



Voir Dire: Plaintiff's Perspective

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In 1899 the Supreme Court of California, in *Lombardi v. California Street Railway Company*, 124 Cal.311, held:

The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury, guaranteed by the constitution. The common law excludes jurors upon the ground of actual bias, and the only important statutory exception to that rule relates to opinions based on public rumor, published statements, or common notoriety, in which case the juror may show that he can and will, notwithstanding such opinion, act impartially and fairly on matters submitted to him.

The prospective juror had been asked: "Do you know of any reason why you cannot give a fair and impartial trial in this case"? The prospective juror replied that he knew the plaintiff and his family, and had dealings with them for years. The juror was candid, honest and sincere in his statement, and the Supreme Court quoted Sir Edward Coke, discussing the right to trial by jury: "For all which the rule of law is that he must stand indifferent as he stands unsworn."

Wainwright v. Witt (1985) 496 U.S. 412 held: "If a juror cannot follow or is even substantially impaired from following the law, that is a cause challenge."

California Code of Civil Procedure Section 229, Implied Bias: "The law presumes a prospective juror is biased and therefore disqualified if any of the following conditions exist: related by blood or marriage to a party or witness; had a relationship (fiduciary, domestic or business); was a prior juror or witness in litigation involving a party; has an interest in the litigation; has an unqualified opinion as to the merits based on knowledge of material facts; has an enmity or bias toward a party."

Voir dire may influence the outcome of a trial by allowing counsel to identify and remove potentially dangerous jurors.

Keep in mind that the sole purpose of voir dire is to identify and deselect unfavorable jurors, and to arm other jurors to deal with unfavorable jurors you cannot deselect.

Jurors are disqualified from a trial if they cannot act with entire impartiality. The grounds for proper cause challenges established by actual bias include:

- Strong belief (dislike for landlord) *Lawlor v. Linforth* (1887) 72 Cal. 205, 206.
- Long-held belief (regarding divorce and remarriage) *Smith v. Smith* (1935) 7 Cal. App. 2d 271, 273-274.



- Belief not easily set aside (preconceived ideas about certain injuries) *Liebman v. Curtis* (1955) 138 Cal. App. 2d 222, 226.
- Party starts at disadvantage (railroad sued, prospective juror felt suits against railroads the fault of the injured parties) *Fitts v. Southern Pac. Co.* (1906) 149 Cal. 310, 313.
- Once a juror has admitted bias, the prospective juror cannot be rehabilitated simply by stating, “I can be fair”, or “I will follow the law”. *Lombardi v. California Street Ry.Co.* (1899) 124 Cal 311, 314.
- Enmity and bias are established if the prospective juror confirms that he or she will not follow the jury instructions if the law went against their conscience. *Merced v. McGrath* (2005) 426 F.3d 1076, 1078-1082; Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2006) Section 5:465-5:465.1).

The California Code of Civil Procedure Sections 190-237, known and cited as the Trial Jury Selection and Management Act, recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship. It is the policy of the State of California that all persons selected for jury services shall be selected at random from the population of the area served by the court. The court may require a prospective juror to complete such questionnaires as may be deemed relevant and necessary for assisting in the voir dire process. To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. 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. The trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. Code of Civil Procedure Section 222.5 requires the judge to allow counsel for each party to examine, by oral and direct questioning, any of the prospective jurors.

Jury Questionnaires may be used to obtain information from the jurors to enable the judge and the lawyers to select jurors that are qualified and suitable to decide the issues of fact presented in the trial. Questionnaires save time and avoid boredom listening to the same tiresome questions being repeated over and over again in court. The answers to the questionnaire must be individual, honest and complete answers. The personal information will allow the selection of those without experiences that may compromise their ability to fairly decide certain issues in the case.

Jury Questionnaires may ask if the prospective juror reads certain newspapers or magazines, listens to talk radio, or watches television, what the juror likes to do best in his spare time, whether the prospective juror considers himself liberal or conservative on social or economic issues; which organizations the prospective juror belongs to, and whether the prospective juror belongs to any organizations which support changing the civil justice system; whether the prospective juror has been employed in any law enforcement capacity, or as an investigator; whether they work in the medical industry in any capacity; whether they have relatives or close friends who are judges or attorneys, or school teachers; whether anyone in their family has been seriously injured or killed in an accident, abused alcohol, been arrested for a crime, had an on-the-job injury or served on a jury before. The questionnaire may seek to determine if the prospective juror feels that money damages in lawsuits are excessive, or if they have beliefs about lawyers, lawsuits and the legal



system which would affect their ability to be fair and impartial? Do they have any negative feelings about people who file lawsuits for money damages? Any hardship if they are selected to serve as jurors? Do they know any of the individuals who may be called to testify at the trial?

Consider whether the prospective juror is “traditional”, a boomer, generation x, or generation y?

What is the prospective juror’s opinion about large corporations changing for the better or worse?

What are the prospective juror’s opinions about the underlying cause of current economic problems in our economy today?

