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## Title 3

each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

(e) If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge. (Added by Stats.1988, c. 1245, § 5. Amended by Stats.1989, c. 1416, § 9.)

Former § 231 was repealed by Stats.1980, c. 81, § 26.

## § 232. Perjury acknowledgement and agreement

(a) Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgement and agreement shall be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement "I do":

"Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution."

(b) As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement "I do":

"Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." (Added by Stats.1988, c. 1245, § 5. Amended by Stats.1989, c. 1416, § 10.)

Former § 232 was repealed by Stats.1980, c. 81, § 26.

## § 233. Discharge of juror unable to perform duties; alternate jurors; discharge of jury

If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew. (Added by Stats.1988, c. 1245, § 5.)

Former § 233 was repealed by Stats.1980, c. 81, § 26.

## § 234. Alternate jurors; drawing and examining; qualifications; attendance; confinement; replacing original juror; fees and expenses

Whenever, in the opinion of a judge of a superior, municipal, or justice court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."

These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff, marshal, or constable during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff, marshal, or constable who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled. (Added by Stats.1988, c. 1245, § 5.)

## § 235. Juries of inquest; selection; compensation

At the request of the sheriff, coroner, or other ministerial officer, the jury commissioner shall provide

such prospective jurors as may be required to form a jury of inquest. Prospective jurors so provided shall be selected, obligated, and compensated in the same manner as other jurors selected under the provisions of this chapter. (Added by Stats.1988, c. 1245, § 5.)

Former § 235 was repealed by Stats.1947, c. 424, § 3.

§ 236. Juries of inquest; oath; duties

When six or more prospective jurors of inquest attend, they shall be sworn by the coroner to inquire who the person was, and when, where, and by what means the person came to his or her death, to inquire into the circumstances attending the death, and to render a true verdict thereon, according to the evidence offered them or arising from the inspection of the body. (Added by Stats.1988, c. 1245, § 5.)

§§ 238 to 240. Repealed by Stats.1988, c. 1245, § 1  
Former § 239 was repealed by Stats.1978, c. 718, § 6.

§§ 241 to 242. Repealed by Stats.1959, c. 501, § 3  
See, now, Penal Code §§ 902 to 906, 908.

§ 242a. Repealed by Stats.1961, c. 72, § 2  
See, now, Penal Code § 908.1.

§ 243. Repealed by Stats.1959, c. 501, § 3

§§ 246 to 248. Repealed by Stats.1988, c. 1245, § 1

§§ 250, 251. Repealed by Stats.1980, c. 81, § 29

§§ 254, 255. Repealed by Stats.1988, c. 1245, § 1

CHAPTER 2. COURT COMMISSIONERS

Section

- 258. Repealed.
- 259. Powers and duties.
- 259a. Repealed.
- 260 to 261.5. Repealed.

§ 258. Repealed by Stats.1953, c. 206, § 7  
See, now, Gov.C. §§ 69894.1, 70141, 70142 to 70144.

§ 259. Powers and duties

Subject to the supervision of the court every court commissioner shall have power to do all of the following:

(1) Hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.

(2) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry

thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.

(3) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.

(4) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.

(5) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of the party appearing at the hearing where the action is either uncontested or the other party or parties are in default. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

(6) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary alimony, costs and attorneys' fees, and issues of fact in contempt proceedings in divorce, maintenance, and annulment of marriage cases.

(7) Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of paragraph (5) above.

(8) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services. This paragraph does not apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.

(9) Provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which the commissioner resides.

(10) Authenticate with the official seal the commissioner's official acts. (Enacted 1872. Amended by Code Am.1877-78, c. 154, § 1; Code Am.1880, c. 35, § 1; Stats.1980, c. 229, § 1; Stats.1982, c. 517, § 95; Stats. 1989, c. 1105, § 5.)

Effect of L.1982, c. 517, see note under § 166.

Cross References

- Administration of oaths, see § 2093 et seq.
- Affidavits, see § 2009 et seq.
- Duties of commissioners in counties with population of 291,000 to 900,000, see Government Code § 70141.5.
- Findings of commissioner, see §§ 643 to 645.
- Mortgage foreclosures, see § 726.
- Notary fees, see Government Code § 8211.
- Official seals, defined, see § 14.
- Power of legislature to provide for court commissioners, see Const. Art. 6, § 22.
- Proof and acknowledgment of instruments, see Civil Code § 1180 et seq.

