenge for cause. (*Rousseau v. West Coast House Movers* (1967) 256 Cal.App.2d 878, 882.) Further voir dire questions are proper to assist in exercising peremptory challenges in an intelligent manner. "Counsel should at least be allowed to inquire into matters concerning which… the population at large is commonly known to harbor strong feelings that may…significantly skew deliberations…" (*People v. Williams* (1981) 29 Cal.3rd. 392, 406-408.)

Questions about the law expressed in the jury instructions are proper. "(A) reasonable question about the potential juror's willingness to apply a particular doctrine of law should be permitted

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when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial" (*Id*., at p. 410.) Examples of questions about critical areas of the law would be: "Do you understand (a certain jury instruction)?"; "What do you think of such an instruction?" or "Will you follow this instruction if it is given to you?"

Number of peremptory challenges/order of challenges

In most civil cases with two sides, each side has six peremptory challenges. If there are more than two sides, each side has eight and the court divides them up as justice may require as long as the number on one side doesn't exceed the total number of all other sides. Unused challenges go to the party on the same side.

On challenges for cause, the defendant goes first. Plaintiff exercises the first peremptory. The first side to complete voir dire doesn't have to advise if they "pass the panel for cause" until the entire voir dire is completed. Challenges for cause are made first. In order to preserve your rights on appeal you must use all your peremptory challenges if the trial court denies a challenge for cause. (*People v. Willis* 27 Cal.4th 811; Code Civ. Proc. § 226, subd. (d).)

Know the court's standard for challenges for cause

Your trial judge may be a legal scholar or have just reviewed the law on challenges for cause. If so, that would be rare. Most judges are no different than most lawyers. Neither the bench nor trial bar has paid much attention to this area of the law. Since you won't have enough peremptory challenges to excuse every juror that is biased against personal injury plaintiffs, you are forced to be very well informed on challenges for cause and skilled at developing them. Be sure to do your homework and have a brief that lays out the law for the court.

Identification of the worst jurors

The era of "preconditioning" and "education" is over. So is the era when there was a fear of "poisoning the rest of the panel." It's a near certainty that all you'll have time to do is identify the worst of the potential jurors. Depending on the venue, that may be over 70 percent of the prospective panel. You will never convince most of the jurors there is no lawsuit abuse, that there is no need for "tort reform," that the so-called "litigation explosion" is a myth, or that the McDonald's verdict was just. You are never going to change anyone's mind in 5 to 30 minutes. What you can do is begin to establish that you and your client are not like the people the jurors dislike, that you and your client hate those that abuse the civil justice system because those people have delayed and threatened your client's pursuit of justice.

When you ask how many of the jurors believe there are too many lawsuits, be sure your hand and your client's is up.

Your goal is to ask open-ended questions and have different ones ready for each juror, designed to expose a potential bias whether it be "jurors are out of control," the civil justice system is "litigation lottery" or "jackpot justice," that people that sue haven't taken "personal responsibility," that the only people who benefit from the civil justice system are the lawyers, that verdicts are too high, or that there should be a cap on the amount that can be awarded. Ask questions like: "How many feel, like my dad, that jurors are out of control?" If no one raises a hand, then select a juror that was more verbal than most during the court's voir dire, and ask them how they feel about your question, watching the rest very carefully.

Some generalizations about jurors who have certain responses may be diagnostic, but you need to carefully correlate the responses you get with all the rest of the information you obtain. If a juror believes that the victim in the courtroom is the defendant or that businesses are at a disadvantage in the courtroom, obviously you should be concerned.

Those jurors who are Anglo, male, upper economic status, with college degrees, especially "generation Xers" tend to be predisposed against personal-injury plaintiffs. Many of these jurors have a deep-seated hostility towards those whom they view as trying to be rewarded without hard work. These jurors might be called "rule makers." They are people who feel they are "in control" and immune from personal misfortune.

