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## The Art of Jury Selection

# The Art of the Voir Dire Process

By Brian J. Panish, Larry Hall & Adam K. Shea

## I. INTRODUCTION

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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 were considered favorable to the defense. Research has demonstrated, however, that it is the juror's life experiences that predispose them, just like our own experiences predispose all of us, to receive information in a certain light.

◆ **Key Point:** 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 consistent with past experiences.

The approach to today's jury selection is three-fold:

1. Identification of the court's time, process, and substance voir dire limitations;
2. Identification of those prospective jurors that have to be challenged;
3. Utilization of the legal standard for challenges for cause.

## II. IDENTIFICATION OF COURT TIME, PROCESS & SUBSTANCE LIMITATION ON VOIR DIRE

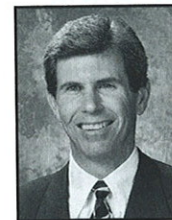
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The ten questions you need answered are:

1. What areas of the county are the prospective panel members drawn from? If the court doesn't know, talk to the jury coordinator.
2. How many prospective jurors will be called up from the jury room?



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3. What are the court's usual trial hours and how does the court handle time qualifications or juror hardship excuses? *Caveat:* Don't stipulate in open court before the court inquires whether counsel will stipulate.
4. Does the court use a 6-pack, 12-pack, 18-pack? Where is juror number 1 seated?
5. How much time will the court spend and what areas does the court cover with the panel?
6. How much time does the court allow for attorney questioning?
7. 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?

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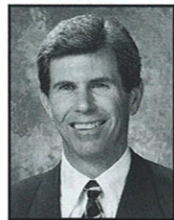
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8. What questions does the court consider improper?
9. How many peremptory challenges are there per side?
10. What standard does the court use for challenges for cause, when does the court want them made, and who goes first?

## 1. 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 marketing studies. Give some consideration to challenging the entire panel as a whole pursuant to C.C.P. section 225 (a) in particular venues with a documented history of adverse verdicts. These venues are well known to the bench and trial bar. Judges in these venues often keep a list of verdicts that they use as a settlement tool. Such a challenge must be raised before challenges to individual jurors since it is based on information available 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. 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 with other attorneys would be helpful.

## 2. Number of Jurors Called From the Jury Room

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

## 3. Court Trial Hours/Time Qualifications/Juror Hardship Excuses

Find out how many hours and minutes the court has scheduled for your trial. There is

a world of difference between 8:30 a.m. to 4:45 p.m. 5 days a week (6 hours 15 minutes per day/31 hours 15 minutes per week) and 10 a.m. to 4 p.m. 4 days per week (5 hours 15 minutes per day/21 hours per week). Trial courts usually 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 (case loads of 600 - 700), a number of courts start their trials mid-morning after law and motion/status conference calendars and end their trials by 4 p.m. so they can prepare for the cases that are not in trial. Given their case loads, some courts do not schedule trials five days a week.

◆ **Key Point:** The shorter the trial day, the longer the length of the trial estimate. 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. *Never exceed the amount of time or the date the jury has been promised the trial will be concluded.* Jurors want to be able to live normal lives; they do not want to be stuck in court - inconvenienced and missing time from work - with strangers.

Listen carefully to the excuses offered by the jurors for any clues about their predispositions. You know 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 a hardship excuse, 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 loathe 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 \$5.00 per day.



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**4. 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, eighteen or twenty-four seated in the first two rows from the jury box and the first row behind the railing. The advantages to this system are having more prospective members of the panel focused on the questions and the attorneys know more about the replacements for the original twelve. The disadvantages are there are even more people to try to get to know in the limited time that the court has allotted for voir dire.

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

**5. The Amount of Time the Court Will Spend and Areas Covered**

Some judges spend the necessary time to get to know the jurors and fully explain the process to them. They want the jurors to be comfortable with the upcoming phases of the trial. Watching a skilled judge do voir dire is one of the pleasures of trial work. Some of our most accomplished trial lawyers believe the court's voir dire presents a tremendous learning opportunity that is often missed. The lawyer is able to focus on the jurors with having to worry about the next question and or what is being missed by concentrating on the one juror being examined.

Many judges cover 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. You should 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. (C.C.P. § 222.5.)

If there is a particular area of the law that is critical in your case, it is helpful to have the court pre-instruct the jury during the voir dire. Such pre-instruction will

avoid two problems: first, the promise of a juror agreeing to follow the law without even knowing what it might be which is useless; second, 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, you should request that the court ask them.

**6. Attorney Time For Voir Dire**

It is absolutely critical that you know exactly how much time the court will allow 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.)

C.C.P. § 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." One criminal case held that time limits on voir dire are discretionary with the trial court, determining 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.3d 386, 409.)

The court system statewide summons approximately six million jurors per day. Most serve on criminal cases or relatively "politically uncharged" straightforward civil matters that don't carry the same potential for anti-plaintiff bias. The courts are attempting to maximize those jurors who come to court with a goal of having them 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 are limited to 30 minutes to question twelve jurors, you've got 2½ minutes per juror. With 18 jurors, you're limited to 90 seconds per juror. Just working through the bias 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 to express their opinions and beliefs.

♦ **Key Point:** It is 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.

**7. Questionnaires**

Many courts do not allow questionnaires because they do not understand the benefits 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 allows a questionnaire which can be completed in 10 to 15 minutes, you'll 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.

