Hon. Elizabeth Allen White

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2018 Issue

Voir dire

THIS IS YOUR ONLY OPPORTUNITY TO TALK TO THE JURORS UNTIL THE CASE IS DECIDED

The venire arrive in my courtroom primed with excuses as to why they should not be required to serve. They've done their research online and learned every excuse for getting out of jury duty. The enthusiastic morning greeting from one of my colleagues explaining the importance of the constitutional right to trial by jury and the need for everyone to serve has not persuaded them.

I put on my sincerest smile and tell them we value their time and that they will enjoy their experience as jurors. After explaining that the case will take five court days and that I will consider excusing them only for hardships relating to childcare or the care of an elderly or infirm individual, I suggest a postponement for those who have prepaid vacations or responsibilities at work. For those who claim financial hardship or an inability to understand English, I inquire further as to the circumstances. In order to get a fair and balanced jury, I meanwhile work to keep the panel as diverse as possible in terms of gender, race and socioeconomic background.

I always tell the jury that the term voir dire means "to see and to say" or "to see [them] say," both of which characterize the process. In legal parlance, the term is used to more broadly describe the process by which jurors are questioned on their backgrounds and potential biases prior to being selected to sit on the jury.

See White, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2018 Issue

In other words, the purpose of voir dire is to see prospective jurors and hear what they have to say in response to questions about their service as a juror.

Challenges for cause

Only by engaging in a thorough voir dire can a party intelligently assess whether to challenge a juror for cause. Challenges for cause can be made based upon: "(A) General disqualification – that the juror is disqualified from serving in the action on trial; (B) Implied bias – as, when the existence of facts as ascertained, in judgment of law disqualifies the juror; (C) Actual bias – 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 any party." (Code Civ. Proc., § 225.)

California law promotes the parties' right to conduct voir dire. California Rules of Court Rule 3.1540 provides: "Examination of prospective jurors in civil cases" states that, "(b) In examining prospective jurors in civil cases, the judge should consider the policies and recommendations in standard 3.25 of the Standards of Judicial Administration."

Standard 3.25(a)(1) provides, in relevant part, that: "The examination of prospective jurors in a civil case…should include all questions necessary to ensure the selection of a fair and impartial jury…. During any supplemental examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case." Standard 3.25(a)(2) provides, in relevant part, that: "In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria: (1) any unique or complex elements, legal or factual, in the case, and (2) the individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case."

Standard 3.25(c) directs the court to tell jurors that "the parties are entitled to have a fair, unbiased, and unprejudiced jury." It includes an extensive list of the topics to be covered by the trial judge during voir dire including: the nature of the case, including alleged injuries or damages; whether the juror feels the type of case should be brought into court for determination by a jury; whether the juror or anyone with whom the juror has a significant relationship has ever sued in connection with a similar case; whether any of the parties, witnesses, or attorneys come from a particular national, racial, religious group (or may have a different lifestyle) that would affect the juror's judgment; or the all-encompassing question of whether there is any other reason that might make the juror "doubtful they would be a completely fair and impartial juror in this case."

A panel of diverse backgrounds

It is with this background in mind, that I set about to get to know the jurors with the goal of making it an enjoyable experience for all of us. In my circle of family and friends, I don't often have occasion to meet people who are from vastly different walks of life and backgrounds and I am sincerely interested in who the jurors are and what they have to say. The diversity of our panels in Los Angeles offers a rare opportunity to get to know our community on a very personal level.

In talking to a plumber, I may ask what aspect of his job he enjoys the most or comment on how valuable his work is in an emergency such as a broken pipe. In talking to a teacher, I may venture to inquire about the most rewarding aspect of the job. Frequently, I'll have a juror who says she is merely a housewife. If I find out she is raising four children and has a husband working full time, I am apt to say her job is no less valuable than the work of someone who gets paid and comment that her work is of great value to her family and to society. With a retiree, I usually ask whether the juror is enjoying retirement.

The point of my questions is not simply to seek information. I am working to make the jurors more comfortable and open to easy conversation. I also reassure the jurors that if they are uncomfortable speaking in public, they can request a sidebar and speak privately to me and the lawyers. I don't know a single judge who wouldn't make the same offer at the outset.

Facilitating the process

I always ask the attorneys if there are areas of inquiry they would like me to address. In this way, attorneys may focus their attention on specific jurors and specific areas of needed inquiry. By breaking the ice with more generalized questions, the court may facilitate the attorneys' more specific follow-up questions in areas that are very personal, embarrassing, or private.

Sometimes, the jurors' answers require extensive follow-up questioning by an attorney. Code of Civil Procedure section 222.5 provides "The fact that a topic has been included in the judge's examination should not preclude additional non-repetitive or non-duplicative questioning in the same area by counsel."

Standard 3.25 also requires the court to tell jurors "the parties are entitled to have a fair, unbiased, and unprejudiced jury" and to close voir dire by asking if there is any reason "that might make them doubtful they would be a completely fair and impartial juror in this case." This is crucial because a new trial can be granted when a juror conceals during voir dire. (*Clemens v. Regents of Univ. of Cal.* (1971) 20 Cal.App.3d, 356, 361.)

Unreasonable time limits on voir dire

Effective January 1, 2018, Code of Civil Procedure ("CCP") section 222.5 was amended to reflect the strong policy prohibiting restrictive time limits on voir dire in civil trials. The recent amendments make clear that courts may not impose unreasonable and inflexible time limitations on voir dire. While the scope of attorney examination during voir dire is still left to the sound discretion of the

See White, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2018 Issue

court, the court must nonetheless consider various factors, such as: the amount of time requested by trial counsel; any unique or complex elements – legal or factual – in the case; length of the trial; number of parties; number of witnesses; and whether the case is designated as a complex or long cause. In other words, each case is unique and there is no "cookie cutter" approach.

