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Don't lose before you've even started

CHOOSING THE RIGHT JURORS FOR YOUR AUTO CASE CAN BE THE DIFFERENCE BETWEEN WINNING AND LOSING

I've always been terrified of jury selection. I've had a vision in my head of asking a panel of prospective jurors about their biases by way of a general question posed to the entire panel and no one raises their hand. Then what? How would I elicit this sensitive information from them without them hating me? What happens if I get a raised hand, and then I don't know how to address the remainder of the panel?

As trial attorneys, we don't typically shy away from risk. I therefore believe it is of vital importance to challenge yourself to fly outside of your comfort zone in every case you try. "Luck" is really nothing more than the result of preparation meeting opportunity. I find that you can be pleasantly surprised what you can do on your feet if you are adequately prepared.

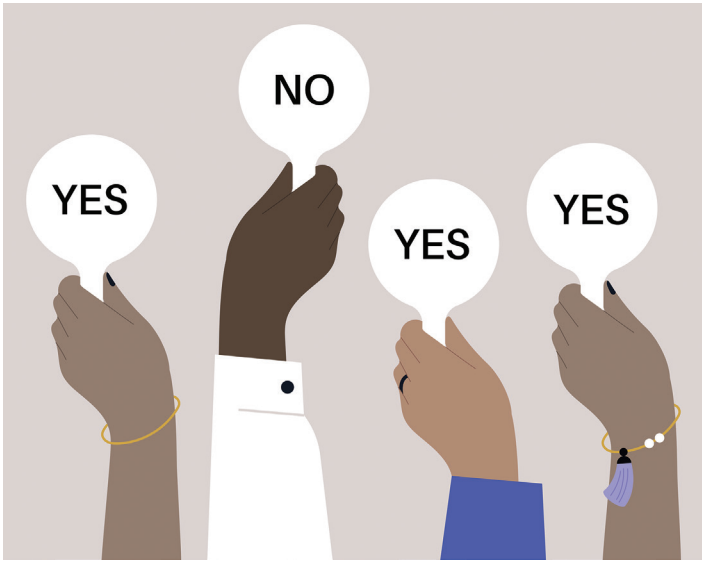
Jury selection can make or break your case

I do not like trying cases alone. I think there are explanations to be drawn and perspectives to be relied upon that can only be found by another set of eyes looking at the same facts and evidence that you are. It is smart to perform the tasks you feel competent performing, but it is equally vital to your growth as a trial attorney to perform tasks you are not comfortable performing. Doing so however, without researching tips by more experienced trial attorneys, is simply foolhardy. A fantastic resource that you are likely to already be familiar with is Keith Mitnik's "Don't Eat the Bruises." This book breaks down jury selection to its smallest component and provides a roadmap to conducting effective and efficient jury selection.

It is said often that jury selection is the most important part of trial. Even if the evidence weighs heavily in your favor, the damages are solid and your client is loveable, if you have a jury replete with biases against you and your client, your trial could very well be lost from the start. Choosing the right jurors is everything, and auto cases in particular are landmines for potential biases.

"I just heard an ambulance go by..."

Talk about an auto collision with any random person and their heads are likely to be filled with images of billboards illustrating slick attorneys wearing a fake smile and an expensive suit, or an attorney wearing a cheap suit sneaking into a hospital room trying to revive a comatose patient long enough to get them to sign a retainer agreement. I recently had someone tell me as I was walking out of the gym that he "just heard an ambulance go by." (Real funny, like I've never heard that one before.)



While there are some characters in this industry who do not hold good intentions, the majority are out for good. We genuinely care about justice and doing what is right by the client. We genuinely care about balancing the scales of justice between injured people and insurance companies. If we don't try cases, there is no system of checks and balances. Successfully trying cases, and therefore enforcing this system of checks and balances, begins with an *impartial* jury.

Jury selection is your first opportunity, aside from the mini-opening, to introduce yourself and your client to the jury. But more importantly, it provides a chance to build a connection and trust with your jury. With carefully crafted questions and strategy, you can elicit information that could bode poorly for your client without having the jury dislike you. This is a fine line, but can be done. Often, the most dangerous biases lie in a corner of the juror's subconscious, and it is your job to bring this buried bias to the juror's and the court's attention.

When you begin your jury selection, it is imperative that you address *each and every* juror. If you ask the panel a question and only a few respond, and you then pass the jury selection to the defense, you lose the opportunity to go back and dig up what is lurking in the back of the minds of the jurors you failed to address.