**8. Questions the Court Considers Improper**

Nothing disrupts your efforts to get critical information from the jurors more than the court admonishing you for improper questions. Many courts consider it improper to question about bias against personal injury plaintiffs because they fear such questions will lead to excessive dialogue about the merits of their views. You might advise the court of your time estimate, your goals, and assure the court that you are not going to attempt to change anyone's beliefs, you just want to know what they are. You may want to prepare a brief on jury selection to educate the court in this overlooked area of jury selection.

Voir dire questions are proper to determine grounds for juror disqualification. You have 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.) 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.3d 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 when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial." (*People v. Williams* (1981) 29 Cal.3d 392, 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?", "Will you follow this instruction if it is given to you?"



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## 9. 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 does not exceed the total number of all other sides. Unused challenges go to the party on the same side.

Contrary to what seems to be a common belief and practice, the defendant goes first on challenges for cause. Plaintiff exercises the first peremptory. The first side to complete voir dire, the plaintiff, does not have to advise if they "pass the panel for cause" until the entire voir dire is completed. Challenges for cause are made first. You must use all your peremptory challenges if the trial court denies a challenge for cause to preserve your rights on appeal. (*People v. Willis* 27 Cal.4th 811; C.C.P. 226 (d).)

## 10. Know the Court's Standard for Challenges For Cause

Your trial judge may be a legal scholar, having just reviewed the law on challenges for cause. If true, that would be rare. Most judges are no more informed about this area than most lawyers. Since you may not have enough peremptory challenges to excuse every juror that is biased against personal injury plaintiffs, you should be well informed on challenges for cause. Prepare a brief that lays out the law for the court.

## III. IDENTIFICATION OF PROSPECTIVE JURORS TO BE CHALLENGED FOR CAUSE

The era of "pre-conditioning" and "education" is over. So is the era when there was a fear of "poisoning the rest of the panel." You may only have time to identify the worst of the potential jurors. Depending on the venue, that may be over 70% of the prospective panel. You will never convince most of the jurors there are no frivolous lawsuits, that there is no need for "tort reform," the "litigation explosion" is a myth, or that the McDonalds' verdict was just. You're never going to change anyone's mind in those few minutes.

What you can do is begin to establish that you and your client are not like those

people: that you and your client hate abuse of 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, such as:

- jurors are out of control;
- the civil justice system is "litigation lottery" or "jackpot justice";
- people that sue haven't taken personal responsibility;
- the only people who benefit from the civil justice system are the lawyers;
- verdicts are too high;
- 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 jurors who are more verbal and ask them how they feel about your question, watching the rest very carefully.

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

Anglo males with college degrees from an upper economic status, especially "generation x-ers" tend to be predisposed against personal injury plaintiffs. Many of these jurors have a deep-seated hostility towards those who they view as wanting to be rewarded without doing any 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, haven't been able to afford a post high school education, are female, or 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" because 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 how a juror views the role of lawyers tends to have a strong link with verdicts. 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 the poor have not taken enough personal responsibility.

Another predictor are the juror's 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 also appear to be reasonable. One approach would be: "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, more painful life, every day for the next 40 years, would \$1 million seem about right, too high, not enough?"

## IV. CHALLENGES FOR CAUSE AND HOW TO ESTABLISH THEM

You may not have enough peremptory challenges to excuse every biased juror. The court will be reluctant to sustain many challenges for causes 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.

You must know how to make your challenge for cause record. C.C.P. section 225 (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.) C.C.P. section 225 (f) defines implied bias as: "the existence of a state of mind evincing enmity against, or bias towards, either party." Prospective jurors may be challenged when they state 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. 310, 313.)

No juror is going to admit to being biased or prejudiced. No one thinks they are anything other than fair and just. Use phrases such as "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. Tell the jurors there are many pending trials 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 could not be a fair juror in a wrongful death case if someone killed one of your children.

If a prospective juror says they don't like people suing for damages, ask what kind of process they would use to set aside this feeling. You might ask something like "Do you have a problem with a parent suing for money for wrongful death of their child?" Ask them to explain why they feel this way. You should ask the court to allow a more private conversation

— such as at side bar or in chambers — for jurors who are shy or feel embarrassed

Don't stop your questions for cause too soon. Make sure the jurors fully explain how they feel so that you have specific reasons why the judge should grant your cause challenge. You may develop information that forces the defendant to exercise a peremptory challenge. Do not 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. Start with the ones where you have made a strong record. Make your record before you tip your hand to the defense.

♦ **Key Point:** Never attack, argue with, embarrass, or lecture the prospective jurors. Listen to their responses.

Keep in mind that judges seem more receptive to cause challenges where the problem juror has some specific issue with facts or circumstances of the case.

## V. CONCLUSION

It has been correctly observed that years of work, substantial investment of capital for experts and demonstrative evidence, even the most obvious justice of a client's cause, will mean nothing *if the jury's mind, eyes and ears are closed*. Do the hard work and make the financial commitment to best gather, analyze and present the evidence. Have the undeniable faith in the cause. *But never lose sight of who will render the verdict*. This is the *spirit of the art of voir dire*. The *practice of the art* is knowing, in your heart, the process, the time and legal limitations, of finding the open mind and eliminating those whose minds are closed, so that *this art* is as much a part of you as the dance of a child: simple, honest, and direct. The goal is nothing short of *a work of art* that will be appreciated and admired, especially by other artists, and a source of joy for the master artist you have become.

It is true that there are a number of constraints and challenges in the voir dire process. And yet, what could be more fascinating than exploring our very receptivity to a vision of justice? ■



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