
# Getting the jury you want

## *A review of the law and some flexible, creative suggestions for jury selection to fit a variety of personalities*

**By Ronald H. Rouda and Karen Jo Koonan**

John Adams described the function of the civil jury in his flowery, 18th Century prose, saying:

> Lose none of my property, or the necessities, conveniences or ornaments of life which indulgent providence has showered around me, but by the judgment of my peers….

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. In reality you might also be able to 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.

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.

### The law on actual bias – a quick review

**Actual Bias:** Prospective jurors are disqualified from a trial if they cannot act with *entire* impartiality. (Code Civ. Proc., § 225, subd. (b)(1)(C).) In other words, prospective jurors are properly excluded for cause if they require a party to go beyond the party's burden of proof, e.g., requiring more than a preponderance of evidence to render a plaintiff's verdict. (*Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226.)

The following areas illustrate the grounds for proper cause challenges established by actual bias. Any of the examples are sufficient for a potential juror to be disqualified for cause; a party need not demonstrate all of them.

- **Strong Belief** – In action for rent, a prospective juror who expressed his dislike for landlords was properly disqualified for cause. (*Lawlor v. Linforth* (1887) 72 Cal. 205, 206.)
- **Long-Held Belief** – In action to enforce agreement, prospective jurors' long-held beliefs regarding divorce and remarriage can be basis for challenge. (*Smith v. Smith* (1935) 7 Cal.App.2d 271, 273-274.)
- **Belief Not Easily Set Aside** – In personal injury action, a prospective juror had considerable experience with the type of injury at issue. The prospective juror's pre-conceived ideas regarding the types of injuries were sufficient to exclude the prospective juror for cause. (*Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226.)
- **Party Starts at Disadvantage** – In action against railroad, a prospective juror felt many damage suits against the railroad were the fault of the injured parties instead of the railroad. The prospective juror was properly disqualified for cause. (*Fitts v. Southern Pac. Co.* (1906) 149 Cal. 310, 313.)
- **Enmity and Bias** are established if the prospective juror confirms that he or she will not follow the jury instructions if the law goes 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).

### Implied bias

**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."

Once a prospective juror has admitted bias, that prospective juror cannot be rehabilitated simply by stating, "I can be fair," or "I will follow the law." Prospective jurors are properly excluded for cause where prospective jurors admit bias but then promise to be impartial or to decide the case according to the evidence presented. (*Lombardi v. California Street Ry. Co.* (1899) 124 Cal. 311, 314.)

## Examples of facts constituting bias

Stock ownership in a party to the action is the type of business relationship that implies bias. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) 5:452; See 50A Corpus Juris Secundum: Juries § 381 (2007) (stockholder in a corporation is impliedly biased where the corporation is a party); See also *In Re Asbestos Litigation Ltd. to Carter* (Del. Super. Ct. 1993) 626 A. 2d 330, 331-332 (any quantity of stock owned renders potential juror impliedly biased).)

Prejudging the merits of a case based on knowledge of individuals or entities involved in the matter constitutes an "unqualified opinion" for which a prospective juror should be excused. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) 5:462.)

## Know and use the language of the law

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

## Script the challenge for cause

Introduce the subject matter: "I really want to know what you think about….."
• How did you reach this feeling?
• Why do you feel this way, i.e., what are the things in your life that led you to this conclusion (moral values you were raised with/philosophy/way of looking at life)?
• It sounds like this is important to you – please tell me why.
• Have you had this feeling for a long time?
• Feel strongly about it?
• Do your family or friends know you feel this way about this issue?
• If asked, would you share this feeling with others – i.e., stand behind opinion/feeling?
• Would you be uncomfortable sitting on a jury that comes to a conclusion contrary to your opinion?
• Couldn't set feeling aside even if another juror told you, you shouldn't think that way; or if attorneys said you have to set aside?
• Is it true that there is nothing anyone can say to make you feel differently?
• So, in all honesty, you don't really start off neutral in this case; the defense starts off with an advantage, doesn't it? Or the plaintiff starts off behind, don't we?

## Let them voice their biases without fear

Jurors are complex human beings who bring a lifetime of experiences and attitudes to their responsibilities as judges of the facts. The more information we can get about each prospective juror, about both experiences and attitudes on key case issues, the more informed will be our decision making in the jury selection process.

There are four areas of information which combine to produce a meaningful understanding of each person:
1. Experience and attitudes relating to the specific issues in the case;
2. General background (demographics) which helps to provide an understanding of the person as a member of a particular group (age, race, gender, etc.);
3. Personality and cultural characteristics such as deference to authority, rigidity vs. flexibility, ability to understand complexity in human interaction vs. seeing things in black and white and the level of satisfaction with life.
4. Role on the jury (leaders and persuaders, special expertise vs. followers, independent thinkers vs. going along with the group).

Understanding the jury selection process as putting pieces of this puzzle together will guide the development of your voir dire methods and questions and produce the most effective assessments of prospective jurors.

In developing the most important voir dire questions for a particular case, it is helpful to think about the kinds of biases a juror might have about this particular case story and ask the jurors if they have those attitudes. It is often helpful to simply say, "Some people believe ….. What do you think?" This form of question gives jurors permission to voice their biases without fear of giving the "wrong" answer and thus being judged.

