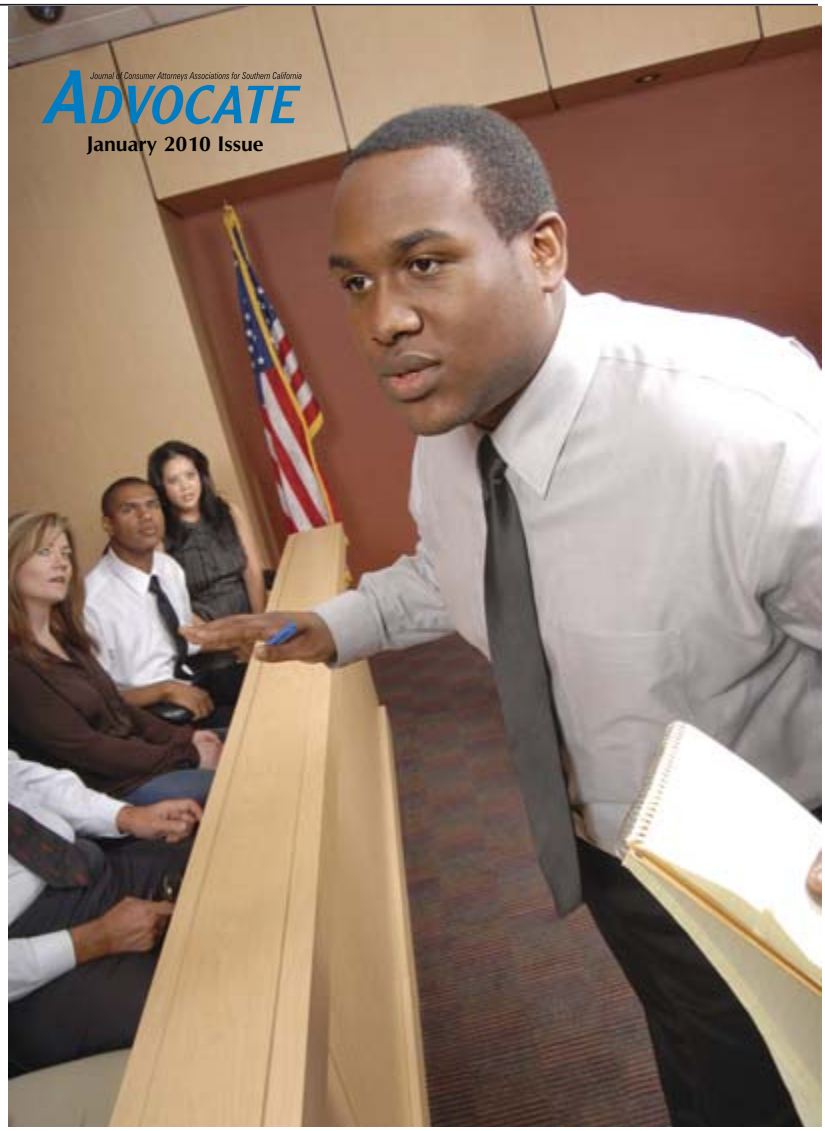
Browne Greene



Jury selection: More important now than ever

Jury selection is, in my view, the most important thing that is done in a jury trial by trial lawyers. And in the wake of decades of "tort reform" propaganda, there is an ever increasing need for new techniques, new strategies, and new means to make voir dire more effective.

Trial lawyers in state court should have at counsel table a copy of Section 222.5 of the Code of Civil Procedure, a statute championed by CAOC's predecessor, CTLA, in response to former Chief Justice Malcolm Lucas's attempts to federalize voir dire in the California courts in the early 1990s. That section establishes a number of extremely important points concerning voir dire. It says that counsel *shall* have the right to oral examination of the jury panel and liberal and probing examination by counsel is mandated. Counsel can voir dire on the same subject matter as covered by the judge with obvious limitations as to redundancy and repetition. The trial judge shall not unreasonably and arbitrarily refuse written questionnaires to be submitted to the jury panel. The scope of examination on voir dire shall be within limits established by the trial judge and specific, unreasonable or arbitrary time limits are not to be imposed.

