APPENDIX TO
CALIFORNIA RULES OF COURT
DIVISION I
STANDARDS OF JUDICIAL ADMINISTRATION

## Sec. 8.5. Examination of prospective jurors in criminal cases

**(a) [In general]**

**(1)** This standard applies in all criminal cases.

**(2)** The examination of prospective jurors in a criminal case should include all questions necessary to insure the selection of a fair and impartial jury.

The trial judge may, upon a showing of good cause, permit supplemental examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case, relevant to a challenge for cause.

**(b) [Examination of jurors]** The trial judge's examination of prospective jurors in criminal cases should include the following areas of inquiry and any other matters affecting their qualifications to serve as jurors in the case:

**(1)** (To the entire jury panel after it has been sworn and seated): I am now going to question the prospective jurors who are seated in the jury box concerning their qualifications to serve as jurors in this case. All members of this jury panel, however, should pay close attention to my question, making note of the answers you would give if these questions were put to you personally. If and when any other member of this panel is called to the jury box, he or she will be asked to answer these questions.

**(2)** (To the prospective jurors seated in the jury box): In the trial of this case each side is entitled to have a fair, unbiased and unprejudiced jury. If there is any fact or any reason why any of you might be biased or prejudiced in any way, you must disclose such reasons when you are asked to do so. It is your duty to make this disclosure.

**(3)** (In lengthy trials): This trial will likely take _____ days to complete, but it may take longer. Will any of you find it difficult or impossible to participate for this period of time?

**(4)** Ladies and gentlemen of the jury: This is a criminal case entitled The People of the State of California v. _____. The (defendant is) (defendants are) seated _____.

**(a)** (Mr.) (Ms.) (defendant), please stand and face the prospective jurors in the jury box and in the audience seats. (Defendant complies.) Is there any member of the jury panel who is acquainted with the defendant or who may have heard (his) (her) name prior to today? If your answer is yes, please raise your hand.

(b) The defendant, _____, is represented by (his) (her) attorney, _____, who is seated _____. (Mr.) (Ms.) (defense attorney), would you please stand? Is there any member of the jury panel who knows or who has seen (Mr.) (Ms.) _____ prior to today?

(c) (If there is more than one defendant, repeat (a) and (b) for each co-defendant.)

(5) The People are represented by _____, Deputy District Attorney, who is seated _____. (Mr.) (Ms.) (district attorney), would you please stand? Is there any member of the jury panel who knows or who has seen (Mr.) (Ms.) _____ prior to today?

(6) The defendant is charged by an (information) (indictment) filed by the district attorney with having committed the crime of _____, in violation of section _____of the _____ Code, it being alleged that on or about _____in the County of _____, the defendant did (describe the offense). To (this charge) (these charges) the defendant has pleaded not guilty, and it will be the question of (his) (her) guilt or innocence of (this charge) (these charges) that you will be asked to decide if you are selected as a trial juror in this case. Having heard the charge(s) which (has) (have) been filed against the defendant, is there any member of the jury panel who feels that he or she cannot give this defendant a fair trial because of the nature of the charge(s) against (him) (her)?

(7) Have any of you heard of, or have you any prior knowledge of, the facts or events in this case?

(8) During the trial of this case, the following persons may be called as witnesses to testify on behalf of the parties: (The defendant may be excused from disclosing the name of any witness. Do not identify the side on whose behalf the witnesses might be called.) Have any of you heard of or otherwise been acquainted with any of the witnesses just named? You should note that the parties are not required and might not wish to call all of these witnesses, and they may later find it necessary to call other witnesses.

(9) Do any of you have any belief or feeling toward any of the parties, attorneys or witnesses that would make it impossible, or difficult, for you to act fairly and impartially, both as to the defendant and the People? Do any of you have any interest in the outcome of this case?

(10) How many of you have served previously as jurors in a criminal case? (To each person whose hand is raised):

(a) (Mr.) (Ms.) _____, you indicated you have been a juror in a criminal case? What was the nature of the charge in that case? (Response.)

(b) Do you feel you can put aside whatever you heard in that case and decide this case on the evidence to be presented and the law as I shall state it to you? (Response)

(11) May I see the hands of those jurors who have served on civil cases, but who have never served on a criminal case? (Response) You must understand that there are substantial differences in the rules applicable to the trial of criminal cases from those applicable to the trial of civil cases. This is particularly true respecting the burden of proof which is placed upon the People. In a civil case we say that the plaintiff must prove his case by a preponderance of the evidence. In a criminal case, the defendant is presumed to be innocent, and before he may be found guilty, the People must prove his guilt beyond a reasonable doubt. If the jury has a reasonable doubt, the defendant must be acquitted. Will each of you be able to set aside the instructions which you received in your previous cases and try this case on the instructions given by me in this case?

