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Winning or losing your case in minutes

JURY SELECTION AND ARGUING CAUSE CHALLENGES; FROM JURY QUESTIONNAIRES TO USING *BATSON-WHEELER* TO OVERCOME DEFENSE'S DISCRIMINATORY PEREMPTORY CHALLENGES

Selecting a jury that will award what you are seeking is arguably the single-most important part of your trial. Because peremptory challenges are limited in number, cause challenges (which are unlimited) are your most important tool in jury selection. We have had multiple trials where the court in each case granted over 30 cause challenges, which was instrumental in obtaining the results we sought. Had even a handful of those excused jurors been on our juries, the result in each case would have been far different.

This article will discuss the best practices for your next jury selection, with an emphasis on arguing cause challenges, using real-life examples from a recent wrongful-death jury trial in Northern California.

As an overview, the jury selection process typically begins with members of the jury pool completing information cards, including questionnaires jointly created by counsel, and submitting to questioning by both the judge and counsel in a process known as voir dire. During either part of this process, a jury member may be challenged for cause on the basis that their unshaken convictions could challenge the right of impartiality of the jury in a trial. As opposed to peremptory challenges, the challenging counsel must present the facts to the court, and the judge must rule on the legitimacy of the claim immediately.

Pursuant to Code of Civil Procedure ("C.C.P." hereafter) section 225, subdivision (b), prospective jurors can be individually challenged for cause for one of the following three reasons:

(A) *General disqualification* – that the juror is disqualified from serving in the action on trial;

(B) *Implied bias* – as, when the existence of the 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, subd. (b), emphasis added.)

Most important for our analysis will be actual bias, which C.C.P. § 225(b)(1)(C) defines 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 entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., §225, subd. (b)(1)(C).)

Jury questionnaires

Jury questionnaires offer a wide range of advantages and are an invaluable tool in obtaining early information from prospective jurors that will qualify them for cause challenges. They help elicit detailed and honest responses from prospective jurors on issues that influence and bias decision-making that jurors may be reluctant to divulge in oral voir dire.

The basic concept underlying this theory is that because questionnaires are filled out in a private setting rather than in open court with an audience listening, prospective jurors are less subject to social pressures of social desirability or appearing fair and impartial. They are more likely to provide in-depth and candid responses, which reflect their true biases, opinions and beliefs. Indeed, a sensitively worded questionnaire is much more likely to elicit information relating to bias against a certain racial or ethnic group, party or a lawsuit than a response in front of a judge and a room full of strangers where the apprehension about conforming to social norms often results in jurors tailoring a response to conform with what they perceive as the most socially acceptable response.

A common occurrence in oral voir dire of jurors is for a prospective juror to provide a response to a question and subsequent jurors to simply respond that they "agree with Juror Number 1" or their "answer is the same" as previous juror. A jury questionnaire often elicits more complete information because each prospective juror must provide an undistorted and thorough response without having heard responses from other jurors or seeing the reactions to those responses by the lawyers, judge and other jurors.

Lawyers can also use juror questionnaires to uncover important information to questions that may be viewed as intrusive or that a prospective juror may be hesitant or embarrassed to answer in open court. For example, in a motor-vehicle collision case involving the use of alcohol, it would be entirely proper to ask whether any of the jurors have ever been arrested for driving under the influence. Similarly, in a wrongful-termination case, it may be proper to ask whether anyone has ever been fired from a job. In both these cases, potential jurors will prefer to answer these questions in writing.

Juror questionnaires help elicit prospective jurors' pre-existing views, beliefs and opinions on an assortment of polarizing issues, such as the civil-justice system, personal-injury lawsuits, and general damages, as demonstrated by the following slate of questions we commonly use in jury questionnaires, which will help shorten, and better prepare you for oral voir dire:

- There has been publicity about lawyers, lawsuits, large jury awards,

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frivolous lawsuits, etc. What opinion have you formed on these topics?