Despite these clear rules, trial judges often seek to curtail voir dire in ways contrary to the statute. It is therefore wise to enlist the assistance of your adversary in discussing these matters with the trial judge, as, obviously, both sides should benefit equally from the ability to conduct a full voir dire as allowed by Section 222.5.

Preparation for voir dire: Focus groups

In order to do an effective voir dire, it is important that you have a full recognition of the assets and liabilities of your case and in particular the liabilities of your case, so that you can anticipate same and handle them in voir dire.

I have found that a very effective way for me to appreciate the angles and slants of a case is to use focus groups prior to trial to determine how a particular focus group segment would look at an issue and determine its importance. Focus groups are a many-splendored thing. You can spend a lot of money on them and have a full-fledged final argument-type setting, which will cost several thousand dollars, and/or you can have a focus group with your spouse, office staff, etc. and run through the various aspects of your case and get their feedback. What you're looking for is valuable feedback and a different view to the case than perhaps you have been looking at in terms of what a jury might look at. To be able to see a focus group react to arguments on a set of facts on liability and damages and thereafter to hear them deliberate for an hour and a half as if you were looking into a jury room gives you an incredibly diverse and fruitful view on

See Greene, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2010 Issue

what your prospective jury panel will be thinking on your case. To get their thoughts and their slants on your case on any one of a range of subjects, whether there's an alcohol problem, drug problem, seatbelt defense, motorcycle driving, etc. ad nauseam is vitally important.

Many times, I have seen focus group participants react on a given set of facts in such a fashion as to give an entirely new view as to the importance of the manner and means of going about jury selection questioning. I have found, for example, that there are certain new areas that require questioning not only orally, but also as far as written questionnaires.

Written questionnaires are a tremendous asset to use for both sides in the voir dire procedure. Written questionnaires open up areas of examination that allow for a much more significant probing of the backgrounds and thought processes of the jurors for both sides. I have found that written questionnaires will save time as far as ultimate voir dire in light of the usual areas of repetitive examination by counsel. The basic procedure of a written questionnaire is: Both counsel prepare a unified written questionnaire and submit it to the trial judge.

Upon obtaining the approval of the trial judge, enough copies are prepared for the entire prospective jury panel when they are first brought into the courtroom. After the judge welcomes the jury panel and reads the basic statement of the case, the questionnaire is handed out to each prospective juror and they are to fill out the questionnaire in toto. Then the questionnaires are copied for both sides and the court and oral voir dire proceeds based upon the matters in the written questionnaire. Obviously, in light of the areas inquired into in the written questionnaire, a great amount of the oral examination is unnecessary, yet on the other hand, amplification questions based upon matters revealed in the questionnaire are in order. The advantage of the written questionnaire is that it allows for a much more thorough revealing of the backgrounds and biases and prejudices of the jurors and it is done in a much more private fashion, to-wit, in writing rather than in front of a courtroom filled with other jurors.

Clearly, this is a benefit to the entire process, including making voir dire more meaningful and of assistance to court and counsel.

Style for jury selection

• ***How should you go about actually questioning prospective jurors and handling yourself in front of this new group?***

I have found over the years that the single most demanding and awkward process of the entire trial is the very first thing that we do in trial – jury selection. On the very first day of a trial, you have a group of 40-50 prospective jurors come into a room, all of whom are unacquainted with you, with each other and with court and counsel.

• ***How do you proceed with such a group so that you get to your final destination of obtaining a just, fair and hopefully favorable jury for your purposes?***

I, for one, want to be as relaxed and as unthreatening as possible to the prospective panel. For that reason, I sit down at all times during voir dire. I feel that podiums are not the right place for lawyers to be, as far as conducting voir dire examinations of the jury. Remember, when you use a podium, you have built a fence between yourself and the jury and you also look like a country preacher in a pulpit. I feel a lot more relaxed sitting at counsel table with my notes in front of me, turned slightly to the jury and not therefore, breaching the invisible zone of privacy that each juror has, particularly on the first day of trial.

