



Jury Selection

By: Mike Murray
Senior Deputy District Attorney, Homicide Unit
Orange County District Attorney's Office

Jury Selection & Voir Dire

- Statutory Considerations
- Preparing for Trial
- Court Strategy
- Picking a Jury
- Pitfalls
- After Selecting your Jury
- After Receipt of the Verdict
- The After Action Report

My Thoughts...

- If you think a jury trial is about the law or the facts, you are sadly mistaken. It is a battle of impressions and persuasive ability...and it starts the minute you take the case.
- The penicillin of a strong case will not cure the V.D. of poor voir dire

Statutory Considerations

- Statutes governing issues in jury selection can be found in the California Code of Civil Procedure beginning with CCP §§190-237. Several provisions are worth discussing now.

Statutory Considerations

- CCP §198 – Competency
 - Citizen of the United States
 - No physical or mental disability which impairs ability to sit as a juror
 - Sufficient knowledge of the English language
- CCP § 203 – Requirements
 - Must be 18 or older
 - Must not be convicted of malfeasance in office or a felony
 - Must live in the jurisdiction

Statutory Considerations

- CCP § 200 – Excuse from Jury Duty
 - Undue personal or financial hardship
- CCP § 206 – Discussion with Jurors after Discharge
 - Judge must inform jurors prior to discharge from service that they are not obligated to discuss the case, and that any contact from either party must be with their consent and at a reasonable time
 - Report issues to the court

Statutory Considerations

- CCP § 220 – Numbers of Jurors
 - In a criminal case, 12 jurors shall constitute a jury, unless in a misdemeanor case the parties agree to a number less than 12
- CCP § 235 – Challenges for Cause
 - General disqualification – not competent
 - Implied bias – facts elicited which evince bias toward or against either party *indicating the prospective juror cannot be fair*
 - Actual bias – statements indicating the juror cannot act with complete impartiality

Statutory Considerations

- CCP 235 – Peremptory Challenges
 - Death Penalty or LWOP – 20 each side
 - All other criminal cases – 10 each side
 - Exception where punishment is maximum of 90 days or less – 6 each side
 - Jointly tried co-defendants – same number as entitled to under provisions above jointly plus 5 additional challenges to be exercised separately. (The prosecution is entitled to an equal number of peremptory challenges as the total number of combined challenges of the defense)

Statutory Considerations

- CCP 235 – Peremptory Challenges (Cont.)
 - Jointly tried co-defendants – where offense is punishable by 90 days or less, the defense may jointly exercise 6 plus 4 separately.
 - Peremptory challenges begin with the People and pass to the defense until both sides pass consecutively and accept the jury as constituted.
 - After 12 jurors are selected, the process continues with alternate jurors.

Statutory Considerations

- CCP § 234 – Peremptory Challenges
 - Each side is entitled to 1 peremptory challenge for the total number of jurors to be seated on the case.
 - Defendants tried jointly – each case gets 1 peremptory challenge per alternate.

Statutory Considerations

- CCP § 223 – Voir Dire in Criminal Cases by Court & Counsel
 - Court conducts *voir dire* except upon a showing of good cause, the parties may supplement the questioning as the court deems proper. (E.g., any unique or complex elements, legal or factual, which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror)
 - NOTE: *Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.*

Statutory Considerations

- Since the passage of Proposition 115, it is up to the discretion of each trial judge to determine how much *voir dire* should be permitted. While some judges may allow lengthy *voir dire* by each side, others will allow only minimal time. There are some judges who may actually refuse to allow the parties to question prospective jurors at all. Know your courtroom & your judges.
- If you know court will not permit attorney *voir dire*, consider filing a proposed set of voir dire questions for the court to ask during its *voir dire*. Focus on special issues so that important issues are raised

Preparing for Trial

- Master the facts and applicable law relevant to your case
- Understand your theory of the case & know your case:
 - Strengths
 - Weaknesses
 - Legal issues
 - Particular social issues intertwined with your facts
 - Particular biases intertwined with your facts
- What type of jurors are seeking for this particular case?
- Prepare a *voir dire* outline as you prepare your case for trial
- Customize your *voir dire* to the time the court will allot you – you may have to trim down your outline to ensure you hit the key points
- Find out who you are in court... and be yourself but always remember be professional, show class and demonstrate that you *own* the courtroom

Court Strategy

- Know your courtroom
- Always be aware of what you are projecting –the battle of impressions is well under way
- Prepare your jury selection sheet worksheet Slide 27
- Review the juror information printout (“*never jurors*”) Slide 28
- Execute your plan from your *voir dire* outline
- Always realize that your true audience includes the prospective jurors in the audience – the 12 in the box will almost certainly be partially or wholly replaced...
- The irony of jury selection...

