

**CASE STUDY PREPARED FROM ORIGINAL
PUBLISHED OPINION**

ERNEST A. LONG

Alternative Dispute Resolution

Resolution Arts Building

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

Alcazar v Los Angeles Unified School District

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**Trial Practice; Jury Selection; CCP section 222.5; Proper topics
of Voir Dire**

On May 7, 2013, shortly after lunch began at the school attended by Edgar A. Alcazar (Edgar), a minor, the principal received a radio call that “something had happened.”

A minute or two after receiving the call, the principal arrived at the scene and found Edgar, who was 13 years old at the time, lying on his back on a pedestrian walkway next to a concrete planter box that held a crepe myrtle tree. Lying next to Edgar was a broken branch from that tree. The branch was approximately 2 inches in diameter at its thickest point and approximately six to eight feet long. Prior to the incident, school staff had seen Edgar swinging

“like Tarzan” from that very same branch and had warned him not to do so as it was “unsafe.” The principal summoned paramedics, who transported Edgar to a nearby hospital where he was treated for a skull fracture and a concussion or a mild traumatic brain injury.

Six months later, in January 2014, Edgar sued Los Angeles Unified School District (LAUSD), alleging that he had “sustained severe and permanent injuries when he climbed and then fell from the subject tree.” By the time of trial in November 2016, Edgar asserted three separate claims against LAUSD: negligence; a violation of Education Code section 44807; and, pursuant to Government Code section 835, a claim for a dangerous condition on public property.

Initially, the trial court suggested that the parties limit their questioning to 1.5 hours per side. Although LAUSD’s counsel was amenable to such a time limit, Edgar’s counsel demurred, explaining that, due to the complexity of a personal injury action against a school district, especially one where the alleged special damages exceeded \$15 million, he would need more than an hour and a half to examine prospective jurors. The trial court stated that it understood the concerns of Edgar’s counsel and **did not place any time limits on voir dire.**

On November 1, 2016, before the start of voir dire, the parties jointly requested leave to give **mini-opening statements** to the

venire. The trial court acceded to the parties' request and limited each side's mini-opening to three minutes.

On November 3, 2016, the first day of voir dire, the trial court began by reading a short, stipulated statement of the case to the prospective jurors setting out the parties' basic contentions. Immediately thereafter, the trial court allowed counsel for each party to give a mini-opening statement.

In his mini-opening statement, Edgar's counsel, among other things, discussed the following: Edgar's age; his learning disabilities; his reputation as a "class clown"; LAUSD's knowledge that children at Edgar's school, including Edgar, were swinging on tree branches; Edgar's theories of liability: LAUSD's failure to provide a safe environment by not cutting down the branch and by not properly supervising the children; and Edgar's alleged damages, including "millions of dollars" of future medical care.

In his mini-opening statement, LAUSD's counsel discussed, among other things, the following: Edgar's height and weight (five feet 11 inches tall, 176 pounds); his learning disabilities and also his ability to distinguish right from wrong; the school's repeated warnings to Edgar not to swing on tree branches and his refusal to follow those directions; the school's supervision of children during lunch recess; and Edgar's alleged injuries.

At the close of the first day of voir dire, the trial court dismissed for cause three prospective jurors who Edgar claimed would be unfair to his case and dismissed one juror who LAUSD claimed would be unfair to its case. The trial court took under advisement the dismissal of a fifth member of the venire, prospective juror No. 3.

On the morning of November 4, 2016, prospective juror No. 3 asked to speak to the court. After the trial court granted his request, prospective juror No. 3 advised that, based upon the “details” that came out in the parties’ “presentations,” he could not be fair to Edgar. Based on the information in the parties’ mini-opening statements, prospective juror No. 3 concluded, “Wow, this kid didn’t take responsibility for his own actions. He did something he was told not to do.” Prospective juror No. 3 stated further that he believed “it was a mistake to put out that much detail about the case because it already gave him reason to be against Edgar.” The trial court dismissed prospective juror No. 3 for cause.

