

**The People's Interest in a Criminal Prosecution is Not That it Shall Win a Case, but That Justice Shall Be Done. A Prosecutor May Prosecute with Earnestness and Vigor-Indeed, He Should Do So. But, While He May Strike Hard Blows, He Is Not at Liberty to Strike Foul Ones.**

**Justice Sutherland  
Berger v. United States  
(1935) 295 U.S. 78**

**The Mission of the Office of the District Attorney of Orange County Is to Enhance Public Safety and Welfare and Create a Sense of Security in the Community Through the Vigorous Enforcement of Criminal and Civil Laws in a Just, Honest, Efficient and Ethical Manner.**

## INTRODUCTION<sup>1</sup>

The term “voir dire” is defined by Black’s Law Dictionary as a French term meaning ‘to speak the truth.’ This phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors.”

Voir dire was allowed in English common law in the eighteenth century only in capital cases. As the number of capital cases decreased, the right was extended to all felony cases. Generally, and up until Proposition 115 was approved by the voters in 1990, voir dire had always been allowed in all criminal cases, felonies and misdemeanors. Proposition 115 took away the right of the prosecution and the defense to conduct voir dire. As of January 1, 2001, California Code of Civil Procedure section 223 restored a limited right to voir dire in criminal cases. CCP section 223 provides that the court must conduct the initial examination, but both sides then have a right to directly question prospective jurors. The court still retains the discretion to limit the amount of time that attorneys spend questioning prospective jurors. In addition, all questioning must be done to aid in the exercise of challenges for cause and not peremptory challenges.

## THE IMPORTANCE OF VOIR DIRE

This is your only opportunity to speak directly to the jurors and for them to speak to you. The initial impression that you create will **greatly affect** the overall atmosphere of the trial and the jurors’ willingness to accept your case. The impressions you get of the prospective jurors during voir dire will be the major factors in exercising peremptory challenges.

## CREATING A FAVORABLE IMPRESSION ON THE JURY

1. The initial impression you create is the one that will stay with the jury.
2. Try to be in court before the jury arrives. Try to have your trial material organized with a minimum of paper on counsel table. The jury will not look to you for leadership if you spend half your time fumbling for papers.
3. Conduct your voir dire in a conversational style: **Don’t Lecture.**
4. Make sure you are able to use the essential names, dates and addresses involved in your case without reference to notes.

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<sup>1</sup> This outline was prepared by using material compiled by former ADA Lew Rosenblum, OCDA, Restatement of the Law and Voir Dire Technique. In addition, this outline was prepared by using material compiled by CDAA, Prosecutor’s Brief.

5. Use understandable English and common terms. *Why call a car an automobile?* Explain unfamiliar terms such as Information, presumption, felony, etc. to the jury.
6. Don't appear to be too smooth, especially if the defense attorney is a "klutz."
7. Avoid unnatural or distracting mannerism or gestures.
8. Show respect to the court. **Respect, not reverence.**
9. Vary the pitch of your voice and the pace of your questioning. The most dynamic voir dire questioning in the world will put the jury to sleep if asked in monotone.
10. If the court allows it, use the names of the prospective jurors, taking great care to pronounce them correctly. **Don't try to memorize them.**
11. Don't be a comedian. Avoid rehearsed humor but don't ignore spontaneous humor. Funny things do happen in court and as long as the jury is not laughing at your case it won't hurt you.
12. Your attitude towards the defendant and defense attorney should be professional. A trial is an adversary process, and although the defense attorney may be your best friend, the jury can easily misinterpret friendly conduct.
13. Treat the case as an important one. This may be your twentieth DUI trial and the judge's five-hundredth, but remember that it is the jury's first and they will take it seriously.

#### **GENERAL CONDUCT OF THE VOIR DIRE**

1. Treat the prospective jurors as equals and don't talk down to them.
2. Remember that the jurors are new to the courtroom and are normally nervous and unsure of what's coming next. Try to put them at ease and ask them to sit back and relax.
3. Be positive in your questioning.
4. Don't ask questions that have no purpose just to be asking questions. An aimless voir dire is worse than no voir dire at all.

