



## Nuclear voir dire

WHILE FOCUSING ON VOIR DIRE IN EMPLOYMENT CASES, HERE ARE VALUABLE TIPS FOR ALL TYPES OF JURY SELECTION IN TODAY'S SOCIAL ENVIRONMENT

Coming out of Covid and (hopefully) entering a brighter future, 2022 is a great time to try employment cases to juries in California. We've already seen employment verdicts hit punitive damages over \$100 million in hostile-work-environment and whistleblower-retaliation trials in San Francisco and Los Angeles in the past six months.

Why have there been so many "nuclear" verdicts recently, in both injury and employment trials? In my opinion, it's a convergence of high levels of compassion and empathy for others (thanks to the self-reflection afforded by Covid) and negative public sentiment toward corporations (probably thanks to the heartless reactions of employers during the economic downturn during Covid). Jurors are much more motivated to punish irresponsible conduct and dishonest excuses than I've seen in a long time.

I hope you're excited to go to trial this year... but I also hope you understand that success (and a great jury) aren't guaranteed, even in a plaintiff-friendly venue, and even with good facts. If there's one lesson I've learned in all my years of picking juries, it's this: The quality of your jury matters much more than the facts of your case do. So, all the anti-corporate sentiment in the world won't matter much to your verdict if the 12 jurors on your panel aren't fed up and outraged by corporate irresponsibility. Nuclear verdicts require not only good facts, but jurors who are capable of being shocked and angered by the facts. Selecting a receptive jury isn't easy to do; without probing voir dire and skillful jury selection, a jury picked at random in LA County will be more likely to defend an employment case than to deliver a nuclear verdict.

So, it's no surprise that any experienced trial lawyer or jury consultant will tell you that jury selection is the most important phase of any jury trial. It's also the most difficult phase of

trial, because it's so challenging to assess and predict how each juror will likely react to your case, when most of the jurors themselves don't really know.

Let's get you ready for your next employment jury selection by focusing on the most important topics to cover in voir dire, and some of the most important factors to keep in mind when judging your jurors... including a few you might not expect.

### Voir dire on mistreatment in the workplace

One of the most common mistakes is for a plaintiff's lawyer to identify their best jurors in voir dire, so let me be clear here: you should *not* ask your jurors, "Who here has experienced [whatever your plaintiff has experienced]?" Don't do the defense counsel's job for them by identifying jurors who have experienced harassment, retaliation, or discrimination.

What you do need to do is to identify jurors who are so used to poor treatment as employees that they no longer believe that employers have a duty to be fair to employees... and now believe that employees who expect to be treated fairly are naïve or foolish.

Despite what defense lawyers think, jurors who have been consistently mistreated and downtrodden as employees tend to be awful for plaintiffs in employment trials. Don't assume jurors who have been the victim of discrimination or unfair treatment will identify with plaintiffs or want to stick it to employers, especially if they've become used to mistreatment. More often than not, downtrodden employees become so cynical and jaded that they accept mistreatment by employers as just a part of life that everyone has to accept. You should always voir dire on poor treatment by employers to identify jurors who have become cynical and jaded.

Here's how I usually voir dire on the subject: "Has anyone here been fired or treated unfairly enough times that you

now feel like the working world isn't fair to employees, and isn't supposed to be fair?" Or I'll sometimes ask each juror: "What are your feelings about whether or not employers have to treat employees fairly in the working world?" Your worst jurors will pessimistically tell you that employers don't have to be fair, that they weren't treated fairly, and that's just how life is.

Your dream juror is someone whose history of fair treatment by their employer has taught them to expect a high standard of fair treatment from all employers. Most defense lawyers would never believe it; they seem to think that only jurors with an axe to grind against employers are dangerous for defendants, but they're wrong.

### Voir dire on your jurors' expectations

There's a reason why poorly treated employees usually become lousy jurors for plaintiffs, and why many of the most well-treated employees are wonderful: because our jurors' experiences set their expectations, and their expectations shape how they view the facts of a case more than anything else. Here's a classic example: Jurors who are used to seeing understaffed emergency rooms with six-hour waits are *never* shocked by inattentive doctors and long delays in medical treatment, so they tend to be terrible jurors in medical-malpractice trials.

The same rules apply to employment trials. And remember, unlike trials that involve patents or product manufacturing or even car crashes, every juror has first-hand experience with employment issues, so they all have opinions and expectations to consider.