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VOIR DIRE  
GENERAL QUESTIONS

BY

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DEPUTY DISTRICT ATTORNEY  
LOS ANGELES COUNTY

JUNE 18, 1988

1. Credibility:

1. Liars ordinarily have a reason to lie. (M. \_\_\_\_\_, ordinarily, do you believe that normal persons need a reason to lie? That if there is no apparent reason for a person to be lying, then it is reasonable to believe that they will tell the truth?

2. If the People present a witness and there is no evidence that the witness is lying, will that suggest to you that the witness is telling the truth? Will you consider that in evaluating that witness's credibility?

3. (Ask a question involving...) The function of a juror is to determine who is telling the truth and who is not and the juror must be willing to perform that function and feel comfortable in making these kind of decisions irrespective of the consequences.

2. Testimony of a single witness.

1. Instruction: The testimony of a single witness is sufficient to prove any fact if you believe the witness.

2. If a witness testifies about a particular element of this offense, and you believe the witness so that you are convinced of the proof of that element beyond a reasonable doubt, would you require any further evidence of that element? Would you require that the people parade a line of witness or present a series of documents to corroborate that testimony even though you were already convinced beyond a reasonable doubt that it was proved by the testimony of that witness?

3. Do you understand that the same rule applies if the witness testifies and is able to convince you of all the

elements of the offense beyond a reasonable doubt, that no further evidence need be presented? Do you understand that principle? Do you agree with it? Will you apply it as instructed by the court?

3. Testimony of a police officer.

1. Do you think police officers are paid to lie?
2. Do you think police officers will suffer serious sanctions if they lie?...even if the case results in a conviction?
3. Do you think police officers will suffer any sanctions if they tell the truth and it results in an acquittal?
4. Do you think that a police officer can be mistaken without intentionally lying?
5. If you disagree with the investigation of the case by the police, but you are convinced that the defendant is guilty beyond a reasonable doubt, would you acquit the defendant just to teach the police a lesson?

6. Instructions:

1. Would you follow the instructions even if they conflict with your own personal ideas?
2. You understand that the jury room is not a place to legislate. The law has already been determined and both counsel expect that you will apply the law as the judge gives it to you? Now suppose there is an instruction that you strongly disagree with. Could you set aside your own personal feelings and nevertheless apply the law as the judge instructs, reserving your objections for another time to be conveyed to your legislator or other appropriate forum?
3. Can you understand how wrong it would be for both the defense and the people to expect that you will apply the law and find that someone is unwilling to do so? It would mean that despite our efforts to obtain a fair trial based on the law, that could not happen and this whole trial turned out to be a sham? It would be so important for us to discover if any of you have any serious objection to setting aside your personal feelings in applying the law at this stage rather than to subject you to the strain of defending

your personal convictions that may run against the court's instructions.

#### 7. Evidence:

1. You must decide from the evidence presented in court.

2. Do not consider items not introduced into evidence. E.g. M. \_\_\_\_\_, If a juror tries to say that he or she has visited the scene of the incident and that it is different than that testified to, what would be your response?

Do you understand that it would be improper to consider something like that?

Since the statement hasn't been subjected to the rules of evidence, and neither the defense nor I have had an opportunity to ask questions, or cross-examine the juror, and the juror has not been placed under oath, can you see why it is not right to consider such a statement?

(Other examples may be personal relations with individuals or police, expertise with a particular subject.

3. This does not mean that you should be restricted in using your common sense in evaluating the evidence and arriving at all the reasonable inferences and rejecting those inferences that you find are unreasonable.

#### 8. Circumstantial (Indirect) Evidence.

1. The law does not favor one over the other

2. Demonstrate direct and circumstantial.

a. Use of pen in pocket with the inference that it could be stuck with bubble gum.

b. Use of little boy who gets caught with cookie crumbs on his mouth. (Inference that someone flew in the window and put the crumbs on the boy's mouth)

c. Robber who is found with the wallet in his pocket belonging to the victim of a purse snatch. (Somebody put the wallet in his pocket and ran away.)

d. Man who goes to his car and puts keys in the ignition and starts the car and drives away. Inference is

that he intended to drive the car, instead of being forced to do so by believing he was commanded by a martian from outer space.

e. Footprints in the snow. Inference is that a person walked in the area vis. the snow fell coincidentally in the pattern of footprints.

f. Lipstick on the collar; inference is that there was an amorous encounter rather than his secretary used his collar as a napkin at lunch that day.

3. Indicate all the alternatives are "possible" but one is reasonable. They must be prepared to select the reasonable and reject the unreasonable even though the unreasonable alternative may be possible.

