

EFFECTIVE *VOIR DIRE* IN ANIMAL CASES

BY
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How to pick a jury in animal cases is a subject that has not been explored extensively. Most civil cases involving animals are settled; criminal cases are usually negotiated. However, if a case goes to trial, you will have an extensive examination of the jury panel, and I want to suggest some ideas you can use in selecting the jury.

Picking a jury begins with a process called *voir dire*, which means "to speak the truth;" however, that is hardly an accurate appraisal of what goes on in a jury selection process. Both attorneys — the attorney for the state and the attorney for the defense if it is a criminal case (or the attorneys for the plaintiff and the defendant if it is a civil case) — are allowed to participate in the selection of a jury by using challenges. Challenges are of two kinds. First, there is a challenge for cause. You may lodge a challenge for cause to a prospective juror if that juror indicates that he or she is prejudiced against your client, prejudiced against a class of people to which your client belongs, or knows somebody in the case. A challenge for cause requires the judge's concurrence; if the judge agrees, the challenge for cause is granted, and the prospective juror is out. Generally, there are few successful challenges for cause because most prospective jurors, unless they want to get out of the case, will say the obvious thing: "No, I am not prejudiced; I will give this person an objective ear." So, you have to use "peremptory" challenges, the number of which varies from state to state and jurisdiction to jurisdiction.

The questions that you can ask potential jurors are those aimed at determining whether to challenge for cause. That is what the codes all say; you are trying to find out if this person is prejudiced. However, what you are *really* doing is trying to find out if you like this prospective juror, and whether the prospective juror is going to be sympathetic to your client. In my cases, I want to find out if the prospective juror has any animal sympathies or not.

I will address the subject of *voir dire* in two parts. First is the issue of what kinds of questions you should ask the panel of prospective jurors to find out if they are sympathetic to your cause. Second is how to present your questions procedurally so the judge will not quash them.

The first issue is: What kind of questions should you ask? You can ask the usual set of questions concerning the potential juror's employ-

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ment. This is often a veritable gold mine because animal exploitative employment is rampant, and you will want to find out the prospective juror's occupation. Is this a person in livestock? Is he a rancher? Is he a ranch hand? Does he work in a meat market or a rodeo? Does this person sell pharmaceuticals that are tested on animals? You can ask, very innocently, about the person's occupation and receive important information. If you uncover no animal-related occupations, you should ask: what was your previous occupation? The person may have only been working in the present position a year; perhaps before she was selling tickets to the rodeo. So, you want to go back a few years and find out if this person has ever done anything that constitutes animal exploitation.

To understand the answers of prospective jurors, you have to understand what animal exploitation is; you have to do your homework. You have to know the products that are tested on animals. If the judge gives you a little leeway, you can get into what kind of products are sold at the store where the prospective juror works, whether she knows those products are tested on animals, and how she feels about these issues. Sometimes the judge will say that these types of questions are not relevant, but you ask them until the judge stops you. However, you cannot ask pertinent questions if you do not know what you are asking for. What I am suggesting is that in picking a jury, you have to know the various fields that are exploitative of animals, including product testing, medical testing, and the ethic surrounding livestock and agribusiness. What if the prospective juror is not a rancher or a cowhand, but is working somewhere in the feed business? Does this mean that he agrees that animal exploitation is okay? The answer usually is yes. The reason that employment is important is because people go voluntarily into employment. It is not like race or place of birth. One decides to be a rancher, and this says something about who one is because people decide to do things that are compatible with their own belief systems.

You may want to also ask whether a prospective juror has any connection with the business or institution that was the subject of an animal rights demonstration. Take a hypothetical case involving a sit-in at a university. Assume that twelve people were arrested, but there was no property damage. You should determine from the panel of prospective jurors if anyone has any connection with the university. If some are students, you want to ask what their majors are. If a person is a science major, this may not be good because she is probably, statistically speaking, not an animal activist. If the person is going into science, she probably believes in the "scientific method" and supports animal testing. So, if this demonstration was against the testing of animals, you have a problem. After you ask about the person's major, you should ask if she believes that testing on animals is essential for human health. Get your big questions in first before the judge calls you to the bench and asks you what you are doing. Practicing attorneys understand that.