• ***What should be your style of examination?***

I have found that the most effective voir dire examination basically is directed toward getting information out of the jury and allowing them to talk, rather than having me talk. Therefore, the asking of questions that open up jurors to reveal their particular thoughts is going to be a much more effective voir dire than otherwise. This even includes allowing jurors to start talking about matters that you think will be prejudicial to your case; to-wit, tort reform type questioning. I feel, for example, that in your written questionnaire, you should be asking in writing questions such as, "Do you feel there are too many lawsuits. Do you feel there are too many big verdicts? Do you feel that there are too many lawyers?" By asking these questions in writing and getting the reactions of the jurors, you already know up front how they lean on those particular points.

Concerning questioning on tort-reform topics, if you find an adamant tort-reform type person, then by asking them questions along the line of what do you think about tort reform, many times you can get them to make statements that will indicate that they are adamantly against the system and against this type of case and therefore, they would be subject to a challenge for cause.

You're attempting in your voir dire not to indoctrinate the jury, and I say this quite sincerely. You cannot really basically indoctrinate a jury in the limited time that you have for voir dire. The best that you can do is to establish the negative jurors as soon as you can and to also establish the favorable jurors and to de-negative as many of the negatives that you have in the case early on. If your slant in voir dire is to try to indoctrinate the jury, I suggest that you will end up giving a bunch of speeches which will turn the jury off right away and will get the judge to slam down on you for violation of the basic concept that jury selection is not to be used for indoctrination. Also, to use that type of technique is to bore the jury and then lose them immediately. If there is one rule to follow about trial work, it is never to bore a jury!

Also, by asking questions that allow the jury to open up with (what do you think?), you basically are appealing to the juror, and it shows your interest in their thought processes which doesn't hurt you at all in the entire important aspect of developing some kind of rapport with each juror.

Another aspect of jury questioning that I want to probe is what the juror feels about jury service itself. Basically, I want to find jurors who are committed to the jury system and to our system of justice, and I do it in such a way that I ask them

See Greene, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2010 Issue

what they think of the system of justice that we have and whether they would want to have a jury determine their particular rights or responsibilities. By asking "what do you think?" type questions in this area, you will find some very strong pro-jury type indications and good blessings upon our system of justice.

In the process of selection of jurors, I also suggest and follow, myself, a technique of not necessarily following an exact established process of going from juror one to juror two to juror three, etc. To do that particular process establishes a regularity, but it also establishes a boring process, one in which you tend to let other jurors who are not immediately being addressed to fall asleep at your procedure. I therefore much prefer to jump around juror-to-juror, issue-to-issue, in the process of jury questioning.

Jury questioning on the issue of damages

One of the most important areas of jury questioning that you will be doing on a personal injury case will be into the area of damages. In a wrongful death case, I always want to ask if any juror has the feeling that to award damages to an heir for the loss of a loved one is a fruitless act, in that you can never award enough damages to replace the loved one. I ask that question up front and you will always find one or two people on the jury who say they have a problem with that concept. I then ask them that if the judge instructs them at the end of the case that they must award damages if there is liability and if there is a loss of love and affection, care, comfort and society to a mother and father for the death of a child, will they be able to do it, then you will find whether or not this prospective juror will be able to follow the judge's instructions. I ask does any juror have a fixed set in their mind that they could not award damages beyond a particular set figure set in their mind. For example, $1 million or $10 million. Inherently conservative people definitely have a leaning in that regard and you need to determine who those people are. If the case in question for example involved a $50 million painting by a master instead of a wrongful death and the proof in the case indicated that the painting was worth $50 million, would the juror be able to award same?

In a wrongful-death case, the jury will be asked to assess the loss of love, affection, care, comfort, society, solace and support. "Mrs. Jones, how would you describe your relationship with your father and mother as you were growing up? In this case, involving the death of a child, you will hear the mother and father describe the love and affection that they felt toward their child and the reciprocal feeling back. Could you listen to that evidence and award damages based upon it? How would you describe your relationship with your own children? What are the special days like in your family, such as Christmas, Mother's Day, Easter, Thanksgiving?"

