
# Don't let the court ruin your jury selection

## Civil attorneys have the right to explore juror attitudes, beliefs and proclivities. Be prepared to defend your rights to the court

**By Antony Stuart**

What do experienced trial lawyers fear most? Answer: A judge who limits time for jury selection, interferes in the process, and disallows important questions. Let's call these "court mess-ups."

Court mess-ups are borne of a fundamental misunderstanding of what happens in jury selection. Unfortunately, most judges, defense lawyers, and even still a few plaintiffs' lawyers, believe that jury selection is for "preconditioning" the panelists and "bonding" with them. It's not hard to understand why these judges mess up jury selection. Who wants to waste precious court time with useless efforts to change the way fully grown adults think, and make friends with them simultaneously? It can't be done.

I find it fascinating that lawyers think so highly of themselves they believe they have some magical ability to change the way a person thinks in the course of two minutes of voir dire. That's old-fashioned, pompous trial lawyer thinking, and it belongs in the ash can of history.

Jury consultants teach us that effective jury selection is jury *de*-selection. Its primary objective is to identify the panelists who will be least receptive to your client's case and get rid of them. Jury consultant Harry Plotkin tells us to "talk like the defense lawyer," by which he means the opposite of "preconditioning." He means asking questions that reflect a defense orientation. Instead of asking, "Do you have any feelings against large monetary awards?" ask, "How do you feel about those excessive jury awards? Don't they make you angry?"

So, objective number one in your pre-trial conference with the court is to convince it that you don't believe in "preconditioning" and won't engage in it. You're there to find out about the panelists, and you're not going to waste time doing anything else.

Court mess-ups are also a product of the fact that a large number of civil judges practiced criminal law exclusively before taking the bench. Jury selection in criminal cases is a bird of a different feather. Proposition 115, the Crime Victims Justice Reform Act, passed by the voters in 1990, strictly limits the rights of the lawyers in criminal cases to engage in voir dire, and greatly expands the discretion of courts to limit lawyers' questioning of the venire panel.

The 1990s saw no such limitation placed upon civil jury selection. Instead, the legislature enacted, in 1990, and then enhanced, in 2011, statutes designed to ensure that civil litigants' Constitutional right to trial by jury was protected, and that lawyers had the right to explore juror attitudes, beliefs and proclivities. In 2016, the legislature acted again (at the behest of Consumer Attorneys of California) to revise Code of Civil Procedure section 222.5 in another effort to ensure a robust voir dire in civil cases.

So, I set forth here a list of typical jury selection incorrect rulings – the mess-ups – and the arguments that may help you convince your court not to make them.

### The blanket limitation of jury selection to a set time period

The most common denial of statutory and, arguably, Constitutional rights to jury trial, is the declaration by a court at the outset of trial: "In this courtroom you have thirty minutes to voir dire the panel." In most, if not a majority of courtrooms, such arbitrary limitations apply to each and every case, regardless of case complexity, the length of the trial, or the sensitivity of the issues. When section 222.5 was enacted in 1990, it included this proscription: "Specific unreasonable or arbitrary time limits shall not be imposed in any case." Of course, a blanket time limitation that applies to a soft-tissue fender bender as well as to an employment discrimination case is an arbitrary one. Trial experience for years demonstrated that this language of the statute wasn't being followed. So, in 2011, the legislature added another sentence: "The trial judge shall not establish a blanket policy of a time limit for voir dire." (Stats.2011, c. 409 (A.B.1403), § 1.)

By 2016, we recognized that courts were routinely ignoring *both* sentences. So in Senate Bill 658, the legislature added a requirement to section 222.5 that the court meet with counsel at the outset of the trial to discuss "the subject matter of voir dire questions," and give consideration to these factors to determine the time allowed for jury selection:

- The amount of time requested by trial counsel.
- Any unique or complex elements, legal or factual, in the case.
- Length of the trial.
- Number of parties.
- Number of witnesses.
- Whether the case is designated as a complex or long cause.

This pre-trial meeting with the court is your opportunity to head off court mess-ups.


### The regular refusal to permit juror questionnaires

Trial lawyers hear, again and again, "I don't permit jury questionnaires in my court. They consume too much time." The first statement contravenes section 222.5, which provides, "A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires," and the second is factually incorrect. A wisely administered questionnaire will actually *reduce* court time spent on voir dire. Here's why:

What takes up time is the filling out of the questionnaire by the jurors, so the sensible way to utilize one is to have a panel answer the questions in the jury assembly room before they report to the courtroom for the selection process. If that's not practical, then the questionnaire should be completed by jurors either before or just after the panel is time-qualified by the court.