Does the prospective juror feel that the little guy has little chance of prevailing against powerful people, organizations or corporations?

Does the prospective juror feel that product manufactures should make their products safer?

Does the prospective juror feel that safety is a very important factor in making any decision?

Pre-voir dire investigation explores local customs and attitudes in the community. Visit the courthouse. See where jurors park their cars; visit the assembly room; become familiar with your surroundings in court before the trial commences. Talk with local counsel about the community, and look out for issues that may influence your jury pool in the community.

Become familiar with the locale where your client was injured or harmed. Learn to pronounce jurors’ names correctly. When in doubt, ask. Review as much material about your own witnesses’ backgrounds as you can. Consider a community survey for your trial strategy. Become aware of local values.

Use open ended questions:

- What do you think about ...
- How do you feel about ...
- Please share your feelings about ...
- Please give me an example of ...
- Who has had experience with ...
- Who is familiar with ...
- What are your thoughts?
- How does that affect your attitude towards this case?
- Can you explain how you feel about a case like this?
- Why is that important to you?

Develop your case themes:

- This was a recipe for disaster.
- This was an accident waiting to happen.
- It was only a matter of time.
- Corporate profit over safety.



Compare the McDonald's coffee verdict to Erin Brockovich.

Question by attorney: I need to know if punitive damages are your broccoli.

Fundamentals for every voir dire examination:

- Get the jury talking ... 80% juror, 20% attorney.
- Ask open ended questions.
- Pay attention to the juror's responses to the question (A jury consultant or associate should be writing down the prospective juror's responses).
- Ask about the critical issues in the case ... for example, how do you feel about a lawsuit against a corporation which provides services to the disabled?
- How do you feel about rules governing the safety of others?

Consider using a focus group, to listen and learn from the mock jury panel's deliberation.

Consider a mediator convening a full day focus group in which the trial lawyers present abbreviated versions of their case to a small panel of people, the panel then retires to deliberate while the trial lawyers and mediator will be able to view their discussions, and then return to the caucus based mediation.

Tips you already know:

- Be courteous;
- Be respectful;
- Be attentive;
- Be fair;
- Listen.

It is very important that you pronounce the prospective jurors' names correctly.

Explain what you are doing undertaking voir dire.

Acknowledge that the prospective juror's views may differ from your own views.

Ask how the prospective jurors feel about personal accountability and responsibility for their own actions.

How does the prospective juror feel about holding the plaintiff responsible for his or her choices?

How does the prospective juror feel about someone who brings a frivolous lawsuit?

How does the prospective juror feel about someone who makes a frivolous defense to a meritorious lawsuit?

Does anyone have a strongly held belief that only one person can ever be the cause of an injury event?



Does anyone have a problem with the concept in the law that the acts or omissions of more than one party can combine bringing about an injurious event?

If part of your job was to assign percentages of accountability and responsibility for those whose actions contributed or caused plaintiff's injuries, could you do that job?

Distinguish Burden of Proof: Preponderance of the evidence versus beyond a reasonable doubt?

Distinguish between damages to the pocket book and damages to a person.

Damages to the pocket book are as if a person were a damaged machine.

Human losses are in addition to damages to the pocket book;

Do you have any problem with the concept in the law allowing damages for human losses in addition to damages to the pocket book?

Identify and beware of the defense juror who thinks:

- Lawyers and their clients are greedy;
- There must be something wrong with the plaintiff's case if the insurance company has not settled the case;
- People should not blame others for their misfortune;
- Stuff happens;
- Loss of consortium claims demonstrate overreaching;
- People should be responsible for their unfortunate injuries;
- Verdicts in personal injury and wrongful death cases are too high;
- There are too many frivolous lawsuits;
- There are too many greedy lawyers.

Ask about pain and suffering:

- If plaintiff cannot prove damages, can you be counted on to give plaintiff nothing for the damages he or she cannot prove?
- If plaintiff has proved substantial damages, can you be counted on to award substantial damages?
- Do any of you have a set floor of damages that you would not go below in this kind of case?
- Do any of you have a set ceiling of damages that you would not go above in this kind of case?

Ask about attitudes:

- Do you think that most cases involving personal injury claims are unjust, unfair or frivolous?
- Do you feel that people are too ready to sue for personal injuries?
- Do you believe that lawsuits are costing us all too much for what they provide to society?



- Do you believe corporations get some kind of special benefit simply because they are corporations?
- Have you seen newspaper ads in newspapers or magazines, or television, or the internet put out by certain groups against jury awards in personal injury cases?
- Do you subscribe to any group that wants to change the jury system, or believe that the jury system should be changed?
- What do you think of the ads?
- What are your feelings about these kinds of cases?

SUMMARY

Objectively, voir dire is undertaken to deselect unfavorable jurors.

During voir dire it is desirable to subtly get jurors to be thinking favorably to your position. The reality is that the best you might be able to do is get prospective jurors to confront their own feelings, attitudes and biases, the limits of their experience, and challenge them to overcome their feelings, attitudes and biases in deciding the case before them.