- Do you support caps or limits on the amount of money juries can award in civil cases?
- Do you start out believing that most claims of emotional distress, pain and suffering in lawsuits are exaggerated?
- Is there an upper limit or cap on the amount of money you would be willing to award someone for pain, suffering and emotional distress, in a personal injury lawsuit no matter what the evidence shows?
- Is there anything in your personal experience or anything about your beliefs or values that has not been covered in this questionnaire that might affect your ability to judge the facts and serve as an impartial juror in a lawsuit of this type?
- Do you believe:
  - There are too many lawsuits?
  - Jury awards are too high?
  - People are too ready to sue?
  - Lawsuits are costing us too much money?

The use of jury questionnaires is authorized by several provisions of the Code of Civil Procedure. Specifically, C.C.P. § 205 permits jury questionnaires to assist in the voir dire process. Further, C.C.P. § 222.5(f) provides that "[a] trial 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 reasonable time to evaluate the responses to the questionnaires before oral questioning commences."

Counsel wishing to use a jury questionnaire should familiarize themselves with the court's local rules, as well as the trial department's policies and procedures regarding the use of jury questionnaires, as different courts have different procedures for their use or approval. In courts that are more reluctant to permit their use, even if not a requirement, one should always consider asking opposing counsel to stipulate to the use of a jury questionnaire. Because the use of a juror questionnaire is usually in the best interest of all parties, opposing counsel will often readily stipulate.

For the foregoing reasons, juror questionnaires are an irreplaceable asset for eliciting candid and complete responses from prospective jurors and uncovering information relating to their experiences, opinions, beliefs and biases that can serve as the basis for cause challenges that can make or break your case.

Setting the cause standard: Pocket briefs

Before beginning of jury selection, you should file a pocket brief with the court setting forth the relevant law pertaining to cause challenges. Not only will this serve as a nice refresher for the court, but it will allow you to have all the pertinent statutes and cases at your fingertips when it eventually comes time to argue the cause challenges.

The focus of your pocket briefs should be actual bias and the grounds for proper cause challenges established by actual bias as defined by C.C.P. § 225(b)(1)(C), but it should also include a discussion of implied bias.

The following are examples where challenges for actual bias or prejudice have been upheld:

- **Strong belief or prejudice against a class or persons** – Where the juror expresses a prejudice against persons of a particular ethnic, political or economic group, the juror is biased and is properly excluded for cause. A judge has a duty to inquire and/or to permit attorneys for the parties to inquire into the prejudices of prospective jurors. (*People v. Mello* (2002) 97 Cal.App.4th 511, 516; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.)

Example: In an action for rent, a prospective juror who stated that he was "hostile to all landlords" was disqualified by actual bias. (*Lawlor v. Linforth* (1887) 72 Cal. 205, 206.)

- **Long-held belief creates bias against a party's substantial rights** – Where the prospective juror holds a belief that makes it difficult for the juror to perform their duty and apply the law impartially, the juror is properly excluded for cause. This same concept applies to any jurors who have particular beliefs regarding personal injury that are contrary to the law. For example, an individual may believe that personal injury law requires further tort reform. Such prospective jurors show a bias that would make it difficult for them to apply the law as stated by the judge in the case and should be excluded.

Example: In action to enforce property settlement agreement, a prospective juror's beliefs regarding divorce and remarriage were proper subject of inquiry to show bias. (*Smith v. Smith* (1935) 7 Cal.App.2d 271, 273-274.)

- **Belief or preconception not easily set aside** – Where a prospective juror holds a belief or preconception regarding a factual issue to be proved during trial and is not able to set their preconceptions aside to impartially weigh the evidence presented, the juror should be excused. When a prospective juror admitted his hostility to the claim sued upon and would require more evidence than a mere preponderance to render a verdict in favor of the claim, his challenge for cause should be granted. (*Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226.)
- **Juror hostile towards claim; party starts at disadvantage** – Where a prospective juror is actively hostile towards the type of claim made in the case, there is a clear bias. A prospective juror should be excluded where they admit to having hostility to the claim sued upon and that they would require *more evidence than a mere preponderance* in order to render a verdict supporting such claim. (*Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226.)

Example: In a personal-injury action against a railroad, a prospective juror was disqualified for actual bias after he stated that he had worked for the railroad and believed that many lawsuits against the railroad involving individuals who sustained personal injuries were the injured party's own fault; that he was prejudiced in favor of the railroad; and he could only render a verdict in favor of

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plaintiff if the plaintiff presented "strong and positive testimony." (*Fitts v. Southern Pac. Co.* (1906) 149 Cal. 310, 313.)

