

## VOIR DIRE

**By: James Roberts**

Most experienced attorneys agree that the liability portion of a civil case is decided by the end of opening statements. For a plaintiff's counsel, that means that where a jury that is undecided at the conclusion of opening statements, or is leaning against a plaintiff, a defense verdict will usually result.

In any event, it means that counsel essentially has two chances to sway a jury on the issue of liability, voir dire and opening.

Most Judges now impose tight constraints on lawyers in voir dire such that many of the questions lawyers used to routinely ask, are now asked by the Judge.

Time limitations on voir dire, even if improper, are routinely imposed.

Nonetheless, during voir dire, jurors are at the least, assimilating to their foreign surroundings. As such, they are often searching for data to allow them to make sense of their new surroundings. Accordingly, they will be watching the parties, lawyers, Judge and court staff. Minor things are given undue import during this period.

Among things to consider, jurors watch the court staff and Judge for clues as to what side the Judge or court staff prefers. Jurors are looking at attorneys and parties to see if they meet expectations, or evidence favorable qualities. If you pick your nose, drum your fingers, fidget, etc., it will be noticed, particularly in the beginning of the trial.

Some basics:

- ★ Look like a lawyer but also someone they know, not too dapper.
- ★ Your client needs to dress as well as thy can, but still look comfortable. Nothing looks worse than a man wearing a suit, looking like he bought it yesterday to go to a funeral. If your client is not used to wearing suits, don't tell him to do it now. For women, no red clothing and no spiked heels.

★ Sit by your client, and talk to him or her. If a jury does not think you like your client, why should they? Touch your client in a friendly way (hand to shoulder or arm).

★ Waive the court reporter during voir dire, and then use the court reporter's desk so you can stand right in front of the jury. Use a clip board, so you can stay in front of them.

★ Talk with the jury, not at them. "Good morning Mr. Smith. I am going to start with you first . . ." "How are you?" "Do you want to be a juror on this case?" It does not have to be, nor should it be a stilted exchange. It can and should be conversational.

★ Get their names right.

★ Tell your client to watch the jurors during selection. If one of them makes your client uncomfortable, there probably is a reason.

★ Listen to answers, ask questions, but do not confront.

★ Despite its limited value, you must rely on assumptions based upon backgrounds.

★ You can carefully sway a jury during voir dire, but you cannot convince them of anything. Do not try to argue your case yet.

## SAMPLE JURY SELECTION

### INTRODUCTION

Good afternoon. Let me begin by reintroducing myself and my client. I know a lot is going on and how easy it is to miss things. My name is Tom Jones. I am the attorney for Mrs. Pat Smith. She is called the plaintiff in this case.

This portion of the trial is called voir dire. It's the part of the trial where the lawyers ask questions to make sure the jury selected will be fair - to both plaintiff Mary Smith and the defendant - and will listen to the facts, follow the law, and render a fair verdict.

It's not my intent to embarrass anyone. If a question is too personal - please tell me - I may withdraw - rephrase - or ask the judge to ask it in private.

Please feel free to correct me if I mispronounce your name.

### BACKGROUND

- A. Hobbies
- B. Use of spare time
- C. Family
- D. Favorite TV shows
- E. Organizations - member of
- F. Authoritarian level questions
  - 1) Police should not hesitate to use force to maintain order (agree or disagree)
  - 2) The right of private property is sacred (agree or disagree)
  - 3) Obedience of children is more important than allowing them to communicate their feelings
  - 4) People who work hard are usually rewarded (agree or disagree)
  - 5) Science may ultimately find many cherished ideas are wrong
  - 6) Progress often results from rebellious youth

## TRIAL EXPECTATIONS

### A. Panel - TV Trials

- 1) Every One here has seen TV versions of trials
- 2) Some of you remember Perry Mason. We all know how he works - at some point he will perform a miracle, and someone will stand up in the audience and confess to something.
- 3) Does everyone understand this is not TV and I will perform no miracles? It is quite likely that after we pick the jury, there will be no audience at all.
- 4) Most of you know what you know of trials from TV - or at least you think you know. Any of you think TV portrays trials distorted in order to entertain and attract as large an audience as possible?
- 5) Also - No script or character actors

### B. Individual - No Script Follow Up

- 1) I'm going to be asking questions in cross-examination that I don't know the answers to. I may at times appear harsh or even nasty in trying to get to the truth.
- 2) Will you hold this against my client if you think I've gone too far?
- 3) Would you agree or disagree that I have to do this?

### C. Panel - No Character Actors (Attorneys - Witnesses)

- 1) Also, in TV most people are chosen for their appearance - Judges look a certain way - lawyers look a certain way. Sometimes it seems that the attorney with the most gray hair, oldest, with deepest wisdom, will always represent the right side.