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One concern I have had with jury selection is the fear that jury selection will elicit opinions from the jurors that may influence the thinking of other jurors. The point of jury selection is less about empaneling a jury of those who are in favor of your position, and more about weeding out those who have feelings against you, your client, and your case. Do not concern yourself with influence. Your only goal is to kick off the jurors who will hurt your client.

Time limits

There is a strong debate regarding the length of jury selection, perhaps only second to the debate about how "voir dire" is pronounced. This is really an individual choice. I will say, however, that this is one area of the trial that I absolutely refuse to rush, knowing the road blocks can be anticipated and prepared for beforehand. You can certainly anticipate the sighs and head shakes of defense counsel, and with a little pre-trial research on your judge, you can be armed with tools to deal with a judge who imposes restrictive time limits on your jury selection.

Judges vary on this issue, with some gently giving you the "counsel, let's move it along" prompts and others giving you restrictive time limits. In the first instance, if you feel there is more to mine out of the jurors, you must be polite. Do *not* make an enemy of the judge before you have even begun to put on your case.

Advise the judge you are doing everything in your power to be efficient but there are areas you still need to uncover to empanel a *fair and impartial* jury. Often, if you assure the judge that you are doing your best to be efficient, the judge will provide you leeway. It is important that you know exactly what you're after because a fishing expedition will only irritate the judge and the jurors.

If the judge seeks to impose time limits

If the judge imposes restrictive time limits, you can gently remind the judge of Code of Civil Procedure section 222.5, which states:

> (b)(1) Upon completion of the trial 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 scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion subject to the provisions of this chapter. 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. 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. The trial judge shall permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning.
>
> (b)(2) The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire.

Without irritating the judge, it could be helpful to remind the judge that your time is being spent to discover bias or prejudice with regard to the circumstances of your particular case. If this does not sway the judge, then there are basic areas you should cover in your jury selection. These would include whether the jurors believe:

1. There are too may lawsuits
2. Jury awards are too high
3. People are too litigious
4. Lawsuits cost too much money
5. Verdicts are too excessive (and whether this would encourage anyone to award as little as possible)
6. Pain and suffering damages are unreasonable
7. It would be too difficult to render a verdict in the millions even if the evidence supports it
8. Any areas of concern specific to your case

This information will obviously guide you in determining whether your jurors would be reticent to render a verdict that justifies your client's losses based upon their biases towards lawsuits. This is California, after all.

If you are given additional time, dig deep into areas specific to your case. These areas are likely to include low property damage, preexisting injuries, disputed liability, witness statements adverse to your client, etc.

If you are given ample time, doing a thorough job when your case has serious areas of concern for you can be time consuming and tedious. However, the time invested can be the difference between winning and losing your case.

Establishing for-cause challenges by eliciting actual and implied biases

Now, you have limited peremptory challenges, but unlimited cause challenges. You therefore want to get as many cause challenges granted as you can. Doing so will require eliciting the information needed to satisfy the court that the juror cannot be impartial as well as getting the juror to use the correct language.

An actual bias is the existence of a state of mind in reference to the case or parties that will prevent the juror from acting with entire impartiality. (Code Civ. Proc., § 225.) Implied bias is the existence of facts ascertained that creates a presumption of bias and disqualifies the juror as a matter of law. (Code Civ. Proc., § 229.)

More specifically, Code of Civil Procedure section 229, subdivision (e) provides: "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," and (f) provides: "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party." As you can see, implied bias is more difficult to ferret out than actual bias.

In my last trial, the judge laid out the language necessary to establish a

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for-cause challenge. He explained, "Actual bias is the existence of a state of mind on the part of a juror in preference to the case or any of the parties which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights to any party. So that's the first requirement, you have to look at 225 of the CCP." I knew the words "entire impartiality" had to come out of the mouths of any juror I did not want in order to use a cause challenge.

There are two types of jurors: those who will flat out admit they don't want to be on the jury (or come up with excuses as to why they can't serve jury duty), and those who will hint that they are adverse to your case without using the language, but add that they "think they can be fair." The latter category will require more invasive questioning to draw out any potential biases.

Jurors who do not want to serve on the jury will usually do the job for you. The latter category will require finesse. Educating the jury about what jury selection is for, and ensuring them that the process is not about judgment, but rather, about ensuring your client receives the most fair and impartial jury possible, will make your jurors feel more at ease to be honest with you. The use of examples here is often helpful.

