

## Successful Jury Selection

or

*It's Best to Try your Case Only Once*



**Actual photo of Maeve's last jury deliberating just prior to the Bailiff being called in to deploy O.C. spray**

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Maeve J. Fox  
February 24, 2004

**Voir Dire**--L. Fr. To speak the truth. This phrase denotes the preliminary examination, which the court may make of one presented a witness or juror, where his competency, interest, etc. is objected to. **Black's Law Dictionary** (Rev. 4<sup>th</sup> ed 1968)

**Voir Dire**-- (vwar der, Fr.) **1.** An oath administered to a proposed witness or juror by which he is sworn to speak the truth in an examination to ascertain his or her competence. **2.** The examination itself. **Webster's Dic. of the English Language**

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### **I. THE LAW – Voir dire in criminal cases. Code of Civil Procedure § 223**

- The court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper.
- Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel.
- The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel.
- 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.

**A. Challenges: CCP 225:** You may exercise a challenge to a prospective juror by a challenge for cause, or a peremptory challenge.

- Cause challenges first – defense before prosecution
- Peremptory challenges next – People go first. (Be ready!) Defense must exercise all peremptories to make denial of cause challenge an issue on appeal.
- Ran out of peremptory challenges?-- Ask for more. Doesn't mean you'll get them

**1) Cause challenges – Unlimited number.** Defendant goes first. All challenges for cause shall be exercised before any peremptory challenges may be exercised. (CCP 226) Make your cause challenges right after you finish questioning that particular juror (or after the first 12). These include:

- **Disqualification Challenge – CCP 223.** You are not qualified to be a juror if you are **1)** not a citizen of the U.S. **2)** less than 18 years of age **3)** not domiciled in California, **4)** not a resident of the County **5)** have been convicted of malfeasance in office or a felony, and your civil rights have not been restored **6)** can't speak English proficiently **7)** are currently serving as grand or trial juror in any court of this state **8)** are the subject of a conservatorship.
- **Implied Bias – CCP 229.** This disqualifies people who **1)** are connected in some way to either of the parties through business **2)** are related to either party by blood **3)** have an interest in, or relation to the case, **4)** have an unqualified opinion or

belief as to the merits of the action founded on knowledge of its material facts or of some of them, **5)** have a state of mind evincing enmity against, or bias towards, either party, **6)** are party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member, or **7)** if the offense charged is punishable with death, entertain such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

- **Actual Bias** – CCP 225(b)(1)(C) The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. I.e.,
  - Can't keep an open mind;
  - Admits bias against a group or issues related to the case;
  - Won't follow the law.

**2) Peremptory challenges - CCP 231.** Prosecution goes first. Kick whomever for whatever, but watch out for Wheeler, below! Peremptory challenges **MUST** be exercised in open court and any error in this regard is per se reversible. *People v. Harris* (1992) 10 Cal.App.4<sup>th</sup> 672.

- **Number of challenges:**
  - Cases punishable with life or death defendant and people entitled to 20;
  - Crimes punishable by 90 days or less: defendant and people entitled to 6;
  - Any other offense: the defendant and state entitled to 10.
- **Multiple defendants (CCP 231)** When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to five additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (2 codefendants = defense table gets 10 together + 5 each to use separately, and you get 20. Yay!)
- **Alternates** -- Judge has discretion to select one or more alternates. Both sides are entitled to as many peremptory challenges as alternates chosen. (Usually one per seat, rather than as a group.)

**3) Wheeler** -- A whole class could/should be taught on this very complicated subject.

- **The law**- leading federal case on the issue, *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712. Neither side can exclude any identified group based on:
  - Race
  - Ethnicity
  - Religion
  - Gender
  - Non-protected groups: poor, less educated, battered women, young people, old people, death penalty skeptics, ex-felons, resident aliens, naturalized citizens, new residents, obese people and men who wear toupees.