4. The use of circumstantial evidence requires the application of common sense.

9. Reasonable doubt.

1. Jurors must determine facts.

2. The facts are determined from the evidence, and evidence may be truthful, or untruthful, reasonable or not reasonable, possible or impossible, and so on.

3. Do you expect that in a trial there will be such evidence, i.e., truthful, untruthful, reasonable or unreasonable, possible and impossible?

4. The determination of facts often means that you must evaluate the truth of evidence that is in conflict. I.e., which version is truthful, reasonable, possible, etc.

5. Resolving conflicts may mean that as between two conflicting versions in the evidence, one pointing to guilt and the other pointing to innocence, you are convinced beyond a reasonable doubt as to that version that points to guilt, notwithstanding the existence of the version that points to innocence. Can you understand that the mere existence of a conflict of the testimony does not mean the existence of reasonable doubt?

Or, do you believe that the mere existence of a conflict of the evidence necessarily means the existence of reasonable doubt?

6. Do you understand that if a mere conflict in the

evidence meant reasonable doubt then in every case a defendant said he was not guilty he would be entitled to an acquittal even if you did not believe him? Can you understand it is important that you evaluate all the evidence and reject that evidence which may be in conflict that you do not believe is trustworthy?

10. Single juror holdout.

1. If you are the only juror voting for a particular position, will you listen to the other jurors to see if you may be wrong?

2. Do you believe it is possible for you to be wrong in evaluating the evidence in this case? Is there anyone on this jury who has never been wrong before?

3. If you are convinced that you are wrong after listening to your fellow jurors, will you unhesitatingly reverse your position in order to avoid what may be an injustice?

4. At the same time, will you discuss your position with your fellow jurors and give them the benefit of your thinking as to the evidence in this case?

11. Use of common sense.

1. You understand that being in a courtroom is no reason to use your common sense any differently than you would use it in any other place?

2. If you happen to be outside the courtroom and you hear something unreasonable it should seem as unreasonable to you as if you were to hear it inside the courtroom, don't you agree?

12. Standards of conduct.

1. Will you hold the defendant to the same standards of conduct that you believe are applicable to any other citizen?

2. Do you think that the defendant is entitled to a fairer trial than are the People?

3. Will you apply the rules of evidence and the law as the judge instructs equally as to the evidence presented by the people as well as that presented by the defendant?

4. Imagine, if you will yourself being asked to perform the same crime that the defendant is being charged with. Can you imagine what your response would be? Do you think that the response by the defendant or any one else should be any different than yours?

12. Sentencing:

1. Do you understand that sentencing is not an issue that may enter into your deliberations?

2. Do you understand that sentencing is a matter that rests exclusively with the judge and other governmental agencies that can evaluate the appropriate sentence, if any, that the defendant may serve?

3. Do you believe you will have the ability only to determine whether the defendant is guilty of the charge? You understand that you must not consider the consequences. If the defendant is found to be guilty, then the court, together with other governmental agencies are charged with the responsibility to determine what, if any sentence should be administered. Do you believe this is proper?

14. Appearance, etc. of deft.

1. Do you think the defendant is entitled to any consideration of leniency because of his youthful appearance?

2. Do you think there is anything in the law that says that if the defendant is young looking or nice looking, or has nice hair or a friendly smile that he is less likely to be guilty?

3. Do you think there is anything in the law that says that if the defendant comes from a particular economic class, or area of our community or has achieved a certain level of education, or social status, or that he has failed to do so, that he is entitled to any greater or lesser consideration of leniency in the application of the law than anybody else? Will you apply the law equally as to this defendant irrespective of his race, national origin, religion, economic status, social or educational status?

15. Deft. testifying



1. I don't know whether the defendant will testify in this case. If he chooses not to testify, you understand that you must not consider that decision to have any effect in the determination of his guilt. On the other hand, if he does, do you believe that his testimony is entitled to be judged by a different standard giving him more credibility than the standard used for any other witness?

2. If the defendant chooses to testify, do you think that he is entitled to a presumption of credibility merely because he is a defendant?

3. Do you understand that the person that gets on the witness stand is considered a witness and is to be judged by the same standards of credibility as any other witness?

4. Remember the question I asked whether you believe a person ordinarily has a reason to lie if he is lying? Will you consider that in judging the credibility of all witnesses including the testimony of the defendant if he should testify?