Also, in death cases, you want to definitely set out front that you are not going to be asking the jury for an award based on sympathy and/or for the grief and sorrow of the heirs. Questioning along that line should go as follows: "In this case, the mother and father who have lost their son, will tell you of their loss. If they cry, do you think that this would be an attempt to ask you for sympathy? The law does not allow for sympathy to be used to determine any issue in a case and in this case, the mother and father will not be asking you for any sympathy! They will describe to you the love and affection and companionship they shared with their son. They will not speak to you of grief or sorrow. Do you think that you can listen to that type of evidence?"

Remember, the defense lawyer will always be reminding the jury in voir dire that the award cannot be based upon sympathy and also grief is not compensable. It is best to anticipate this and handle it before your opponent has an opportunity to deal with it.

How to handle the problem areas in voir dire

• *Alcohol and drug-related issues*

Alcohol and drug-related issues are often issues in personal-injury cases, and in other kinds of cases as well, and can be difficult to deal with in civil jury trials. I have used the following types of approaches in voir dire on these issues:

"Does any member of the prospective panel not drink alcoholic beverages? Does any member of the prospective panel know of any law that restricts citizens in America from drinking alcohol beverages? How many of the prospective panel have never ridden in a car where the driver had some amount of alcohol prior to driving the vehicle?" (Ultimately, all jurors will agree that at some time in their life they have been a passenger in a vehicle with a person who has been drinking!)

"When you got in the car with the individual who had been drinking, did you feel that it was safe for you to drive knowing the condition of the person when you got in the car? Did you in fact arrive safely at your destination?" (Jurors will usually respond that they did in fact arrive finally at that destination safely.)

"The defense in this case contends that the accident herein was caused by alcohol. Will you make them prove their case?"

How to handle motorcycle cases

We are all aware of the tremendous antipathy of the motoring public towards motorcycle drivers. If you have a motorcycle case, you need to establish right up front the negative views of the jury towards motorcycle drivers and all different aspects, usually, the sound and noise of motorcycles, weaving in and out of traffic by motorcyclists, supposed speeding by motorcycles, etc. Careful questioning of jurors in this area goes as follows:

"Mrs. Jones, what do you think of motorcycle riders?" Now, assuming that this juror reacts in the fashion as described above, the next set of questions should go as follows:

"At the present time, do you think there will be any evidence whatsoever in this case that our client riding a motorcycle was weaving in and out of traffic? Do you think that there will be any evidence in this case that will establish that his motorcycle was overly noisy or didn't

See Greene, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2010 Issue

have a muffler? Does any member of the jury feel that motorcycles have absolutely no positive features to them in today's motoring world?" (Thereafter, you can follow up by the fact that motorcycles use much less gasoline, provide much less smog and take much less space to park as obvious positive features.)

I always like to conclude motorcycle voir dire by asking this basic question: "Does any member of the jury panel feel that our client riding a motorcycle is not entitled to a just and fair trial? Does a motorcyclist have the same rights and responsibilities of being on a public road as any other motor vehicle driver?"

How to handle problem areas in wrongful-death cases

Let's assume that you have a wrongful -death case where the mother and father have lost a 23-year old son who was no longer living with the parents and had moved away to the East Coast at the time of his death and there are three other children left to the parents. How do you handle these obvious damage problems? I have used the following approach:

"Mrs. Smith, you have indicated that you have a 27-year old daughter who now lives in Chicago. Do you feel that because she is now married and living in Chicago that you love her any less than when she lived with you? Is she still in your heart and mind, although she now lives apart from you?"

"Mr. Smith, because you have four children, if you lost one of those children, what kind of a loss would that be to you?"

Who do you select for your jury?

Obviously, the whole purpose of voir dire is to assist you in finally making your critical peremptory challenge selections. We are allowed six peremptory challenges per side in a civil jury trial. The selection of those six and in reality, the first five, are vitally important. Those selections must be very carefully considered, carefully drawn and meticulously decided upon. Never forget that your opponent may well do you the favor of striking a juror that you probably don't like at all. Never ever give your opponent the advantage of thinking that he's going to be making all correct decisions.