- The procedure- Keep your mouth shut and DO NOT offer any explanation until and unless the judge rules that the defense has shown prima facie discrimination.
- Prima Facie showing includes: making complete record, establish that persons struck are members of cognizable group, showing “strong likelihood” that peremptories were based on “group association” rather than specific bias. Factors include:
  - Opponent struck most or all of identified group
  - Opponent used disproportionate # of peremptories against this group
  - Challenged jurors show only single characteristic of group membership; in other ways heterogeneous
  - Opponent asked no questions of challenged jurors or engaged in only “desultory” voir dire
  - Relevant if defendant and struck jurors from same group, but not necessary
- After Prima Facie showing burden shifts to other party to justify challenges. Keep good notes on all your kicks if you do need to explain. Even a “trivial” reason, if genuine and neutral will suffice. *People v. Arias* (1996) 13 Cal.4<sup>th</sup> 92. Test is totality of circs. If called upon be prepared to describe demeanor attributes between keepers and challengees:
  - Soft-spoken/tentative/low-key/timid/hesitant
  - Long hair/unkempt/poorly groomed
  - Hostile/looked away from prosecutor/frowning/cavalier
  - Smiled at defendant/blew kisses at defense attorney
  - Fidgety/nervous/upset/defensive/tired
  - Weird/kooky/stinky/whatever!
- If Wheeler granted: whole panel is struck and you start all over. Ouch!
- When the trial court denies a Wheeler motion without finding a prima facie case of group bias, the reviewing court considers the entire record of voir dire. *People v. Howard* (1992) 1 C.4th 1132, 1154

**B. Proper scope of inquiry:** Remember, questioning of jurors can only be conducted in the exercise of challenges for cause. CCP 223. Some fertile areas that go to cause challenges include:

- Attitudes about law enforcement, the police, the courts and the criminal justice system
- Attitudes and fears about crime, having been a crime victim or a relative or friend of a crime victim
- Knowledge or opinions about the case, the victim the victim’s family, the defendant and defendant’s family
- Opinion about the guilt or innocence of defendant
- Ability to follow the law and instructions of the judge regardless of personal feelings regarding:
  - Juror misconduct – no research or visiting the scene.
  - Circumstantial evidence
  - Eyewitness ID
  - Child witnesses

- Snitches/paid informants
- Prior criminal history
- Unsavory witnesses or victims
- Experts, police officer witnesses
- Police tactics such as wires/cool calls etc
- Ability to be fair in particular type of case (i.e. molest cases, DUI's, drugs)
- Strong opinions about alternative lifestyles or organizations
- Publicity about the case
- Attitudes toward rights of defendant (especially 5<sup>th</sup> and 6<sup>th</sup> Amendment rights)
- Potential health problems
- In three strikes cases, questions as to that issue not allowed. *People v. Cardenas* (1997) 53 Cal.App.4<sup>th</sup> 240. Nor are questions related to punishment. *Shannon v. U.S.* (1994) 512 US 573
- Membership in any group that lobbies to change the law in an area connected to the case
- Sympathy for the defendant

## II. PICKING AND KICKING

### A. Procedural Considerations

#### 1) Before you start

- Go in chambers and discuss with defense counsel and the Judge the scope of inquiry, time limits, etc
- Request that the judge pre-instruct in the important areas: burden of proof, circumstantial evidence, reasonable doubt etc.
- Make sure judge okays your questionnaire
- How hardships will be handled

#### 2) Who goes first: Defense questions first.

- Plus: you get to see juror's reactions and know where you need to focus.
- Minus: jurors may need rehabilitation if the defense attorney is skilled and left your best jurors open to a cause challenge. If that happens, and it will, be prepared!

**3) Rehabilitation of jurors after defense challenge for cause: (Ssshh! Use leading questions)** Give them a speech about the Founding Fathers and stress to them their fair-minded-ness and duty to follow the law! But don't bother to rehabilitate people who are obvious jerks. The rest of the panel will love you when you utter the word "submitted" in response to a defense challenge to such a person.

