

Voir Dire Topics Checklist for Your Trial Notebook: Anticipate Why a Jury Might Wrongly Acquit!

by Mike Quesnel

This article continues the series on potential voir dire outlines and checklists for your Trial Notebook. In the last issue we discussed potential objections to defense voir dire questions. This article focuses on topics you might want to consider for your own voir dire questioning.

ATTORNEY VOIR DIRE TO AID CHALLENGES FOR CAUSE GENERALLY FOCUSES ON WHETHER THE JURORS CAN FAIRLY AND IMPARTIALLY PERFORM THEIR JOB.

As discussed in the last article, attorney voir dire is allowed only to aid challenges for cause—not peremptory challenges. (Code Civ. Proc. § 223.) A challenge for cause may be based on either a (1) general disqualification; (2) implied bias; or (3) actual bias. (Code Civ. Proc. § 225(b)(1).) Most general disqualification challenges for cause under Code of Civil Procedure section 203 (under 18, not a citizen, felony conviction, etc.) are usually resolved by the court early during jury selection, as are most implied bias challenges for cause under section 229 based on the prospective juror's relationship to the parties (consanguinity, financial interest, etc.).

Instead, attorney voir dire examination to aid a potential challenge for cause is generally focused on one or more of the following interrelated grounds:

1. Actual bias preventing juror from acting impartially (Code Civ. Proc. § 225(b)(1)(C));
2. Prospective juror incapable of performing duties without prejudice to the rights of the party (Code Civ. Proc. § 228(b));
3. Unqualified opinion or belief as to the merits based on knowledge of a material fact (Code Civ. Proc. § 229(e)); and
4. State of mind evincing enmity against, or bias towards, either party (Code Civ. Proc. § 229(f)).

These grounds are interrelated because they each state in various different ways the simple issue of whether the prospective juror can fairly and impartially perform the job of a juror.

A JUROR'S JOB IS TO FAIRLY AND IMPARTIALLY FOCUS ON THE FACTUAL ISSUES, TO CONSIDER WHETHER THERE IS ONLY ONE REASONABLE INTERPRETATION OF THE EVIDENCE ON THOSE ISSUES, AND TO DELIBERATE.

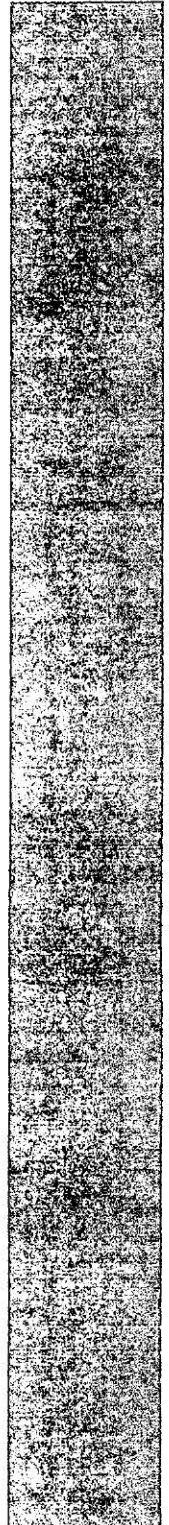
The public (and even some attorneys) are often confused about a jury's job. This confusion is exacerbated by movies, plays, television shows, and media coverage of trials. We have sometimes heard the jury referred to as the "conscience of the community" or as a "check on the power of the government." Jurors often think they are there to "judge the defendant" and determine whether he or she "deserves to be punished."

Contrary to these assumptions, the jury's job, as we know, is really rather simple—determine whether the defendant committed the acts charged. Logically, a jury should do this by (1) focusing on the specific prohibited acts as outlined in the jury instructions, (2) considering all of the evidence to decide whether the only reasonable interpretation is that the defendant committed those acts (or had that state of mind), and (3) deliberating on these issues as a body before rendering an individual decision.

THERE ARE A VARIETY OF WAYS A JURY CAN "FALL DOWN ON THE JOB."

So if the jury's job is really this simple, how do they get so confused? As experienced prosecutors know, there is an almost endless variety of ways in which a jury can get misled, sidetracked, or confused. The following is a partial list of questions for jurors addressing some major issues that tend to confuse or sidetrack a jury, organized by the three juror tasks:

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1. Can You Avoid Being Sidetracked From The Factual Issues You Will Have To Decide?

Can you avoid being sidetracked by the people involved?