16. Closing

1. Is there any reason that you can think of that would prevent you from giving both sides in this case a fair trial?

1. Popular observation of a juror:

2. What is the most important part of a trial?

As far as I am aware, no one has ever been able to determine what, if any part of a trial is most important in determining its outcome. Not if it is the opening statement, the voir dire, the direct, the cross, the summation, the facts, the preparation, the temperature of the courtroom at any particular moment, the dress of any of the attorneys, their personality, the conduct of the judge, or even the prejudice or bias of any particular or group of jurors. If you win, and are asked why, you may say it was obviously because of your sterling performance and uncompromising devotion to perfection in the exercise of all of your endeavors. A more truthfull and accurate response may be, "Hell, I don't know."

3. The importance of insuring a competent performance of voir dire.

So why try? Why make such a supreme effort in any part of the trial, such as voir dire, if nobody knows the affect it may have in the trial? I think a good enough answer is because it is fun. Trying cases, each aspect of the case, can be a very enjoyable experience and to the extent you can have fun during the process, usually because you feel that you can do it well, then that should be a sufficient reason to try to do a competent job.

Other possible answeres may be that:

(1) It is necessary to try to "educate" the jurors about important aspects of the case, e.g. felony murder rule, aiding and abetting, single witness testimony is sufficient, etc.

(2) To condition them about the unfavorable parts and to have them oriented to receive such aspects favorably to the prosecution, e.g. sleazy witnesses and informants, negligible amount of dope, child and elderly witnesses who have difficulty articulating, viable defenses, bad police work, etc.

(3) To point out obscure but significant legal points, e.g. entrapment, possession, attempts, etc.

(4) To raise their level of consciousness as to certain areas, e.g. not to consider sentencing, both sides have a "right" to a fair trial, treat the defendant's testimony the same as any other witness, appearance of the defendant has no relation to guilt, etc.

(5) The process reflects your concern over the case (for whatever that is worth), it gives you a sense of having done the responsible thing, and who knows, you might be able to discover a juror that is willing to tell you that he or she is a bigot, that they hate police, that they can't understand the English language, that they are within the fourth degree in consanguinity or affinity to the victim or the defendant, etc.

4. So you want to voir dire a jury.

I will assume that you will want to voir dire a jury. Some DAs don't and therefore don't, and from what I know of their track record it does not reflect that they are less able to convict than any other DA. If it did, then we probably would mandate all DAs voir dire in the way that has "proven successful" for the DAs that do, and we would work to eliminate the offensive provisions of P.C. 1078. We don't and we haven't.

5. The importance of non-verbal communication, astrology, and intuition, etc.

I don't know whether non verbal communication has a significant affect on the "success" of voir dire, but I don't consciously try to do anything that I think is going to make the juror mad. I try to smile when it is appropriate, maybe more than usual to assist the jurors in relaxing and feeling good in the voir dire experience I am taking them through. I am not overly concerned with my dress. Sport coat or suit, depending on which I catch first in the closet. I try to get the pants to match the coat and the same color of right shoe with the left. I have the

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feeling that most jurors are impressed with a lawyer that is not impressed with what he or she wears in the court so long as it is within the norm of attire that is something more than casual weekend wear. If I picked a juror that is more concerned with whether my shoes match my tie, than the facts of the case, it is further proof that nobody can tell what it is that determines the guilt of a defendant. So, I don't ask juror if they care if my shoes match my tie.

6. "You can avoid Wheeler by picking the first twelve."

I am concerned about covering my rear on Wheeler motions. I don't dump jurors because of their race. I don't believe that I am going to win or lose a case because I left a juror of a particular race on the case. I honestly believe that despite my motives for trying a case, the community has a right to have a trial conducted without an expression of racial prejudice on the part of the DA. I think it is ugly when I see it, I feel good about not having to engage in it, even if I lose, but especially if I win, and I personally favor having a defendant being told by members of his own race rather than from some other race, that they disapprove of his conduct and that they would like to see him in the state prison. So, I try never to have a jury that does not have at least one person that is a member of the defendant's race.

Nevertheless, members of the defendant's race will often be excused for a variety of reasons, and I insure that when the inevitable Wheeler motion is made at the bench, I make my views clear about the necessity of having representatives of the defendant's race sit in judgement, and that the reason for dismissal of the jurors of the defendant's race was that they looked funny, or talked funny, or dressed funny, or would not make eye contact with me, or refused to articulate the reasons for their responses, or the like.

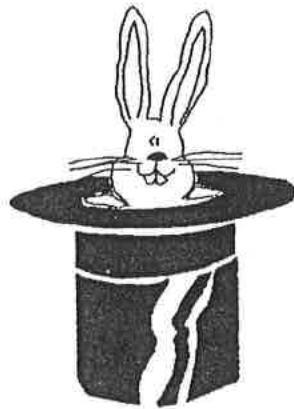
7. Analyze and draft. Analyze and draft.