(12) The fact that the defendant is in court for trial, or that charges have been made against (him) (her), is no evidence whatever of (his) (her) guilt. The jurors are to consider only evidence properly received in the courtroom in determining the guilt or innocence of the defendant. The defendant has been arraigned and has entered a plea of "not guilty," which is a complete denial, making it necessary for the People, acting through the district attorney, to prove beyond a reasonable doubt the case against the defendant. Until and unless this is done, the presumption of innocence prevails.

(13) Have any of you, or any member of your family or any close friends to your knowledge, ever been arrested for or charged with an offense similar to that in this case?

(14) Have any of you, or any member of your family or any close friends to your knowledge, ever been a complaining witness or a victim in a case of this kind?

(15) Have any of you, or any member of your family or any close friends to your knowledge, had any law enforcement training or experience or been a member of or been employed by any law enforcement agency? By law enforcement agency, I include any police department, sheriff's office, highway patrol, district attorney's office, city attorney's office, attorney general's office, United states attorney's office, FBI, etc.? (If so, elicit the details of the experience or connection.)

(16) Would you be able to listen to the testimony of a police or other peace officer and measure it by the same standards that you use to test the credibility of any other witness?

(17) Would you have any difficulty or embarrassment in returning a verdict for or against the side which had a police or other peace officer as a witness?

**(18)** (When appropriate). It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a life style different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?

**(19)** It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply that law to this case. To put it somewhat differently, whether you approve or disapprove of the court's rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. Will all of you follow the law as given to you by me in this case?

**(20)** Each of you should now state your name, where you live, your marital status (whether married, single, or widowed or divorced), the number and ages of your children if any, your occupational history, and the name of your present employer. If you are married, you should also describe briefly your spouse's occupational history and present employer if any. Please begin with juror number one.

**(21)** Do you know of any other reason, or has anything occurred during this question period, that might make you doubtful you would be a completely fair and impartial juror in this case or why you should not be on this jury? If there is, it is your duty to disclose the reason at this time.

**(22)** (At this point the court asks each side to exercise any challenges for cause.)

(At this point the court calls on each side, alternately, to exercise any peremptory challenges.)

**(23)** (When a new prospective juror is seated, the court should ask (him) (her)):

(i) Have you heard my questions to the other prospective jurors:

(ii) Have any of the questions I have asked raised any doubt in your mind as to whether you could be a fair and impartial juror in this case?

(iii) Can you think of any other reason why you might not be able to try this case fairly and impartially to both the prosecution and defendant, or why you should not be on this jury?

(iv) Give us the personal information requested concerning your occupation, that of your spouse and your prior jury experience.

(Thereupon, as to each new juror seated, the court should ask counsel whether it has adequately covered the proper subjects of inquiry, ask such additional questions as the court determines are proper, permit counsel upon request to ask supplemental questions, and proceed with challenges as above.)

**(d) [Improper questions]** When any counsel examines the prospective jurors, the trial judge should not permit counsel to attempt to precondition the prospective jurors to a particular result or allow counsel to comment on the personal lives and families of the parties or their attorneys. Nor should he allow counsel to question the jurors concerning the pleadings, the applicable law, the meaning of particular words and phrases, or the comfort of the jurors, except in unusual circumstances, where, in the trial judge's sound discretion, such questions become necessary to insure the selection of a fair and impartial jury.

1. What is your business or occupation?

2. What is the business or occupation of your spouse if you are now married:

   a. If you are no longer married or if your spouse is deceased, what was his or her business or occupation during the marriage or during his or her lifetime?

3. Of whom does your family consist?

   a. If adult children, what are their businesses or occupations and that of their spouse, if any?

4. In what area of San Diego County do you reside? (Do not state your home address.)

5. What prior jury experience have you had?

   a. How many civil cases have you tried; did any of these cases go to the jury, and did you decide them?

   b. How many criminal cases have you served on; did they go to the jury, and did you decide them?

      (1) On the criminal cases that you have served on as a juror, what was the charge or charges filed against the defendant?

6. Would the nature of the charges preclude you from giving the defendant a fair trial?

7. Do you have anything in your mind that would make it difficult or impossi to act fairly and impartially both as to the defendant and the People?

7A. Do you have any bumper stickers on your car?

8. Are you acquainted with, or have you had any personal dealings or contacts with, any of the

   a. parties or attorneys?

   b. possible witnesses?

