SELECTING A JURY

KERRY WELLS, DEPUTY DISTRICT ATTORNEY

I. WHAT TYPE OF JUROR DO YOU WANT

- A. MAY DEPEND ON TYPE OF CASE
- B. IN GENERAL
  1. TYPE OF PERSON YOU FEEL COMFORTABLE WITH
  2. HAPPY
  3. SMART-COMMON SENSE
  4. WORK WELL WITH OTHER PEOPLE - NO LONERS

II. GOALS OF VOIR DIRE

- A. SELL YOURSELF
- B. SELL YOUR CASE
- C. EDUCATE/INDOCTRINATE

III. SELLING YOURSELF

- A. FIRST IMPRESSIONS LAST
- B. IMPRESSION - YOU ARE COMPETENT, THEY CAN TRUST YOU, AND YOU CARE ABOUT YOUR CASE
- C. DON'T HAVE TO BE THE MOST EXPERIENCED ATTORNEY TO PROJECT THIS IMAGE

IV. SELLING YOUR CASE

- A. BY TIME VOIR DIRE IS OVER JURY SHOULD KNOW JUST ABOUT EVERYTHING THERE IS TO KNOW ABOUT YOUR CASE
- B. DIFFUSE ANY PROBLEMS

V. EDUCATING

- A. THE LAW IN YOUR CASE

B. DEVELOP UNINDOCTRINATING QUESTIONS

1. PRESUMPTION OF INNOCENCE

2. BURDEN OF PROOF

3. CHARGED DOESN'T MEAN GUILTY

4. REASONABLE DOUBT

VI. DO'S AND DON'TS - SPECIFIC TECHNIQUES

A. DO MEMORIZE THEIR NAMES

B. DO LOOK AT YOUR JURORS

C. DO LISTEN TO THEM

D. DO ASK QUESTIONS FOR A REASON

E. DON'T ASK LEADING QUESTIONS

F. DON'T TALK TO JURORS IN ORDER

G. DON'T ASK GROUP QUESTIONS

H. DON'T GET INTIMIDATED BY WHEELER MOTIONS

VII. THE PRACTICAL ASPECTS OF VOIR DIRE

JUDICIAL VOIR DIRE

Proposition 115 repealed the former Code of Civil Procedure (CCP) section 223 on voir dire and added the new CCP 223 as follows:

> "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

Thus, the trial court, rather than the attorneys, now has the responsibility of conducting the voir dire examination. However, the attorneys for both sides can still have significant input in the voir dire process.

The revised California Rules of Court concerning voir dire provide as follows:

Rule 228.1 Pre-voir dire conference in criminal cases

(a) [The conference] Before jury selection begins in criminal cases, the court shall conduct a conference with counsel to determine:

> (1) a brief outline of the nature of the case, including a summary of the criminal charges:
>
> (2) the names of persons counsel intend to call as witnesses at trial;

(3) the People's theory of culpability and the defendant's theories;

(4) the procedures for deciding requests for excuse for hardship and challenges for cause; and

(5) the areas of inquiry and specific questions to be asked by the court and, as permitted by the court, by counsel and any time limits on counsel's examination.

The judge shall if requested, excuse the defendant from then disclosing any defense theory.

(b) [Written questions] The court may require that all questions to be asked of prospective jurors, either orally or by written questionnaire, shall be submitted to the court and opposing counsel in writing before the conference.

Rule 228.2 Supplemental examination in criminal cases

In criminal jury trials after completion of the initial examination, on request of counsel or on the court's own motion and on a showing of good cause, the court may conduct or permit counsel to conduct supplemental questioning as the court deems proper.

[See Rules 516.1 and 516.2 for the Municipal Court].

Both the statute and the rules contemplate the attorneys submitting voir dire questions for the court to use in examining prospective jurors. Resource materials on voir dire have been provided to each division. Also, Division Chiefs should accummulate voir dire questions on the specific types of cases handled by their division. It is the responsibility of each deputy to prepare appropriate questions tailored to apply to the case being tried.

In addition, the court may permit the attorneys, upon a showing of good cause, to personally question prospective jurors. Deputies should request that both sides be permitted at least limited access to the jurors to personally conduct part of the voir dire. Such personal questioning by the deputy should aid in the process of obtaining a fair and impartial jury and eliminating prospective jurors who may be biased against the prosecution.

Remember that we need all twelve jurors to obtain a guilty verdict; the defense only needs one juror to prevent a conviction. Also, the voir dire examination must be sufficiently detailed to enable deputies to properly comply with the requirements of People v. Wheeler (1978) 22 C.3d 258 and People v. Johnson (1989) 47 C.3d 1194. Deputies can never base a peremptory challenge on group bias.

The new CCP 223 has changed the law in two additional respects. First, the practice of sequestering jurors for individual voir dire has been largely eliminated, including in death penalty cases. This overrules Hovey v. Superior Court (1980) 28 C.3d 1, which required such a procedure. However, CCP 223 still allows some court discretion, and a deputy may request sequestered voir dire if it is appropriate in a particular case.

Second, the purpose of voir dire is to aid in the exercise of challenges for cause. This overrules People v. Williams (1981) 29 C.3d 392, which permitted voir dire to assist in the intelligent exercise of peremptory challenges. Of course, many questions which might assist with peremptory challenges are also relevant to a challenge for cause for implied or actual bias (See CCP 225-231).

To properly implement judicial voir dire, it is essential that deputies think about and prepare for the voir dire process before trial. Deputies must prepare written and oral questions based on the nature of the crime and the facts of the case, taking into account the practice of the court in which the case is being tried. Deputies must vigorously represent our interests during the entire jury selection process. Our goal is to identify and eliminate the unfair or biased person so that the case may be tried before a reasonable and impartial jury.