5. Vary the subject of questioning.
6. Don't repeat the same question over and over again. If it is the type of question that you need to ask to all the prospective jurors, ask the entire panel.
7. Avoid, if possible, personal questions. If you need to ask a personal question, apologize to the jury in advance and explain to the jury why you are asking a personal question.
8. Involve the prospective jurors in the voir dire process. The objective is to learn about the prospective jurors. Get them talking and responding. **Don't ask only "yes" and "no" questions.** You will not learn much from such questions.
9. Maintain eye contact with the prospective juror you are questioning.
10. Never argue with, embarrass, or humiliate a juror. Take great care to give dignity to his or her occupation.
11. Don't try to flatter or curry favor with the jurors. Besides being obvious and counterproductive, it's unethical.
12. Get the prospective jurors to identify with the community as the victim.
13. Don't abuse the defendant or the defense attorney.
14. Don't invade the territory of the jury. Stay a reasonable distance away from the jury box.
15. Listen to the answers given by the jurors and note appropriate responses for your closing argument.
16. Get the prospective jurors to talk.
17. **BE YOURSELF.**

### **FACTORS TO CONSIDER IN SELECTING JURORS**

1. The way a juror is dressed should give you some idea as to whether or not he or she is a conformist. It should also give you a clue as to how seriously he or she takes jury duty.

2. Pay attention to the physical, non-verbal responses. "Body language" is very telling.
3. Watch for equivocal or reluctant responses.
4. Watch for stress when answering. Compare reaction to your questions and defense questions.
5. Be alert to relationships between jurors -- friendships, antagonism, neighbors, co-workers, etc. You need unanimity.
6. Attempt to distinguish between the leaders and the followers. A strong leader is fine if he or she leads in your direction. Some jurors will be neutral and quickly follow whoever takes the lead.
7. Try to select the strongest one or two jurors for you as foreperson. Your voir dire can lead the other jurors to select them.
8. Watch for reading materials as clues to the personalities of prospective jurors.
9. Don't ignore your personal reaction to a prospective juror. If you have a vague feeling that there is something wrong about a prospective juror, **don't gamble**.

### **SPECIAL PROBLEM AREAS TO COVER IN VOIR DIRE**

It is always to your advantage to divulge and deal with the weaknesses of your case at the earliest possible stage, voir dire, before the defense attorney does it for you. It is also wise to hide the strengths of your case and not give it all away in your voir dire. Prepare the jury to accept potentially unpalatable evidence. If you are sure of the defense's theory of the case, and the defense is committed to it, you should try to ask voir dire questions covering the defense's case.

1. If the defendant has jury appeal because of his or her looks, age or demeanor, dispel the sympathy as soon as possible.
2. In a joint trial, you should explain to the prospective jurors that some evidence may go to one defendant and some to all.
3. The use of informants or undercover police officers may initially seem somewhat unfair to jurors. If you have this type of witness, explain that this is the only way to effectively combat the sort of crime involved, and ask if they would hold it against the People that it was done. The same theory

applies in those cases where you have given a grant of immunity or made a plea bargain in exchange for testimony. If the prospective jurors understand the necessity, they will not hold it against you.

4. Prepare the jury to accept children as witnesses.
5. If the facts are shocking or gruesome, or if the language used is filthy, prepare the prospective jurors with an apology for having to present such evidence.
6. If you know that the critical issue is one of identification or voluntariness of a confession, etc., talk about it in voir dire and get the prospective jurors to commit themselves to follow the law.
7. If you have an obnoxious defense attorney and you anticipate having to object repeatedly to his or her inappropriate questions, explain to the prospective jurors the need for objections to make sure that only reliable competent evidence is presented.

### **COMBATING THE DEFENSE'S VOIR DIRE**

1. Do not let the defense attorney get away with asking the jurors to make a "promise" or "bond" with him or her to do anything.
2. Don't let the defense attorney minimize the charge involved or the process by which the defendant came to be in the courtroom. The statement that "all they have to do is file a piece of paper" is objectionable because it is not true. *However, should you object?*
3. Do not allow the defense attorney to get away with misstatements of facts or law.
4. Do not be afraid to object to objectionable voir dire. *Maybe?*
5. Never engage in wars of personalities with the defense attorney.
6. A common defense tactic is to ask jurors if they would give police officers any greater credibility simply because they are police officers. Respond to this by asking the jurors the same question and adding "but on the other hand, you wouldn't ignore the fact that police officers are especially trained in the detection and investigation of crimes, would you?"
7. Make sure to rebut any unwarranted impressions that might be left following the defense's voir dire.