These are also key phrases and concepts that should flow throughout your voir dire questions, which make it easier for any judge to rule in your favor if you are using the exact terminology from the definitive cases.

Judge's initial examination; time limits; and mini-openings

Jury selection typically begins with the judge's initial examination of the jury pool, often with simple demographic questions like whether the individual is married, has children, what their occupation is, and if they know any of the parties or attorneys. "To select a fair and impartial jury in a civil jury trial, the trial judge shall conduct an initial examination of prospective jurors…the trial judge shall consider and discuss with counsel the form and subject matter of voir dire questions. (Code Civ. Proc., § 222.5. subd. (a).)

C.C.P. § 222.5(b)(1) then states that "[u]pon 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."

C.C.P. § 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." (Code Civ. Proc., § 222.5, subd. (b)(2).)

After the judge's questioning, it is recommended that the parties engage the jury pool in a brief "mini-opening." "Upon the 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." (Code Civ. Proc., § 222.5, subd. (d).)

Mini-openings are helpful for a number of reasons, including the following:

- By allowing each party in a nonargumentative manner to present the liability and/or damage issues or unique circumstances the jury will be asked to decide, the mini-opening statement affords counsel an opportunity to outline their case to the venire, raise questions and concerns, and more efficiently question jurors during voir dire. Further, with the expanded contextual background provided by the min-openings, potential jurors' answers are more likely to reveal their biases and impartialities.
- Mini-opening statements diminish prospective jurors' reluctance to answer probing and personal questions with full candor when they are in a room with strangers and do not understand the context or purpose of the questions. (See Donner & Gabriel, Jury Selection Strategy and Science (3d ed. 2014) § 39:4, p. 1; see also 67 Connor, Def. Couns. J. (April 2000) 186, 187 [in absence of context, many questions on voir dire often are posed in a vacuum. Mini-openings penetrate this vacuum by triggering memories and providing a foundation, resulting in more relevant and timely responses].)
- Mini-openings also allow prospective jurors to digest each party's case and evaluate the impact of their own experiences and beliefs on their ability to be impartial. (See 44 Macpherson & Krauss, Tools to Keep Jurors Engaged (March 2008) 32, 33).)

It is good practice to use your mini-opening as a way to present your case in the most vanilla way possible, while also highlighting the dollar amount you may be asking for to prepare your jurors for those follow-up questions regarding the size of awards.

Here is a condensed version of the mini-opening from a recent trial:

> PLAINTIFF'S COUNSEL: Defendant agrees that they are solely responsible for the crash and decedent's death. Defendant realizes that she must pay for Plaintiff's, who was a child at the time of this tragedy, loss of financial support that decedent would have provided. There is only one issue in this case, and that's the loss of the relationship of Plaintiff's father. We are entitled to seek the loss of love, companionship, moral support, protection, training, and guidance. And this is one of those things where there is no ledger, there's no invoice. Plaintiff will be asking for substantial compensation for that loss: many, many, millions of dollars. Thank you."

Round 1 arguments: Establishing boundaries

When beginning your voir dire, you can start as simply as asking a juror whether or not they believe they can be fair after hearing the facts of the case presented in mini-opening. Several examples are shown below, with each concluding with counsel confirming that that juror cannot be "entirely impartial":

> PROSPECTIVE JUROR #1: My religious beliefs would be based on forgiveness and not judging other people, so I don't feel like I can, with my religious conviction, judge somebody else.
> PLAINTIFF'S COUNSEL: You cannot be entirely impartial and sit on this jury, correct?
> PROSPECTIVE JUROR #1: Yeah.
> …
> PROSPECTIVE JUROR #2: The intangible of paying for that life lost is what I struggle with, putting a price tag on that.
> PLAINTIFF'S COUNSEL: So, the intangible compensation for the value of the relationship, that's not something you believe should be compensated for?
> PROSPECTIVE JUROR #2: Correct.
> PLAINTIFF'S COUNSEL: And that you cannot be entirely impartial in this case?
> PROSPECTIVE JUROR #2: Correct.
> …
> PLAINTIFF'S COUNSEL: Then another issue is forgiveness and the belief in forgiveness, you would not bring a lawsuit on your own behalf seeking this type of compensation because of your belief system?
> PROSPECTIVE JUROR #3: That's correct.
> PLAINTIFF'S COUNSEL: Knowing that that's the only thing that is