Think about the things you're accusing your defendant of doing. What is "fair" or "unfair" depends entirely on the perspective of the juror doing the judging. You need to know if the things you're suing over, or the defendant's affirmative defenses, are shocking and upsetting or seem

common and routine to each of your jurors. You need to voir dire on what they're used to.

Here's a common example: If you represent a plaintiff who was fired for (alleged) performance reasons without any prior warnings or write-ups, you need to figure out which jurors on your panel are used to progressive discipline (and therefore will be stunned and suspicious at an employee being fired without a single warning) and which have seen it happen frequently. The expectation of progressive discipline is why union members and government employees are often so great in employment cases.

In a sexual-harassment or hostile-work-environment trial, voir dire the jurors on whether or not they're used to professional, politically correct workplaces with strict rules... or used to workplaces where off-color jokes or language is common. In the *Diaz v. Tesla* jury selection (which involved racial harassment and offensive language in the workplace), we asked jurors the following two questions in voir dire:

1. Have any of you seen a workplace where it was *normal* for co-workers to make racial or sexual comments or jokes or trash talk to each other that others might find "offensive"?
2. How many of you feel like our society or the workplace has become too "politically correct" these days?

There are a thousand other examples of employment issues that might be necessary to voir dire your jurors on, depending on the issues in your case. In a disability discrimination trial where the defendant is claiming an accommodation would have been an undue burden, you'll need to voir dire jurors on whether they've seen co-workers' time-off be a "headache" to the employer... or easy to staff around.

In the *Tesla* trial, because we had to prove that Tesla was a joint employer, we identified and struck some jurors whose employers routinely staffed with independent contractors or staffing agencies.

No matter what the issues, you need to identify the jurors who won't be shocked or surprised by the things your defendant did.

#### **Don't necessarily strike your managers**

Contrary to conventional wisdom, jurors in management can sometimes be great for plaintiff... but you need to be extra careful and choosy with which managers you keep on the jury. It's true that, on average, jurors in management are worse for you than employees. But if you're automatically striking every juror in management, you're probably wasting some of your precious strikes on receptive jurors (and probably keeping some terrible jurors on your panel simply because they're employees).

The only thing that matters when it comes to assessing jurors is their attitudes and expectations. Not their demographics or their titles. It may be true that members of a shared demographic group – or a shared occupation – have shared experiences that lead them to form shared attitudes. But it doesn't mean they have all come away with the same attitude.

The experiences many managers share – being loyal to the company and the bottom-line, dealing with headache employees – do leave many managers with the attitude that a company's operations are more important than employee rights. But not all managers come away with that attitude. Many come away with the attitude that employers have a responsibility to help employees succeed. Those that work for responsible, ethical employers expect other employers to treat employees fairly... and get shocked and angry when a defendant doesn't. Some managers may work for an employer that has a strict progressive discipline policy... and get shocked and angry if they see a defendant fire an employee without any second chances.

Instead of automatically striking every management juror, voir dire

them on their experiences to see how they're used to handling the issues that you're accusing the defendant of mishandling. Do they feel responsible for giving coaching or help to struggling employees... or do they feel it's okay to fire a struggling employee who can't figure it out themselves? Do they feel like it's no problem or a headache to cover for an employee who needs to take a medical leave? When an employee complains, how do they handle it and how do they feel about having to handle it?

Jurors who feel like a defendant handled something the "wrong way" get angry... and one thing I can promise you is that jurors in management can have the strongest opinions about the right and wrong way for employers to handle employee issues.

#### **Make sure to strike jurors who suspect fakers**

Probably the most damaging point of view that a juror could have in an employment case is the belief that most people claiming to be the victim of discrimination, harassment, or retaliation are liars and fakers. You must always voir dire on this subject. Don't worry that asking about fakers will "poison your jury" or convince otherwise-receptive jurors that your client is a faker. You need to know which jurors are skeptical of fakers.

Frame your reason for asking the question carefully, by telling jurors that "because the defendant is basically calling my client a liar" or perhaps saying something like "now even though we'll show you evidence to prove our case, I understand that someone who has seen an employee fake or exaggerate accusations might have a hard time trusting other accusations, so I have to ask" before you ask the question.

But you need to ask your jurors if anyone has ever seen someone make a false accusation, or fake a disability, to get special treatment or to get out of working. Or if they've seen an employee take a medical leave they didn't really need... or

milk a medical leave they did need for longer than they needed.