D. Individual - Follow Up - No Character Actors

- 1) My witnesses may not have as much gray hair as Defendant's attorney - should this be held against my client?
- 2) I may not know as many courtroom tricks as Defendant's attorney - you will have you listen to the evidence and the law in making your decision.

E. Panel - Burden of Proof

- 1) Perry Mason. Matlock always had criminal trials
- 2) This is a civil trial with different rules
- 3) Any of you sat on a jury before in a criminal case?
- 4) What is the standard of proof in a criminal case?
- 5) Do you understand that Plaintiff need only prove the Defendants responsible by what is called the preponderance of the evidence or "slight proof." (use hands)
- 6) Do you think the standard of proof should be different for a money judgment than for sending a person to jail?
- 7) Do you have any problem with the law in this regard?
- 8) Do you think the law should be changed?

F. Panel - Anyone Disagree

- 1) Anyone disagree?
- 2) Follow up

GENERAL

A. Individual - Fair Juror - Plaintiff

- 1) If you had a lawsuit against someone who injured you - would you want yourself as a juror?

2) Would it be fair to Plaintiff to have 12 corporate presidents as jurors?

B. Panel - Fair Juror

Is there anyone here who thinks they can't be a fair juror for the Plaintiff?

C. Individual - Fair Juror - Defendant

Conversely - if you were the defendant in this case - would you be satisfied with yourself as a juror?

D. Individual - Burden of Proof and Theft of Defendant's Questions

- 1) You do understand, of course, that just because Plaintiff brought a lawsuit does not entitle Plaintiff to an award. You will listen to both sides - Plaintiff goes first - then Defendant - before making up your mind - based upon the preponderance of evidence.
- 2) You won't require Plaintiff to prove his case by more than the preponderance of evidence.
- 3) If the evidence shows the Plaintiff had serious damages - can you give a large award? You understand though that any sympathy for Plaintiff should not be used in deciding the issue of liability.

#### AUTO/DUI QUESTIONS

A. Panel - General

- 1) Anyone not a licensed driver?
- 2) Anyone who's never had a traffic ticket?

B. Individual - Follow Up Non-Driver

- 1) Have you ever operated a motor vehicle?
- 2) You have obviously been in a vehicle while it was driven
- 3) You know certain rules govern driving

- 4) Do you think you can sit as a juror in this case - and apply them even though you don't drive?
- C. Individual - Speed Limits (Non Driver Preferred)
- 1) You have noticed speed limit signs, stop signs, etc.
  - 2) These things have meaning to you - right?
  - 3) What does a speed limit sign mean to you?
- D. Panel - Danger of driving
- 1) Would it be fair to say each of you appropriate duties of a driver relative to:
    - (a) full time attention
    - (b) observing speed limits
    - (c) that type of thing
- E. Individual - Danger of Driving
- 1) Have you heard the term drive defensively?
  - 2) What does it mean to you?
  - 3) Should a driver be aware of his surroundings?
    - (a) school area
    - (b) other cars
- F. Individual - Danger of Driving
- 1) Do you know how much a car weighs?
  - 2) Would you agree it weighs a lot and it's important to have it under control?
- G. Panel - Juror As Good Driver
- Have any of you ever had a situation where you saw someone drink and drive?

H. Individual

- 1) Did you think it was a safe thing to do?
- 2) Should a drinking driver be responsible for what he does?

I. Individual - Follow Up - Juror As Good Driver

- 1) Would it be fair to say a driver should be constantly alert for whatever might happen - literally?
- 2) Is that the way you drive?
- 3) Have you ever had a pedestrian, bicycle or car stop in front of you?
- 4) Have you ever struck that person with no attempt to evade, brake, honk, or anything?
- 5) Was this because you were paying attention?
- 6) Do you think alcohol affects your ability to pay attention?

J. Individual - Juror As Good Driver - Similar Facts to Our Case - Juror as Defendant

- 1) Ever been confronted with a situation where a vehicle pulled in front of you - across your lane and stopped a distance in front of you because of traffic coming from the other direction?

K. Panel - Accidents or Close Calls

- 1) Have any of you ever been in accidents with other cars?
- 2) Have any of you ever been in close calls as a driver?

L. Individual - Follow Up - Accidents

- 1) Tell me (chum around til you get to similar case) then -
  - (a) Do you have any opinions on (similar facts, eg.g who has the right of way - the car first in the intersection - or the second car in the intersection?)



M. Panel - Familiarity with Scene

- 1) Anyone have any particular knowledge of the intersection of . . .

N. Individual - Follow Up - Familiarity with Scene

- 1) How often drive this?
- 2) Any opinions?

O. Individual - General -Open

- 1) Do you consider yourself a careful driver?
- 2) How many miles do you drive a day?