PAUL PFINGST

VOIR DIRE

I. FORMULATE STRATEGY FOR THE ENTIRE TRIAL
(AKA EXCEDRIN HEADACHE #1)

A. The "real trial" starts before voir dire.

B. Select the messages, themes, or issues.

C. Themes must be pursued through opening statement, testimony, closing, and instructions.

II. VOIR DIRE GOALS

A. **Select 12 unbiased, reasonably intelligent, mainstream-type people.** (Prosecution and defense extremists need not apply.)

B. **Sensitize jurors to critical issues that they will ultimately have to confront.** (Leave the thinking to us.)

C. **Establish our professionalism and competence.** (Let those Dale Carnegie lessons pay off.)

1. **GOAL A: Selection**

(a) Watch them whenever and wherever you can. Locate the loners, big mouths and losers; then execute them.

(b) Note physical as well as verbal reactions to judge and defense attorney. Locate the people who distrust defense attorneys and hug them.

(c) Find the ones who respond to us. Rule of thumb: If it seems you didn't get along well with a juror--you didn't! Kick em.

(1) Do they look us in the eye?

(2) Do they follow our cues?

(3) Do they respond directly to our questions?

(4) Do they try to help us perform or are we doing all the work?

(5) Is there an ease to the conversation?

(d) Don't waste a lot of time on the sure winners and certain losers. Save attention for the question marks.

(e) Keep the questions simple. Complexity is quicksand.

2. **GOAL B: Sensitize**

(a) Pick two (or at most three) important ideas we want them to remember forever; i.e., bad people can be good witnesses; circumstantial evidence is great stuff; alibis are phony.

(b) We think positive ideas. We speak positive ideas. We have no problems, only solutions. So will the jury.

(c) Follow up on the two or three ideas in opening and closing. If they die at voir dire, they may be forgotten by deliberations.

(d) Make them tell you they will convict.

3. **GOAL C: Establish Professionalism**

(a) Jurors want us to succeed and they expect us to be competent.

(b) The single best predictor of a guilty verdict is the jury's perception of the prosecutor.

(c) The jurors' perception of the prosecutor is three times more important than their perception of the defense attorney.

(d) There are four "musts" for successful juror perception.

(1) The prosecutor must appear efficient and competent.

(2) The prosecutor must appear likeable.

(3) The prosecutor must be relied on to tell the truth.

(4) The prosecutor must appear confident about the case.

(e) Voir dire makes our first impression as a law enforcement official and as a person.

(1) Prepare a two to three minute opening.

(2) Don't forget your good buddy--the D.A.

(3) We are purposeful and direct. (Don't step in quicksand).

(4) We are concise.

(5) We tell them what we are looking for.

(6) We are not overly ingratiating.

(7) We keep it short and keep it moving.

(8) We obviously represent all of those things the defense attorney does not.

(f) Social Science tells us:

(1) Volume counts;

(2) Dress doesn't.

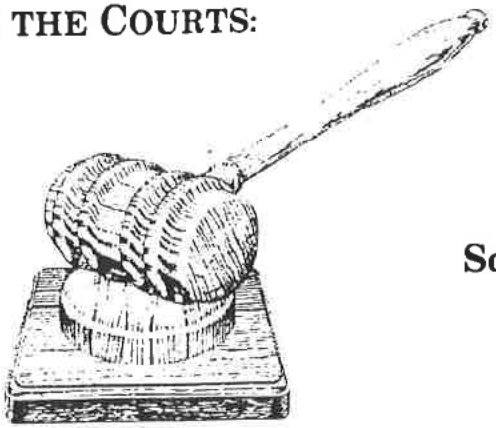
(3) Eye contact counts;

(4) Sex doesn't.

(5) Watch their eyes; watch their eyes; watch their eyes.

P.S. (1) Their jury selection expert is <u>our</u> friend.

(2) Questionnaires: a good question with legal complications.



Some Thoughts on Voir Dire Examination

by Judge Charles R. Hayes

Ask a trial juror what he or she thinks of the voir dire process. You are likely to hear that it is a waste of time. You are also likely to learn that jurors are frequently offended by an endless series of aimless, repetitious questions perceived to have little, if anything, to do with whether they would be fair jurors. Likewise, if you ask the same question to lawyers, they will say voir dire is boring and tedious—until they are given center stage and a captive audience of 45 jurors. Suddenly, those boring, tedious, and repetitious questions take on a certain eloquence in the mind of the speaker . . . and the eloquence continues on and on.

The practical considerations that follow are intended to assist counsel at getting the most out of jury selection while lessening the risk of irritating or offending jurors and others who are a part of the trial process. Admittedly, suggestions and the cited examples are rather basic. While they may be a matter of second nature to most trial attorneys, they highlight situations which recur with surprising frequency, even among experienced trial counsel.

Purpose of Voir Dire

Despite what many seminars on the subject seem to support, the purpose of voir dire is not to educate the jury concerning the particular facts of the case, nor is it to indoctrinate the jury as to counsel's factual or legal contentions. However, much of the focus of voir dire seems to be aimed toward these ends.

It is important to keep in mind that the purpose of voir dire examination is to select a fair and impartial jury. The examination consists of asking prospective jurors questions to determine whether grounds exist for the exercise of a challenge for cause or a peremptory challenge.

In the case of *People* v. *Williams* (1981) 29 Cal.3d 392, the California Supreme Court extended the scope of examination to allow attorneys to question jurors to aid in the exercise of peremptory challenges. Prior law required an attorney's questions to be directed to the issue of challenges for cause. While the court's decision in *Williams* led many to conclude that the floodgates had been opened, this concern proved largely unwarranted.