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happening in this case, do you believe that you cannot be entirely impartial on this case right here?
PROSPECTIVE JUROR #3: I do not believe I could.
PLAINTIFF'S COUNSEL: And that puts my client at a disadvantage?
PROSPECTIVE JUROR #3: Yes.
PLAINTIFF'S COUNSEL: And your beliefs, those are strong and long-held?
PROSPECTIVE JUROR #3: Yes.
…
PLAINTIFF'S COUNSEL: But is there a cap on the amount of compensation before you start worrying about the impact to the defendant?
PROSPECTIVE JUROR #4: Well, from what little I can gather of the defendants, I would put it on maybe their gross income of maybe ten years, twenty years. They have to have a life too. It was an accident, this was not deliberate. Life goes on, you know?
PLAINTIFF'S COUNSEL: And that's important for you that in compensating my client, it's kind of correlating it to the ability of the defendant to pay?
PROSPECTIVE JUROR #4: Yes.
PLAINTIFF'S COUNSEL: And that's a strong belief that you have?
PROSPECTIVE JUROR #4: Very strong.
PLAINTIFF'S COUNSEL: And anything over two million dollars, you could not be an entirely impartial juror in this case?
PROSPECTIVE JUROR #4: True.
PLAINTIFF'S COUNSEL: And that puts my client at a disadvantage?
PROSPECTIVE JUROR #4: Yes, and I'm sorry.

The questioning above includes textbook examples of situations where a prospective juror has an actual bias and should be disqualified, and each of these jurors were removed following the court's granting of a cause challenge from Plaintiff's counsel.

If a prospective juror admits disqualifying bias, they cannot rehabilitate themselves by simply stating that they "can be fair" or "will follow the law." Since few people will admit they cannot be fair, a juror's reassurance that they can be fair despite admitted bias should not be relied upon. (*Quill v. Southern Pac. Co.* (1903) 140 Cal. 268, 270; *People v. Riggins* (1910) 159 Cal. 113.)

In such cases, the court has considerable discretion in the matter and may reject a challenge for cause. (*People v. Kipp* (1998) 18 Cal.4th 349, 366; *Graybill v. De Young* (1905) 146 Cal. 421, 422-424.) Indeed, the trial judge is the arbiter of whether a juror will act fairly where there are indications both ways or other ambiguity. (*People v. Thornton* (2007) 41 Cal.4th 391, 414.) Therefore, it is important to ask various questions designed to show the extent to which a juror feels about the issue that can be used in support of your argument that they should be disqualified.

Enforcing the cause standard; stipulations; and Round 2 arguments

Where the parties have challenges for cause, defendant's challenges are taken first, then plaintiff's. (Code Civ. Proc. § 226, subd. (d).) Court may also excuse prospective jurors sua sponte and without a challenge from the parties. This may occur where a particular juror appears troublesome or where extensive questioning would be required (e.g., where a particular juror has been a party to many lawsuits).

To expedite the proceedings, the court may ask for a stipulation that the juror be excused. Once complete, counsel for Defendant will make their arguments for cause. (Code Civ. Proc. § 226, subd. (d).) There is no limit on the number of jurors who may be challenged for cause, or the number of grounds for challenge that may be raised as to a particular juror. (Code Civ. Proc., § 227.)

Local rules in some courts require the challenge to be made outside the hearing of the jury. However, even where such rules are not in effect, the better practice is to ask that any challenge for cause be made outside the jury's presence. That juror or other jurors may feel resentment toward you or your client for making the challenge. Therefore, strive to make the challenges out of the presence of the prospective jurors, either at sidebar or during a recess, but on the record in any event.

