



The voir dire process: Ways to reach your goal to seat an impartial jury

There's more than one way to treat a juror



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Once your trial ends and the judge releases the jury, take the time to talk to as many jurors as possible. You may find this exercise an enlightening experience about our jury system, which is sometimes fraught with surprise, irritation and frustration.

On one memorable occasion, after a lengthy and bitterly contested trial in a medical malpractice case, the jury had returned its verdict. A poll of the jury revealed a 10-2 split decision on the question of liability. In the hallway outside the courtroom, the jurors who had decided against my client approached me, and to my surprise, launched into a tirade in which they expressed their disdain for my client. In clear and certain terms, these jurors made it known how from the moment they saw my client at the very start of the trial, they had decided he was “too slick for his own good and needed to be taken down a notch.”

Now mind you, at the start of the trial, the judge had made a near Herculean effort to extract from these same jurors, “on the record,” their promises to be fair and impartial, and to keep an open mind without reaching any final decision until all the evidence was presented. These same jurors with straight and solemn faces acknowledged their obligation, took their seats in the jury box, and then began to metaphorically cobble the coffin in which they sought to inter my client’s case.

To this day, years later, I sometimes revisit the examination of those specific jurors in hopes of finding some clue that somehow had been overlooked and would have revealed their predisposition. In the end, I am reminded of the important rule that one should never expect a “perfect jury,” and that everyone is biased in some way or another.

The term *voir dire* is borrowed from the French language meaning: “To See; To Say.” It is, in effect, the

lawyer’s opportunity to talk with the jury. In California, the parameters of this discourse in the context of a civil trial is defined in Code of Civil Procedure section 222.5; Rules of Court, Rule 3.1540; and Rules of Court, Standards Of Judicial Administration, Standard 3.25. The statute and rules address the scope of the judge’s and counsel’s examination which permits “liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.” In addition, many superior courts will have their own local rules pertaining to the procedures for voir dire examination. Los Angeles County Superior Court, for example, has its own Local Rules 8.20 through 8.36, which provide further guidance on the conduct of Voir Dire examinations.

Preparation for voir dire

When preparing for voir dire, consider the following:

Keep a copy of Code of Civil Procedure sections 220 through 234, Rules of Court, Rule 3.1540 and Standard 3.25.

- **Know the judge’s specific preferences for voir dire examinations:** “Six-pack” method of jury selection? Time parameters? Categories of questions that will draw the sustaining of an objection? Order of questioning by counsel? Method of using peremptory challenges?

- **Prepare a list of the important factors, concepts and themes unique to your case.** This list can be used as a guide to formulate questions of potential jurors. For instance, if your trial involves a claim of the wrongful death of a high-income earning patient during surgery, your list could include topics of inquiry such as a potential juror’s past experience with and attitudes toward doctors, types of surgeries, complications from medical care, health insurance, death of friends or family, and large damage awards.



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• **Consider whether a written juror questionnaire would be appropriate for your case.** California Code of Civil Procedure section 205(c) and (d); Rules of Court, Rule 3.1540(b) and Standard 3.25(a)(1) permit the examination of prospective jurors by written questionnaires. To this end, the Judicial Council of California has an approved form entitled the *Juror Questionnaire for Civil Cases*. Any supplemental or additional written questions beyond the standard form questions should be filed and served at least three court days prior to the pre-trial conference. The use of written questionnaires is a matter of the judge's discretion and are typically reserved for complex matters with an estimate exceeding 15 court days.

• **Consider whether the judge should ask specific questions.** When examining a prospective juror, a lawyer is sometimes obliged to inquire into potentially embarrassing, sensitive or controversial matters that may nevertheless be salient to gauge whether that prospective juror would be suitable to serve as a member of the jury. To minimize the risk of alienating or prejudicing a prospective juror against a client's case, the lawyer, outside the presence of the jury panel, can request the judge to examine the juror on those potentially sensitive matters (See Cal. Rules of Court, Standards of Judicial Administration, Standard 3.25(e).) Jurors are more inclined to answer sensitive questions from the judge, as opposed to a party's counsel, without harboring any resentment against a particular side.

• **Use a diagram of a jury box** with a minimum of 18 spaces divided into three rows of six, and a generous pad of self-stick adhesive note paper. The dimensions of the self-stick adhesive note paper should be large enough to accommodate your notes of any pertinent information gleaned from the examination of a prospective juror. As a prospective juror is being called to the box, an adhesive note setting forth that juror's information is placed in the corresponding space on

the diagram. Many courtrooms will provide counsel with a pre-printed diagram of the jury box complete with spaces to track the number of peremptory challenges used by each party.

Conducting voir dire

Typically, at least 30 prospective jurors will be initially called as the panel. When filling the jury box with prospective jurors, the judge may seat 12 in the box. Using the "six pack" method of jury selection, the judge may also seat an additional six prospective jurors outside of the box for questioning.

The judge may read a statement of the case prepared by the parties. In some instances, a judge may permit a brief opening statement of the case by the lawyers. (See Cal. Rules of Court, Rule 2.1034.) The judge will then make first inquiry of the prospective jurors. In doing so, a judge will usually follow the list of questions set forth in Standard 3.25(c) and any supplemental questions submitted by the parties that have been approved by the judge.