Every case has its own unique problems. I have come to believe that it is important to disclose those special problems to the jury at the time of voir dire to condition the jurors on receiving the information in as favorable light as possible. I am not comfortable trying a case knowing that an evidentiary bomb is going to explode and hoping the jury will be able to understand and accommodate the context of the problem if they first hear of it during the presentation of the case. This means that in every case, you will have to sit and think where the problem is. What is the defense going to be. How can I condition the juror to accept the People's version despite the problem.

How can this be done by asking certain well phrased questions on voir dire? For example, in a simple drop case, the problem may be the credibility of the officers, in a rape case the existence of penetration, in a molestation case, the ability of the child to testify, in any case the sleaziness of the informant, in a narcotics case the attitude of the juror towards narcotics, or in a DUI case the attitude of the juror toward drinking and driving. Each case has its own. Your mission is to detect the problems, expose them in the most favorable light now that you have the opportunity, and reduce them to their lowest level of significance when they comes up in the case. But I believe strongly that it is of paramount importance, though I have no statistical data to verify it, to do this in voir dire.

Ned's

COMPLEAT <sup>®</sup>  
VOIR DIRE



New Prosecutor's College

1990

**MAGIC** (Maj'ik), n. The art of predicting or affecting events such as jury trials via supernatural powers. See also, Conjury, Bewitchment, Sorcery, Occultism, Witchcraft & VOIR DIRE.

The art of voir dire has as many experts and theories as exist trial attorneys. Clearly, however, the art of voir dire is a subset of the "art of trial advocacy." An effective vd is both consistent and integrated with the theme/theory of the case in order to present a coherent whole.

I hope that the following will serve as a guide to jury selection in misdemeanor cases.

Your buddy,

A handwritten signature in cursive script that reads "Ned".

Ned Lee  
Deputy District Attorney  
County of Santa Clara

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NED's RULES

1. Don't be an idiot.
2. Ask open ended questions.
3. LISTEN to the answers.
4. First impressions count.
5. Go with your gut.

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PURPOSE OF VD.

The nominal purpose of vd is to "examine the prospective jurors and select a fair and impartial jury." (CCP 223) Right or wrong, in practice, it also fulfills two other functions -- that of establishing a relationship between the attorneys and the jurors, and educating the jurors concerning the important issues of the case.

GOALS OF VD

- 1) Elicit information from jurors to assist in selecting fair and impartial jury.
- 2) Establish rapport with jury.
- 3) Educate the Jury (if permitted).

THE PROSECUTION JURY.

Prosecutors at all levels should decide what sorts of jurors will best be able to decide the case fairly and impartially. In my humble view, the ideal prosecution jury consists of persons who represent the values of the community as a whole. In general, a prosecutor will want to select persons who:

1. Have a stake in the community . . . homeowners, stable renters (> 2-3 years in one place), have children in the home, long-standing job relationships
2. Can work together. . . persons who work with others in "committee-like" environments . . . church committees, PTAs, supervisors, etc
3. Are mature . . . have had significant life experiences . . .



have been lied to, are used to making significant decisions

4. Respect the communities institutions and procedures

#### CHALLENGES

Challenges come in two flavors -- for cause and peremptory.

Prosecutors should be familiar with statutory reasons for implied bias such as being a former juror in same action, related to parties, etc. Former PC section 1074, now CCP 190-276.

Either party may challenge potential jurors for actual bias.

In most misdemeanor cases without multiple defendants, each side receives 10 peremptory challenges. In misdemeanor cases where the maximum punishment is 90 days or less, each side is entitled to 6 preempts.

Remember that there is no limit to challenges for cause.

Exercise a challenge by saying "The People will thank and excuse Ms. Juror (Aside to juror) Thank you, Ma'am."

#### VD PROCEDURES

Normally, after in limine motions are completed, the trial judge will discuss vd with counsel. The judge's discretion in vd is broad indeed (see Trends, infra), however, usually the court will disclose what questions it intends to ask of the jurors, and in what areas it will permit (or forbid) the attorneys to enquire.

A sample list of forbidden areas is included as Annex A.

Absent a contrary agreement, a misdemeanor case shall have 12 jurors. The court clerk will draw 12 names and the persons called will be seated in the jury box. The trial judge will then examine the potential jurors. Typically, the judge will ask about:

- business/occupation of prospective jurors and spouses
- general area or residence
- prior jury service and if there was a verdict
- acquaintances with parties, witnesses, attorneys, etc
- physical or time problems which might prevent juror from sitting.
- if juror has been victim/witness/defendant in same/similar crime
- close friends/relatives in law enforcement

After the judge has questioned the potential jurors, the defense

may conduct vd. After the defense has concluded questioning, the People may vd. The first challenge for cause is made by the defense. After all the challenges for cause are heard, the People have the first peremptory challenge. Neither side losses a peremptory challenge by "passing," however if both sides pass consecutively, all remaining peremptory challenges are waived and the jury is sworn.

