



## Voir dire for the employment case

THERE IS ONLY ONE BATTLE YOU CAN'T LOSE IN TRIAL; A PRACTICAL GUIDE TO COMING OUT AHEAD IN JURY SELECTION

There is no guarantee that good facts will result in victory. Different jurors, with the same set of facts, will reach vastly different conclusions. Why? Jurors have different belief systems that influence how they process the evidence. We accept facts that are consistent with our belief system, while rejecting those that conflict with it. Thus, the goal of voir dire is to learn the jurors' belief systems.

This article discusses some thoughts on how to successfully execute voir dire. It is based upon my experience, the teachings of David Ball, Keith Mitnik, Lisa Blue, Rick Friedman, and countless conferences and podcasts.

First, I will discuss the strategies to employ in voir dire and follow by identifying the type of jurors you want to avoid in an employment dispute.

### Preparation is the key

It is crucial to devote a significant amount of time preparing your case-

specific questions. There is nothing worse than canned questions over and over with the same jurors; it is a great way for them to tune you out. Pivot, display some variety, be jovial, and the jurors will appreciate it. You build credibility with preparation. Jurors trust lawyers that don't waste their time.

### Insist upon a written jury questionnaire

Jurors will write down things they don't want to verbalize. Prepare a draft with favorable questions, but not too slanted, and try to get buy-in from defense counsel. A united front always has a better chance of success.

Thanks to CAOC, we now have California Code of Civil Procedure section 222.5 subdivision (f), which provides: "A trial judge 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 shall be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences."

### Explain the why of jury section

After reviewing the questionnaires, it is time to start picking the jury. Jurors will open up if you explain the *why* of jury selection. You are trying to find out which way they *lean* on issues. How does the topic strike them in the gut? Is it something they have strong feelings about or none at all?

Significantly, delete the word "biased" from your voir dire. No juror is going to admit they are biased; it is a dirty word. This is an honor system that both attorneys are relying upon them to participate in with transparency, self-awareness, and without sugarcoating their responses. If they believe that people usually get fired for good reasons, and it is counterintuitive for an employer

*See Rager, Next Page*

to fire a good employee, explore why they feel this way.

Explain that you will embrace negative information that is heartfelt and truthful. I personalize jury selection and the concept of brutal honesty by saying that my dad needles me for being a plaintiff's attorney when he thought he had raised a solid defense attorney. I am communicating that my closest relative can give me a hard time, and I still like them. It gives them a security blanket to open up to me.

### Ways to engage the reluctant juror

A good way to get jurors to open up is to ask scaling questions. On a scale of 1-10, do you strongly agree or disagree that there is too much government regulation of employers? On the same scale, who believes big verdicts hamper the economy? Or who believes you get what you deserve in life?

Another method is the good ol' fashioned show of hands. Raise your hand if you have even slight difficulty awarding damages for non-economic losses. Losses you can't see or reduce to a spreadsheet. Go juror by juror. Who feels a little bit like Mr. Smith?

When doing this, explain non-economic damages to them. And don't use the word non-economic, call them compensatory damages for emotional suffering. Ask them, which is worse: losing \$30,000 in wages or an elementary teacher losing a career who now does back-breaking work for Amazon. The isolation of picking and packaging random products at Amazon versus the ability to teach, develop, and bond with young children. Which loss is worse?

### Be strategic with your peremptory challenges

You get six peremptories. Use them carefully. Don't rely on the judge granting for-cause challenges. The judge is likely to extract a concession out of the juror that they will be fair and follow the law. Each of us has seen the juror who admits leaning against one side or a difficulty following a portion of the law get rewarded with a rebuke from the court. Other jurors quickly learn to get in line

to avoid the same lecture. Does the following sound familiar?

Court: Mr. Smith, you told Mr. Rager that the scales were slightly tipped against him. The defense was just a little ahead at the start of this race. Now, you have not heard any of the facts, right? And you haven't heard the law that I will give you to follow. Can you assure everyone in this courtroom that you are a fair person and you will follow the law that I give you?

Smith: Uh, yes, sure, come to think of it, I can be fair and follow the law.

Court: Cause challenge denied. Mr. Smith just admitted he could be fair.

A fantastic trial lawyer by the name of Keith Mitnik uses the following technique known as the "cause coffin" to *pre-empt* these inevitable efforts to defeat a cause challenge. It goes like this:

Q: Would you agree with me that when people have strong feelings or beliefs, they rarely change that view?

Q: Would it be fair to say, in all honesty, that you're not going to be able to put those feelings aside, that you can't turn them on and off like a light switch?

Q: Since your views are so strong, and because human nature is such that people don't tend to change their views, wouldn't you agree with me that it would be difficult, if not impossible, for you to set aside that view?

Q: I want to thank you so much for being honest with us. Wouldn't you agree with me that there is nothing that I or the defense lawyers or even the judge could say that would change your answers to any of these questions?

Use these questions for ammunition at side bar. Even if the cause challenge is not granted, it highlights that the juror's concession to act fairly and follow the law is an act of compliance rather than a truthful response.

### Stereotyping? Not me!

Let's switch gears to discussing some defense tactics and how to respond. Stereotyping: it's a problem, and it happens frequently. If you have a pregnancy discrimination case, guess who gets kicked? Invariably women, especially the mothers. Racial discrimination case, guess who gets kicked? Those of the

same race as your client. If only the odds were this good in Vegas. I digress.

What is your remedy? The *Batson/Wheeler* challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) The party raising this challenge must show that the "totality of the relevant facts gives rise to an inference of discriminatory purpose."