- Whether the defendant, victim or witnesses are good or bad people.
- Whether the jurors like or dislike the defendant, victim, or witnesses.
- Whether the jurors understand or even sympathize with the defendant.

Can you avoid being sidetracked by the law involved?

- Whether jurors agree with the law in general.
- Whether they agree with the law in this situation.
- Whether they believe the defendant was right to have acted in a general "street justice" sense.
- Whether their notions of "street justice," legal labels, or anything else might interfere with their understanding or correct application of the law.

Can you avoid being sidetracked by the criminal justice system?

- Whether jurors like or dislike the officers involved.
- Whether they think the police did a good or bad job.
- Whether they like or dislike the attorneys.
- Whether they think the attorneys did a good or bad job.
- Whether the People should prosecute even when the victim(s) and/or witness(es) do not want them to.
- Whether others who have violated the law are being prosecuted.

Can you avoid being sidetracked by penalty or punishment?

- What punishment the defendant faces.
- Whether the potential punishment "fits" the conduct.
- Whether different charges should have been filed.

2. Can you use common sense to decide what is reasonable?

Are you able to distinguish what is possible from what is reasonable?

Will you require that guilt be the only *possible* interpretation?

Will you require absolute certainty, a "smoking gun," etc.?

Will you demand "Crime Scene Investigation-type" scientific proof?

Will you completely disregard anything from imperfect witnesses (those with imperfect memory, agenda, etc.)?

Will you discount evidence that is just "circumstantial"?

Will you focus exclusively on only some evidence rather than looking at all of it?

Will you ignore whether innocence is a reasonable interpretation of the evidence?

Will you speculate about some other *possible* evidence or story of innocence?

3. Can you properly deliberate and decide?

Do you feel that by determining whether the defendant committed the acts charged you are "judging" him or her?

Do you have any hesitation in "judging" whether the defendant committed the acts charged?

Will you be hesitant to share your review of the evidence with a group of people?

Will you be willing to listen to other points of view?

Will you be willing to accept the possibility that your initial opinion might be wrong?

If the deliberations convince you that your initial opinion was wrong, would you have any hesitation publicly changing it?

Of course, like anything in life, this list is imperfect. However, I would recommend that you have some such list to remind you of potential *voir dire* topics to explore. If you like, start with this list

and modify it to reflect your own experience and needs.

What is the point of the list? To allow you to formulate the voir dire questions on the topics most pertinent to your case. What might those questions look like? Assume that you decided to question a juror, or the panel as a whole, to ensure that they could distinguish what is "possible" from what is "reasonable." Your questions might look like the following:

Q: The law uses two sets of concepts that I want to ensure you are capable of distinguishing: Reasonable and Unreasonable, on the one hand, and Possible and Impossible, on the other hand. Let me start by asking whether any of you think it is possible that I can flap my arms and fly?

[Assuming that you have no one who says yes.]

Q: Can anyone explain why that is not possible?

[Assuming someone says that it violates the laws of physics, human anatomy, gravity, etc.]

Q: That's right. Now let me switch the question. How many of you think it is possible that I might be the richest man in the world. That is, that I have more money than Bill Gates, Warren Buffet, the Sultan of Brunei, or anyone else in the world. However, for some reason, I have chosen to ignore that wealth and instead take a job as a public servant here in Riverside County. No month-long vacations on the French Riviera, no springtime in Paris, etc. Further, the newspapers have never found out about or disclosed my fabulous wealth. You see no newspaper articles talking about an eccentric multibillionaire working in your county as a deputy district attorney. Does anyone believe that this scenario would be impossible?

[Assuming that you have no one who says yes.]

Q: Can anyone explain why that is not possible?

[Assuming someone says that it does not violate the laws of physics, human anatomy, gravity, etc.]

Q: That's right. Now let me switch the question slightly. If I told that I really was the richest man in the world, how many of you think it would be reasonable to believe me?

[Assuming that you have no one who says yes.]

Q: Does anyone believe they will have any problems distinguishing what might be unreasonable from that which is impossible?

Q: Does everyone understand that at the end of this trial you are to determine what are reasonable interpretations of the evidence?

Admittedly, this is not a great voir dire questioning pattern for reasons we will discuss in a future article. It is adequate, however, to illustrate how a broad topic can be turned into concrete voir dire questions. It also shows how much time it takes to fully question a jury during voir dire about any particular topic. As a result, unless you have a death penalty case in which the judge has given you almost unlimited voir dire, you will not have enough time to adequately explore all potential voir dire topics. Instead you have to determine from your checklist which topics to explore in which case.

