required; it is inferred as a matter of law. California Criminal Law: Procedure and Practice, Section 28.6, CEB, 1986.

C) Actual bias

Actual bias is defined as a state of mind which prevents the juror "from acting with entire impartially, and without prejudice to the substantial rights of any party."

Many, if not most, of the questions formerly asked during voir dire to determine whether there is a basis for a peremptory challenge are still relevant to determine whether implied or actual bias exists as a basis for a challenge for cause. There is no "bright line" distinguishing questions designed to uncover bias from those designed to assist with peremptory challenges.

The trial judge is given wide latitude to determine how best to conduct voir dire and his failure to ask specific questions will be reversed only for abuse of discretion; however, abuse will be found if the questioning is not reasonably sufficient to test the jury for bias or partiality. U.S. v. Jones (1983) 722 F.2d 528.

In U.S. v. Washington (1987) 819 F.2d 221, which reaffirms the standard in Jones, Id., the court held that the trial judge must exercise sound discretion in accepting or rejecting supplemental questions proposed by counsel. Discretion is not properly exercised when questions are not reasonably sufficient to test the jury for bias or partiality.

In the federal system, it has been held that detailed voir dire or attorney-conducted voir dire is appropriate where issues of special or unusual concern permeate the case, such as racial prejudice when race may

an issue, or jury prejudice based on extensive pre-trial publicity. (See generally United States v. Giese, (9th Cir. 1979) 597 F.2d 1170 for extensive discussion of judicially conducted voir dire.)

II

THE COURT SHOULD EXERCISE ITS DISCRETION TO PERMIT APPROPRIATE SUPPLEMENTAL QUESTIONS.

The questions asked on voir dire are a matter of the trial court's discretion, but this discretion is "subject to the essential demands of fairness." Alridge v. United States, (1931) 283 U.S. 308, 310. Further, the judge must exercise sound judicial discretion in accepting or rejecting supplemental questions proposed by counsel. "When the trial court undertakes the examination of potential jurors, it has a duty to consider the perspective of informed counsel, as well as its own, in determining what questions will tend to reveal possible juror prejudice." United States v. Baker, (10th Cir. 1980) 638 F.2d 198, 201.

"[A] requested voir dire question should be asked if an anticipated response would afford the basis for a challenge for cause." United States v. Blount, (6th Cir. 1973) 479 F.2d 650, 651.

A thorough voir dire requires careful attention to jurors' responses so that appropriate follow-up inquiry can be pursued.

> By definition, presumed bias depends heavily on the surrounding circumstances. Therefore, when a defendant is trying to prove presumed bias, the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual bias'. This duty cannot be discharged solely by broad vague questions once some potential area of

actual prejudice has emerged. United States v. Nell, (5th Cir. 1976) 526 F.2d 1223, 1229-30.

DATED:

Respectfully submitted,

IRA REINER
District Attorney

By:

_____

Deputy District Attorney

FROM THE SAN DIEGO DISTRICT ATTORNEY'S OFFICE PROPOSITION 115 MANUAL

JUDICIAL VOIR DIRE

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

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

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

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

Rule 228.1 Pre-voir dire conference in criminal cases

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

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

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

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

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

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

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

Rule 228.2 Supplemental examination in criminal cases

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

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

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

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

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

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

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

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

Voir Dire - Post Prop. 115

Prepared by

Los Angeles County

MEMORANDUM

TO: JEFF JONAS, Head Deputy CT-15

FROM: PAUL PFAU, Deputy District Attorney

SUBJECT: VOIR DIRE QUESTIONS IN THE FACE OF PROP. 115

DATE: OCTOBER 31, 1990

Given the inability of DDA's to personally voir dire in view of the prohibitive mandate caused by Proposition 115, I have compiled a list of voir dire questions that may be helpful for DDA's to use in making sure that (judges) properly canvass a jury during their voir dire.

It is currently the practice of most judges in the CCB to accept questions from (the) attorneys for his consideration and possible inclusion in the voir dire process.

The questions that are attached are not intended to exclusively define all of the areas that a particular DDA might want to suggest to the court. They are just some examples that broadly attempt to cover most of the typical areas included in voir dire and might, therefore, be useful as a general resource.