In light of the comments made by prospective juror No. 3, and in light of **concerns that the trial court had about Edgar’s counsel preconditioning the prospective jurors**—concerns that the trial court shared with counsel before interviewing prospective juror No. 3—the trial court concluded that **the parties would not be allowed to give mini-opening statements to any future panels of prospective jurors**; instead, the court would simply read the parties’ agreed-upon statement of the case. In addition, the trial court

instructed the parties that during voir dire “there will be no mentioning of facts specific to this case.” The court explained that while general questions about school safety, for example, were permissible, questions based on facts specific to the case at bar were not.

To the **second venire** on November 4 and to the third venire on November 7, the trial court read the parties’ joint statement of the case, but **did not allow the parties to give mini-opening statements**. In addition, on November 4, the trial court, using the language of CACI No. 106, instructed the prospective jurors that statements by counsel, including statements made during voir dire, were not evidence.

During his questioning of the second and third venires, Edgar’s **counsel referenced a number of case-specific facts and issues** that were either not mentioned in the joint statement of the case or only alluded to; those **facts and issues** included the following: Edgar’s age at the time of the incident; Edgar’s status as a special needs student at a regular school; whether a 13-year old could look at a tree limb and appreciate that the branch would not hold his weight; whether a 13-year-old could be at fault for hurting himself; whether a tree should be cut/trimmed for safety reasons; whether a school should supervise children who are 13 years or older; whether a school district has an obligation to do more than tell a 13-year-old not to do something that is risky or unsafe; whether telling a student not to swing on a tree limb was sufficient

to deter the student from repeating that behavior in the future; whether a school should tell parents about their child's potentially dangerous behavior while at school; whether a school should supervise children in the same way as their parents; and whether any of the prospective jurors had suffered a traumatic brain injury or had any experience with someone who had suffered such an injury.

In addition, **Edgar's counsel questioned the second and third venires on a number of legal concepts.** For example, Edgar's counsel discussed with the prospective jurors the concept of comparative negligence, asking repeatedly if they could keep an open mind if Edgar admitted that he was partially at fault. Edgar's counsel also explored with the prospective jurors whether they could award Edgar "a lot of money" for his alleged damages, including compensation for pain and suffering. On a related note, Edgar's counsel inquired if the prospective jurors would cap Edgar's damages or award him reduced damages because the defendant was a school district.

One of the members of the initial venire was **Juror M.** During voir dire on November 3, Juror M volunteered that she thought LAUSD could not "be held responsible for a kid being a kid." Juror M explained further that, Edgar "was told multiple times, but he did it nonetheless. And kids will be kids, they'll do whatever they want." When pressed by Edgar's counsel on whether she could keep an "open mind," Juror M responded as follows: "Sure, I guess; but then again it would have been another issue. . . . I mean—I

don't know. I just don't think the school should be held responsible for the kid's actions." When asked by Edgar's counsel if she could be fair to Edgar, she replied, "No. I wouldn't be fair."

When asked by LAUSD's counsel if she could try to be fair and analyze the evidence as it came across the witness stand, Juror M said, "Yes." Further, when asked if she was going to give Edgar a "fair shake," Juror M said, "I'll try, yes." And, when asked if she would obey the law as instructed by the court, Juror M replied, "Yes."

On the following day, November 4, Edgar's counsel again inquired as to Juror M's ability to be fair given Edgar's damages claim. Juror M responded that Edgar's claim for damages was "very excessive." Juror M admitted further that, because she was already thinking that the damages claim was excessive, she was effectively telling Edgar's counsel that she "probably can't be fair." However, Juror M also told Edgar's counsel that she would try to be fair and that she "would have to see the evidence."

In response to probing by LAUSD's counsel, Juror M stated that she would be able to be fair and keep an open mind, listen to the testimony and then make a decision. In addition, Juror M re-affirmed that she would follow the law as instructed.

