

## Questionnaire Results: Opening Statements Before Entire Venire

On September 19, 2017, Judge Thomas Marten conducted a civil jury trial in which he required attorneys to deliver their full opening statements to the entire venire before voir dire. He then administered a questionnaire to the dismissed jurors, 19 of which were returned. The attorneys were given a separate questionnaire, with 4 being returned. Although the survey has limitations, there are some takeaways. Generally, jurors found the opening statements interesting and engaging, and attorneys did not think that time was wasted or that it gave one party a strategic advantage. Critically, both jurors and attorneys felt that the practice helped elicit more complete responses during voir dire. While additional study is necessary, this survey suggests that judges need not be overly skeptical or protective about experimenting with this innovation. The results of are as follows:

### Responses from Dismissed Jurors

1. *On a scale of 1 to 7, when the lawyers were addressing you, did you feel that they were primarily arguing their case and trying to convince you that their side was correct, or primarily providing information so that you could understand what the case concerned?*

Average: 4.8

Note: Only two of the jurors marked that the attorneys were mostly arguing their case. The mode response was 4, suggesting that the respondents felt the lawyers were both informing and arguing.

2. *On a scale of 1 to 7, did you find the lawyers' statements about the case unhelpful or helpful in informing your answers to their subsequent questions about your ability to serve on the jury?*

Average: 5.6

Note: Only one of the respondents marked 1, indicating that the lawyers' comments were unhelpful in informing their answers to voir dire.

## Responses from Attorneys

1. *Did delivering your opening statement to the entire venire change your preparation or strategy? If so in what way?*

All of the attorneys agreed that it did not change their preparation. Two of them noted that they might have cut down on their opening if it were given in the traditional manner, as slightly more time was needed to provide context when presenting to the entire venire. But their preparation and material did not change.

2. *Did you think delivering your opening statements to the entire venire help the potential jurors provide more thorough answers during voir dire? Why or why not?*

All of the attorneys agreed that that it likely helped the prospective jurors better understand the issues and provide more thorough answers.

3. *Do you think delivering your opening statements to the entire venire made the jurors more biased or capable of self-selecting either in or out? If so, is that a problem? Why or why not?*

All attorneys agreed that this occurred. Three of the attorneys suggested that the practice allowed jurors to express more biases and op-out, and that one of the potential jurors attempted to hide his bias to self-select in. Another attorney wrote: "It felt as though we were penalized by doing a good job on our opening statement, convincing jurors and losing them for cause." One attorney noted that while biases were more likely to be expressed or hidden, that the risk is also present in traditional voir dire.

4. *Do you think providing opening statements to the entire venire required additional time that could have been better spent? If so, what would you propose instead?*

All attorneys agreed that no time was wasted.

5. *Do you think providing opening statements before the entire venire gave one party a strategic advantage over the other? Why or why not?*

Three of the attorneys agreed that no party received a strategic advantage. The other attorney noted that it potentially could, especially if good attorneys are able to elicit favorable emotions in potential jurors and thus lose them for cause.

6. *Would you recommend more courts adopt this practice? Why or why not?*

All of the attorneys seemed open to the idea of expanding the practice, noting that it was not disruptive. One attorney, who appears to have felt punished for performing well, suggested that she would only support expansion if for-causes challenges were more restrictive. One other attorney was very enthusiastic, noting “that it allows lawyers to get the most out of voir dire without dancing around what the case is about.”

7. *Is there anything else you would like to share about your experience providing opening statements before the entire venire?*

Each attorney emphasized something distinct:

- “Overall, I liked the efficiency gained, but did not like the fact that we lost favorable jurors to a convincing opening statement.”
- “It worked in a large courtroom. Might not be feasible in a smaller setting.”
- “The one caveat I would note is that in our case, we had a jury pool of 25. In cases with a much larger pool, or in courtrooms of a much smaller size, this approach may not work as well. Overall, I really-enjoyed the change and hope more courts start going in this direction.”
- “I think they liked it.”

## **Conclusions**

There are a few noteworthy points. First, the jurors generally did not seem to think that the attorneys were primarily arguing their case, and felt that that information that was given to them helped them answer voir dire questions more thoroughly. The attorneys agreed, believing that earlier opening statements allowed voir dire to be more complete and effective. Some of the attorneys worried that it allowed jurors to self-select in or out, most did not say whether this was a problem. One attorney noted that opportunities for self-selection were likely similar in the context of traditional openings. Next, the attorneys did not think that the practice provided one side an inherent strategic advantage. With that said, one attorney repeatedly noted that she felt punished for having convinced jurors in opening statement and having them struck for cause. Finally, all of the attorneys seemed open to expanding the practice, with one openly recommending that courts do so.

It is important to highlight the many limitations with this study. First, it is very small, involving but a single trial in a single jurisdiction. Second, the questionnaire is not scientifically formulated any may have swayed responses. Nevertheless, the findings conform to our expectations. Providing opening statements to the entire venire does not waste time or add unnecessary expense. It appears to provide jurors with a more enjoyable experience, though it may sway some of them to expose or hide biases during voir dire. Overall, more study is necessary to discern whether this practice should be more widely adopted. However, the findings here suggest that testing to make this determination should not be considered problematic.

If you are interested in experimenting with this innovation and administering the Civil Jury Project's questionnaires, please contact Richard Jolly at [rlJolly@nyu.edu](mailto:rlJolly@nyu.edu).