Below are two examples of successful oppositions to cause challenges by defense counsel:

DEFENSE COUNSEL: Prospective Juror #5 is a juror whose husband lost his father and brother in an accident. She related how she sees him struggle every day, and I believe that she was very close to acknowledging that she would not be fair and that she would be biased. Ultimately, she agreed that this is not a jury that she should be sitting on because she couldn't be fair.
PLAINTIFF'S COUNSEL: I don't think she went that far. He never asked the question, which is, "Can you be entirely impartial?" Can you be fair and impartial?" He never asked those questions, so everything that he mentioned initially goes to a peremptory may be the reason he wants to strike her. For some reason he did not ask those questions.
THE COURT: The court is going to leave her on the panel.
…
DEFENSE COUNSEL: We would ask the court to strike Prospective Juror #6 for the same reasons. He acknowledged during my questioning that he was biased in favor of the plaintiff and that he could not be fair in this case, and that he did not think that this was a case that he should be sitting on as a juror.
PLAINTIFF'S COUNSEL: The exact same thing. For some reason he did not ask, "Can you be entirely impartial?" And again, the most that Prospective Juror #6 said was that "I feel a little bit more than 50 percent on one side." He then didn't inquire as to what that meant, and it's – again, the plaintiff is going to a get a verdict. It's a stipulated fact in this case. He just didn't ask enough questions, and it's peremptory.
THE COURT: I agree with plaintiff.

As seen above, defense counsel failed to establish the actual bias standard of

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being "entirely impartial," and simply forgot to even ask that question of the prospective jurors he wished to strike.

Batson-Wheeler: The three-step process

After both Plaintiff and Defendant "pass for cause" the original jurors and replacement jurors, the parties may exercise peremptory challenges, beginning with plaintiff's counsel, and alternating between plaintiff and defense counsel until all peremptory challenges are exhausted or both sides consecutively decline further peremptory challenges. (Code Civ. Proc. § 231, subd. (d).) Each side gets six peremptories (eight, where there are several parties on the same side); plus an additional peremptory for each alternate juror appointed. (Code Civ. Proc. §§ 231, subd. (c), 234.)

Peremptory challenges may not be used to systematically exclude any jurors who are members of a distinct racial, ethnic, religious or other "cognizable" group, because of membership in that group. Members of a cognizable group have a distinctive viewpoint that cannot be adequately represented by other members of the community.

C.C.P. § 231.5 states, "[a] party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in section 11135 of the Government Code, or similar grounds." Pursuant to California Government Code Section 11135, protected characteristics include "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, [and] sexual orientation."

When a party believes that opposing counsel is exercising peremptory challenges in a discriminatory manner in a trial, that party must make a timely objection. " '[I]t is necessary that a *Wheeler* objection be made at the earliest opportunity during the voir dire process ...'" (*People v. Perez* (1996) 48 Cal.App.4th 1310, 1314.) Once the objection has been lodged, the trial court engages in a three-step process. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613; *Johnson v. California* (2005) 545 U.S. 162, 168; accord *People v. Manibusan* (2013) 58 Cal.4th 40, 75.)

Proponent's burden – The first step requires the trial court to resolve whether or not the proponent has raised "a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Johnson v. California*, *supra*, 545 U.S. at 168 [overruling prior case law requiring proponent to show a strong likelihood of invidious intent].) Evidence of an invidious intent may be that the opposing party engaged the dismissed jurors in nothing "more than desultory voir dire, or indeed [failed to] ask them any questions at all." (*Id*. at 280-281.)

Justification – In the second step, "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible ... neutral justifications for the strikes." (*Johnson v. California*, *supra*, 545 U.S. at 168 (bracketed portions and other modifications added).)

Court ruling – Following the attorney's explanation, the trial court must decide if the proffered reasons are true or merely a pretext (a lie) cloaking an invidious intent. (*Johnson, supra*, 545 U.S. at 168.) The proper focus is on "the subjective genuineness of the race- neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 (emphasis added); *People v. Adanandus* (2007) 157 Cal.App.4th 496, 506.)

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. The trial court can also compare the dismissed juror with similar jurors who are not members of the cognizable group and whom the lawyer did not dismiss." (*People v. Lenix*, *supra*, at 612-613.)

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