- Understand that the protections put on place for a criminal defendant protect us all
- You are a law abiding citizen- with respect for the system
- You are a fair minded person, not an ideologue (use a smaller word- fanatic)
- You would never want to convict an innocent person

- It's good that the People have the burden of proof
- The standard of BRD is stringent but fair- it's the law of the land
- When the judge tells you \_\_\_\_\_, you will follow that law, won't you?
- As a citizen, it is your duty to follow the law in this case, and you will, right?

**4) Making and handling objections to questioning.** Make the objections quickly then ask to approach the bench. The most common objections you can make include:

- Doesn't go to cause
- Asking the juror to prejudge the evidence (improper indoctrination)
- Misstates the law
- Leading (inferring some attitude or feeling to the juror.)

**5) Use of questionnaires** – Remember, you have to read them. This is a time consuming and tedious process which requires you to have a comprehensive cheat sheet upon which you record pertinent information so that you don't have to flip through the 20 page questionnaire looking for a particular question and answer.

- When to use. Recommend extensive questionnaires only in long cases with multiple or VERY sensitive issues where you are going to have to question a hundred or more jurors. This allows you to record the information on a cheat sheet and have it ready when the jurors are questioned individually. Shorter questionnaires work fine for less intense cases.
- What to include. The big issues in your particular that go to cause, including a general statement of the facts of the case, and any sensitive issues that that jurors may not feel comfortable discussing in open court
  - To facilitate the intelligent exercise of both peremptory and cause challenges, parties may inform prospective jurors of the general facts of the case. *People v. Ochoa (2001) 26 Cal. 4<sup>th</sup> 398*
  - Get to the point. Don't make questionnaires overly long.
- What to leave out. What the judge tells you to and your own personal (and very clever) line of questioning that will endear you to everyone.
- What to do with the completed forms. After everyone is through, collect all but courts copies and shred. After reproducing any important data in your jury trial report for future use by your colleagues.

### III. MISCELLANEOUS

**1) What kind of Jurors do you want in a particular case?** (Fox usually tries to kick all people under thirty, anyone who identifies with the underdog and residents of Ojai.)

- People who are comfortable with you and vice versa. Therefore, very important to be yourself and see how they react.
- Intelligent people- this does not always equate to well (or over) educated. Look for common sense and ability to communicate
- People with life experience that will give them insight in this particular case. Older people generally have more experience making decisions and working on groups.

**2) What is the Goal of Voir Dire?** You want a fair jury—because you are a fair prosecutor.

- Collect information about their background and experience. It colors their perceptions of the evidence. Gauge their reaction to the case information they receive.
- Impart information to them. This is your courtroom and they are your jurors. Be respectful, concise, matter of fact, reliable and fair. Never be afraid to talk about the importance of the defendant's rights. You want a FAIR conviction.

### **3) Demeanor is Important**

- Ask simple questions, simply
- Maintain eye contact always – watch body language
- Call jurors by their names (only chance to do it)
- Listen to the answers – let them finish -- ask appropriate follow up
- Speak up – no mumbling – not too familiar - no slang or cop talk

### **4) BE ORGANIZED!**

- Get the order in which jurors will be called from the judge (Beg, if necessary.)
- Run jurors on DA computer (get help if no time.)
- Cause Challenges: Get judge to pre-instruct on Presumption of Innocence, BOP, Reas. Doubt, Circ. Evid, Juror's job, unanimous verdict, juror misconduct (etc – see above ) then ask if they can follow the law.
- When in doubt – rely on your gut feeling – then boot 'em.

### **5) Tricky get ahead strategies with peremptories**

- Be *vevy*, *vevy* careful. Before you say, “The People accept the panel as presently constituted,” you better mean it. Don't do it just to get ahead of the defense.

**6) Hovey Voir Dire** – the now disfavored practice of conducting individual voir dire of jurors in capital cases, based on a case of the same name. While you can make a motion to have Hovey— statute now makes such a motion less likely to be granted.

- **CCP 223** - Voir dire of prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
- This is a VERY lengthy and tedious process, the point of which was to allow extensive questioning of jurors regarding their qualification to sit on and impose the ultimate sentence in a death penalty case.
- Differing opinions on whether it helps or hurts the prosecution

*Good Luck!*