In 1987, the Legislature codified the *Williams* decision in Penal Code section 1078. Under this enactment, trial courts must permit reasonable examination of jurors by counsel. However, section 1078 by its own terms established an express "duty" of the trial court "to provide for a voir dire process as speedy, focused and informative as possible and to protect prospective jurors from undue harassment and embarrassment and from inordinately extensive, repetitive or unfocused examination." Even the former Chief Justice in *Williams* urged trial courts to employ an Evidence Code section 352 approach by weighing the relevance of voir dire questions against their potential to create confusion or waste time.

Section 1078 specifically sets forth the types of questions which "trial courts shall not permit" when their sole purpose is any one of the following: 1) educate the jury as to the facts of the case, 2) compel the jurors to commit themselves to vote in a particular way, 3) prejudice the jury for or against a party, 4) argue the case, or 5) indoctrinate the jury. Although none of the factors identified by the Legislature is particularly new, the legislative intent that trial courts should take strong measures to control the length and content of voir dire is clear.

Over the next few years, trial courts will be assuming more responsibility over the voir dire process and exercising increased control over both its length and content. Accordingly, attorneys should be prepared with well considered questions directed toward efficient voir dire.

Looking for the Right Jury

Prior to questioning jurors, think about the types of jurors best suited to your case. For example, consider looking for jurors with a business or accounting background to decide a fraud case; in a child molest case, you might seek jurors with more of a family orientation or background.

Think about the particular facts of the case as they relate to an "ideal juror." Are your witnesses primarily drawn from law enforcement or are the witnesses paid informants? Are your witnesses comprised of unsavory characters who might appear to be less sympathetic than the defendant? Each of these situations is somewhat unique to the case. A little prior planning related to the desired demographics of the jury will go a long way to the formulation of clear, concise, and thoughful questions. The careful formulation of questions will certainly aid in the selection of a jury relatively unencumbered by preexisting bias.

The Right Questions

Once you determine the types of jurors you will be seeking, tailor questions specifically to finding those jurors in light of the case you will be trying. Avoid asking merely a set of generic, boilerplate questions. Nothing puts a jury to sleep faster than asking each juror a series of repetitious, general questions not particularly germane to your case. At best you will put jurors to sleep. At worst you risk alienating the entire panel for wasting their time with aimless repetition.

In formulating questions, be aware of any preexisting bias of your own which could shade the wording or manner of your questioning. The following is a most graphic example which occurred when a male attorney blundered through the examination of the panel. The manner of this attorney's repeated questioning indicated he had certain views concerning the

place of women, and especially homemakers, in society.

The panel was comprised of several men who had extensive business or professional backgrounds, and several women, two or three of whom had described their current occupations as that of "mother" or "homemakers." The defense attorney asked the same questions of each woman. "Mrs. Jones, do you think that during deliberations, since you are just a housewife, you might tend to be intimidated by the professional men on the jury? Do you think you might tend to just go along with what ever decision they may have come to in this case?"

Finally, one female juror who had been asked the above questions passed a note to the bailiff asking to talk to the court and counsel privately. During the individual voir dire that followed, the juror came directly to the point. The juror stated in substance: "Mr. _____, that's the fifth time you have asked that question about merely going along with the professional men on the jury. You have only asked it of the women. You have not asked it of any of the men on the jury. I may be just a mother taking care of my son but I am not stupid as you apparently presume. I have an undergraduate degree from Berkeley and an MBA from Stanford. In answer to your question, NO! I will not be intimidated by the gentlemen on the panel. . . and I am not intimidated by you. Your sexist attitude toward women is transparent and offensive."

On how many occasions are similar thoughts or feelings encountered but not expressed other than among the jurors? Over a period of hours this lawyer had unintentionally demonstrated his own gender bias by condescension in the manner of his speech and the content of the questions.

Sensitive Areas or Questions

A sensitive area or question is encountered in voir dire where there is a reasonable possibility the trial judge will sustain opposing counsel's objection to your question or line of inquiry. If your case involves issues which you feel must be addressed to the jury during voir dire but which could draw a successful objection, bring the matter up during the pretrial conference with the judge.

All too often during the pretrial conference, attorneys—both prosecutors and defense counsel—fail to mention issues which will surely arise during voir dire. Frequently, important factual and legal issues regarding voir dire are neither raised nor discussed with the trial judge prior to commencing the process. Counselors simply wade into the pond without checking the depth of the water. By the time a particular question has been asked in open court, it is often too late.

This situation is a good example of the truth of the adage, "an ounce of prevention is worth a pound of cure." Bring up the topic during the conference. Do not just surprise the judge with something which could have been anticipated and thereby force the judge to rule on the objection on the spot. By discussing the sensitive matter in advance, you can convince the judge that a particular area is a legitimate subject of voir dire inquiry. A series of carefully phrased questions discussed with the court in advance may avoid drawing a successful objection from your opposition.

For example, a prosecutor might have a case resting entirely on circumstantial evidence and wish to ask the jury questions concerning the distinction between direct and circumstantial evidence. The prosecutor may wish to carefully phrase a series of questions relating to whether any member of the jury could not convict a defendant solely on circumstantial evidence. The precise language of the questions will determine whether they are permissible or objectionable as an attempt to compel the jury to commit themselves to vote in a particular manner.

Give the judge some warning. Let the judge know there is a legitimate area of concern that you wish to address in voir dire. Avoid the possibility of having the judge sustain your adversary's objection in front of the jury and either explicitly or implicitly finding your tactics are improper.