What if the person is not a student, but is a professor? This could be okay depending on what the professor teaches. If she is a professor of philosophy, alternative women's studies, Chicano studies, Black studies,

or something like this, it is a good sign because a person in that field has often taken on an alternative lifestyle, or at least has considered an alternative lifestyle to be acceptable. You may want to ask that person a little about her beliefs, if you can. I would say that somebody who is a professor at the university should not automatically be disqualified. You want to find out what she does at the university, and what her feelings about the university are.

If the person is an alumnus, in my experience that is usually not good, and I have questioned a lot of prospective jurors. What alums usually have is a very rose-colored picture of what the college was like when they went to it. They do not like anybody criticizing their college. And you are criticizing their college, make no mistake, when you sit-in and refuse to get up. I usually challenge alums. The same holds true with employees of the college. Employees are in a bad position because if they are on a jury that acquits your client, and then have to go back and be a clerk the next day at the registration office, they are going to take some flak. So I would say that employees of the college should usually be challenged. This reasoning process may apply to any institution. I used the university as an example because sit-ins at colleges are my most common kind of case.

If there is property damage — for example, say all the animals are let out of the lab — the case becomes much more difficult. You are now going to have to seek people with alternative lifestyles and beliefs. What you want to find is somebody who is not necessarily conversant with animal issues, but has endorsed protests in the past. For instance, if somebody has supported or sat in on a Vietnam demonstration, in a civil rights demonstration, or something similar in the past, she may be able to relate to your client. If you can ask these questions, if the judge will allow you this kind of latitude, you may have something. You might find a juror who will be sympathetic to your client's actions.

Ask the prospective jurors where they went to college, even if they are not connected with your college. Ask them because going to college represents a lifestyle choice. Somebody who went to The Citadel is different from someone who went to Berkeley. They have made a choice; people want to associate with compatible people. If they went to college at a military school, they are going to have a certain set of beliefs, as opposed to places like UC-Berkeley or UC-Santa Cruz, where there are different sets of rules. So you want to find that out, and then you draw your own conclusions. If you know the significance of a college choice, you have a leg up on the opposition. The attorney on the other side might not see the significance. Then you have better information than the other side does.

Get good information on prospective jurors in order to exercise your peremptory challenges. Even better, if you get that information without the other side knowing it, you may be able to empanel a sympathetic juror without the other side knowing it. You can accomplish this by asking prospective jurors the kinds of questions that correlate to beliefs in animals or beliefs in a protest mentality, but are not the direct questions about beliefs. The kinds of questions you ask include: Do you have any "companion animals?" Do you know what a companion animal is? If she

says, "Yes, I have two cats," ask whether or not the cats are spayed or neutered? She may answer, "No, I would never do a thing like that." There is your information. She may say, "Yes, of course I have a spayed animal; there are too many animals." There is your information. The other side may not know the implication of having a spayed or an unspayed animal because they are not sensitive to animal rights issues. You can also ask, "Where did you buy your dog?" If she bought it from a breeder, that is different from buying from a shelter. This is the kind of information you can get if you know what you are doing, and the other side does not. They may not know that you are getting important information.

Another area you want to pursue (although this is hard because judges often declare these questions irrelevant) is information about the diet of the prospective juror. If this person is a vegetarian, this is essential information. If the judge will not let you ask that question, you might just throw out a question about diet or about the meat industry. If a prospective juror makes any comment about being a vegetarian or even just uses the word "vegetarian," you have your information.

Another important piece of information has to do with possession of weapons. If you simply ask, "Are you a hunter?," everyone will know what you are doing. However, if you can find out that the prospective juror owns weapons, you know there is a statistical correlation between owning weapons, being a hunter, and being unsympathetic to animals. If you can find out whether this person owns weapons, you have a lot of information about how that person is likely to view your case. Most people that own weapons are not going to like your clients.

The second issue concerning peremptory challenges is how to proceed procedurally so that you will be allowed to ask prospective jurors the kinds of questions that are useful to you. The most important classes you take in law school are classes such as Civil Procedure and Criminal Procedure. They might seem to be the least interesting classes, but they are the ones you are going to use the most. You need to know how to do a demurrer and a summary judgment, and you must know how to do a pleading. The other stuff you can look up in the library. One bit of wisdom I want to pass along is: listen in your procedure classes. It will save you again and again.