The starting line analogy

An effective analogy to use with jurors is "the starting line." Imagine there is a race. All the athletes gather at the starting line waiting to begin the race. (Here, I literally draw the starting line with my hands in front of the jury box). Biases essentially position one party behind the other party before the race has even begun.

When you discover a potential bias that you believe could be the basis for a cause challenge, ask the juror whether, based upon their comments/thoughts/beliefs, your client would be starting out behind the defendant at the starting line. If they agree, ask them whether they believe they cannot be "entirely impartial" regardless of what the evidence shows. If they agree, you have your cause challenge, if not, keep going.

The contest

A common example that helps jurors understand the role bias plays is the contest. You can get creative with this. Take juice, for example. There is a contest about who makes the best homemade fruit juice. You're chosen as a judge. At the contest, the contestants have submitted their homemade apple juice, grapefruit juice and orange juice. When your review the submissions, you take a mental note that you don't like grapefruit. The contestants have gone to such trouble to make their juice, and they deserve a fair shot at winning. You cannot provide them a fair shot because you already know the grapefruit juice is likely going to lose. Wouldn't it be fair that you excuse yourself as a judge, and allow someone who likes all three types of juice equally to judge the juice contest? Of course.

The same goes for your client. If there is an aspect of the case that does not sit well with anyone in particular, it is only fair for the juror to reveal this fact to you so that you can determine if they would be a *fair* juror for your case. Obviously, disliking grapefruit juice has no bearing on your character, but judging a fruit juice contest when one type of juice already has a mark against it would be unfair. Explaining that any particular bias does not mean someone is bad, but it might mean they are not right for your case, can help jurors open up about what's going on inside their heads.

Other common examples are pies, sporting events, etc. You get the picture. The point here is to establish by way of example that the juror is actually doing you a service by being honest.

Confirmation bias

A common example of confirmation bias would be the dog example. Imagine that when you were young, you took a walk in your neighborhood with your family. As you passed one of the houses, there was a pit bull behind the fence in the front yard. As you passed the house, the pit bull ran to the fence, barking, growling and gnashing its teeth at you. The owner was nowhere to be found. Naturally, this scared the daylight out of you, and ever since then, you hesitate every time you see a pit bull. You never actually admitted to yourself or anyone else that you believe pit bulls are dangerous by their very nature, but that feeling is there based upon an experience you had when you were a child.

Now you're a prospective juror, and you were just advised that the trial involves a dog bite. Of course, the dog at issue is a pit bull. You have heard none of the evidence, but already in the back of your mind that dog was dangerous and that dog did it. If defense counsel does their job properly, they could effectively establish that their client is at risk for confirmation bias. In other words, the juror is already predisposed to believe pit bulls are dangerous, and they are almost waiting for confirmation of that fact through this case.

Taking an auto accident, for example, you were involved in an auto accident. The damage was bad and you walked away from the car crash uninjured. You also believe that Californians are just too litigious. Every time you see a billboard boasting a wealthy-looking attorney encouraging you to call them if you get into an accident, you think of people lying about their injuries to get a payday. You are essentially waiting for a defense expert to say the plaintiff was not that badly injured, because based on your experience, they probably weren't. This is confirmation bias at play.

This is valuable because as the jurors reveal experiences they've had that are similar to what your client experienced, or smack of any resemblance to your case, you want to be on the lookout for confirmation bias. Giving an example of confirmation bias before you ask them the questions intended to elicit the existence of confirmation bias will aid them in determining for themselves whether there is the risk of this bias being at play in your case. I ask the question, give the example, and then ask them if this is true

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for them. If they admit there is confirmation bias at play, ask them whether this means they cannot be entirely impartial given the experience they just shared. This will establish a cause challenge.

No rehabilitation after a juror has admitted bias

It is worth it to note that once a juror admits that they cannot be entirely impartial, defense counsel and/or the judge will often attempt to rehabilitate the juror. Judges often do this to hasten the jury selection process. Having a pocket brief on counsel table with the law clearly identified on this issue is imperative to stopping this assault in its tracks.

Even if a juror states that, despite their earlier statements that suggest they harbor a bias, they believe they can be fair and impartial that should not overcome your challenge for cause. "Few men will admit that they have no sufficient regard for truth and justice to act impartially in any matter, however much they may feel in regard to it, and every day's experience teaches us that no reliance is to be placed in such declarations." (*Quill v. Southern Pacific Co.* (1903) 140 Cal. 268; see also *Lombardi v. California Street Cable Ry. Co.* (1899) 124 Cal. 311.)