The court may cause alternate jurors to be examined and sworn. It is a good idea to have at lease one, even on a two day trial. Each side gets one peremptory challenge for each alternate to be sworn.

#### GENERAL GUIDELINES

1. Tie your vd to your theme/theory of the case, as well as your opening statement, your evidence, and your argument.
2. ASK OPEN ENDED QUESTIONS and LISTEN TO THE ANSWERS. Hear what the juror is saying to you ( and what the juror is NOT saying.)

#### MECHANICS AND GOOD IDEAS

1. Speak up.
2. Stand erect.
3. Position yourself at proper distance.
4. Look at jurors (all of them.) Watch their eyes.
5. Be yourself, don't talk down.
6. Never argue with a juror.
7. Use group or "panel" questions first -- get them nodding or raising their hands.
8. Always be polite and professional -- first impressions count.
9. Never apologize -- be positive.
10. Deal with sensitive subjects - profanity, sex, blood, etc
11. Steal D's thunder -- protect his rights.
12. Highlight weaknesses.
13. Some may want to answer in camera.

14. Refer to D by name -- point to D, use D.
15. Memorize names or at least something about every one.
16. Talk about "Truth".
17. Project image of confidence and preparation.
18. If a your challenge for cause is denied, use a preemp.
19. All things being equal, short or restricted vd is in our favor.
20. In general, you should object when the defense attorney attempts to propogandize the jury or when he attempts to get specific facts before the jury
21. Get the jurors talking and keep them talking; avoid leading questions ---"Will you be fair and impartial?" -- as opposed to questions like "tell me about your ability to be fair and impartial in a case where your brother has been arrested for the dame offense."
22. Attempt to contrast with the defense. If she has been long, dull and boring, do not ask the same questions or be long, dull, or boring.
23. It can be a lot of fun to pass. After your second or third pass, and the def is still busy bouncing people, try a resigned smile and say "Gee, Your Honor, the People still believe the jury to be fair -- we pass"
24. Don't rely on stereotypes -- they tend to inhibit communication.
25. Keep the questions simple and short. Remember, these are the common people, the salt of the earth.

#### KINESICS (Body Language)

A huge amount of research has been done in this area -- see bibliography. My advice is DON'T GET WRAPPED AROUND THE AXLE ON THIS -- who's got which legs crossed, arms crossed, hands open, hands closed, sitting forward, sitting back, etc. Just GO WITH YOUR GUT - bounce people you're uncomfortable with, keep those you are comfortable with. After all, you've been using body language for years.

#### TRENDS

Clearly, the judicial trend in vd is to limit it. CCP 223 was enacted specifically to limit the length and scope of vd in

criminal cases. It specifically requires the judge to forbid questions that educate, indoctrinate, or instruct the jury on the facts or the law of the case. Strictly applied, this can be very favorable to the prosecution. However, the courts still seem to be less than consistent in the application.

#### The (dreaded) WHEELER Problem

Although a thorough treatment of the Wheeler case((1978) 22 C3 258) is beyond the scope of this lecture, all prosecutors must read the case, which concerns limiting use of peremptory challenges to prevent systematic exclusion of any constitutionally cognizable group from the jury. Exclusion by race is a good example. Don't do it.

Grossly oversimplified, first the defense must specifically object to your use of a peremptory challenge on Wheeler grounds. The defense must make a prima facie showing that you are excluding members of a cognizable group based on their group association rather than specific bias. Second, the court must find that a sufficient prima facie showing has been made. Third, once the court has found a prima facie showing, the prosecution has the burden of justifying his or her peremptory challenges.

You can avoid the Wheeler problem by taking the first 12, or very near to it.