The amendments to CCP section 222.5 also require the courts to allow supplemental time for questioning based on individual responses or conduct of jurors evincing attitudes inconsistent with serving as fair and impartial jurors, the composition of the jury panel, or an unusual number of for cause challenges. For instance, unanticipated responses to the topics listed in Standard 3.25 may prompt the need for additional time to question prospective jurors.

Code of Civil Procedure section 222.5 further requires the courts to allow, if requested, a brief opening statement (mini-opening) by counsel for each party prior to voir dire. The judge has no discretion to refuse a request for a mini-opening. The idea is that presenting a brief, non-argumentative outline of the case gives counsel an opportunity to more efficiently question jurors during voir dire. An additional benefit for counsel and the jurors is that mini-openings grab the jurors' attention much more effectively than the court's reading of a bland Statement of the Case.

Jury questionnaires

Finally, as an additional tool to more efficiently question jurors within time allotments, CCP section 222.5 instructs that a trial judge should not arbitrarily or unreasonably refuse to submit written questionnaires when requested by counsel. Because the contents of questionnaires must be approved by the court, opposing counsel should meet and confer and submit mutually acceptable questions. The statutory amendments require courts to give parties a reasonable time to evaluate the questionnaire responses before oral questioning commences, taking into consideration the need to photocopy the completed questionnaires for counsel and the court.

Attorneys usually craft questionnaires to obtain information which is case specific and focused on whether the jury members have any personal experience with the issues involved in the case. In this regard, it may be better to pose more specific questions and then use the responses to those questions to elicit broader opinions in verbal questioning.

For example, rather than ask jurors in a sexual harassment case whether they have any strong opinions about the "me too" movement, it may be better to ask whether they have ever been sexually harassed or accused of sexual harassment. Personalizing the questions will also help to get the jurors talking, and by varying the talking points, will also help keep the proceedings interesting.

After the questionnaires are completed, attorneys are permitted to review the responses and formulate further questions. CCP section 222.5 mandates that counsel should be permitted to conduct a "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case" and "in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause." Counsel should accordingly be prepared to identify the unique "circumstances of the particular case" that require more time to conduct a "liberal and probing examination."

Pre-conditioning jurors is not permitted

It is improper to ask "any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law." In fact, Standard 3.25(c) provides that the trial judge will ensure jurors "will, without reservation, follow the court's instructions and rulings on the law and will apply that law to the case."

In personal injury or medical malpractice cases, counsel will sometimes expose jurors to certain themes they intend to repeat during trial, for example, concepts like danger, safety, and risk. The repetition of such themes may encourage the jurors to focus undue attention on these ideas during opening statements and trial. This is known as the "reptile approach," based on the notion that, when survival is threatened, the brain's reptilian function takes over and overpowers logic and reason. Judges are aware of this approach and when faced with an objection, must look closely to determine if counsel is attempting to improperly pre-condition the jury by suggesting inadmissible and prejudicial matter or asking the juror to react to particular evidence in violation of their duty to remain fair and impartial. After all, voir dire is not evidence, testimony, argument or indoctrination.

Damages

The topic of damages can be a dicey area of inquiry if, for example, plaintiff's counsel suggests an exorbitant award and then asks whether a juror would be unwilling to award that amount. Questions about the topic of damages and, more specifically, a prospective juror's ability to award damages are generally permitted but they must be supported by the evidence that will be presented in the case. Counsel representing the plaintiff should inform the court before trial of the intention to discuss this topic with prospective jurors and the need for sufficient time to do so.

More than 12

Many courts now employ the "six pack" or "strike-and-replace" method, where at least six additional prospective jurors are randomly selected in addition to the 12 seated jury members. This increases efficiency by allowing counsel to focus on the responses of all 18 jurors, knowing who will replace any of the originally selected 12 jurors. It also allows counsel to take into account the next available juror when deciding whether or not to use a peremptory challenge on a sitting juror. Some judges question the entire venire, assigning a

See White, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2018 Issue

number to each juror. While this method is efficient and has the benefit of engaging every juror in the discussion, the attorneys may have difficulty keeping track of the responses of the entire venire.

In my courtroom, my hope is to make voir dire an enjoyable process for everyone involved. Remember this is your only opportunity to talk to the jurors until the case is decided. Think of the juror as someone you want to get to know socially. This is a good way to get them to relax. Voir dire is a fine art and, with the help of the court, ensures you will have a fair trial and that our jurors walk away from the process feeling valued and appreciated.

Elizabeth Allen White is a Judge of the Los Angeles Superior Court. She was appointed to the then-Los Angeles Municipal Court in 1997 and elevated in 2000 upon unification. Judge White graduated from UCLA and obtained her Juris Doctorate from Loyola Law School in 1981. Judge White currently presides in a civil court at the Stanley Mask Courthouse. She taught Civil Discovery at Judges College and has been a frequent lecturer for judicial education. Judge White has served as an Instructor for UCLA's Attorney Assistant Training Program, Adjunct Faculty at USC's Gould School of Law and Adjunct Faculty at Loyola Law School where she taught Civil Discovery. She is the author of The Rutter Group's Paralegal Manual - Civil Procedure Before Trial and co-author of the Paralegal Manual – Civil Trials and Evidence and the Paralegal Manual – Personal Injury. Judge White also represents the California and Nevada area as District 14 Representative to the National Association of Women Judges, an organization dedicated to promoting diversity on the bench, fostering collegiality and providing quality education for judges.