The last time I pulled this out of my arsenal based on the judge's attempt to rehabilitate a juror that stated they could not be entirely impartial, the judge laughed about the age of the case. I quipped back that the age of the cases only indicated the strength of the law given that the cases were older than everyone in the courtroom. Everyone had a good laugh. The juror was kicked for cause.

Specific areas of inquiry for your auto case

Of course, you should tailor your jury selection questions to the unique facts of your case. However, there are some more common areas of exploration associated with auto collision cases. Some of these were previously mentioned.

My last trial contained all of the commonly known "problem" areas for an auto collision: prior accidents, preexisting injuries, and low property damage. Naturally, I questioned the jurors about the following:

1. Belief that a person cannot be injured if a car crash occurs at slow speed
2. Belief that someone cannot be injured if the property damage is low
3. Whether any of the jurors have ever been responsible for a rear-end collision
4. Whether anyone has had a case filed against them for an auto collision
5. Whether someone believes you have to break a bone to be considered "injured"
6. Whether someone believes that if someone waits to have surgery, they did not really need it
7. Anyone who believes that if someone traveled to another country before having surgery, they weren't that injured
8. Feelings about compensating for pain and suffering

Of course, this is not an exhaustive list. A good way to determine additional areas of inquiry would be to ask yourself, "If I were to lose this case, why do I think I would lose?" Delve into those areas with your potential jurors to weed out the biases. Consistently thank your jurors who admit their biases to you for being honest as this encourages other jurors to follow suit. Finally, and most importantly, *be you*. Learning strategy, tips and tricks is essential to growth as an attorney, but only when these are expressed in a way that is uniquely you. When you do this, it builds credibility with the jury and they will be far more inclined to be honest with you.

Make sure you accurately record all the gold you have unearthed

You must have, as part of your team, one or more teammates who are recording the "key" information you receive from the potential jurors. Without accurate recording of the nuggets received during questioning, the value might be lost. Great note taking is critical; otherwise, what's the point? The attorney conducting the examination, cannot be the same one making the notes of responses and watching the facial expressions of others on the jury.

This is such an important time for your client's case, you should consider having two individuals helping at counsel table, one to watch the expressions of jurors and body language, and the second (most importantly), to take accurate notes of the answers given by the jury members questioned. When the attorney handling voir dire is "on" and in the zone, connecting, listening, questioning and establishing a connection with jurors, they cannot be responsible for the note taking.

This may be obvious, but you will want to have ready-to-go your Post-it notes stacked on a paper representing the exact location of each juror with the juror's number and name. You will want to be able to "peel off" those who are "kicked off" and be ready to move around the jurors notes for those who remain. You don't want to get confused at this crucial time. Trial moves fast. The trial team has a lot on their mind and ensuring that the location, name and juror number matches the actual information elicited is a key role of the trial team.

Remind the jury of the importance of their civic duty

Jurors, as they are people, are busy. They (generally) don't want to spend their time in jury duty (yet, you always have one or two who have seemed to make a career of jury duty). Fans of Larry David and Curb Your Enthusiasm will know the lengths that some individuals will go to avoid jury duty, even providing information that is not wholly accurate just so they don't have to hear you speak.

It may be worthwhile to remind these potential jurors of the country's proud history of jury trials and the right to a trial by a jury of their peers. There is a reason so many movies have been made about trials, especially in civil cases. We

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live in the best country and we honor and respect the process and procedure that allows disputes to be heard and decided by these humans, your potential jurors. Respect, appreciation, and admiration should be shown to the jurors. Thank them for showing up, for responding to questions and for speaking in a group of others. They are not lawyers and this might be uncomfortable to them. Public speaking is known to be very stressful and uncomfortable for many people. Be compassionate and patient with your panel. Ours is a noble profession. Even if disrespect, impatience and disdain is what you receive, treat your panel with complete compassion and professionalism. The other potential jurors and judge are watching. Your client's case is at stake as is the right to a jury by their (unbiased) peers.

Ashley Laiken received her Juris Doctor degree from Southwestern Law School in 2010. She began her legal career at a malpractice-defense firm, switched to the plaintiff's side in 2016, and in 2019 founded Laiken Law Group.

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