Avoid Tainting the Panel

On one hand, voir dire is aimed at eliciting information from prospective jurors which would reveal a bias or prejudice toward one party or the other. On the other hand, care should be taken not to inadvertently pose a question which may elicit a juror's response that could significantly prejudice your case. Similarly, you must be alert to opposing counsel's questions which may also result in prejudice to your case. For example, defense counsel may ask a perfectly legitimate question concerning whether any jurors have any bias for or against law enforcement officers or whether any juror has had any unpleasant experiences with law enforcement officers. However, opposing counsel may then follow with a question calling for the juror to respond in a narrative explaining the basis for the bias or to describe what happened during an unpleasant encounter with law enforcement. In this example, if either of defense counsel's questions calling for the narrative is asked without objection, you run a significant risk. In the presence of the panel, the juror may answer the question in graphic detail, describing perceived misconduct or mistreatment by a law enforcement officer. After Pandora's box is opened, the unwary or inattentive prosecutor who failed to take steps to prevent this from happening is for all practical purposes without remedy.

From the defense standpoint, there is also the story of the juror who expressed doubt about being able to be fair in a driving under the influence case. One of the lawyers asked her to explain "why" and was greeted with a graphic and emotional description of the juror's daughter being killed before her very eyes by a drunken driver. Having heard the tearful story, the balance of the panel was not in any position to dispassionately sit in judgment, and a new jury had to be impaneled. So goes the morning's voir dire, all because a lawyer who asked the question was not thinking and the balance of the participants were not being attentive.

The pretrial conference is the appropriate forum to discuss ground rules to prevent such occurrences. It is suggested that whenever a juror expresses an opinion in a sensitive area that needs follow up, the juror should be questioned on the subject at a convenient time out of the presence of the balance of the panel. Advance planning and discussion of such potential problems is time well spent by the court and counsel.

In summary, trial judges are given wide latitude and discretion in controlling the content and length of voir dire examination. Judges are individuals having differing views and approaches on the permissible scope of examination. The scope of voir dire is circumscribed by the unique factual and legal issues presented in the case you are trying. These complex factors simply highlight the importance of the well prepared prosecutor. Consideration should be given to (1) the scope and content of one's own voir dire examination, (2) the examination of the opposition, and (3) ensuring the court is fully apprised of the anticipated factual and legal issues presented by voir dire. To overlook the importance of the voir dire process in the case you are trying is to invite disaster. □

The Honorable Charles Hayes is a judge of the Superior Court of San Diego County.

Hon. J. Clinton Peterson

Voir Dire Examination of Jurors in the Criminal Case for Purposes of Peremptory Challenge

The parameters of voir dire examination of jurors in aid of peremptory challenges in criminal cases have been varied in practice. They also have represented a difficult and somewhat confusing area of the law for over 80 years in California. There is probably no phase of trial more frequently a source of exasperation to the courts and of frustration for counsel than voir dire. The practices of lawyers in jury selection and the trial court's role in controlling such practices have been the basis of frequent delays and repeated objections from counsel of both sides and have spawned a panoply of appellate court criticism and comment.

> "In theory, the attorneys try to select neutral and unprejudiced jurors; in practice, each strives to mold a panel favoring his side. To this end, *mind-numbing quantities of time* may be exhausted interrogating the veniremen. In big cases voir dire may continue *wearyingly for weeks or even months.*" [*People* v. *Helton* (1984) 162 Cal.App.3d 1141, 1144, 209 Cal.Rptr. 128 (Emphasis added).]

The Legislature has responded to such criticism by substantially amending California Penal Code section 1078. Among other changes, those amendments add subsections (b) and (c) to create a "Task Force on Voir Dire" to submit to pilot program counties (Fresno and Santa Cruz counties) by July 1, 1988, a list of standardized voir dire questions to be utilized exclusively by the courts of those counties in asking all questions "designed solely for assisting in the intelligent exercise of the right to peremptory challenge" [California Penal Code section 1078(b)].

Curtailment of all voir dire by counsel for the purpose of aiding exercise of peremptory challenges may be a statewide reality after January 1, 1992 [California Penal Code section 1078(d)], when the Judicial Council reports the pilot project results to the Legislature.

An examination of the legal history of voir dire in California, including the present law, reveals that the varied control or exercise of judicial discretion as to voir dire examination by appellate and trial courts has contributed as much to the existing problems as have the tactics of both counsels.

From 1912 until 1981, voir dire examination by counsel was prohibited from being conducted as a basis for the exercise of peremptory challenges. [*People* v. *Edwards* (1912) 163 Cal. 752, 127 P.58.] Such examination was allowed only for purposes of challenges for cause. The *Edwards* rationale was almost identical to the quoted language of *Helton, supra.* That is, the curtailing of . . .

> "tedious examinations of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, . . . the *supposed privilege* of doing this has been greatly abused." [*People* v. *Edwards, supra,* 163 Cal. 753 (Emphasis added).]

In 1981, the Supreme Court, in *People* v. *Williams* (1981) 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869, recognized the *Edwards* rule was often widely ignored in practice and was unevenly applied by trial courts. *Williams* held:

> "[C]ounsel should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause.
>
> "[W]e leave intact the considerable discretion of the trial court to contain voir dire within reasonable limits." [*People* v. *Williams, supra,* 29 Cal.3d 407-408.]

Williams instructed trial courts:

> "[C]ounsel should at least be allowed to inquire into '*matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.*' " [*Id.* at p.408 (Emphasis added).]