P. Individual - Alcohol

- 1) Do you believe you can tell if someone is intoxicated by talking to and watching a person?
- 2) Have you or any of your friends or family been involved in an alcohol related accident?
- 3) Have you ever been a passenger in a car driven by someone under the influence of alcohol?
- 4) Do you drink, and if so, what do like to drink?
- 5) Have you or any members of your family ever been stopped for driving under the influence of alcohol?

## LAWSUIT ACCEPTABILITY

A. Individual - Open - General Re Lawsuits

- 1) Ever been involved in a lawsuit?
- 2) Which side were you on?
- 3) How do you feel about lawsuits?

- 4) If you have 50 lawyers at the bottom of the ocean - what do you have? (a good start)
- 5) You would probably agree our society has too much litigation - too many lawyers wouldn't you? I would.
- 6) On the other hand, would you agree that some people fail to take responsibility for their own actions?
- 7) If a big company took something from you and then did not pay for it - would you feel that they owed you something?
- 8) In such a case is a lawsuit appropriate?
- 9) Is the National Inquirer (or the like) the price we pay for free press?
- 10) Do you agree that for every National Inquirer, there are 1,000 Mercury News?
- 11) You've read of some frivolous lawsuits in the papers. Do you think this is the norm?
  - (a) Common
  - (b) Rare
- 12) If a company and its employee injured someone - and it was their fault - but still did not accept responsibility - is this a case where a lawsuit is ok?
- 13) I read in the paper recently \_\_\_\_\_ was awarded \_\_\_\_\_ for \_\_\_\_\_. Did you see this? What is your response to this?

## EXPERT WITNESSES

### A. Panel - General

I expect expert witnesses to testify in this case - on both sides.

### B. Individual - Knowledge re Experts

- 1) Have you heard anything about expert witnesses?
- 2) Know anything about how are selected?

- 3) Heard of proposals to make them independent by having judge pick them?
  - a) Agree or disagree?

## CONCLUSION

A. Panel - Individual (Mixed)

Are there any reasons, which I have not covered, why you could not sit on this case and be fair to both the Plaintiff (NAME) and Defendant?

B. Panel - Fair and Objective

Is everyone fair and objective to both sides?

C. Panel - Follow Law

Is everyone here aware of the important of following the law as instructed by the Judge?

D. Panel - Importance of Listening

Is everyone here aware of the importance of listening to the evidence carefully?

E. Panel - Duty to Justice

Is everyone here aware of their duty to do their best to see justice is done?

**VOIR DIRE**  
**LAW SUMMARY**

GENERAL

- ❑ Court shall examine first. CRC 3.1540.
- ❑ Parties have right to examine if request is made. CRC 3.1540.
- ❑ Court may control scope. CRC 3.1540.
- ❑ Counsel may cover same topics covered by court. CCP 222.5.
- ❑ Court may not require counsel to submit questions in advance unless counsel has engaged in improper questioning. CCP 222.5.
- ❑ Court must permit reasonable questioning designed to allow intelligence exercise of peremptories and challenges for cause. CCP 222.5. But must be within reasonable limits; it must shed some light on the relevant issues. People v. Williams (1985) 29 C3d 392.
- ❑ Arbitrary time limit disallowed. People v. Hernandez (1974) 94 CA3d 75.
- ❑ Counsel may submit written questions and the court shall not unreasonably refuse. CCP 222.5.
- ❑ Number of peremptory challenges allowed each “side” is 6 if only 2 parties, if more than two parties then 8 for each side. CCP 601.
- ❑ Voir dire terminates once jury is passed for cause and sworn, even in bifurcated trial. Bly-Magee v. Budget Rent-A-Car (1994) 24 CA4th 318 once the jury is passed for cause and sworn, voir dire may only be reopened to evaluate a challenge for cause based upon subsequently discovered facts. Linderman v. San Joaquin Cotton Oil Co. (1936) 5 C2d 480.

PERMITTED ACTIONS

- ❑ May ask if will follow law in a hypothetical. Kram v. Stockton, Ry. 22 CA 737.
- ❑ May ask if they know counsel, parties, or potential witnesses. Scott v. McPheeters (1942) 52 CA2d 61, Estate of Mesner (1947) 77 CA2d 667.



## OBJECTIONS

- ❑ Instructing jury on law. People v. Love (1960) 53 C2d 843. But may ask jury if will apply a legal principal. People v. Parker (1965) 235 CA2d 86. But May not misstate law in asking if will follow. People v. Tibbets (1929) 102 CA 787. May explain law in hypothetical. Kram v. Stockton RR 22 CA 737.
- ❑ Prejudging evidence. People v. Warner (1905) 147 C 546, People v. Williams (1985) 29 C3d 392. Example - may not ask if will give any partial evidence weight. People v. Fowler (1918) 178 C 657.
- ❑ Prejudicial matter. Swift v. Winkler (1957) 148 CA2d 927. (Is also misconduct)
- ❑ Improper form. People v. Mitchell (1964) 61 C2d 353.