Jury selection: Changes to Code Civ. Proc. § 222.5

2018 brought changes to jury selection statutes that will be helpful when it is time to pick your jury

By Maryann P. Gallagher

2018 brought tremendous changes to the jury selection statutes. These changes provide you with all the language you need to make sure you are permitted to have an effective voir dire that is not arbitrarily limited in time or scope. However, the best way to ensure that you get all of the great protections that Code of Civil Procedure section 222.5 allows you, is to make sure you file a motion in limine so it can be heard at the same time as the other motions in limine and when you start voir dire, you know that you will be given the opportunity to fully question the jurors. (All further statutory citations are to the Code of Civil Procedure.)

File your motions regarding voir dire as a motion in limine so they can be heard before you start the trial. The Final Status Conference, or whenever the motions in limine are heard, is the time that you want to make sure you have your motions heard to ensure you have effective voir dire. If you have an FSC, make sure you file your Motion in Limine Re: Voir Dire ahead of time. If the court hears the motions on the first day of trial, make sure you have this prepared and ready to go.

Scope of the examination

The Scope of the Examination should not be limited. *Yes, you should be able to talk about the facts of your case.* Section 222.5 (b)(1) provides in part:

> During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to *discover bias or prejudice with regard to the circumstances of the particular case before the court.*

(Emphasis in original.)

The Court cannot impose arbitrary time limits for jury selection. *You are entitled to a voir dire without a standard time limit.* Section 222.5 (b)(2) provides:

> The trial Judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire.

Even if some of the questions were covered by the court, you are still entitled to ask follow-up questions on that topic.

"The fact that a topic has been included in the trial judge's examination shall not preclude appropriate follow up questioning in the same area by counsel." (§ 222.5 (b)(1).) The Court is required to give you both the alphabetical list and the list of the jurors in the order they will be called, *before jury selection begins*. Section 222.5(g) provides:

> To help facilitate the jury selection process, *at the earliest practical time*, the judge in a civil trial *shall* provide the parties with both the alphabetical list and the list of prospective jurors in the order in which they will be called.

You are entitled to submit a jury questionnaire and the court *must give you reasonable time to evaluate the responses before oral questioning begins*.

Section 222.5(f):

> A judge shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. If a questionnaire is utilized, the parties shall be given a reasonable time to evaluate the responses to the questionnaires before oral questioning begins.

Section 205(c) provides:

> The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voir dire process or to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule.

Always ask for a mini-opening in your motion in limine

You are entitled to a mini-opening statement. Section 222.5(d) provides: "Upon request of a party the trial judge shall allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process."

Always ask for a mini-opening in your motion in limine. You are entitled to one and it's a great way to get the jury involved in your case early, before you start questioning them. I cannot stress enough how important the mini-opening is. You get to make a brief statement to the jury about the issues in the case; you should identify the good and the bad. Be up front; that way when you are questioning them, they will know why you are asking the questions you are asking, and it will put them in context so you will get better responses.

Discuss all of these requests with the court as much in advance of voir dire as you can. That way everyone knows the parameters or (non)parameters of the jury selection.

Bringing these issues ahead of time, before voir dire, and having a good discussion with the court about how the voir dire process will proceed, will help the process run much more smoothly for everyone: you, the defense, the court, the jury. This will take a lot of the unknown out of the jury selection for you and ensure you have a clear path to conduct the best voir dire that you can.

The challenging issue of challenging jurors for cause

Challenge for Cause: The statute protects from three types of challenges for cause:

> General Disqualification: Sections 227(b) and 228: This would apply to a juror who does not have the qualifications to serve as a competent juror. (§ 228a.) This would also apply to someone who has an incapacity so that they are incapable of performing their duties of a juror without prejudice to the substantial rights of the challenging party.
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> This would be used to challenge someone who does not speak or understand English, or does not do so competently so they could fully perform their duties.
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> "Implied bias" is defined as "having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them" or, "the existence of a state of mind in the juror evincing enmity against, or bias toward, either party."

(§ 229 (e),(f).)

Enmity is defined in Merriam-Webster's Dictionary as "a very deep unfriendly feeling." (2018 Merriam-Webster.) Implied bias means that the court has to consider not just what is said, but how it is said, the tone of voice, the body language. Simply asking a person if they can be "fair and impartial" is not probing whether or not they have an implied bias.

In order to properly determine whether a juror has an implied bias, you must be able to provide them the material facts of the case, so you can determine if that person holds an implied bias.

> "Actual bias" is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of the parties."

(§ 225(b)(1)(C).)

It is error to deny a properly stated challenge for cause: "It has been held repeatedly that it is prejudicial error to deny a good challenge for cause and compel the challenger to use one of his peremptory upon a particular juror where that robs him of a challenge which he would have used upon another juror who remained in the box." (See *Leibman v. Curtis* (1955) 138 Cal.App.2d 222,226; see also, *Quill v. Southern Pac. Co*. (1903) 140 Cal. 268, 270 [finding in a personal injury action that two prospective jurors should have been excused for cause when they stated in voir dire that they believed too many personal injury actions lacked merit, that the number of such meritless suits was increasing, that the plaintiff would have to provide "conclusive proof" the defendant was negligent to obtain their votes, and they admitted that their state of mind "might influence" their decision, or could affect them unconsciously.].)

When exercising the challenge for cause, the defense goes first, unlike the peremptory where the plaintiff exercises the first challenge. Section 226(d) provides "all challenges to an individual except peremptory challenges, shall be taken, first by the defendants, and then by the people or the plaintiffs."

Let the defendants go first; they may have challenges for cause you agree to and you will also get a preview of who they don't want on the jury.

How many peremptory challenges?

There is some confusion as to how to assign peremptory challenges. When there is just one defendant and one plaintiff, each party gets six peremptories. When there are more than two parties, the court shall, for the purpose of allotting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to eight peremptory challenges. (§ 231(c).)

Often, in multi-party cases such as employment cases, defendants try to claim that there are "multiple sides." This, despite the fact that they have provided a joint defense throughout the case. The law is clear; if there are multiple parties, the court should divide the parties into sides, and give the same amount of peremptories to each *side*. Therefore, there may be two defendants, but they are on the same side. If there are two or more defendants, the judge divides all the parties into sides and each side gets eight peremptory challenges.

Be focused and be prepared

In the midst of all the trial preparation, securing your witnesses, and getting your exhibits, sometimes jury selection can be upon you before you had a chance to prepare. However, for this most important part of the trial, you must be focused and ready. If you can, try to go to a jury selection that your assigned judge handles before your FSC; that way you know what particular methods the judge uses. If you are not assigned a judge until the last minute, then go online to see the judge's rules, and call the clerk if possible for some tips on the judge's particular method for proceeding with jury selection. Make sure you prepare your motion in limine addressing all of these issues in advance. Have a good discussion with the court beforehand because once the jury is in the box, the court will want to move quickly.

No matter how much time you have, don't worry, focus on the jurors once they start coming into the courtroom and keep your focus on them at all times during jury selection, whether you are questioning them or the other side is conducting their voir dire. *Listen* to the jurors; they should be talking more than you. Make the jurors feel comfortable so that they can open up. Take the time and spend the time on this most important part of the trial and you will be way ahead of the game as the trial progresses.

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