9. Have you, or any close relative ever been:

   a. a victim of a crime?

   b. a witness to a crime?

   c. a party or a witness in any lawsuit?

10. Have you had any connection whatsoever with law or law enforcement work?

11. Do you have any relatives or close friends who are, or have been, involved in law or law enforcement work such as:

| | |
|---|---|
| 1. Police Officers | 5. Judges |
| 2. Deputy Sheriffs/Marshals | 6. Probation Officers |
| 3. Lawyers | 7. Immigration Officers |
| 4. Deputy District Attorneys | 8. Or other similar occupations? |

12. Would you be able to listen to the testimony of a peace officer and measu it by the same standards that you would use to test the credibility of any other witnesses?

13. Do you agree to be governed by the Judge's rulings and instructions given by the Court as to the law rather than by any personal view you may have of what you think the law is or what you think the law ought to be?

14. Do you have any quarrel with the rule of law which requires the People to prove their case beyond a reasonable doubt?

15. Do you agree not to make up your mind as to the guilt or innocence of the defendant until you have heard all of the evidence, the instructions and have deliberated with your fellow jurors?

DEPT. 11? - SUPERIOR COURT:
BONNIE RUNDLE - COURT CLERK
ED BARTH - BAILIFF
ANA REID - COURT REPORTER

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.

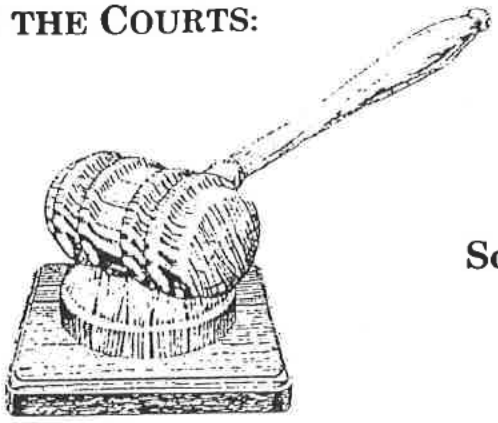
(3) Eye contact counts;

(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. □

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

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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 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*, . . . 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.* p.410 (Emphasis added).]

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 have erred had it unduly restricted counsel 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*.

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

**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)]. . . .**

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:

**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.**

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. □

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§215. Enacted 1872. Repealed 1980 ch. 81.

§§219, 220. Enacted 1872. Repealed 1980 ch. 81.

§§225-227. Enacted 1872. Repealed 1988 ch. 1245 §1.

§228. Enacted 1876. Repealed 1988 ch. 1245 §1.

§§230, 231. Enacted 1872. Repealed 1980 ch. 81.

§231.5. Enacted 1975. Repealed 1980 ch. 81.

§232. Enacted 1872. Repealed 1980 ch. 81.

§233. Enacted 1949. Repealed 1980 ch. 81.

§§235. Enacted 1872. Repealed 1947 ch. 424.

§238. Enacted 1872. Repealed 1988 ch. 1245 §1.

§239. Enacted 1972. Repealed 1978 ch. 718.

§§239, 240. Enacted 1978. Repealed 1988 ch. 1245 §1.

§§241, 242. Enacted 1872. Repealed 1959 ch. 501.

§242a. Enacted 1959 ch. 714. Repealed 1961 ch. 72.

§243. Enacted 1872. Repealed 1959 ch. 501.

§§246, 247. Enacted 1872. Repealed 1988 ch. 1245 §1.

§248. Enacted 1907. Repealed 1988 ch. 1245 §1.

§§250, 251. Enacted 1872. Repealed 1980 ch. 81.

§254. Enacted 1872. Repealed 1988 ch. 1254 §1.

§255. Enacted 1959. Repealed 1988 ch. 1254 §1.

A new Chapter 1 follows.

## CHAPTER 1
## TRIAL JURY SELECTION AND MANAGEMENT ACT



### §190. Title.

This chapter shall be known and may be cited as the Trial Jury Selection and Management Act. Leg.H. 1988 ch. 1245 §2.

Ref.: Cal. Fms Pl. & Pr., "Juries & Verdicts"; W. Cal. Pro., "Trial" §118.

### §191. Policy Statement.

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. Leg.H. 1988 ch. 1245 §2.

### §192. Applicability 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. Leg.H. 1988 ch. 1245 §2.

### §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. Leg.H. 1988 ch. 1245 §2.

### §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. Leg.H. 1988 ch. 1245 §2.

### §195. Jury Commissioner—Salary, Term, and 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. Leg.H. 1988 ch. 1245 §2.

### §196. Duties and Powers.

(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