This effort was motivated by the concern due to Proposition 115's prohibitive effect in allowing prosecutors to directly address the jury at voir dire and the corollary problem caused when judges are not thorough in their questioning.

QUESTIONS FOR PROSPECTIVE JURORS

1. (Per the duties of juror's laid out in the "Juror's Handbook"): Do you understand that you have 2 basic duties as a juror?
   - To determine the facts from the evidence that is presented to you &
   - To apply the law that the (judge) will give to you to the facts in order to determine if the defendant is guilty beyond a reasonable doubt?

2. Do you understand that is not your duty to be an advocate for one side or the other, but to do your best to search for the truth given the facts of the case and your application of the law to them?

3. Do you understand thAt you should not consider the subject of penalty in determining whether or not the defendant is guilty?

4. Do you understsand that sympathy should not affect your judgment in determining whether the defendant committed the (charged) crimes? Similarly, do you understand that sympathy should not affect your judgment in assessing the credibility of any witness?

5. Will all of you apply the law as given to you by the (judge) even if you disagree with it?

6. Will any of you have any difficulty applying the same standards to judge all of the witnesses' testimony, regardless of whether they are called by the People or by the defense?

7. In judging the credibility of each witness, do each of you understand that you will be given instructions at the end of the case that will provide you with standards that you may use to help you measure the believability of (each) witness?

8. Do you understand that it is up to you to determine whether a discrepancy in a witness's testimony - or between witnesses - involves a material fact or is a trivial detail?

9. Do you understand that in weighing conflicting testimony that the final test is not in the (relative) number of witnesses, but in the convincing force of the evidence after a full and fair consideration of it?

10. Do you understand that in helping you to determine the believability of any witness that you may take into account - among others - such things as the demeanor of that witness while he is testifying as well as the character and quality of that testimony?

11. Do you understand that neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events?

12. Do you understand that a witness to any evidence used to prove a crime must be judged by the instructions that (I) will give involving credibility, and that any feelings that you may have toward that witness - such as whether that witness would be your friend, whether you like or dislike him, whether you respect or do not respect him - should not be considered in determing whether all or any of that witness's testimony is to be believed? (Suggest follow-up question citing an example)

13. Do you understand that the weight that you give to any so-called expert witness's testimony is up to you to determine given the extent of that witness's training and experience?

14. Do you understand that a police officer witness should be judged by the same standards as any other witness? If, on the other hand, that witness is proved to have some level of expertise, then it is up to you to determine the weight that you will give to such testimony?

15. Would you find the defendant not guilty merely because the witnesses that are used to prove the crimes against him are persons that you personally would not associate with?

16. Realizing that the case before you is not from some dramatic TV show or movie, will you work as hard as you can to determine the facts from the evidence and to apply the law in order to find the truth?

17. Do you understand that the People do not have to prove the case to you "beyond all doubt" or "beyond a shadow of a doubt"?

18. Do you understand that the burden of proof that the People need to prove the case to you is "beyond a reasonable doubt"? And that (like #17) this does not mean that the People need to prove the case to you beyond all possible doubt "because everything in human affairs is subject to some possible or imaginary doubt". (Suggest an example or at least to differentiate that popularized TV standards of the burden of proof are not applicable in the real-life context of a criminal case)

19. Do you understand that if the attorneys "stipulate" to a fact that you must consider that fact proved (and just as though evidence were produced during the case to prove such fact to you)?

20. A party, attorney or witness may come from a particular national, racial, or religious group or have a lifestyle different from your own. Would that fact affect your judgment or the weight and credibility you would give to his or her testimony?

21. Will you have any difficulty keeping an open mond until you have heard all the evidence as well as hearing all the arguments of both counsel and the instructions that (I) will give you regarding the law that you are to apply to the case?

22. If any of you have any preconceived ideas about what the law is that you should apply to the case (e.g., what murder means, etc.) will you put that idea aside and wait for (me) to give you the law at the end of the case (or when I do)?