However, *Williams* excluded voir dire questions which sought to: 1) educate the panel to the case's particular facts, 2) compel jurors to commit to a particular vote, 3) prejudice a juror for or against any party, 4) argue the case, 5) indoctrinate the jury, and 6) instruct the jury in matters of law. Finally, *Williams* explained that:

> "[A] question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its *additional tendency* to indoctrinate or educate the jury." [*Id.* (Emphasis added).]

The six criteria for excluding voir dire questions (at least conditionally) recited above from *Williams* are incorporated in subdivision (a)(4) of the recent amendment to Penal Code section 1078. That subdivision, however, seems to accord with *Williams* on the proposition that a voir dire question may have a dual result (a legitimate purpose with a concomitant "tendency to indoctrinate or educate the jury") and be properly allowed:

"The trial court shall not permit questions which the trial court concludes would, *as their sole purpose*, do any of the following:" [California Penal Code section 1078(a)(4) (Emphasis added).]

An early troublesome area in applying *Williams* was encountered where voir dire questions were directed to matters of law. *Williams* held the trial court in a murder prosecution prejudicially abused its discretion in refusing to allow defense counsel to ask prospective jurors on voir dire "*reasonable*" questions about their "attitude," if so instructed, in following the legal doctrine that a person has the right to resist an aggressor by using necessary force and has no duty to retreat (*Williams, supra*, 29 Cal.3d 398).

"We therefore hold that in general a reasonable question about the potential juror's willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial. *Reversal will be required, however, only if the doctrine is actually relevant, and the excluded question is found substantially likely to expose strong attitudes antithetical to defendant's cause.*" [*Id.* at p.410 (Emphasis added).]

The Supreme Court revisited this last emphasized portion of *Williams* in *People* v. *Balderas* (1985) 41 Cal.3d 144, 222 Cal.Rptr. 184, 711 P.2d 480. *Balderas* cited *Williams* as providing this voir dire standard for questions involving jurors' attitudes toward relevant legal principles: "questioning need be allowed only on a doctrine both material to the trial and controversial" (*Balderas, supra*, 41 Cal.3d 184). Barred questions concerning jurors' willingness to apply instructions on circumstantial evidence were held *not* to be an abuse of discretion "since an average juror would probably not disagree with the court's instructions." (*Id.*) Conversely, the court said that, since it was well known a substantial segment of the public looked with disfavor on diminished capacity defenses (now abolished by Penal Code section 25), "the court would ve erred had it unduly restricted unsel from probing jurors' attitudes toward that doctrine." (*Id.* at p.185) *Balderas*, then, apparently applies *Williams* as requiring a trial judge to make a threshold determination that a legal doctrine included in a voir dire question is *controversial* before allowing the question, i.e., one on which jury members could be reasonably expected to disagree.

Since *Williams*, the appellate courts have considered whether trial courts abused their discretion in barring or curtailing voir dire examination undertaken for the purpose of assisting in the exercise of peremptory challenges.

People v. *Wells* (1983) 149 Cal.App.3d 721, 197 Cal.Rptr. 163, a post-*Williams*, pre-*Balderas* case, applied *Williams* to the following excluded voir dire questions in a murder case with a black defendant and a white female victim. Defendant's attorney claimed the right to explore attitudes of veniremen for racial bias:

Question: "What do you think of Playboy Magazine?"

Holding: Held properly excluded as irrelevant.

Question: [Two questions regarding Proposition 8 and the motivation for juror's vote thereon.]

Holding: Held properly excluded as infringing on a juror's right to privacy (Cal. Const. Art. I, sec. 1); too tenuous, broad and unfocused to elicit answers exposing racial bias.

Question: [Questions regarding juror's attitude toward cutbacks on the administration civil rights programs; hiring of minorities as prerequisites to obtaining government contracts; whether Los Angeles Police Chief Gates should have apologized for his remarks concerning effect of police choke holds on minorities.]

Holding: Properly excluded. Although possibly relevant, so unfocused, overbroad and intertwined with other concerns that answers were not substantially likely to uncover racial bias.

Question: "Why are there so few blacks in professional golf and tennis?" "Why are there so few blacks president (sic) of large corporations?" "Why has there never been a black governor of California?"

Holding: Each relevant and substantially likely to uncover racial bias or prejudice; trial court's refusal to allow such questions was abuse of discretion compelling reversal.
(*Wells, supra*, 149 Cal.App.3d 726-727.)

Wells has apparently not been subsequently cited in any opinion not decertified for publication as precedent for reversal on similar grounds.

The same Second Appellate District in *Helton, supra*, by a different division, took this view of restricted voir dire.

There is probably no phase of trial more frequently a source of exasperation to the courts and of frustration for counsel than voir dire.

Helton involved a claim of prejudiced restriction of voir dire in the court's refusal to allow defense counsel to ask prospective jurors if they would automatically, before hearing the testimony of defendant's girlfriend, an alibi witness, " 'say she's lying because she's the girlfriend' " (*People* v. *Helton, supra*, 162 Cal.App.3d 1145). The court's bar of this line of questioning "on the ground that the defendant was trying to educate the jurors and induce them to prejudice the evidence was upheld (*Helton, supra*, 162 Cal.App.3d 1145).

People v. *Fields* (1983) 35 Cal.3d 329, 197 Cal.Rptr. 803, 673 P.2d 680, following *Williams*, dealt with a prosecutor's voir dire as to an insanity defense. Objection to the following question was sustained: " 'On the other hand, do you feel that the defense of insanity is the last refuge of a scoundrel?' " (*People* v. *Fields, supra*, 35 Cal.3d 358.) The prosecutor's reframed question, " '[D]o you feel there could be such a thing as a person who is legally insane?' " (*Id.*) was held to be proper in scope and nonexcludable by the court "since the juror's views on the insanity defense was a suitable subject for voir dire." (*Id.*) The trial court was said to have acted properly in requiring questions regarding this subject, and proper in scope, to be " 'phrased in neutral, nonargumentative form' " (*Id.*).