Later that day, the **trial court denied Edgar's challenge to Juror M for cause.** Ultimately, **Juror M served on the jury.**

Juror S joined the panel of prospective jurors on November 4, the second day of voir dire. When Edgar's counsel asked Juror S if he had any strong feelings about the case, he replied that he needed to "hear more about the case." When asked if he had any strong feelings that would make him unfair to Edgar, Juror S responded, "No." When pressed by Edgar's counsel, Juror S stated that he would keep an open mind even if Edgar admitted to being partially responsible for his injury. Juror S stated further that it would not be hard for him to keep an open mind about the school's alleged role in causing or contributing to Edgar's injury. However, Juror S expressed some hesitation on the issue of compensating Edgar for his injury: "Well, the kid, they already know the rules. That's his own responsibility because they already know about the rules." When Edgar's counsel attempted to explore Juror S's answers regarding Edgar's knowledge about the school's safety rules, Juror S became in his own words "nervous," responding to questions by stating, "I don't understand," and "I don't know what to say," and ultimately reversing himself, **stating that he could not keep an open mind because he was nervous**. After Juror S said that he was nervous, the trial court suggested that the parties turn their questioning to another prospective juror, which they did.

Later that day, the trial court denied Edgar's challenge to Juror S for cause. Ultimately, **Juror S served on the jury**.

On November 7, 2016, while voir dire was still proceeding, Edgar moved for a mistrial, arguing that the trial court should have granted certain of his challenges for cause, including his challenges to Jurors M and S. On November 9, 2016, LAUSD filed its written opposition to the motion. On November 10, 2016, after voir dire had ended and testimony had begun, the trial court denied the motion.

At trial, Edgar conceded that he was “partially responsible” for his injuries, but argued nonetheless that LAUSD failed to follow its own safety plans and rules and that its negligence caused his injuries. In its defense, LAUSD argued that there was a detailed safety plan in place, the school and its staff followed that plan, and Edgar’s learning disabilities did not interfere with his ability to distinguish right from wrong—that is, Edgar, having been previously warned about the danger of swinging from tree branches, knowingly chose to engage in risky behavior and no reasonable amount of supervision could have prevented the accident.

On December 5, 2016, after less than two hours of deliberation, the jury returned a **verdict in favor of LAUSD**. On each claim, the jury’s vote was 11 to 1. On January 3, 2017, the trial court entered judgment in LAUSD’s favor. Edgar timely appealed.

On appeal before the Second District Court of Appeal, Edgar argued that the trial court erred when, following the first venire, it refused to allow counsel to make **mini-opening statements** to the

second and third venues and prohibited counsel from referring to the specific facts of the case during the balance of voir dire. Second, Edgar contended that the trial court erred by refusing to remove two jurors for cause.

The Justices noted that in September 1990, the Legislature enacted **section 222.5 of the Code of Civil Procedure** as part of a broader effort to revise and extend indefinitely the Trial Court Delay Reduction Act of 1986. “In order to further reduce delays in criminal court actions, the Trial Court Delay Reduction Act provided judges with more authority to control voir dire examination.” Section 222.5 was designed to extend that authority to control voir dire to civil court actions.

In short, the legislative history of section 222.5 reveals that the Legislature enacted the statute and later amended it to insure that civil trial courts possessed the necessary discretionary authority to control the voir dire process.

As a result of the 2011 amendments, **section 222.5**, in pertinent part, provided as follows at the time of trial: “Upon completion of the judge’s initial examination, **counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination**

calculated to discover bias or prejudice with regard to the circumstances of the particular case. . . . The trial judge should allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process. The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. . . . For purposes of this section, an 'improper question' is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law."

Our Supreme Court has repeatedly affirmed that "***it is not 'a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.'*** Therefore, a question may be excluded if it appears to be intended solely to accomplish such improper purpose." (*People v. Williams* (1981) 29 Cal.3d 392, 408; see *People v. Carter* (2005) 36 Cal.4th 1114, 1178) The

law is “clear that ‘it is not a proper object of voir dire to obtain a juror’s advisory opinion based upon a preview of the evidence.’ ” (*People v. Butler* (2009) 46 Cal.4th 847, 860.) Rather, **a proper inquiry must be “ “directed to whether, without knowing the specifics of the case, the juror has an ‘open mind’ ” ’ ” on the issues presented.**

Here, in order to minimize the risk of improper questioning by counsel for either party, but especially to reduce the likelihood that counsel for Edgar might engage in **preconditioning**, the trial court decided to limit the amount of case-specific facts the parties could put before the prospective jurors either through mini-opening statements and/or their questioning. This decision, as the relevant version of section 222.5 makes plain, was an act within the sound discretion of the trial court—a discretion that the Legislature in 2011 was intent on preserving. That version of section 222.5 expressly provides that the “scope of the examination conducted by counsel shall be **within reasonable limits prescribed by the trial judge in the judge’s sound discretion.**” Moreover, that version of section 222.5 did not require the trial court to allow the parties to make several or even one brief opening statement or to reveal detailed facts about the case that supported the parties’ contending theories.