Ned's GOOD PEOPLE

cops

middle class, middle aged homeowners

ties

prior jurors (unless hung)

pleasant, congenial people

friends/relatives in law enforcement

people who dislike defense attorney

retired persons

retired service persons

followers ( up to 11 per jury)

steady job

rapport

persons with children at home

persons with traditional lifestyles

Ned's BAD PEOPLE

lawyers

Teenagers/ young people

post graduate education (think too hard -- over-represented as forepersons)

small claims or traffic court litigants

people who have been on hung juries (unless they voted G)

previous arrests or convictions of juror or family for same/similar offense

occupations sympathetic to defendants

evidence of anti-establishment or anti-police attitudes (especially if prosecuting cops)

unusual or weird people

writers

people who have trouble making decisions -- philosophers or people who are overly thoughtful, introspective, or conscientious

people who ramble on and talk too much in vd

any display of antagonism towards you or judge

people who have led sheltered lives, with little practical experience

social workers

teachers (same thing)

scientists

cosmetologists/barbers

bartenders

## THE QUESTION COMPENDIUM

Here, in no particular order are a bunch of questions I have used at one time or another. Some worked, some didn't. No guarantees, no promises.

Remember, try to ask panel questions first, then follow with questions to individual potential jurors.

### **Military Service**

- Q: Have you or your spouse ever been in the military?
- Q: What branch of the service were you in?
- Q: What rank did you obtain?
- Q: Did you serve in the Military Police?
- Q: Did you ever serve as a member of a Court Martial?

### **Volunteer and Part-Time Jobs**

- Q: Have you ever been a volunteer for any group, club, or organization?
- Q: What kind of part-time jobs have you had?

### **Education**

- Q: What is your educational background?
- Q: (Follow up with majors, degrees, schools, etc)
- Q: Do you have any plans to go back to school?

## Membership/Participation in Organizations and Groups

Q: What organizations of a civic, religious, political, or social nature are you involved in?

Q: Do you support or belong to a group or organization that supports a change in our laws concerning \_\_\_\_\_? (eg MADD, NORML, NRA, etc)

Q: (follow up -- how active, how long, etc)

## Juror as Witness

Q: have you ever been a witness before?

Q: what was the nature of the proceeding?

Q: Testify for plaintiff or defendant?

## Involvement with Persons arrested or charged

Q: Have you ever posted bail for anyone who was arrested?

Q: (Who/what crime/when/relation to)

## Objections

Q: Our legislature has made rules to keep out improper or unreliable evidence. Consequently, during trial I may object to questions asked by Ms. Defense Lawyer. If Judge Lastname upholds my objection, you may not be able to hear the answers to these questions. Will you earnestly avoid guessing or speculating about the answers?



Q: Do you understand that attorneys are allowed to make objections because this provides the only means by which the judge can decide what is proper evidence?

Q: Sometimes Judge Lastname may overrule an objection. Would you be prejudiced against a lawyer because the lawyer was not correct?

#### **Questions concerning TV and Movies**

Q: You understand that (this trial/real life/police work) will not be like (television/LA LAW/Hill Street Blues/Miami Vice)?

Q: If (I/the police) do something, and you think to yourself "hey, that's not the way (Don Johnson/Grace VanOwen/Perry Mason) would do it!" -- would you vote to acquit D based on that alone?

Q: Similarly, if my opponent were to make what you perceived as an error -- would you convict D just to teach the attorney a lesson?

#### **Questions about Defendant**

Q: I am sure you have noticed that D appears to be (young/old/attractive/ugly/handicapped etc). Do all of you agree that the law should be applied to all persons regardless of their age/appearance/physical condition?

Q: Is there anyone on the jury who would have a difficult time finding the defendant guilty because of her (age/appearance/disability)?

**Pro Pers**

Q: As you have seen, D is not represented by an attorney. Rather, he has chosen to represent himself in the trial. Do you understand that D has a right under the law to be represented by counsel if D chooses?

Q: Do you understand, Mr. Juror, that D has a perfect right to represent herself and that there is nothing wrong with doing this?

Q: Do you realize that her representation of herself is her own choice and a decision she made for herself?

Q: The defendant has chosen to represent herself despite the fact that the state would appoint an attorney to represent her at no charge or cost if she could not afford an attorney. Does anyone think it is unfair to try D when she is not represented by counsel?

Q: In fact, the choice the defendant has made to represent herself won't even enter into your deliberations, will it?

Q: Would you be willing to hold the defendant to the same standards of conduct during the trial as you would expect of me or any other attorney?

Q: Will all of you be able to set aside any feelings of pity or sympathy that you have for the defendant because she is not represented by an attorney?

Q: What feelings or opinions do you have about the fact that D is representing herself?

Q: Understand sole purpose here is final truth.

## **Sympathy for Defendant**

Q: During the trial, you may become aware that D's (wife/mother/kids/etc) will generally be present in the courtroom. Will you be able to ignore their presence and consider only the evidence in reaching your verdict?

Q: Do you understand that the evidence presented by D is not entitled to any more weight simply because he is accused of a crime?