Section 222.5 provides, "If a questionnaire is utilized, the parties shall be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences." This means that after the questionnaires are completed and collected, the panel should be adjourned and told to return the next morning or afternoon. This will give the parties time to scan, distribute and review the questionnaires, make notations on them or about them, and rank them. If the court has provided the parties with the random list of panelists (required under section 222.5(d)), the parties can arrange their copies of the completed questionnaires in the random order.

Some judges still complain that this process adds a day to the jury selection process. But there's no reason that day can't be occupied by other matters related to the case – motions in limine, for example – or the business of other cases.

When voir dire begins with a questionnaire, the lawyers will already know the problem jurors, the ones they like, and the ones they don't. The voir dire process proceeds with a much higher level of efficiency. Some jurors may not need to be questioned at all, and the 'mysterious' ones, those who reveal little about themselves, can be questioned much more effectively with questions that follow-up on their written responses. An experienced trial lawyer utilizing a questionnaire can power through a six pack in half the time it would take to question a panel cold.

More important than the time issue is the wealth of information that a well-designed questionnaire produces. Answers given on paper tend to be more honest, less couched to conform to what in open court is quickly recognized as the expected or 'politically correct' answer, and less affected by the way other jurors have repeatedly answered the same questions. Knowing who the jurors are helps lawyers figure out how they should present their case, and best enables them "to intelligently exercise both peremptory challenges and challenges for cause." (Section 222.5, subdiv.(a).)

### The refusal to permit the use of printed voir dire questions on blow-ups or video screen

In an effort to facilitate jury selection and make the most of the limited time some courts permit for it, many trial lawyers have developed poster boards with printed questions used to ask each juror to respond, quickly, to the same questions that would take twice the time to ask of each juror individually. Strangely, some judges deny the use of these boards. I've heard one explain that their use "would just be too chaotic." Actually, the opposite is true. The use of poster boards or a video screen with printed questions speeds the process and makes it orderly.

### The refusal to permit certain questions or lines of questioning

Thirty years ago, before social science research and the experience of thousands of focus groups revolutionized trial work, lawyers were taught to "establish a rapport" or "bond" with the venire panelists in jury selection. They were also taught to get the jurors thinking along the lines of the desired theme of the case. But it's not realistic to think that lawyers have some magical ability to change how jurors will decide the issues of a case before the presentation of the evidence or argument.

Attitudes, beliefs and predispositions are the result of years of life experience. You can't change them by asking a few questions in the space of two or three minutes. Lawyers who try to do it risk losing credibility with the jury at the outset of the case, because, especially in jury selection, the common thought of venire panelists is "Why is he asking me this? What is he trying to convince me of?" Venire panelists are suspicious of the lawyers at the voir dire stage. Not until opening statements have been presented do the jurors get a feel for what the case is about and begin to form impressions of who's probably telling the truth and who isn't.

So there's not much to worry about in the questions lawyers ask the venire. They are, after all, just questions. Lawyers will object to argumentative questions being asked in voir dire, and courts routinely instruct: "Counsel, please don't argue your case in voir dire." But is the lawyer who does this harming anyone other than his own client? The case will be argued sooner or later, and probably sooner – in opening statement or in leading questions. What harm does it cause the opposing party if jury selection questioning becomes argumentative? In all likelihood, the potential juror being asked the question will chafe at it.

Many questions that lawyers ask in voir dire seem strange, even silly, but the lawyers know their case better than the judge – especially if they have conducted a focus group. There may be very good reasons to ask such questions, and the court is in no position to second guess them.

By way of example, consider this exercise put to a panel of jury consultants: They were asked to come up with the single most revealing question that could be asked of a potential juror. Their choice was, "How do you feel about homeless people?" I could imagine a good half of trial judges ruling that such a question may not be asked. "It's irrelevant," they might say. "There's no issue of homelessness in


this case." But the answer to that question speaks volumes. Is the juror's answer, "Get a job!" or is it, "There, but for the grace of God, go I"? Homelessness may be irrelevant to the issues of the case, but the answer to that question says much more about whether the juror is plaintiff-oriented or defense-oriented than the answer to "Can you be fair?"

Here's what your court must understand: Under section 222.5, there *is* no relevancy standard in voir dire: "Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause." A peremptory challenge is one where no reason need be given for its exercise. (Code Civ. Proc., § 226, subd. (b); 1 *Civil Procedure During Trial* (CEB 3d ed. 2016) § 8.64.)

If a party has the *right* to examine for the intelligent exercise of a challenge for no reason, then the court cannot demand a reason for the examination. This means that the court may not sustain an objection to voir dire examination on the grounds of relevancy. Nor can it preclude what are sometimes referred to as "the bumper sticker questions."

