

Statements made to the psychotherapist during this interview, however, are inadmissible in the guilt phase of the trial *unless* the defendant puts his mental condition in issue. *In re Spencer* (1965) 63 Cal.2d 400, 411; *People v. Danis* (1973) 31 Cal.App.3d 782, 586 (superseded by *Verdin v. Superior Court* (2008) 43 Cal. 4<sup>th</sup> 1096, now overruled by *Sharp v. Superior Court* (2011) 191 Cal.App.4<sup>th</sup> 1280

- iv. These experts may be called by either party. *Penal Code sec. 1027(e)*.
- v. The defendant's plea necessitates a bifurcated trial on the issues of guilt and sanity but with a single jury voir dire, including questioning on sanity issues.

If the defendant pleads not guilty by reason of insanity and also enters a plea of not guilty, trial is first held on the issue of guilt and the defendant is presumed sane. The first trial is conducted as if the defendant simply pleaded not guilty, without raising the insanity defense.

If the defendant is found guilty, a second trial is held on the issue of sanity. *Penal Code sec. 1026(a)*.

The separation of the two stages of the bifurcated trial is solely for the purpose of keeping the issues of guilt and sanity distinct. For other purposes the trial is regarded as single and continuing; for example: there is only one voir dire examination, during which the prospective jurors may be informed that the defendant has pleaded not guilty and not guilty by reason of insanity, and examined on their state of mind toward the issue of insanity. *Witkin & Epstein, California Criminal Law* (3d Ed.), V.5, 671, 964; *People v. Phillips* (1979) 90 Cal.App.3d 356; *People v. Guillebeau* (1980) 107 Cal.App.3d 531

The two phases *may* be tried by separate juries at the discretion of the court. *Penal Code sec. 1026(a)*; *People v. Williams* (1988) 44 Cal.3d 883, 952. Further, the parties may *waive* the right to a bifurcated trial. *People v. Kelly* (1973) 10 Cal.3d 565, 568

### c. Sanity Cases - Voir Dire Ideas and Topics

- i. “There might be two phases to this trial. The first is to determine whether a crime was committed, and who committed it. The second, if that is proved, will be to determine whether the defendant was **LEGALLY INSANE** at the time he committed the crimes proven in the first phase.”
- ii. “In that second phase, you will be given an actual definition of **LEGAL** insanity.
  - a. Will you promise to follow that legal definition?
  - b. When you see and hear the instructions by the court, you’ll see there is a difference between someone who has a **MENTAL ILLNESS** and someone who is **LEGALLY INSANE**, and not responsible for their actions. Do you understand why? Can you follow that instruction?
- iii. “In that second phase, I have no burden of proof. The defense cannot just claim I failed to prove anything in that phase. They have to prove that the defendant was **NOT GUILTY** by reason of **INSANITY**.”
- iv. “We talked earlier about doctors, do you all agree that all medicine is not an exact science? Especially true for behavioral sciences? Psychology and psychiatry?”
- v. “Do you believe it is possible to fool a doctor? Will you sort through the evidence? Compare the evidentiary facts and the medical testimony to the facts of this case to determine the truth?”
- vi. “I am the DDA. Most people’s expectation is for the DDA to prove the case. Do you feel that way? In this phase of the case, I have no burden. The defendant has already been convicted of .... That has been proven. It is the defense who must prove the defendant is not **legally responsible** by reason of insanity. Any problem with that? Is it fair that tie goes to the runner and that’s me?”
- vii. “What about the narrowness of the issue? Did the defendant know his actions were wrong on the date of the crime? Not delusional, suicidal etc... That’s not contested. Can you sort out those two things? To the extent that they are relevant to the issue, they can be considered, but that is not the question that gets answered. Just did he know his act was wrong?”