CONSIDER USING A CHECKLIST AND ASKING THE QUESTION "WHY WOULD THE JURY WRONGLY ACQUIT?" TO DETERMINE WHICH TOPICS SHOULD BE EXPLORED DURING VOIR DIRE.

How do you determine from the large number of potential voir dire questioning topics which ones to explore? You might consider asking the question "Why would the jury wrongly acquit?" The answer will vary depending upon your case facts. Once you articulate the greatest dangers of a wrongful acquittal, you have articulated the topics to explore on voir dire.

For example, assume you are handling a domestic violence case in which the victim is now recanting at trial. Also assume that the evidence is pretty strong—the victim at the scene was very compelling, had injuries consistent with the story of the assault, etc. Despite the evidence, why would a jury acquit? Answering this question requires us to think like a "normal" person—not like a lawyer or a prosecutor.

The average man on the street often confuses civil cases (which are prosecuted by an individual victim to obtain damages or remedy) and criminal cases (which are brought by the state to hold the defendant accountable for criminal behavior often times irrespective of the victim's desires). As a result, you will want to voir dire on whether the

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jury can do their job of determining whether the defendant committed the acts charged, despite the fact that the victim does not want prosecution and may even now claim that something different occurred.

The “average” person also frequently views criminal cases as “liars versus truth tellers.” As a result, that average man or woman may be very sympathetic to the defense pitch that the prosecutor is asking the jury to find that the defendant committed the acts beyond a reasonable doubt based upon the unsworn, out-of-court statements of a person who has now come to court and told the jury under oath that the event did not occur the way he or she told the police. As a result, you will want to voir dire on the fact that the trial is about what happened—not who to believe—and the focus should be on whether the defendant assaulted the victim, not whether the victim lied to the police and is now telling the truth.

As another example, assume you are handling an assault case where the victim punched the defendant who then responded by pulling out a knife and stabbing the victim. That average man on the street often assumes that people have a legal right to retaliate against someone who hits them first. As a result, you will want to voir dire on the difference between legitimate self-defense and illegal retaliation.

The list and the examples could go on and on. They will vary with each individual case. Is it a poorly investigated case in which the defense will attack the police? In that case you need to voir dire on the fact that the trial is not about whether or not the police did a good or bad job but about whether the defendant committed the acts charged. Is it a case in which you have an attractive or highly likable defendant? In that case, you may need to voir dire on the fact that even attractive and otherwise good people sometimes commit a wrong act.

Hopefully, this article has given you some ideas for templates and checklists to include in the voir dire section of your Trial Notebook and how to use them. Once you develop a template on a potential voir dire topic, you can use it in every such case—circling or checking off those topics that need to be addressed in that particular case.

We will explore some of the different specific questioning patterns for examining the jury on individual topics in a future article.

2010-11 CDA Training Calendar

September

- 14 Faculty Development Seminar (*Sacramento*)
- 15 Domestic Violence in Underserved Populations (*Riverside*)
- 15-17 Criminal Discovery Seminar (*Sacramento*)
- 20-22 Basic Asset Forfeiture Course (*South Lake Tahoe*)
- 24 Rural Counties Conference (*Sacramento*)

October

- 6-8 Worker Safety Violations Seminar (*Newport Beach*)
- 7 Introduction to Vehicular Homicide Seminar (South) (*San Diego*)
- 14 ID Theft Seminar (*Sacramento*)
- 18-20 Prosecuting Physical & Sexual Abuse of Children (*Sacramento*)
- 21 Appellate Practice Seminar (*Riverside*)
- 21 DUI Prosecutions Seminar (North) (*Sacramento*)
- 22 Introduction to Vehicular Homicide Seminar (North) (*Sacramento*)
- 25-26 Community Prosecution Programs Seminar (*San Francisco*)
- 28-29 Basic Sentencing for Felony Prosecutors Seminar (*Sacramento*)

November

- 9 No-Body Homicides (*Sacramento*)
- 10 Voir Dire Seminar (*Riverside*)
- 15-18 Fraud Symposium: Real Estate & Insurance Fraud (*Anaheim*)
- 16-17 Evidence Seminar (South) (*Rancho Mirage*)
- 17-19 Adult Sexual Assault Prosecution Seminar (*Sacramento*)
- 20-23 California Narcotic Officers' Association 46th Annual Training Institute (*Anaheim*)

