



Practical advice for voir dire

Before you ask jurors to “stretch” for the verdict, make sure that they are flexible

**BY WILLIAM VEEN
AND ANOUSH LANCASTER**
The Veen Firm, P.C.

It is often said that you win or lose a case during voir dire. While this doesn't give enough credit to the hard work it takes to put on a trial, special attention must be given to voir dire. Much of your work in choosing your jury should be done before you even stand in front of the box. Know the major areas of concern in your case; engage the support of your staff; and stay relaxed in front of your jury.

Always use a questionnaire

Courts prefer that you and opposing counsel agree on a questionnaire. However, if you cannot reach agreement, create your own and suggest it to opposing counsel and the court.

Code of Civil Procedure sections 205, 222.5 and California Rules of Court, rule 228 permit you to submit a questionnaire for use at the court's discretion. A questionnaire saves the court time and gets answers to questions that would otherwise require repeated 'for cause' hearings. To create your questionnaire, blend the Judicial Council form questions (Code Civ. Proc., § 205(c)-(d)) with questions tailored to the needs of your case. In order to do this, you must identify the major focus areas of your case.

Always ask a few questions that will expose extreme positions. "I strongly agree." A few examples: "As a general rule, do you think verdicts in California are excessive?" "Do any of you believe that you cannot find against the defendant unless you are 100 percent sure he's legally responsible?" Questions like this give you an opportunity to find potential

jurors with strong ideas and an opportunity to educate your juror pool on important legal principles like the difference between reward and compensation or "beyond a reasonable doubt" and "preponderance of the evidence".

Use every opportunity to get and give information to your potential jurors

Consider the content of your neutral statement prior to voir dire. While you always want to use language that helps your case, consider using it as an opportunity to expose issues and views that will help you to eliminate a number of jurors. An example: Your client waited two months before seeking medical treatment. This fact is coming into evidence, so you will want to know which jurors have strong feelings about people who wait to receive medical treatment while you still have an



opportunity to do something about it. If the judge allows a mini-opening statement, use it. Use every opportunity you have before opening statement to get the good, the bad and the ugly of your case in front of your potential jurors.

What are you working with?

In many courts, the court will provide you with a list of your potential jurors. This list is usually organized in the order in which your jury pool will be called into the box. That list, plus your juror questionnaire, will give you a wealth of information. Develop a simple ranking system so you and your staff can easily assign scores for your potential jurors, e.g. 1-5. Have someone research potential jurors' political party status and contributions. A juror's political party status can be obtained at the County Registrar of Voters. The Internet often provides great bits of information on your juror's lifestyle and politics. Helpful information includes:

- Who did they vote for?
- What propositions have they donated to?
- Have they contributed to a group that wants tort reform or judicial change?

Information you glean from researching this information can be used to adjust a juror's score.

Find your experts and your leaders

Read your questionnaires. You are on the look-out for experts, biases, and leaders. Find the experts and get rid of them. If your plaintiff is a contractor, you do not necessarily want contractors on your jury. Often, the closer the connection to your client's profession, the less sympathetic a juror tends to be. It's the "I would've dealt with it better/it wouldn't have happened to me" mentality. We inherently want to separate ourselves from the idea that danger can come into our lives.

There is also a general rule that you do not want to have a juror with the same interests as your defendant. David Ball explains this phenomenon beautifully in his book, *Reptile*. Apply the opposite for

your defendant's profession. If your client is suing an employer, you may not want business owners on your jury. The general mentality being "I could've made that mistake." Consider adding a question to your questionnaire relating to suing an employer. An example: "Do you believe it is wrong for an employer to be held legally responsible for the wrongful acts of its employee even though the employee was the actual person at fault?"

Your worst juror is someone who is both biased against your client and is going to be a leader. It is imperative that you scrutinize potential juror leaders. Being able to know who you need to watch out for ahead of time is worth every hour spent in preparing for voir dire. Remember your leaders during voir dire.

Jury selection is a bit like poker. Because you will never see all the cards, there will always be surprises. No matter how many questions you ask, you'll never know everything about every juror. Your job is to focus on reverse selection: who don't you want? Like counting cards in poker, you must keep track of how many potential jurors are left and how you have them ranked. You can have a block of bad jurors ahead. You may be able to get some of them off for cause, but not all. The worst case scenario is using your last challenge and then having a biased leader take that juror's place.

Ask probing questions, then listen

Use voir dire to ask, not tell. You will not change anyone's mind in voir dire. Your goal is not to get potential jurors to commit to a plaintiff's verdict, but you do want to get them to "start stretching" in their views.