Those jurors who are lower on the economic scale, who haven't been able to afford a post-high-school education, are female, are perhaps African American or Hispanic, may be less predisposed against personal-injury plaintiffs. These jurors have an anger towards the unfairness of society whose rules leave them powerless. These jurors might be called "rule breakers" since they can't seem to make progress with "society's rules." They are often people who feel that they don't have much control in their lives and are vulnerable.

Asking about how a juror views the role of lawyers tends to have a strong linkage with verdict outcomes. Do lawyers serve a necessary and productive role or are they unproductive and harmful? Those who have a favorable view towards lawyers and the civil justice system, who believe the right to sue is important, are more open to personal-injury plaintiffs. Those jurors who have compassion for the less fortunate in society tend to be better plaintiff jurors than those who believe that the poor haven't taken enough personal responsibility for their situation.

Another predictor may well be feelings about the amount of jury verdicts. Although you run the risk of seeming to be greedy by asking about the amounts of verdicts, you can in some ways appear to be reasonable while getting a sense of the jurors. One approach would be to say: "This isn't the McDonald's case where we're asking for millions for spilled coffee. But I want to know your feelings about how you might value the loss of the life that my client was living. If he had to live a different, in fact painful life, every day for the next 40 years, would $1 million seem about right, too high, not enough?"

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The legal standard for challenges for cause and how to establish it

You won't have enough peremptory challenges to excuse every biased juror. Further, the court is going to be reluctant to sustain many challenges for cause unless you have clearly met the legal standard. Even then, the court, due to the diminished juror pool, may deny your proper challenge for cause and let you make your case on appeal.

Therefore, you've got to fully understand the law and how to make your challenge for cause record. Section 225, subdivision (c) defines actual bias as: "the existence of a state of mind on the part of the juror in reference to the case, or any of the parties which will prevent the juror *from acting with entire impartiality, and without prejudice to the substantial rights of any party.* (Emphasis added). Section 225, subdivision (f) defines implied bias as: "the existence of a state of mind evincing enmity against, or bias towards, either party." A prospective juror was held properly challenged when they stated they would require more evidence than a mere preponderance to give a favorable verdict or when there would have to be strong and positive testimony. (*Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226; *Pitts v. Southern Pacific Co*. (1906) 149 Cal. 210, 313.)

No one is going to admit to being biased or prejudiced. No one thinks they are anything other than fair and just. Use phrases like "slight uphill battle" or "leaning in a certain way." A favorite is "if we were running a race, would my client be even or a little behind, given the way you feel?"

Start with explaining the purpose of your questions, reminding the prospective jurors that everyone has life experiences which affect how everyone views the world. Remind the jurors that there are many trials pending and they may feel comfortable on another type of case. You might give an example of how you like a certain football team or how you couldn't be a fair juror in a wrongful death case if someone killed one of your children.

If a prospective juror says something like they don't like people suing for damages, ask what kind of process they will use to set aside this feeling. If they are not talking, you might ask something like "do you have a problem with a parent suing for money for wrongful death of their child?" Have them explain by asking: "Help me understand why you feel this way." You should ask the court to offer a more private conversation for jurors who are shy or feel embarrassed such as at side bar or in chambers.

Don't stop your questions for cause too soon. You need to make sure the juror fully explains how they feel so that you have specific reasons why the judge should grant your cause challenge. Also you may develop information that forces the defendant to exercise a peremptory challenge. Don't leave room for the court or defense counsel to rehabilitate the juror. You might ask in closing: "No matter how fair you want to be, no one, not the court, not defense counsel, certainly not me, is going to change the feelings that you have in the short time we have?"

Select the first few challenges very carefully. Be sure you start with the ones where you've made a strong record. Be sure you've got the record before you tip your hand to the defense.

Never attack or argue with the panel

Never attack, argue with, embarrass, or lecture the prospective jurors. Listen to the responses. Keep in mind that judges seem more receptive to cause challenges where the problem juror has some specific issue with the facts or circumstances of the case.

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