



# Selection criteria

## The mechanics of jury selection



Cooper

BY MILES B. COOPER

The defense lawyer looked down at a field of post-its. “Your honor, the defense would like to thank and excuse Ms. Smith, juror number 17.” The judge’s head swiveled, lips pursed. “Number 17? Counsel, please approach.”

### Ask “dumb” questions

During trial, no-one wants to look inexperienced. This is particularly true with jury selection. Scanning through C.C.P. §§ 200-237 (codes governing jury selection) helps but is not enough. Many of the mechanics themselves are discretionary. Will initial questioning include 12, 18, 24 or some other number of potential jurors? When a juror in the first 12 seats is struck, is the seat filled from seats 13-18 (typical) or someone completely new (rare but happens)? Does the method change between cause challenges and peremptories? Will there be a time limit, and if so, is there *any* flexibility?

Most departments have specific (unwritten) rules. They’ve used their own rules so long that they forget not everyone knows them. Ask. One can’t effectively play the jury selection game without knowing the specifics.

### Questionnaires

Questionnaires deserve their own column. For now, know that copying and reviewing (turning jury selection into two days at a minimum) means judges disfavor questionnaires. Having a jointly-agreed questionnaire with a specific copy and review plan helps overcome judicial displeasure.

### Random

Request the random list before the panel files in. It lists jurors in order of how they’ll be seated in the jury box. As roll is taken, identify and cross out anyone who got lost between the jury commissioner’s office and the department.

### Moo

The clerk advises that the jury panel is heading up. Exciting, right? Yes and no. The cattle call – 60 or so people filing in, roll call – lacks pizzazz. But as the jurors file in and roll is taken, kick your senses into overdrive. They don’t have their guard up yet. Look for ideological buttons on jackets and packs, scan for reading material, and listen for strong personalities in responding to roll call. That copy of Trump’s *The Art of the Deal* will disappear before the potential juror sits down in the box.

### Hard times

Typically, the judge initially “hardships” the jury. Some departments request jurors fill out a form or line up to make a

hardship case. Others take them as they go. Gather hardship data. The hardships might be denied but the information given can be useful for decision making. Those who want hardship relief but don’t get it tend to be bad for the plaintiff.

### Organization

After trying different methods – post-its on a board, software programs, notepads, I’ve decided simple is best. I use a standard clerk’s 18-pack chart on 8.5” x 14” paper. The only items listed are the jurors’ names, a score, leadership capability, and challenges. Fives are great, ones are bad. L’s are leaders, S’s are followers (S for sheep – not my creation but it works.) P-C is a plaintiff cause challenge, D-C is one we suspect will be a defense cause challenge. Same with P-P (plaintiff peremptory) and D-P.

As people move out of the box, the name and score is lined out and replaced with the next person. This method gives a global view of the current jury and the upcoming potential jurors.

I also use a Word document for the jurors’ answers. It has an auto-numbered table with columns for juror number, name, and answers to questions. All answers – to judicial questions, our questions, defense questions, go in this section. I type 65 words per minute. I scribble at roughly 30. I can also highlight or italicize items mentioned that I want to follow up on.

### Challenge

Cause challenges are handled first, with the defense typically challenging first. Detailed notes – precise quotes (that Word document) – help. The quotes can be used to knock or argue to keep a juror. Cause challenges are made to the judge, not in front of the jury panel.

Next come peremptories. Each side gets six challenges. The game theory here is riveting and fast-paced. Keep track of the challenges used. Try to avoid using the last challenge or two. Using all challenges means someone truly awful can slide in at the last minute.

### Alternates

Alternate selection rules tend to vary greatly. One usually gets one peremptory per alternate. This means if there are three alternates, one gets three peremptories. Lawyers sometimes get tired by the time alternates get picked. The day has been stressful, folks want to be done, and it is frequently 4:30. Stay focused, as alternates tend to make it onto the jury.

### Outro

Back to our defense lawyer and the peremptory challenge to juror 17. The judge conducted a brief sidebar, gently reminding the lawyer that peremptory challenges were restricted to the first 12 potential jurors. The defense lawyer went back out, made an appropriate challenge, and the game continued.



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