8. Pay attention to the prospective jurors' reactions to the defense attorney's questions and to the defense attorney.

### ISSUES RELATING TO *WHEELER*

California law has been clear since 1978 that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial or ethnic group violates the state and federal constitutions. (*People v. Wheeler* (1978) 22 Cal.3d 258.) *Wheeler* was echoed 8 years later at the federal level in the case of *Batson v. Kentucky* (1986) 476 U.S. 79. The basic *Wheeler* procedure is as follows:

1. The defendant<sup>2</sup> makes a *prima facie*<sup>3</sup> showing of group bias in the exercise of peremptory challenges. The case of *People v. Walker* (1998) 64 Cal.App.4th 1062 provides excellent list of cases on inadequate *prima facie* showings;
2. The burden shifts to the prosecutor to provide a race-neutral [or group-neutral] explanation;
3. The prosecutor is presumed to have used his or her challenges in a constitutional manner, and the appellate courts give great deference to the trial court [*People v. Ervin* (2000) 22 Cal.4th 48, 74] which must;
4. Distinguish a bona fide reason from a sham excuse;
5. If the court grants the *Wheeler* motion, the remedy is to discard the entire jury panel and call a new one to begin anew. If the trial court erroneously denies the motion, a *Wheeler* error on appeal will result in a reversal of a conviction.

In the case of *People v. Jamison* (1996) 43 Cal.App.4th 560, the 2nd DCA held that body language alone [lack of eye contact by prospective juror] is an insufficient reason to support a prosecutor's challenge of a juror of the same race as the defendant. Fortunately, the California Supreme Court ordered the *Jamison* case depublished on June 12, 1996.

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<sup>2</sup> Or the prosecutor. The *Wheeler* rule applies to both sides.

<sup>3</sup> The federally mandated standard only requires the moving party to raise a **reasonable inference** of bias, which is more protective of defendants than California's standard of **strong likelihood**. (*Wade v. Terbune* (9th. Cir. 2000) 202 F.3d 1190; *People v. Martinez* (2000) 81 Cal.App.4th 339.)

In the case of *People v. Martin* (1998) 64 Cal.App.4th 378, the court upheld a challenge of a Jehovah's Witness prospective juror based on the juror's answer regarding religious principles making it difficult to judge others. Please note that a challenge of a Jehovah's Witness solely due to religious membership would still be unconstitutional. (*People v. Ervin* (2000) 22 Cal.4th 48.)

Gender as a cognizable group giving rise to a proper *Wheeler* motion. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.)

African-American males or females constitute a cognizable class for *Wheeler* purposes. (*People v. Gray* (2001) 87 Cal.App.4th 781.)

Gays and lesbians are cognizable groups for *Wheeler* purposes. (*People v. Garcia* (2000) 77 Cal.App.4th 1269.) The holding in *Garcia* was codified in Code of Civil Procedure section 231.5 which forbids the use of peremptory challenges on the basis of sexual orientation, race, color, religion, sex, national origin or "**similar grounds**."

Persons excused due to financial hardship based on low income remain a non-cognizable class for purposes of a *Wheeler* motion. (*People v. Carpenter (II)* (1997) 15 Cal.4th 312, 352; *People v. Carpenter (III)* (1999) 21 Cal.4th 1016, 1035.)



## USING EXPERT WITNESSES

- I. Know the area of expertise.
  - a. You must study the area so you are at least the 2<sup>nd</sup> most knowledgeable in the area.
  - b. Talk to your expert beforehand
    - i. Get outlines from them
    - ii. Ask what areas they like to highlight
    - iii. Ask their responses to defense attacks
- II. Simplify the presentation
  - a. Make easy to use exhibits
  - b. Don't over-do them
  - c. Use them persuasively
- III. Create a simple direct exam
  - a. Training and Experience
  - b. Explain what you do and why we care
  - c. How sure are you?
- IV. Have the expert lay foundation and re-use your demonstrative exhibits
- V. If defense puts on a battling expert, elicit the inconsistencies