## The effort to rehabilitate panelists who have admitted bias

Jurors are hard to come by, and many courts struggle to recruit enough of them to be able to run trials through the system efficiently. Little wonder that so many judges are loath to grant hardships or to excuse jurors who admit bias. But the principles to be balanced in such circumstances include the State and Federal Constitutional rights to trial by jury. A party who is forced to use a precious peremptory challenge to remove a juror who qualifies for a cause challenge is being denied a statutory right to a specified number of peremptory challenges. This has repeatedly been held reversible error. (*Leibman v. Curtis* (1955) 138 Cal.App.2d 222, 226; but see, *People v. Black* (2014) 58 Cal.4th 912, 920 [holding, in a criminal case, that a trial court's erroneous denial of for-cause challenges cannot constitute reversible error unless the challenged jurors ultimately serve on the jury].)

Many courts apparently feel it's better to keep a juror who has confessed some feeling of bias on an issue of the case than to lose her to a cause challenge. They typically seek to "rehabilitate" such jurors by asking them, despite their personal feeling on the issue, if they would be able to follow the court's instructions on the law. Those questions go something like this:

**The Court:** I understand that you think you may have beliefs about the law that could interfere with your participation as a juror in a case like this. But I want you to understand that your duty as a juror is to follow the court's instructions on the law that I will give you. Can you assure me, Ms. Smith, that you will set your personal feelings aside and follow my instructions on the law?

**The venire panelist:** Yes, Your Honor, I will.

This sort of effort at court rehabilitation of bias is wrong-headed for two reasons. First, the question asked of the juror is a leading one, and its clear purpose is to elicit agreement. Facing the power and authority of the court, the scrutiny of dozens of fellow panelists, and the indication of what the acceptable response should be, the vast majority of people will shrink from their position and give the 'yes' answer that the court is looking for. Our Supreme Court has recognized this. (See *People v. Balderas* (1985) 41 Cal.3d 144, 183; *People v. Williams* (1981) 29 Cal.3d 392, 410 [General questions about whether a juror will follow instructions have only one "right" answer – "yes," and are not effective at revealing or eliminating bias].)

The second problem is that such court efforts at rehabilitation foster disrespect for the court. Everyone in the courtroom witnessing the effort knows what the desired answer is. All observers know that the panelist being cowed into a yes answer is really telling a lie. That the court is looking for an insincere response and applauding the giving of it is destructive to the court's authority, and to the integrity of the process.

In some jurisdictions it is reversible error for a court to deny a challenge for cause to a juror who has admitted bias but subsequently been "rehabilitated" by the court with a leading question. (See, e.g., *McGill v. Commonwealth* (Va. App. 1990) 10 Va. App. 237, 391 S.E. 2d 597, 600.) This specific issue has not arisen in California decisional law, but in view of the language of *Balderas* and *Williams*, *supra*, one would expect California courts to follow the Virginia rule.

## Conclusion

Years ago, I was encouraged to read The How-to-Win Trial Manual, written by esteemed appellate judge Ralph Adam Fine. His chapter on jury selection (in the first edition – the book is now in its sixth) was only a few paragraphs long. The reason for this brevity was Judge Fine's belief – one shared by many judges today – that it really doesn't matter who is on the jury. What matters is how the case is presented. We now know how terribly wrong he was.

Why do we know this? We know it primarily from conducting focus groups. Today's most successful trial lawyers on both sides of the bar wouldn't think of taking a high stakes case to trial without conducting at least one focus group. Some jury consultants recommend several of them, so that different case themes, different evidentiary rulings, or even different juror characteristics can be tested. For years I've been telling lawyers at continuing education seminars that they will learn more about how to be an effective advocate by watching a focus group deliberate a case they presented than by conducting five *actual* trials. The focus group experience makes you realize that most cases involve two trials: The first is conducted in the courtroom, the second in the jury deliberation room. The film classic, Twelve Angry Men, made this point.


We also know how critical jury selection is to case outcome from emerging social science studies on human behavior. Elizabeth Kolbert's recent article on how important decisions are made (*That's What You Think – Why reason and evidence won't change our minds*, February 27, 2017, New Yorker magazine) provides an excellent discussion of such studies. Once you recognize that people decide issues by emotion, calculation of group dynamics, and other non-rational bases, you also must accept that who gets on the jury, and who is kept off, drives the result as much as any other factor in a trial. We may think this is a bad thing. Juries should decide important cases rationally. But social science tells us that it's wrong to view this as good or bad. It's simply human.

That's why the rules set forth in section 222.5 are so important, and why, for the sake of justice, it's so important that they be followed. Don't let your court skirt them!

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