The trial court’s decision was not only within its discretion, but it was also grounded in fact. The decision was based on the court’s independent observations of the first day of voir dire. The Justices “afford deference to the trial court’s factual determinations”

which are based on firsthand observations not available on appeal. (See generally *People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.)

The trial court's decision was also supported by the independent statements of prospective juror No. 3, who felt that his ability to be impartial had been irrevocably compromised by the detailed nature of the parties' mini-opening statements. The Appellate Court will defer to the trial court when it has had the opportunity to hear a witness speak and observe his or her demeanor. (*In re Lawley* (2008) 42 Cal.4th 1231, 1241.)

Finally, following its order, the trial court allowed Edgar's counsel considerable leeway with respect to what facts did and did not constitute case-specific facts. Edgar's counsel was permitted to question the second and third venires on a wide range of facts germane to the case, including Edgar's age, his status as a special needs student at a regular school, a 13-year-old's ability to evaluate the risk of injury from swinging on a particular tree limb, school supervision of 13-year olds, traumatic brain injuries, the principles of comparative negligence as applied to this case, and compensation for Edgar's alleged pain and suffering. In other words, the trial court did not impose or enforce a complete ban on case-specific facts; rather, it imposed what it determined to be necessary but limited restraints on counsels' examination of the prospective jurors. As a result, **any potential prejudice to Edgar arising from the order denying additional mini-opening statements was mitigated by the**

liberality with which trial court allowed his counsel to question the second and third venires.

In short, on the record, the Justices cannot conclude that the trial court's decision was beyond the bounds of reason. (*People v. Benavides*, at p. 88.) Consistent with the terms of and the legislative intent behind the statute, the trial court permitted liberal and probing examination of the prospective jurors within reasonable limits.

A prospective juror may be challenged for cause when the juror has actual bias, "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (§ 225, subd. (b)(1)(C).)

California courts have long recognized that **"a juror is not disqualified by reason of general bias entertained against a class of actions, when it appears from his testimony that he can lay aside that prejudice, and, uninfluenced by it, try the cause at issue solely upon the evidence and the instructions of the court as to the law."** (*Fitts v. Southern Pacific Co.* (1906) 149 Cal. 310, 314.)

"In general, the qualification of jurors challenged for cause are 'matters within the wide discretion of the trial court, seldom disturbed on appeal.' " (*People v. Kaurish* (1990) 52 Cal.3d 648, 675.)

“A trial court’s rulings on motions to exclude for cause are afforded deference on appeal, for ‘appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person’s responses (noting, among other things, the person’s tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record.’ ” (*People v. Avila* (2006) 38 Cal.4th 491, 529.)

In *People v. Weaver* (2001) 26 Cal.4th 876, our Supreme Court stated, “A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror’s responses in deciding whether to remove the juror for cause. . . . **‘Where equivocal or conflicting responses are elicited regarding a prospective juror’s ability to apply the law, the trial court’s determination as to his true state of mind is binding on an appellate court.’ ”**

Here, the trial court did not abuse its considerable discretion when it denied Edgar’s “for cause” challenges to Jurors M and S. Although both jurors made conflicting statements about their ability to remain impartial, neither juror “expressed views indicative of an unalterable preference” in favor of LAUSD. (*People v. Crittenden*, at p. 123.) Instead, both Jurors M and S expressly stated that they could keep an open mind. Accordingly, the DCA holds that the trial court did not abuse its discretion by denying Edgar’s “for cause” challenges to Jurors M and S.

The judgment is affirmed. The parties are to bear their own costs on appeal.

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