Not everyone who has seen a faker will be a bad juror for you (but it's not a good sign), so I always follow up by asking these jurors, "Have you seen that only once, or many times?" and "Do you think that was an unusual situation, or do you think it's something that happens too much these days?" Jurors who see faking or lying or milking the system as a common problem in the society will probably assume your client is faking or exaggerating.

### **Voir dire on circumstantial evidence**

Because 99% of employment trials rely entirely on circumstantial evidence in the face of defendant denials and pretext, you absolutely have to voir dire about it.

Jurors hate to guess. Maybe they're lazy, maybe they hate uncertainty, or maybe they want to think the best of people and give employers the benefit of the doubt, but they hate to find a defendant guilty of serious wrongdoing in court based on speculation. They want concrete evidence and a smoking gun that proves to them that a defendant fired someone because of their race or gender.

But the truth is, you don't have that smoking gun proof 99% of the time. There's no confession or guilty email. Your defendants will always deny wrongdoing, have a pretextual excuse, and hide behind your jurors' reasonable doubt. And so, in employment trials, you really are asking jurors to guess, because they can never read a decision-maker's mind and know the "real reason" they fired or refused to promote or hire someone or paid someone less.

This is why the burden of proof is so hard to overcome in employment trials. And so, if you don't voir dire about it, many of your jurors will view your case as speculative and "unproven."

The first thing you have to do in every circumstantial employment voir dire is to point out *why* they won't see any direct evidence. Through questions, make them realize that no company

would ever admit breaking the law, and would never be dumb enough to confess in writing.

Here's how I ask it: "How many of you believe, if a company really did fire an employee for an illegal reason like their gender or age or race, that they would confess or admit it to a jury in a trial? Or that they would be dumb enough to send an internal email saying something like "Make sure we only hire white employees?" Would you ever expect to see that kind of evidence in a racial discrimination trial like this? Why or why not?"

If you don't point this out directly, your jurors will fault your case for not having direct proof. You then have a golden opportunity to reframe the pretext as something to be skeptical of. Ask something like: "When [defendant] tells you that their reason for firing [plaintiff] had *nothing* to do with his/her [race or age or gender], is anyone here going to automatically believe that's the truth?"

Now you have a truly golden opportunity to convince jurors to value circumstantial evidence instead of discounting it. Tell them: "Your job will be to look at all the facts and decide for yourselves what defendant's *real* reason was for firing plaintiff... but you won't have to read their minds; you will get to see all the clues and evidence and witnesses and see who's story fits, like a detective. Can everyone here do that?"

The goal is that all your receptive jurors will now be welcoming and focused on circumstantial evidence. But you also can't forget that some jurors are so skeptical that you can never convince them, so make sure to voir dire one last time on circumstantial evidence to identify jurors who simply find it too speculative.

Here's how I ask it: "No one wants anyone to do a job you're uncomfortable doing, so let me ask: would anyone here feel uncomfortable having to be a detective as a juror and *figuring out* for yourselves what you think the real reason the defendant fired plaintiff... even if they tell you their reason was something

else? Does anyone here feel like that's impossible for you to ever feel convinced and proven for yourselves, without reading minds?"

And because jurors often struggle to second-guess employers, one of my favorite questions, which you're welcome to steal and use in your next trial, is designed to focus jurors on the lies: Ask your jury, "If a manager or company being sued did *nothing* wrong and followed the law in firing an employee, does anyone here feel like they'd have *any* reason to lie about *anything* in the trial about what they did and why they fired the employee? Why or why not?"

The reason this question is so important is that jurors often get distracted on what an employer's lies mean and focus entirely on whether there's "proof" of illegal conduct. Jurors need to be reminded in voir dire that companies only lie to cover up wrongdoing... and so any lie, no matter how small, shows a cover-up.

### **Don't give damage numbers in employment-case voir dire**

It's common practice and often a great idea in personal-injury trials to tell your jurors in voir dire exactly how much money you're going to ask the jury to award. The good jurors will tell you they're open to millions over a death, and bad jurors will immediately tell you they think millions over an injury is ridiculous and excessive. In other words, in serious-injury trials, your jurors' first reactions mean something. Not in employment trials.

Unlike a wrongful-death or severe-injury lawsuit, jurors can't grasp how serious most employment trials are until they've heard the facts, so it's usually a terrible idea to tell your jurors you're asking for big damage numbers in employment voir dire. Jurors know immediately that losing a parent or child or spouse – or having chronic pain or a disability over an injury – can be devastating. But every juror has changed jobs or plans to in the future. They don't view losing a job as devastating or worthy

of big damages on first glance. And even though many jurors have never experienced serious discrimination, retaliation, or sexual harassment in the workplace, it's easy for them to imagine that if they did, they would quickly and painlessly switch jobs and get out of a bad situation.