Fields seems to make it clear that both prosecution and defense can ask voir dire questions testing jurors' attitudes toward relevant legal principles to be embodied in anticipated instructions, subject to *Williams* and *Balderas*.

Curtailment of all voir dire by counsel for the purposes of aiding exercise of peremptory challenges may be a statewide reality after January 1, 1992 [Cal. Pen. Code section 1078(d)]. . . .

In *People* v. *Kronemyer* (1987) 189 Cal.App.3d 314, 234 Cal.Rptr. 442, an attorney was prosecuted for perjury and grand theft arising from acts he committed while attorney and conservator for an elderly man. The appellate court held that the trial court erred in refusing to allow voir dire as to whether the prospective jurors . . .

"could imagine that a competent, but lonely, elderly client might

voluntarily make a substantial gift to his or her attorney.

"[W]e find the inquiry is directly relevant to the defense, i.e., that a lonely, elderly, wealthy client gave the major share of his liquid assets and bequested a substantial portion of the remainder of his estate to his attorney. . . . In fact, with the publicity surrounding the reported defalcations of attorneys toward their clients and client's (sic) property, we believe it is a matter falling within the category of those [strong feelings] ' "which either the local community or the population at large is commonly known to harbor . . . that may . . . significantly skew deliberations in fact." ' " [*Kronemyer, supra*, 189 Cal.App.3d 336-337.]

Kronemyer, however, found no *prejudicial* error in such voir dire restrictions because the court's rulings did not completely foreclose defense inquiry into the relevant area. Voir dire of most jurors was cursory, and defense accepted the jury with only one peremptory challenge.

People v. *Blackwell* (1987) 191 Cal.App.3d 925, 236 Cal.Rptr. 803, reversed a murder conviction because concealment of relevant information by a juror during voir dire constituted prejudicial juror misconduct. Defendant shot and killed her husband in their home, claiming to be a battered wife who shot the victim to prevent further beatings or her own death. In commenting on the propriety of questions to a female juror regarding alcoholism and domestic violence in her family, the court said they were:

> "[C]learly relevant to the issues in the case. (Citation.) Appellant's defense was that her husband's abusive conduct caused her to entertain an honest, even if unreasonable, belief in the necessity to defend herself against imminent bodily injury." *People* v. *Blackwell, supra*, 191 Cal.App.3d 931.

The foregoing authorities suggest that the line between proper and improper voir dire is not only a fine one, it is frequently almost indistinguishable. The amendment of Penal Code section 1078, coupled with recent expressions of appellate support for deferring to the trial judge's limitation of voir dire, indicate trial judges will be curtailing and aggressively controlling improper voir dire examination.

What constitutes "improper" voir dire examination is largely left to the trial court's exercise of discretion, which seems increasingly less likely to be found to be prejudicial error on appeal. However, these conclusions seem warranted:

1. The drumfire of criticism directed at counsel's voir dire examination of jurors in aid of peremptory challenges continues unabated after nearly 80 years. In fact, it may be increasing to the point where total curtailment of lawyers' voir dire examination of jurors for such purposes may well be established by the Legislature in the next decade.

2. Except in the courts of Fresno and Santa Cruz counties [from July 1, 1988, to June 30, 1991 (California Penal Code section 1078(b)], the rules governing counsel's voir dire of jurors require that all voir dire questions designed to aid the exercise of peremptory challenges must meet these threshold conditions:

a. They must be clearly relevant; and

b. They must expose jurors attitudes antithetical to the case of defendant or People.

3. Both prosecution and defense may address voir dire questions to prospective jurors that deal with legal doctrine if:

a. The question addressed to the prospective juror solicits that juror's attitude toward an announced legal doctrine;

b. The legal doctrine embodied in the question is properly stated;

c. The legal doctrine is relevant at trial to case issues;

d. The legal doctrine can be deemed to be "controversial," i.e., not one with which a juror would be likely to agree. A suggested format for such a question would be:

(i) Mr. ____, if chosen as a juror in this case, would you have any objection to following an instruction of the court advising you that one threatened with an attack justifying the right of self-defense need not retreat?

(ii) Ms. ____, if chosen as a juror in this case, would you have any objection to following an instruction of the court advising you that, where a person voluntarily does that which the law declares to be a crime, it is no defense that he did not know that his act was unlawful?

4. All parties are allowed to ask voir dire questions of jurors which explore a juror's attitude or opinion on matters as to which the local community or population at large is *commonly known* to harbor strong feelings; which feelings fall short of compelling a presumption of bias, but may significantly skew deliberations in fact.

5. Where voir dire question accomplishes dual results [i.e., (i) a proper result of legitimately obtaining information and knowledge to aid in the intelligent exercise of a peremptory challenge, and (ii) an improper result of indoctrinating or educating the jury], the question may not be excluded because of the incidental "improper" result. However, questions having the "improper" result as their *sole* purpose will be excluded.

6. Subject to the foregoing and pursuant to *Williams, supra*, 29 Cal.3d 408, and Penal Code section 1078(a)(4), counsel should avoid voir dire questions which seek to do the following:

a. Educate the panel to the case's particular facts;

b. Compel jurors to commit to a particular vote;

c. Prejudice a juror for or against any party;

d. Argue the case;

e. Indoctrinate the jury;

f. Instruct the jury in matters of law.

