

## **Department 34 Trial Procedures**

*(These are my preferences, but I do not preclude any reasoned argument for departure from these procedures)*

Jury Selection: I prefer to select alternate and regular jurors in one group, adding the necessary peremptory challenges and addressing all necessary potential jurors at once. I seat in order only those jurors we will need in the absence of challenges for cause to select the requisite total of jurors and alternates assuming that counsel exhaust peremptory challenges. I prefer not to identify and excuse any alternates remaining until immediately prior to deliberations, and then to select alternates by lot, so that I can tell jurors we will not know who would be excused if more than the number necessary for a jury remain until deliberation.

I require disclosure of all potential witnesses before voir dire.

I readily permit mini openings or a joint statement about the issues in the case. Absent agreement, I will describe the nature of the case and the issues I expect to be presented in the most general terms; I am happy to discuss this with counsel before jury selection begins.

I prefer to conduct entertain peremptory challenges in chambers, but challenges for cause must be exercised before we begin the exercise of any peremptory challenges. If a prospective juror is excused for cause, we will replace that juror from the back of the courtroom, have that juror answer the routine posted questions, and afford counsel an opportunity to bring current voir dire of that juror before proceeding generally with voir dire.

It is entirely appropriate to explore proclivities that may be unique to a case, but it is not appropriate to disclose the facts of a case to gauge a juror's response to those facts, and it is not appropriate to employ prospective jurors as witnesses for the purposes of making a preliminary argument. Prospective jurors are not case witnesses. I will sustain objections that violate these principles.

I am happy to articulate any legal principle when that is helpful should counsel encounter a juror response that asks about the law that applies, but counsel should not attempt to instruct the jury on the law that applies.

I use a non-standard reasonable doubt instruction to avoid concepts of "moral certainty" which are entirely misunderstood even by most highly educated people – a position that I am entirely happy to discuss.

Once we have seated and questioned the requisite number of jurors, no challenges for cause remain, and we commence peremptory challenges, I do not "move" jurors (whether we are using "ballots" in the courtroom or proceeding in chambers). The prospective jurors remain in the order in which they were seated. Counsel may use a peremptory challenge against any juror so seated, and need not wait until that juror has "reached" the group consisting of that number of jurors necessary for a jury with alternates. Counsel who is "satisfied" before exhausting peremptory challenges waives challenges as to any jurors then remaining who would be within the jury plus alternates counting those remaining jurors in the order in which they were seated. Remaining challenges may be used only against prospective jurors brought into that group by an opponent's peremptory challenge.

Jury questions: I generally allow juror questions in any type of case. I instruct jurors that I will ask whether there are any juror questions when counsel are through examining a witness. If so, the juror(s) will write out the question so that I can discuss it with counsel before posing it

to the witness. If I pose any such questions, I will afford counsel an opportunity to follow up with further questions.

Jury instructions: I ask counsel to provide electronic copies of requested instructions (Word or WordPerfect) so that I may prepare a draft for discussion with counsel, and which, when finalized, will be provided to each juror. I have no problem with simply giving me the number and title of a requested instruction if no modification or adaptation of the instruction is necessary. But give me both number and title, because our jury instruction committees apparently missed the class on why we don't use the same number for different statutes or regulations – we get numbers referring to different instructions depending upon the year of promulgation.

Also, please do not consider it helpful to leave to me the process of adapting an instruction to your case. Please refine, for example, a noneconomic damage instruction to articulate only what applies to your case, or the options and mental states that make an escape an escape in the second degree.

I generally instruct at the close of argument, but happily instruct before argument if counsel agree that this would be preferable.

Opening Statement: It is the office of opening statement to identify issues and your position on issues, as well as the evidence you expect to be presented during the trial, but I will sustain objections to argument.

Exhibits: It is helpful to secure any stipulations concerning admissibility or authenticity before trial, and to provide the clerk and me with a numbered list of exhibits before trial.

I allow counsel to publish exhibits to the jury once they are received in evidence, but don't understand the practice of dividing jurors' attention by passing exhibits while continuing to examine a witness. But that is your choice. You may also wait until the jurors have had an opportunity to pass the exhibit and examine it.

Argument: It is improper to vouch for witnesses or evidence – counsel is not to state counsel's opinion, but to take and support positions with evidence and argument. I will sustain objections should counsel violate this principle.