I've seen many, many juries award huge verdicts at the end of employment trials. But I've never seen jurors, even good ones, react well when a plaintiff lawyer has announced their intention to ask for millions in voir dire in an employment trial. I once saw an entire jury express disgust when defense counsel told them in a mini opening that plaintiff was seeking \$10 million. Until they have reasons to be angry at the defendant and understand what the plaintiff went through, jurors can't imagine why plaintiffs in employment trials could deserve big damages.

I never recommend asking for specific dollar amounts in voir dire in employment trials. So, how should you voir dire on damages?

Instead of talking about specific numbers, talk about the concepts. Unlike a wrongful death or personal injury trial that involves injuries that can never be fixed, some of your jurors truly believe that anyone is capable of finding another job... and that a new job fixes everything.

If it's a wrongful-termination case, ask them if they think "losing a job is no big deal" and if it's "easy for someone who wants to work to find another job." Jurors who feel that way will obviously award only a short period of economic damages, blame the plaintiff for failing to find another job if it took more than a few weeks, and minimize any emotional distress that comes with losing a job.

Even if it's not a wrongful-termination case, these same jurors will believe that someone being mistreated in a job can easily find another one, so if they haven't, it means either they're not that upset

and just exaggerating or they should only blame themselves for not quitting and finding another job.

I always love to ask this question in voir dire, because a surprising number of jurors agree with it: "How many of you feel like someone who has been fired or mistreated at a job should just move on with their lives and find another job, instead of filing a lawsuit against their company, no matter what their situation may be?"

Even a straight-forward question like, "Being totally honest with yourselves, are any of you thinking 'how in the world can losing a job be upsetting enough for someone to deserve compensation for emotional distress over?'" can tell you most of what you need to know about your jurors' willingness to award a large verdict.

But when it comes to damages voir dire, I've found that the best way to get a good read on how jurors will feel about non-economic damages is to talk about them conceptually, without numbers. Explain to your jurors that "the only thing we're allowed to ask for, and the only thing a jury can force a defendant to do, is to compensate the victim with money." Explain to them that "even if my client is paid back all the income they lost, that doesn't take away the worrying they went through all that time... and it doesn't take away the traumatic lessons they learned." You're doing this to put non-economic damages in the best possible light, so that when you ultimately ask your jurors what they think of the concept of awarding money for distress, you know for sure that the ones who are uncomfortable are bad jurors.

Keep in mind that most jurors are completely unaware of what non-economic damages are... and have never spent even a minute thinking about whether they agree or disagree with them. If you ask a juror their feelings about non-economic damages without explaining why the law allows them, the answers you get don't mean much. Even good jurors often feel that money for "hurt feelings" sounds a little unfair.

But after you've sold your jurors on damages by putting them in the best possible light – "to put a value on the humiliation for how she was treated, the worrying about finding another job and feeding her family, and the thought at the back of her mind that she might get fired again if she stands up for a co-worker" – you can then voir dire jurors in a meaningful way.

And when you do, don't ask them whether they "can" award damages; even the worst jurors will often tell you they'll follow the law. Instead, ask your jurors open-ended questions, like "What are your feelings about whether the concept of using money to compensate for how someone was treated in the workplace seems fair and important... or maybe a little unfair or unnecessary?"

If you want to get a sense of how high they may go, I love to ask them if they've already decided whether the value of how someone is treated by an employer could be worth much more than the size of their paycheck. Not only can you get a sense of which jurors might cap non-economic damages at less than the economic loss, but you can also make the point that one has nothing to do with the other.

### Spend as much time preparing for voir dire as you prepare for opening

Because the makeup of your jury is even more important than the facts of your case and your performance in trial, don't cut corners on your preparation for jury selection. Take time identifying the key issues, writing your voir dire questions, and even practicing your voir dire.

And good luck the next time you're in front of a jury – hopefully sometime in 2022.

*Harry Plotkin is a jury consultant for many of CAALA's most accomplished trial lawyers, including 20 recipients of CAALA's Trial Lawyer of the Year award. Harry now works exclusively for plaintiffs in consumer cases and can be reached at [harry@yournextjury.com](mailto:harry@yournextjury.com) and at 626-975-4457. ☺*