## Setting the stage

Gerry Spence sets the stage with something like this:

> This is a very special part of the trial. It's the only time, until this case is finished, where we can just talk to each other, where I can ask you questions about how you feel about certain things, and where you can ask me questions about what I mean. One of the things we're here to talk about is the prejudices we have. I have them, my opponent has them, and so do you. All it means is that we prejudge things. There's nothing wrong with that. We pre-judge people based on the cars they drive or the clothes they wear. Our kids pre-judge things when they don't want to try a new food. It's OK to have prejudices. We all have them. But the problem, the biggest crime that could be committed in this courtroom today, would be for somebody who really had an opinion about something – and we all have opinions – to not be willing to say it.

Spence goes on to tell jurors that he is nervous about voir dire because he is afraid of offending someone, but that he has to do this job for his clients.


By establishing an expectation that the jurors will be candid, and by sharing his own anxiety with them, he sets a tone that elicits honest responses.

### An example of voir dire

John Feder and Ron Rouda ("the attorneys") used open-ended questions when voir diring a jury in a dangerous roadway case against the City of Los Angeles. The attorneys asked the jurors to share their feelings about holding a public entity liable for injuries and damages to a person caused by a dangerous condition of a public crosswalk. The attorneys asked the prospective jurors how they felt about assigning percentages of liability against the governmental entity and a motorist who struck the pedestrian in the marked crosswalk.

They used a focus group to listen and learn from the mock jury panel's deliberation. The focus group's feedback was helpful in allowing the attorneys to frame their voir dire questions regarding the critical issues to be decided by the jury. Focus groups can help identify the kinds of life experiences and attitudes that will produce the highest obstacles to the jurors' acceptance of the plaintiff's story. (It is important to pay the most attention to the negative lessons. Relying too much on the positive feedback and information can be misleading.)

In the attorneys' dangerous roadway case, they used the language from the CACI instructions 430 (Causation: Substantial Factor), and 431 (Causation: Multiple Causes). They asked the prospective jurors if the jurors had strong feelings or beliefs about the law that says that a substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm.

The attorneys asked about their feelings or beliefs about the law of multiple causes which provides that a person's negligence may combine with another factor to cause harm.

They asked if the jury found that the negligence of the City of Los Angeles was a substantial factor in causing plaintiff's harm, would the jurors have any difficulty holding the City of Los Angeles responsible for the harm even if there were other causes of the harm.

They asked the prospective jurors if they had any thoughts, feelings or attitudes about holding a public entity responsible for harm when some other person was also a substantial factor in causing plaintiff's harm.

The attorneys asked the prospective jurors if they had any set floor of damages that they would not go below in this kind of case. They also asked if any of the prospective jurors had a set ceiling of damages that they would not go above in this kind of case.

The attorneys sought to elicit responses from the prospective jurors that would indicate whether they thought that personal injury claims were frivolous, unfair or unjust.

The attorneys asked the prospective jurors if they felt that people were overly anxious to sue for personal injuries or believed that lawsuits were costing too much for what they provided to society.

They asked the prospective jurors if they had seen ads in newspapers or magazines, television or the internet criticizing jury awards in personal injury cases.

They asked what they thought about these ads, and their feelings about these kinds of cases.

The attorneys wanted to identify those jurors who were "tort reformers", did not believe in the civil justice system, or who thought that there should be limits in damages in personal injury cases.

Using the services of a jury consultant, the attorneys probed the attitudes of the prospective jurors about (and in particular their resistance to) compensating people with serious disabilities.

### Connecting voir dire to closing argument

Using your imagination and preparation, link the voir dire message to the final argument. It is helpful to review the voir dire transcript or voir dire notes when preparing your closing argument. For example, you have asked the prospective jurors if they will follow the law. Now you wish to argue the law involving, for example, aggravation of a pre-existing condition. Your voir dire question might be: "Do you have any concern that people with a pre-existing condition have a right to seek damages for the aggravation of their pre-existing condition?" If silence is the response, then say, "I take it you do not." Your closing argument may refer back to your voir dire question; then explain the law by using an illustration such as "The Story of the Three Dolls."

> Three dolls sit on a shelf of a doll shop. One doll is made of glass, another of wood, and a third of steel. A negligent person knocks all three dolls from the shelf. The steel doll is unharmed. The wooden doll is chipped, but it can be repaired. The glass doll shatters and cannot be fixed. It is no defense for the negligent person to say that if the glass doll had been made out of steel or wood, the damage would not have been so great. The defendant is liable for the aggravation of the pre-existing condition. The mere fact that the plaintiff is fragile is no defense at all.

Because people are so complex and each case is different, these suggestions should be applied with flexibility and creativity. There are only a few cardinal rules for jury selection:

- Be respectful.
- Listen carefully.
- Understand people in their complexity.

Finally, remember that the closer a person's experience is to the facts of the case, the more dangerous they are. They may be good or they may be a problem, and you better know which it is before you leave them on the jury. Their experience is likely to become part of the evidence of your case and other jurors are likely to defer to the juror with the relevant experience.



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