ASSOCIATION OF BUSINESS TRIAL LAWYERS

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JURY DE-SELECTION

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The trial phase that takes place before opening statements and presentation of evidence is popularly referred to as jury "selection." This is a misnomer. The parties do not "select" jurors who will hear their case. Rather, after several rounds of vetting by courthouse staff and the judge, potential jurors are seated in the jury box and become jurors by default—except to the extent they are "excused," or "*de*-selected," before trial begins. Jury "selection" is therefore about removing bad jurors, not selecting good ones.

Potential jurors are first contacted by courthouse jury commissioners through mail solicitations based upon a "master list." (Code Civ. Proc., §§ 191-195.) Based on their responses, potential jurors could be "deferred" or "excused" and the rest "qualified" to be summoned to the courthouse. (*Id*., § 194.) On the day trial is scheduled to commence, a "jury pool" will assemble in a large room. (*Id*., § 194, subd. (e).) There, courthouse staff weeds out those who are "ineligible" for reasons including lack of citizenship, felony convictions, or inability to understand English. (*Id*., §§ 196, 203, subd. (a).)

In some counties—for example, Los Angeles—the courthouses are exclusively devoted to either civil or criminal cases. In other counties, the courthouse holds both criminal and civil trials, and criminal trials are given priority. In those counties, if enough potential jurors remain after juries have been selected for the criminal trials, a group of jurors—maybe forty—will be seated in the courtroom's audience section. This is the "trial jury panel" (Code Civ. Proc., § 194, subd. (q)), popularly termed the "venire." (Perhaps a linguist or historian can explain why French terms such as "venire" and "voir dire," which hale from a nation without jury trials, are used for jury selection.)

The judge will briefly address the venire, likely reading a "Short Statement of the Case" filed by the parties. The judge may address any lingering "qualification" issues, and "hardship" grounds warranting dismissal of potential jurors for whom it would be "unreasonably difficult" to serve on the jury. (Code Civ. Proc., § 204, subd. (b); Cal. Rules of Court, rule 2.1008(b).)

In pretrial filings, business litigators commonly lapse into designating every possible witness and exhibit, yielding a bloated trial estimate. If not vetted before jury selection, and if the judge does not impose a time clock, this could have an unanticipated and possibly undesirable impact on jury selection. Anticipate audible groans from the venire when the judge announces the estimated trial length, and hands shooting into the air when the judge asks jurors about hardships. Depending on the judge, those who claim their employer won't pay for the estimated length of jury service and who could not pay for housing or food if they served can be dismissed for hardship.

There are many reasons counsel should trim their case before jurors are summoned. But among those to consider is whether the case is well-suited to jurors who can sit for a lengthy trial, which may trend toward those who are retired, unemployed, periodically employed, or homemakers.

Only after potential jurors have been "hardshipped" can counsel directly address the venire. Counsel has the right to give a "mini-opening," a short introduction to the case—maybe five minutes. (Code Civ. Proc., § 222.5, subd. (d).) Because consumer trial lawyers requested this right,

corporate defense counsel may view this procedure with suspicion, but all counsel should consider the opportunity to introduce themselves along with the issues in the case. The prevailing theory is that litigators hold back the best parts of their case and preview difficulties to identify "bad" jurors who they wish to remove.

Trial judges may require potential jurors to fill out a questionnaire, a Judicial Council form. (Code Civ. Proc., §§ 205, subd. (c), 222.5, subds. (a), (f); Judicial Council Forms, form JURY-001.) The form contains useful questions that could supplement, or supplant, questions otherwise asked during selection (i.e., job, family, prior jury service). For cases with difficult issues, the judge may allow custom written questions. If a questionnaire is allowed, the judge may trim counsel's time, as the questionnaire would reduce time spent asking the questions verbally.

Commonly judges do not allow "voir dire,"—*i.e.*, questions and answers between counsel and prospective jurors—while potential jurors are still seated in the audience. However, there are exceptions. For example, in a case where we represented a plaintiff claiming breach of a joint venture to sell cold storage panels, typically used for food refrigeration, to customers who were building cannabis grow facilities, we wanted to avoid jurors who would nullify a verdict due to their aversion to cannabis. The judge permitted us to draft custom written questions about cannabis and allowed counsel to question the venire and challenge jurors for cause based upon their answers.

Only after these layers of vetting—qualification, hardship and any cause challenges to the entire venire—does the clerk call potential jurors into the jury box. Counsel receives a sheet with all jurors in the venire in alphabetical and number order. (Code Civ. Proc., § 222.5, subd. (g).) As jurors were excused while in the audience, counsel should have been scratching them off the list. The top remaining twelve are called to sit in chairs in the box numbered one through twelve. Commonly, another six are called to sit in chairs placed before the box and numbered thirteen through eighteen. The twelve jurors in the box are, by default, the jury. Assuming there are alternate jurors, say two, then those in chairs thirteen and fourteen become the default alternate jurors. These numerical designations change only if jurors are removed, in which case jurors in the six chairs in front of the box move up, in order. In other words, if Juror No. 7 is removed, Juror No. 13 moves into the box and Juror Nos. 14-18 slide over.

It may be useful to have a poster board with eighteen numbered squares and larger post-it notes with information about the jurors, which can be removed and moved as some jurors are removed and others move up. The clerk may have a seating chart on legal paper, but using this method requires using small post-its or teeny writing in pencil with lots of erasing.