23. Each attorney has the right to excuse prospective jurors without showing cause. Would you disfavor the attorney or that side of the case if he excused the prospective juror - even though you may have developed a friendship with that (excused) juror?

24. Each attorney has the right to object to evidence and testimony that is offered during the case. Would you disfavor the attorney or that side of the case if he objected to (such) evidence? What if he continued to object to evidence being offered many times?

25. Have you or any of your relatives or friends ever been involved in any criminal charge or any charge similar to that alleged here?

26. Do you have any feelings about this particular offense that would make it difficult for you to be a fair and impartial juror?

27. Are you a lawyer or have you received any training as a lawyer?

28. If you observe an attorney - out in the hallway/somewhere else - appear to be discussing something with an individual who later appears as a witness in the case before you, would you hold it against that side (because of such fact)?

29. Would the mere fact that the case takes a shorter time than you feel (this) type of case should take affect your judgment in determining whether the case has been proved to you?

30. Do you understand what "direct" evidence is? What about "circumstantial" evidence? (Suggest you differentiate the two forms of evidence by citing examples of each)

31. Do you understand that BOTH direct and circumstantial evidence are entitled to the same weight and that neither form of evidence - by themselves - is entitled to any greater weight than the other?

32. Do you understand that you must decide all questions of fact in this case from the evidence received in this trial and not from any other source? Do you understand that you must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence?

33. Do you understand that you must not speculate about evidence (that you may wish had been presented to you) but which was not actually presented to you during the presentation of the case in this court?

34. Do you understand that statements made by the attorneys during the trial are not evidence?

35. Do you understand that the only evidence that you may consider is that which is produced during the case and that it may consist of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact?

36. Do you understand that it is perfectly reasonable for you to use your common sense in helping you to find the truth in this case?

37. In this case of murder-with-special-circumstances do you understand that the defendant does not face the death penalty?

38. In being impartial, will you avoid bending over backwards - over-compensating - should you recognize in yourself that you identify with one class of witness as opposed to another? (E.g., relative of police officer, etc.)

39. If, after a full and fair comparison of all of the evidence in the case - and after considering its relative convincing force - you determine that the People have proved the case beyond a reasonable doubt, will you be able to vote guilty? Again, will you avoid letting feeling of sympathy or pity for the defendant or for any witness affect your decision? And will you avoid letting any consideration of penalty affect your decision? Will you do your best to avoid being an advocate for one side or the other but rather to be an impartial judge of the facts?

40. When all is said and done, will you do your best to search for the truth?

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41. As an alternate juror will you give this case the same attention as though you were one of the twelve chosen to hear it?

42. Please ask questions, above. Please note "priority" questions, below.

PRIORITY QUESTIONS: #'s 2, 3, 4, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 20, 22, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40.

COUNTY OF SAN DIEGO

INTER-DEPARTMENTAL CORRESPONDENCE

August 30, 1990

TO: Don MacNeil
Bob Sullivan

FROM: Richard McCue

RE: Voir Dire
Sec. 8.5 of Standards of Judicial Administration

I have discovered that the California Rules of Court have a preferred judicial voir dire script. It is sec. 8.5 of the Appendix to Calif. Rules of Court, Division I, Standards of Judicial Administration. It follows in full.

RM/jc

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 impossib 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 measur 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. 12 - 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.

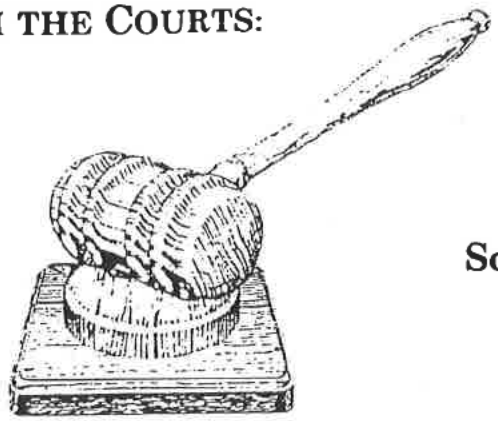
(3) Eye contact counts;

(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. □

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

Hon. J. Clinton Peterson

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

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