Be the yoga instructor and get them to stretch left and right because you'll be calling on them to stretch later. Keeping with the yoga analogy, get them exercising and you'll keep them engaged. "Whoever here agrees with what juror No. 2 just said, raise your hand." Getting a physical response helps to ingrain the

concept. Start with simple "yes" questions first. A few examples:

- Do you believe you can give me honest responses today? If so, please raise your hand;
- If I don't prove my case in accordance with the law given by her honor, do you agree that you will give the plaintiff nothing? If you agree, please raise your hand;
- Likewise, if I do prove this case in accordance with the law given by her Honor, even if the damages were in excess of \$10 million, do you believe you would be able to write that number on a piece of paper and hand it to the court? If you agree, please raise your hand.

Listen and watch the way the potential jurors are responding to your opponent. It's not just about whether the jury is pro-you, you must also consider your defendant.

Topics to focus on

Ask questions about the relationship between special and general damages. Frequently in a plaintiff's case, the general damages can be many times the special damages. Do your potential jurors have a problem with this? Sometimes it is helpful to compare two scenarios. For example:

- Raise your hand if you have a problem with the concept that the out-of-pocket damages can be many times that of the pain and suffering of a person. Imagine a fancy car is totaled but the driver gets away with a scrape.

How about the opposite?

- Raise your hand if you have a problem with the concept that the damages to the person can be many times that of the out-of-pocket damages.

Get them stretching. Stretch your negative, biased jurors instead of shying away. You're going to get rid of them for "cause" anyway but use them to stretch the rest of your jury first. You may want to use them to discuss reward v. compensation. Stretch. So, you believe plaintiffs usually get rewarded for their injuries? Is this based on personal experience? Did you read the trial transcript? Is it your



FEBRUARY 2012

perspective that those plaintiffs were better off than if the accident never occurred? You are saying that if those plaintiffs could turn back the hands of time and choose their verdict and injury, or no injury, they would say “bring it on”? You’re not trying to change this juror’s mind, it’s just a great opportunity to use them as an example for the rest of your jurors. Raise your hand if you agree with juror No. 2’s opinion that.... This will retain the jury’s attention.

Don’t shy away from the state of the economy

These days, you’ve got to address the economy. It’s on every juror’s mind and their verdict will last 30 to 50 years for your client. Your jury pool is facing real problems. Job security is a concern for many. Unfair things have happened to people. Be sensitive but pay attention to those who have started to become jaded or whose own suffering will prevent them from compensating your client for their suffering. What challenges do you face awarding justice in a bad economy? Get them talking about it. Always keep your jury well fed, i.e. provide pastries, fruit, coffee (if the court will so allow). You are asking them to take a significant amount of time out of their life to decide your client’s fate. Do what you can to show them you appreciate them. Ask opposing

counsel to split the cost. As an added benefit, keeping your jurors fed encourages them to arrive on time and gives them added time to get to know each other.

Relax and have support

Your job is to get to know your jury. Do not take notes; it interrupts the flow and the connection. You’re having a conversation with the potential jurors. Get the jury pool involved. Ask open-ended questions. Do not condemn jurors; use it to stretch the rest of the jurors. “That’s interesting.” Stay on your feet so you can go with the flow of the jurors’ responses. Make sure your second chair, or someone else from your office, is there to assist. You need someone to take notes and to watch your jury pool while you converse. While smiles and nods do not usually mean as much as you may think, people do give signals. Do not just focus on the responses of the member of the jury you are questioning, watch the rest of the jury. How are they responding to the answer being given?

Lastly, as much information as you have received, your mind is trained to form opinions about others in social situations based on cues that you may not even be consciously aware of (that feeling you get, “I don’t know what it is but there’s something wrong with that juror.”) My

general rule is to go with my gut. If I sense there is something wrong with a juror, even if I can’t put my finger on it, or if I think he’s a “sleeper” with an agenda of his own, I will use that challenge.



Veen

William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates, and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.



Lancaster

Anoush Lancaster is an associate at The Veen Firm, P.C., as part of the Lancaster Trial Team. She litigates complex catastrophic injury cases involving negligence, wrongful death, products-liability, industrial accidents and exceptions to the workers’ compensation exclusive remedy doctrine. For more information on this article, sample motions in limine, and other helpful materials, please e-mail: a.lancaster@veenfirm.com or visit our Web site: www.veenfirm.com.