Counsel then begins "voir dire": the "right to examine . . . prospective jurors . . . to intelligently exercise both peremptory challenges and challenges for cause." (Code Civ. Proc., § 222.5, subd. (b)(1).) Counsels' questions should be "calculated to discover bias or prejudice with regard to the circumstances of the particular case." (*Ibid.*) Attorneys must not "precondition the prospective jurors to a particular result," "indoctrinate the jury," or pose questions about "applicable law." (*Id.*, § 222.5, subd. (b)(3).) The questions should be addressed to all eighteen brought forward.

Challenges for "cause" must be based upon "implied bias,"—a list of factors putting the juror too close to counsel, the parties or the outcome (Code Civ. Proc., §§ 225, subd. (b)(1)(B), 229)—or "actual bias," meaning a "state of mind . . . which will prevent the juror from acting with entire impartiality" (*id.*, § 225, subd. (b)(1)(C)).

In civil cases, parties are entitled to six peremptory challenges, a number that can be altered if there are more than two parties. (Code Civ. Proc., § 231, subd. (c).) Peremptory challenges may be exercised "for any reason, or no reason at all" (*People v. Armstrong* (2018) 6 Cal.5th 735, 765), save for reasons excluded by public policy, such as excluding jurors based upon race or gender (Code Civ. Proc., § 231.5).

After introducing themselves and their clients, counsel should orient the jury to the purpose of voir dire. They should not tell the jury that they are probing for "bias," which may sound like they are hoping to identify stubborn jerks. Instead, counsel can tell prospective jurors that they are looking for jurors who are neutral to start, "on the 50-yard line," but whose personal experiences may render it difficult for them to be impartial <u>for this case</u>. For example, in a case where our client was aligned with a surgeon who was charged with performing unneeded surgeries on patients, we wanted to know which potential jurors had bad experiences being treated by doctors, and who thus might not be neutral given the issues.

Once the purpose of voir dire is explained, counsel should get into the facts and issues that will be presented. Counsel should generally identify the themes they intend to elicit at trial but should avoid getting jurors too enthused over their cause. The error in preconditioning the jury, aside from being against the law, is that doing so too vigorously could highlight the jurors who view your case favorably, flagging them for challenge by the other side.

Counsel could start with questions to generally identify liberal or conservative jurors. For example, corporate defense counsel could ask which jurors think citizens cannot get a fair deal from companies, while plaintiff's counsel may ask which jurors worry about runaway verdicts against deep pockets (the "McDonald's coffee cup" bias). The judge may bar questions that sound like politics, but counsel could try probing topics revealing liberal or conservative views, such as government minimum guaranteed salaries or whether government went too far with Covid-19 mask and stay-at-home orders.

From that high level, counsel should preview potential weaknesses of one's case and find out who reacts poorly. Plaintiff's counsel could ask whether jurors would have difficulty awarding high damage figures even if the evidence supported that verdict. Defense counsel could disclose their client's worst conduct, or for corporate defendants, ask who has been treated poorly by corporations.

In an elder abuse case where we were adverse to an elderly surgeon complaining of signing estate documents that he said didn't reflect his wishes, we wanted to identify and eliminate any juror who felt that busy surgeons could sign lengthy legal documents without either reading them or being responsible for their contents. In the cold storage panel/cannabis case, where we sought to prove breach of an oral agreement where the parties circulated but never signed a term sheet, we wanted to identify and challenge prospective jurors who believe that only written contracts can be enforced or who would be reluctant to award damages based upon an oral agreement.

When counsel identifies prospective jurors they want to remove, they should ask them to admit, based on their experiences, that they would have difficulty being impartial. If they say so, this will support a challenge for cause, saving a valuable peremptory challenge.

After the questioning concludes, the judge accepts challenges for cause, first from the defense and then from plaintiff. (Code Civ. Proc., §§ 226, subds. (c) & (d), 230.) After challenges for cause are concluded, the parties are allowed peremptory challenges. (*Id*., §§ 226 subd. (b), 231, subd. (c).)

At that point, counsel should know which of the first twelve they would like to challenge, tempered by the knowledge that this could bring onto the panel someone else they don't like in chairs thirteen through eighteen.

The judge may take challenges for cause at sidebar, to avoid the embarrassment of counsel raising a for cause challenge that is denied.

Peremptory challenges will usually be taken in open court, by counsel "thanking and excusing" a juror by name and seat number. The judge may first hear challenges only as to the twelve in the box before allowing another round as to jurors who move into the box from seats thirteen through eighteen.

If the number of jurors has been sufficiently depleted before challenges are exhausted, the judge may pause the process and the clerk may call jurors left in the audience, if any, to sit in the vacant chairs. The judge will likely permit another, shorter, round of voir dire, only to those newly called forward. This may be followed by another round of challenges, likely directed only at the new potential jurors.

Jury "de"-selection is completed after both sides pass on challenges, or in a multi-party case, when all parties consecutively pass on challenges. (Code Civ. Proc., §§ 231, subds. (d), (e).) The twelve in the box and the chosen number of alternate jurors in the next seats outside the box are then sworn, and the trial may commence.

In the realm of California courtrooms, selecting a jury is the ultimate chess game where peremptory challenges are the bishops, jury de-selection is the queen's gambit, and every juror is a potential checkmate.

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