This is important to get on the table early, although it almost never gets granted. Still, it's important because the opposing counsel is put on notice. It makes them gun-shy, and quite frankly rattles their cages; they have been caught with their hand in the cookie jar.

Next, be tactical with your peremptories. Defense counsel typically feels this overwhelming need to use all their peremptories, especially if they have a jury consultant. If they are paying a consultant, that person feels like they must add value by kicking some jurors off. These defense consultants are usually not going to have the moxie to pass on exercising a peremptory early on.

Thus, my recommendation is to pass after using one or two challenges to eliminate your case killers. This forces the defense to burn their peremptories. Once they have used three to four peremptories, re-engage, and you have control of the panel. You must be willing to roll the dice, but this is a test of courage you are probably going to win.

### Avoiding mistakes and bad jurors

I have noticed a propensity in some lawyers to go against the grain. There seems to be this ego-driven desire to transform or flip jurors. As if the lawyer has the power to change a lifetime of experiences with their magical oratory. Give me a break! Every time I have seen this done it has backfired miserably.

If a juror wants off the jury, get them off. Listen to verbal and nonverbal cues that tell you that they have certain fatal predispositions and/or this is not the case for them. Trust me, this common-sense advice is not always followed. Take jurors' professed leanings and desires at face value; don't convince yourself they will come around!

*See Rager, Next Page*

Also, I feel strongly that you must avoid the “one-person jury.” What do I mean by this? If you have a case about a medical provider, get the medical provider off the case. What one doctor sees as substandard care they reported, the other doctor or nurse sees as a normal day at the office. What one police officer sees as office harassment, the other sees as standard banter. You know that this person is going to be the foreman; they are the expert in the field being litigated. The other jurors will defer to them, so why go to the trouble of a jury trial! You want the collective wisdom of twelve, not one.

A corollary to this is, no lawyers on the jury! Do you want to bank your case on one person? That lawyer is going to bring all their inside knowledge about jury instructions, contingency lawyers, etc. into that jury room, consciously or subconsciously. That is a gamble you do not want to take. Kind of like having a lawyer for a client, right . . . just pass.

Another problem juror is the “similarly-situated” juror. The similarly-situated juror has experienced the same pain and loss and received no compensation. It just hits them wrong when you ask for a substantial verdict when they got nothing. Don’t buy the self-serving mantra that they will feel your client’s pain and understand it. They may, but they are not paying you for it.

Also be wary of the “stuff happens” juror. This juror believes that things just happen in life and it just so happened to your client. This may not be true in catastrophic-injury cases but is more prevalent in wrongful-termination cases. This juror tends to blame the plaintiff by conjuring up what they could have done differently to avoid the termination. They want the plaintiff to move on and find another job.

Moreover, I have an aversion to the “lock ’em up and throw away the key” juror. If a juror has served on multiple criminal cases in which they have reached a verdict, be warned; especially if they were the foreperson. That criminal burden of proof, and the evidence required to satisfy it, is etched into their subconscious. These are the jurors that

will say there just was not enough proof of discrimination. They have relied on direct evidence in the past, and employment cases are light on direct evidence.

Lastly, there is a psychological concept known as heuristics that should be on your radar. Heuristics are mental shortcuts that allow us to resolve problems quickly without having to seriously deliberate. Be aware of the juror who displays these tendencies. This is the juror who will never give you a direct answer to your questions – the “I need to know more” juror. They are resistant to spending the mental capital required to engage in meaningful dialogue.

Once they are on the jury, they will take the same shortcuts. The evidence will not be carefully evaluated, but rather, framed to suit their shortcut.

### Teaching the defense-leaning juror

Invariably, you will end up with a juror or alternate that potentially fits into the “bad for plaintiff” category. This can be the “too many lawsuits” juror or “there should be caps on damages” juror. I suggest posing the following questioning to that prospective juror.

**Q:** If a person gets injured by the wrongdoing of another, who should bear the responsibility for the injury? Should it be the injured person, society (tax dollars), or the wrongdoer? Of course, it’s the wrongdoer. Acceptance of responsibility. It’s what we teach our children, and this resonates with these types of jurors.

Another similar question that I have found effective:

**Q:** What is the fairest way to assess damages? Is it to pull from a jury of your peers in the community and to determine a fair amount after hearing all the evidence? Or is it to have some bureaucrats who heard none of the evidence predetermine the amount?

Tap into logical thinking, and their aversion to government regulation.

### Alternates matter

When you have navigated all these land mines, it is time to pick your alternates. Picking the alternates is just as

important as picking the sitting jurors. Don’t relax; I estimate that in 60% of my cases, an alternate gets on the jury.

When it comes time to seat an alternate, don’t agree to picking the alternate out of the hat. You fought hard to get juror number thirteen into that seat, so reap the rewards. Unless of course, fourteen and fifteen are better.

Knowing which alternate is next on the panel matters. It will determine whether you stipulate to time off for a juror’s doctor appointment, or simply agree to excuse them.

### Closing practical suggestions

Don’t go at it alone. Bring an associate or jury consultant. It is impossible to concurrently ask questions, effectively listen, and be a reliable scribe. You just can’t do it. Plus, a sounding board never hurts.

For the techies out there, I would look into the computer app “Jury Analyst.” It was developed by Robert Eglet, a Nevada lawyer with over 120 jury trials, premised upon the concept of psychographics. Psychographics is an understanding of the juror’s personality, which influences their behavior. Jury Analyst tabulates positive (green) and negative (red) responses to questions and generates a score for each juror, to assist in jury selection. The application is downloadable in the Apple store.

In summation, jury selection is about common sense. Trust your instincts based upon an informed and open dialogue with the jurors. It’s truly not rocket science, and anyone can excel at it. You just have to put yourself out there.

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