The first one or two peremptories from your side should be the easy ones; the most obvious negative jurors that you want to get rid of. Hold back on the marginal ones that you may get your opponent to bounce.

Another key consideration in exercising peremptory challenges is the all-important need to preserve that last challenge – the number six. This is particularly important where you're in a situation where the opposing attorney is way ahead of you in terms of having a number of challenges left since he has waived prior challenges. Remember, if you exercise that last critical challenge, then it is totally available to your opponent to have a free reign of very antagonistic, unfavorable jurors coming on without your having a chance to do anything about it. With the use of a "six-pack" jury process by some courts, there is an advantage to both sides to know which jurors are going to be coming up in terms of the replacements for jurors who have been peremptorily excused. I feel that the six-pack system is an advantage to both sides, so that when peremptory challenges are exercised, you are able to know exactly who you are going to be getting from the upcoming jurors who fill slots 13-18.

• ***Do the old ethnic considerations still hold in terms of favorable plaintiff jurors?***

In the past, we have always considered the fact that minority people are often plaintiff-oriented jurors and we should therefore favor them in terms of selection. Basically, I prefer open-minded and open-hearted type mature people to serve on juries when I am trying a plaintiff case. If I can have a juror with a minority setting, ordinarily I would prefer that kind of a person; preferably from a Romance language country. I much prefer southern Europeans to northern Europeans.

Occupations to avoid in my view are those centered on scientific education, such as engineering, accounting, computer science, etc. More sympathetic type occupations would be welfare workers, school teachers and government workers.

Age-wise, I prefer mature middle-aged between the ages of 35 and 55, who are still working and/or who are still raising children. These are the mature people who have a footing in the realities of life who have suffered a bit and enjoyed a bit and can empathize with the plaintiff's case. I do not like jurors who are too young or too old.

• ***Should you be afraid of exercising peremptory challenges, fearing that the remaining jurors will resent your use of the challenge?***

Absolutely not. What you must remember is that your duty is to get the best possible jury you can get for your case and once you have exercised your peremptory challenges and the jury has been sworn, the trial commenced, the jurors who have been there before and who have been challenged will become but a forgotten memory.

Alternate jurors. Do not forget the importance of spending time and effort in the selection of alternate jurors. In any case exceeding 8-10 days of trial time, you can almost always count on an alternate juror having to be used in the trial, particularly if it's during the flu season. Therefore, the selection of alternate jurors should have a prime focus on the same basis as the other jurors. In the voir dire of alternate jurors, always spend time individually with each alternate, as well as of course with all of the other jurors, including the original 12. Each juror and alternate should have individual questioning and some amount of time spent with them, so that you can obtain from them some indication as to how they are reacting to cases, as well as basically the entire matter of establishing some basic feeling on your part as to whether or not this is the kind of a personality or person that you want on the jury. You cannot do that by generalized questions to the entire panel; you must do that individually with each prospective juror.

Conclusion

Once you have followed some of these suggested methods, as well as those

See Greene, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2010 Issue

of a lot of others you've read and listened to and thereafter followed your own best hunches as far as selection of a jury, you will then enter that sacred land of trial lawyers that will find something like 53 percent of all plaintiff's cases being winning cases year-in/year-out according to court records.

Hopefully, your batting average will be higher than the norm and your strike-out ratio will have been reduced immeasurably. All in all, good luck and good batting.

Browne Greene, a senior partner with Greene Broillet & Wheeler, has set standards in the practice of law and furthered the plaintiff's cause nationwide. Among his many honors, he has been listed in Woodward & White's "The Best Lawyers in America" every year since its first edition in 1987. He is an active member of CAALA and served as its president, secretary and treasurer. He has served on the Board of Governors of CAOC and as its president. Among his other accomplishments, in 1972, he co-founded the California Arbitration Plan, now a statewide feature used in the California court system. His trial record includes verdicts involving motor vehicle accidents, product liability, burn injuries, entertainment and performing arts accident and breach of contract matters.