Picking a Jury Some Basic Rules

- The “never jurors” – there are no rules, but ...
 - Teachers
 - Lawyers
 - Engineers
 - Social workers
 - Psychiatrists psychologists
 - Youngsters
 - Gangsters & family members
 - Firefighters
 - Almost any juror who wants an *in camera*
- Need both leaders and followers
- For cause, make a solid, well-articulated record
- Stipulations – weigh your desire to work with opposing counsel against the objective to gain an advantage in the selection process.
- Stipulating to an obviously biased juror has the benefit of demonstrating to the panel you are fair and impartial

Picking a Jury

Some Basic Rules

- When exercising your own peremptory challenge, look jurors in the eye and ask the court to thank and excuse juror
- When you "pass", you show confidence in your case and in the jury. Know when you can do this safely – or be ready to try the case with the jury you have
- Document who excused a juror and why
- Document reasons why you want to exercise a challenge – for cause or peremptory, so that you have that documentation for future use

Picking a Jury

- You are now about to educate the prospective jurors on the law, sell your case and pick a group of jurors you like and who will work together for a verdict.
- Prejudge the facts – legal if artfully done
- Divulge the weaknesses in your case – flip them if you can
- Educate on the law – within limitations
- Get implicit promises

Picking a Jury (Cont.)

- Prepare back-up questions & follow-up questions (particularly if time is limited)
- Identify the *head cases* – then use them to educate the others
- Remember, it's not always the words they say that count
- Use analogies, stories, examples
- Within legal limits, you pick the jurors you want and the *case is won or lost here during jury selection*

Pitfalls

- *People v. Wheeler* (1978) 22 Cal.3d 258 and its progeny (to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias)
- See *People v. Johnson* (2003) 30 Cal.4th 1302.
- See also *Batson v. Kentucky* (1986) 476 U.S. 79. (discussing federal standard)

Don't Look Back

- Once the jury is sworn, it can't be changed (unless you lose a juror for some reason) so don't worry about your jury composition. It's too late to change anything...trust yourself. Many, many times, a juror you think is a problem turns out to be your biggest advocate. Once jury selection is finished, focus on trying your case.
- Frequently, jurors are replaced during trial. Particularly in longer trials or during trials that span holidays. Use the same techniques when selecting alternates. Many a poorly picked alternate has derailed a well-trying case.

After the Verdict

- Critically analyze how your *voir dire* helped, or hurt your case. Just winning doesn't mean you did it right or don't have room to improve
- Talk to the jury after trial and get feedback – particularly when learning your craft
- Always be mindful of your ethical obligations when talking to jurors after the case and always have an investigator present with you.

The After Action Report

- How do you learn and evaluate and improve your performance for the next trial?
 - Learn from more experienced or creative attorneys – prosecution, defense, civil
 - Learn from your own mistakes (Hung juries, NG's, rough voir dire)
- How did you feel during voir dire?
 - Did you feel like you connected?
 - Were you fooled by a juror you thought you had on your side? Why?
- What did jurors, court staff or peers tell you after your voir dire?

The After Action Report

- Critically analyze how your voir dire helped, or hurt your case. Just winning doesn't mean you did it right or don't have room to improve
- How do you know if you are mastering *voir dire*?
 - Consistently good results – No hung juries, NG's
 - Post trial juror comments
 - Comments from peers or court staff
 - Motions by the defense for mistrial during or after *voir dire* – even when questions are proper

A Final Suggestion

- Create a personal file system at the beginning of your career
- Develop a comprehensive file for jury selection and build on it throughout your career
- If you think you are done learning...retire
- The best way to learn is watch those with experience do it in court...copy their stories, analogies and adapt them to fit your style. The greatest form of flattery is outright theft.