Voir dire should be carefully planned. With the broad discretion of trial judges as to voir dire and the conceded "fine line" between proper and improper examination, equivocal questions regarding the propriety of the subject or method of jury examination in criminal cases may be addressed to the trial court on *in limine* motion. Judicial interference in and curtailment of such examination, in the presence of a jury panel, is not only embarrassing, it may practically denegrate the offending party's case in the eyes of the jury because of a perception of the ineptness of counsel.

The Legislature and appellate courts are mandating active supervision of voir dire examiation by trial courts. Judicial intervention, without objection, to preclude proscribed voir dire practices is becoming, and will become, more common.

The practices of lawyers in jury selection and the trial court's role in controlling such practices . . . have spawned a panoply of appellate court criticism and comment.

Judge J. Clinton Peterson has been a Superior Court Judge in Solano County since December 1986. He was formerly a Deputy Attorney General for the State of Idaho and a Deputy District Attorney for Solano County.

COUNTY OF SAN DIEGO

INTER-DEPARTMENTAL CORRESPONDENCE

DATE December 27, 1988

MEMORANDUM

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: PETER C. LEHMAN
DEPUTY DISTRICT ATTORNEY
CHIEF, APPELLATE AND RESEARCH DIVISION

RE: JURORS

Attached is Chapter 1245, Statutes of 1988 - The Trial Jury Selection and Management Act. This act, which is effective on January 1, 1989, enacts an extensive revision of the laws with respect to juries, and consolidates all of them into the Code of Civil Procedure, starting with section 190.

Nothing in the act changes the permissible scope of voir dire examination of jurors.

Peter C. Lehman

PETER C. LEHMAN

PCL:esp

Attachment

Title 3

PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE

CHAPTER 1. TRIAL JURY SELECTION AND MANAGEMENT ACT

Cross References

Appellate courts, power to make findings where jury trial waived, see Const. Art. 6, § 11.
Civil actions, number of jurors, see Const. Art. 1, § 16.
Competency of jurors, religious beliefs, see Const. Art. 1, § 4.
Criminal cases, waiver of jury trial, see Const. Art. 1, § 16.
Grand jury, see Const. Art. 1, § 23; Penal Code § 888 et seq.
Right to trial by jury, see U.S.C.A.Const. Amends. 6 and 7; Const. Art. 1, § 16.

§ 190. Citation

This chapter shall be known and may be cited as the Trial Jury Selection and Management Act. *(Added by Stats.1988, c. 1245, § 2.)*

Former § 190 was repealed by Stats.1988, c. 1245, § 1.

§ 191. State policy; random selection; opportunity and obligation to serve

The Legislature recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship.

It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose; and that it is the responsibility of jury commissioners to manage all jury systems in an efficient, equitable, and cost-effective manner, in accordance with this chapter. *(Added by Stats.1988, c. 1245, § 2.)*

Former § 191 was repealed by Stats.1988, c. 1245, § 1.

Title 3

§ 192. Application of chapter

This chapter applies to the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial courts of the state. *(Added by Stats.1988, c. 1245, § 2.)*

Former § 192 was repealed by Stats.1988, c. 1245, § 1. See, now, § 193.

§ 193. Kinds of juries

Juries are of three kinds:

(a) Grand juries established pursuant to Title 4 (commencing with Section 888) of Part 2 of the Penal Code.

(b) Trial juries.

(c) Juries of inquest. *(Added by Stats.1988, c. 1245, § 2.)*

Former § 193 was repealed by Stats.1988, c. 1245, § 1.

§ 193.2. Repealed by Stats.1988, c. 1245, § 1.

For provisions relating to definitions, see § 194.

§ 194. Definitions

The following definitions govern the construction of this chapter:

(a) "County" means any county or any coterminous city and county.

(b) "Court" means the superior, municipal, and justice courts of this state, and includes, when the context requires, any judge of the court.

(c) "Deferred jurors" are those prospective jurors whose request to reschedule their service to a more convenient time is granted by the jury commissioner.

(d) "Excused jurors" are those prospective jurors who are excused from service by the jury commissioner for valid reasons based on statute, state or local court rules, and policies.

(e) "Juror pool" means the group of prospective qualified jurors appearing for assignment to trial jury panels.

(f) "Jury of inquest" is a body of persons summoned from the citizens before the sheriff, coroner, or other ministerial officers, to inquire of particular facts.

(g) "Master list" means a list of names randomly selected from the source lists.

(h) "Potential juror" means any person whose name appears on a source list.

(i) "Prospective juror" means a juror whose name appears on the master list.

(j) "Qualified juror" means a person who meets the statutory qualifications for jury service.

(k) "Qualified juror list" means a list of qualified jurors.

(*l*) "Random" means that which occurs by mere chance indicating an unplanned sequence of selection where each juror's name has substantially equal probability of being selected.

(m) "Source list" means a list used as a source of potential jurors.

(n) "Summons list" means a list of prospective or qualified jurors who are summoned to appear or to be available for jury service.

(*o*) "Trial jurors" are those jurors sworn to try and determine by verdict a question of fact.

(p) "Trial jury" means a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a question of fact.

(q) "Trial jury panel" means a group of prospective jurors assigned to a courtroom for the purpose of voir dire. *(Added by Stats.1988, c. 1245, § 2.)*

Former § 194 was repealed by Stats.1988, c. 1245, § 1. See, now, § 220.

§ 194.5. Repealed by Stats.1988, c. 1245, § 1

See, now, § 221.