How do you get your questions before the jury? The way that I have done it most successfully is to make a motion well in advance presenting to the judge all the *voir dire* questions. Know your *voir dire* questions and submit them to the judge. This will get the judge thinking about your issues, and you may get more latitude when you finally get your chance to question the panel. Procedurally what happens is that the judge questions the jurors first and asks questions designed to discover if prospective jurors are prejudiced, if they know anybody in the case, or is it going to destroy their business to sit through the case. These are automatic questions and few people are challenged for cause on the basis of these questions because all the prospective jurors know the right answers to give if they want to sit on the jury. Then you get your turn to ask questions.

Depending on the judge and the case, you may have five minutes to ask questions per prospective juror or ten minutes per prospective juror. In one case that I did, the *San Quentin Six*, we were given up to half an hour per juror, but that was an unusual case involving five counts of murder. You want the most time you can get to question each juror because then you can engage in a dialogue and ask open-ended questions. Do not ask closed questions such as "do you hate animals?" or "do you like Michigan State University?" Ask questions that are open-ended like "what do you think about animal testing?" Let the prospective jurors talk, because you will get to know a little bit about them.

How do you get your questions to the jurors? You make a motion in advance and you submit pages of *voir dire* questions. You ask the judge's permission either to ask those questions yourself or for the judge to ask those questions. You ask in your motion, "your honor, would you ask these questions of the jurors?" At the pre-trial conference the judge usually says, "counsel, I am not going to ask all these questions." At that time, you explain the importance of your questions, and why the views of the individual jurors on animal issues are essential to picking a fair jury. You should use analogies that you can find in the casebooks concerning other cognizable classes of people. You explain to the judge that there exists substantial prejudice against animal rights activists as a class.

The judge may ask only one or two of your questions, perhaps what prospective jurors think about animal rights. However, the rest of the submitted questions may serve the purpose of having the judge go to the law library, look them up, and think about them in advance so when you get up and start asking your *voir dire* questions, the judge will not quash you. However, if you spring a big surprise on the judge, he or she is not going to be happy and might call you up to the bench, embarrass you, and then you are off on the wrong foot. So you want to give plenty of warning, advising the judge you are going to want to ask these types of questions. If you do that, the judge will appreciate it, and you might get more latitude in questioning. So put your questions in a motion. *Voir dire* is not the time to spring surprises; surprises are for later in the trial.

Suppose the judge does not allow you to ask any questions. Suppose the judge says, "Well, sorry counsel, this is all irrelevant, you are not going to ask prospective jurors what they think about this, the only issue at hand was whether this person was sitting down on state university property." You then at least have a paper trail in case you decide to appeal.

There are many ways to approach a prospective juror, but what you want to do is to sincerely talk to them the way that I am now talking to you. You do not want to stand up and read off some list. They do not want to hear that. You should talk to them, and you should get a feeling for who a prospective juror is as a person. This is the most important part of your case. You could have the greatest case in the world, but if the jury is looking at you like you are from Mars, you have had it. This has happened to me several times when I have had to argue to a jury the premise that animals are not property.

Because you are arguing premises that may be unfamiliar to the jury, another purpose of *voir dire* is to set forth premises early. For example, the idea that it is wrong to use animals for medical testing may not exist in a prospective juror's universe. Suppose a prospective juror has been using medications tested on animals for years and thinks they are great. Now you are telling her that testing is wrong. You must say so early in your *voir dire*; if you put the idea out there early, then later when you argue it in your closing statement, the jury will at least be familiar with your premise. In your closing statement, you can then draw analogies to other social movements that were ahead of their times, such as the movements against slavery, child cruelty, and child employment.

The last time I had to argue an animal issue, I had to do it in a very rural county in northern California. It was hard. It always is hard when you get blank stares, but that is why you are doing this kind of work. I assume you are here because you are not trying to make more money for corporate America; if so, you would not be here. So, you are going to have to argue alternative viewpoints, and you are going to have to know your audience. You need to believe in your clients in order to stand up there and speak for them because these people are not criminals; they were acting out of conscience. Say that to the jury. The system does not differentiate between people that sit in as an act of conscience and people that are out there stealing things. *You* do that; that is *your* job. You should be very proud of what you do. It is a great thing; it is a privilege.