Q: By a show of hands, how many have children between 18 & 25? How old? Son or Daughter?

Q: Would the similarity in ages between you kids and the D have any effect on this case?

### **General Questions:**

Q: Have you or any member of your family ever had a bad experience with a law enforcement officer? (eg- impolite cop, undeserved ticket, unsolved crime, etc)

Q: Have you or any member of your family been involved in a court case in any way -- including as a P, D, witness, juror, etc, including traffic or small claims?

Q: Where were you raised? (judge will likely ask where they reside)

Q: Familiar with location of crime? Had occasion to drive by or near?

## Liars

Q: Do you have children?

Q: Have you ever been lied to?

Q: How could you tell?

Q: Do you think its possible that someone might take an oath to tell the truth, and then lie from the witness stand?

Q: In sorting fact from fiction, would consider

-surrounding facts (other evidence)?

-demeanor of witness on stand?

- motive to lie or tell the truth?

- absence of motive to lie?

- corroboration (or lack of )?

Q: Would you agree that liars ordinarily have a reason to lie?

Q: If one side or the other presents a witness and there is no evidence that that person is lying, will that suggest to you that the person is telling the truth?

## Mistakes

Q: If you felt the (police/prosecutor/witness) made a mistake, but you were otherwise convinced D was guilty -- would you acquit just to teach a lesson?

## Unsympathetic Victims or Witnesses

Q: Would you automatically disbelieve or reject the testimony of a witness or victim because you do not like their appearance? The actions they took? Their conduct or morals?

## Reasonable Doubt

Q: Is there anyone here who will disregard the judge's instructions and require the People to prove more than the law requires?

Q: You understand that the law only requires that I prove the case BRD? Not beyond any possible doubt, or any doubt whatsoever?

Q: Lets talk for a moment about what is NOT reasonable doubt. For example, it is possible in this case, as in any other, that there may be a conflict in the evidence. You understand that simply because one or more facts are disputed that that alone does not give rise to reasonable doubt?

Q: Similarly, in some cases that def testifies. Without more, do you understand that merely because the defendant denies a charge does not give rise to reasonable doubt -- otherwise how would anyone ever be convicted of any crime if all they had to do was deny the crime?

Q: Have you and your (spouse/parents/significant other/old friend) ever recollected differently about an event where you were both present -- first date, proposal, prom, etc) Does that

mean that one of you was lying? You agree then that two person witnessing the same event may recall it somewhat differently?

Q: Understand that the only thing the People have to prove BRD are the elements of the offense? That there may be loose ends and incomplete pictures about non-crucial facts at the end of the trial? That real life rarely ties things up at the end like TV or the movies?

Q: Agree that it is impossible in human affairs to prove most things beyond (1) any doubt whatsoever, (2) shadow of a doubt, (3) to absolute certainty?

Q: Understand you are not to search for a reasonable doubt if none arises naturally?

#### **Circumstantial Evidence**

Q: Understand the law does not favor direct over circumstantial.

Q: kid w/cherry pie

Q: Trash gone from your curb on trash day

Q: Kid/swimming pool

Q: Heard phrase on TV/Movies "merely circumstantial"? Follow judge's instruction that circumstantial evidence is every bit as strong as direct evidence?

Q: Examples -- blind deaf witness vs fingerprint at POE

-- fleeting glance of robber at night vs V's wallet found on D moments after robbery

-- Bank teller: "that's him" vs tellers description that D has red bandana, Gucci bag, showed me a note that said

"this is a stuck up" (sic) and I gave him \$1,234.56. D drove away in car w/license plate ABC123. Cops find car ABC123 occupied by man in red bandanna, a Gucci bag w/ \$1,234.56 and a note which says "this is a stuck up"

#### Duces

Q: Anyone NOT have a driver's licence?

Q: Anyone not drive a car?

Q: Would you all agree that a driver needs her full attention and ability to drive a car safely?

Q: Would you agree that alcohol in sufficient quantities reduces ability to drive safely?

Q: Are you aware that there are different degrees of alcohol effects: sober, UI, drunk, falling down drunk, passed out, dead?

Q: Will you follow law and only require proof that D was UI and not necessarily drunk?

Q: Do you take a drink with dinner from time to time?

Q: Do you drink socially?

Q: Is there anyone on the panel who has NOT seen someone they thought was UI alcohol?

Q: (To individuals) What was it about that person that made you think they might be UI alcohol? (Elicit objective symptoms they will hear from wits -- R/BS eyes, slurred speech, staggering, talkative, mean, etc)

Q: Have you seen someone you thought was intoxicated even though