§ 195. Jury Commissioners; appointment; term; ex officio commissioners; clerk/administrators; salaries; duties

(a) In each county, there shall be one jury commissioner who shall be appointed by, and serve at the pleasure of, a majority of the judges of the superior court. In any county where there is a superior court administrator or executive officer, that person shall serve as ex officio jury commissioner. The person so appointed shall serve as jury commissioner for all trial courts within the county. In any municipal or justice court district in the county, a majority of the judges may appoint the clerk/administrator to select jurors for their court pursuant to this chapter. In any court jurisdiction where any person other than a court administrator or clerk/administrator is serving as jury commissioner on the effective date of this section, that person shall continue to so serve at the pleasure of a majority or the judges of the appointing court.

(b) Except where the superior court administrator or executive officer serves as ex officio jury commissioner, the jury commissioner's salary shall be set by joint action of the board of supervisors and a majority of the superior court judges. Any jury commissioner may, whenever the business of court requires, and with consent of the board of supervisors, appoint deputy jury commissioners. Salaries and benefits of such deputies shall be fixed in the same manner as salaries and benefits of other court employees.

(c) The jury commissioner shall be primarily responsible for managing the jury system under the general supervision of the court in conformance with the purpose and scope of this act. He or she shall have authority to establish policies and procedures necessary to fulfill this responsibility. *(Added by Stats.1988, c. 1245, § 2.)*

Former § 195 was repealed by Stats.1988, c. 1245, § 1.

§ 196. Jury Commissioners; inquiry into qualifications; oaths; travel expenses; failure of prospective to respond; summons

(a) The jury commissioner or the court shall inquire as to the qualifications of persons on the master list or source list who are or may be summoned for jury service. The commissioner or the court may require any person to answer, under oath, orally or in written form, all questions as may be addressed to that person, regarding the person's qualifications and ability to serve as a prospective trial juror. The commissioner and his or her assistants, shall have power to administer oaths and shall be allowed actual traveling expenses incurred in the performance of their duties. Such traveling expenses shall be audited, allowed, and paid out of the general fund of the county.

(b) Response to the jury commissioner or the court concerning an inquiry or summons may be made by any person having knowledge that the prospective juror is unable to respond to such inquiry or summons.

(c) Any person who fails to respond to jury commissioner or court inquiry as instructed, may be summoned to appear before the jury commissioner or the court to answer such inquiry, or may be deemed to be qualified for jury service in the absence of a response to the inquiry. Any information thus acquired by the court or jury commissioner shall be noted in jury commissioner or court records. *(Added by Stats.1988, c. 1245, § 5.)*

Former § 196 was repealed by Stats.1988, c. 1245, § 1.

§ 196.1. Repealed by Stats.1988, c. 1245, § 1.

§ 197. Source lists of jurors; contents; data from department of motor vehicles; confidentiality

(a) All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court. Sources may include, in addition to other lists, customer mailing lists, telephone directories, or utility company lists.

(b) The list of registered voters and the Department of Motor Vehicles' list of licensed drivers and identification cardholders resident within the area served by the court, are appropriate source lists for selection of jurors. These two source lists, when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population, within the meaning of subdivision (a).

(c) The Department of Motor Vehicles shall furnish the jury commissioner of each county with the current list of the names, addresses, and other identifying information of persons residing in the county who are age 18 years or older and who are holders of a current driver's license or identification card issued pursuant to Article 3 (commencing with Section 12800) of, or Article 5 (commencing with Section 13000) of, Chapter 1 of Division 6 of the Vehicle Code. The conditions under which these lists shall be compiled semiannually shall be determined by the director, consistent with any rules which may be adopted by the Judicial Council. This service shall be provided by the Department of Motor Vehicles pursuant to Section 1812 of the Vehicle Code. The jury commissioner shall not disclose the information furnished by the Department of Motor Vehicles pursuant to this section to any person, organization, or agency. *(Added by Stats.1988, c. 1245, § 5.)*

Former § 197 was repealed by Stats.1988, c. 1245, § 1.

§ 197.1. Repealed by Stats.1988, c. 1245, § 1

§ 198. Master and qualified juror lists; random selection; use of lists

(a) Random selection shall be utilized in creating master and qualified juror lists, commencing with selection from source lists, and continuing through selection of prospective jurors for voir dire.

(b) The jury commissioner shall, at least once in each 12-month period, randomly select names of prospective trial jurors from the source list or lists, to create a master list.

(c) The master jury list shall be used by the jury commissioner, as provided by statute and state and local court rules, for the purpose of (1) mailing juror questionnaires and subsequent creation of a qualified juror list, and (2) summoning prospective jurors to respond or appear for qualification and service. *(Added by Stats. 1988, c. 1245, § 5.)*

Former § 198 was repealed by Stats.1988, c. 1245, § 1.

§ 198.5. Master and qualified jury lists; counties where superior court sessions held in cities other than county seat

In counties where sessions of the superior court are held in cities other than the county seat, the names for master jury lists and qualified jury lists to serve in those cities may be selected from the judicial district in which the city is located and, if the judges of the court determine that it is necessary or advisable, from a judicial district adjacent to a judicial district in which the city is located. *(Added by Stats.1988, c. 1245, § 5.)*

§ 199. El Dorado County; drawing jury trial venires

In El Dorado County, trial jury venires for the superior court shall be drawn from residents of the supervisorial district, or a portion thereof, within which the court will sit for such trial and from residents of such other immediately adjacent supervisorial district, or portion thereof, as may be specified by local superior court rules. Such venireman shall serve the court sitting in the geographical portion of the county from which this section and such court rules specify trial jury venires shall be drawn; provided that such rules shall afford to each eligible resident of such county an opportunity for selection as a trial jury venireman. Such court may, in its discretion, order a countywide venire in the interest of justice. *(Added by Stats.1988, c. 1245, § 5.)*

Former § 199 was repealed by Stats.1988, c. 1245, § 1.