After completing an initial examination, the judge will permit counsel to conduct their voir dire examination. The trial judge is vested with the discretion to reasonably limit the scope of the examination, but is expressly forbidden from imposing "unreasonable or arbitrary time limits." (Code Civ. Proc., § 222.5 prohibits "improper questions"; that is, questions which "... 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.")

It is critical to understand the objective of voir dire – to find and challenge the juror who will be biased or prejudiced against your client's case. This very objective is codified in the first paragraph of the Code of Civil Procedure section 222.5, which states that "the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the

particular case." A lawyer should not make the mistake of using voir dire examination in an attempt to change the mind of a juror. Most jurors have their own deeply ingrained value systems and opinions that they have cultivated over the course of their lives. It is extremely difficult, if not impossible, to change such opinions in a half-hour. That time would be better spent identifying the prospective jurors that will probably be biased and prejudiced against your case. Focusing on the jurors that appear to favor your client's case will only invite your opposing counsel to challenge that juror and eliminate him or her from the jury.

The questioning of prospective jurors is in large part a matter of style, and can be likened to an art form. Thus, there will always be some controversy over what will qualify as an effective voir dire examination. Nevertheless, the following is a distillation of well accepted guidelines for an effective voir dire examination:

• **Develop a rapport with the juror.**

It helps to memorize the names of the prospective jurors and ask each one at least one or two questions interspersed with group questions. Subtle humor can be disarming. However, avoid being over-friendly or obsequious. Perceptions of the lawyer's insincerity can damage the case that he or she is trying to advocate.

• **Use questions to establish your credibility with the jury.** A command of the law and the facts specific to your case can be communicated through your questions. Be careful, however, not to sound arrogant or demeaning towards the juror.

• It would seem obvious that **the lawyer should pay some attention to his or her physical appearance.** Yet, on more than several occasions, I have overheard jurors comment upon a lawyer's state of dress (i.e. flamboyant fabrics, stains on a shirt or worn-out shoes) and the distraction it can cause. Understated, sophisticated, neat and professional appearances tend to be well-received by most juries.



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• **Do not alienate the juror.** Questions that have a good chance of eliciting the animosity, embarrassment or boredom of a prospective juror should be avoided. If it is anticipated that questions of a potentially sensitive nature (e.g. politics, religion and/or sex) will be asked, the lawyer should consider asking the judge to pose the questions, or request that the questioning take place in a more private setting away from the other prospective jurors (i.e. the judge's chambers or at side-bar). Repetitive and/or grammatically complex questions should also be eschewed.

• **Carefully consider whether to use an open-ended question.** Open-ended questions of a juror may prompt a lengthy response from the juror that can provide better insight into his or her state of mind. However, it can also result in answers that could have adverse consequences to your case. In one extreme example, lawyers representing a number of different parties in a medical malpractice trial had taken nearly three full days questioning prospective jurors and were very close to impaneling a jury. The plaintiff's lawyer then asked one of the last prospective jurors an open-ended question to the effect of "Tell me your feelings about suing doctors for medical negligence." That juror proceeded to comment upon the availability of malpractice insurance for doctors. On motion by the defendant doctor, the court declared a mistrial and excused the entire jury panel; three full days of work lost. Using leading questions first to guide the juror away from such potential

problems is suggested. In the situation described herein above, the question, "Do you feel it is inappropriate to sue doctors for medical malpractice?" would be an effective place to start the examination. A well-tailored series of leading questions built upon the responses that follow would then have a better chance of revealing any prejudice without any collateral damage which an open-ended question could inflict.

• **Mitigate the weaknesses of your case.** Most cases have their weaknesses. Those weaknesses can reside in the applicable law, the pertinent facts or both. When questioning prospective jurors, try to gauge them on their reactions to the weaknesses of your case. In a case where the law may not strongly support your case, caution should be exercised when questioning jurors on the law. Many judges will forbid questions concerning the law, particularly those that attempt to instruct or educate the jury. However, determining if a juror is more rule-oriented than result-oriented can be permitted.

• **Track the panel.** Weigh your concern for the juror in the box against the jurors who would be replacing that juror, if disqualified. Is the juror in the box worse than the possibility of his or her replacement? As the number of prospective jurors dwindles, the lawyer should find it easier to weigh these factors. To assist in your assessment of the replacement jurors, the court clerk may provide you with a list of the remaining jurors, which could include information such as occupations and ages.

• **Cause as the basis of a challenge.**

The lawyer may recognize that a prospective juror possesses qualities that make him or her unfavorable to his client's case, but initially do not rise to the level requiring disqualification for bias as defined by Code of Civil Procedure section 225. In that event, use questions designed to establish the requisite bias warranting disqualification for cause. On the other hand, to save a favorable juror from a challenge for cause, a lawyer should pose questions to rehabilitate that juror demonstrating the absence of bias.

In summary, the use of a careful and thoughtful plan will allow you to reach your ultimate goal of finding a jury that can impartially decide your client's case.

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