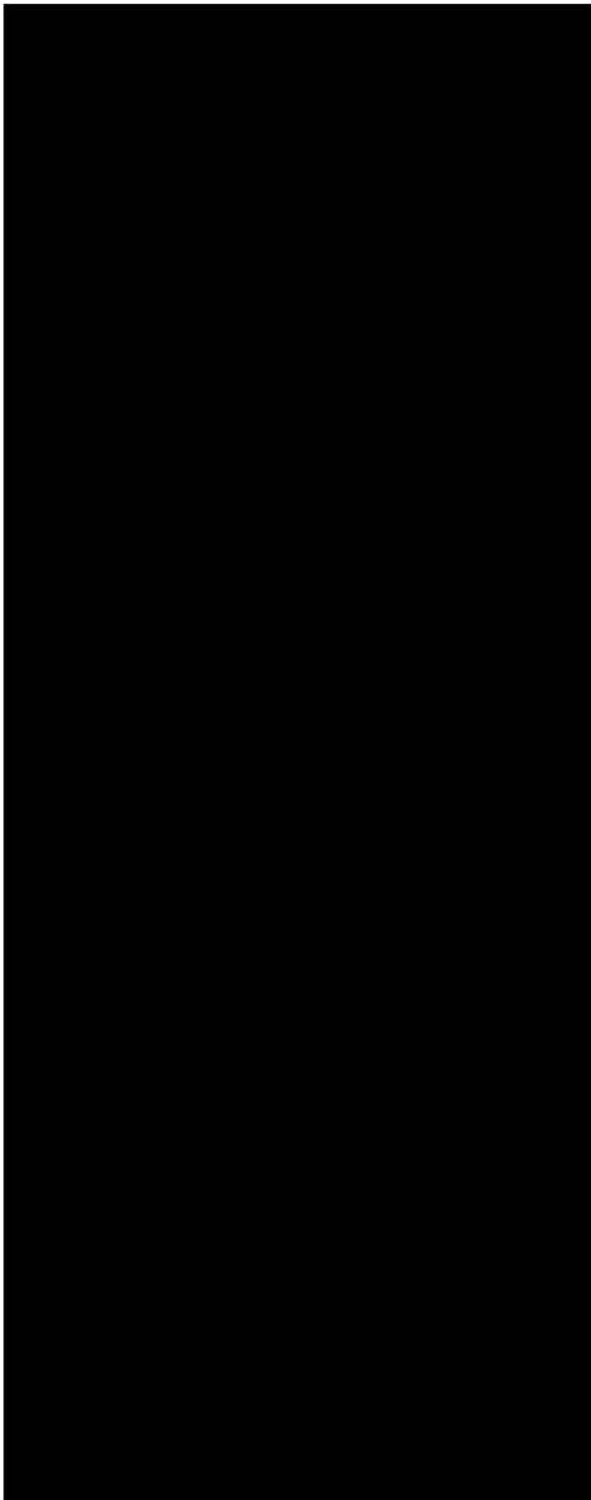
December

- 7-10 Elder Abuse Symposium (*Napa*)
- 7-10 Trial Advocacy Skills Workshop (*Orange*)

January

- 6-7 DNA/Cold Case Workshop (*Sacramento*)
- 10-11 Civil Discovery Seminar (*Sacramento*)
- 11-13 Basic Asset Forfeiture Course (North) (*San Francisco*)
- 14 Ethics, Substance Abuse & Elimination of Bias: The Procrastinators' Seminar (*Sacramento*)

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SPECIFIC LAWS AND RULES

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- 1. EACH PARTY HAS THE RIGHT TO QUESTION:**
 - A. ANY AND ALL PROSPECTIVE JURORS**
 - B. BY ORAL AND DIRECT QUESTIONING**

- 2. THE COURT MAY LIMIT QUESTIONING BY:**
 - A. SPECIFYING MAX TIME FOR AN INDIVIDUAL JUROR**
 - B. SPECIFYING AGGREGATE TIME FOR EACH PARTY**

WHAT IS THE PURPOSE OF VOIR DIRE

"EXAMINATION OF PROSPECTIVE JURORS SHALL BE CONDUCTED ONLY IN AID OF THE EXERCISE OF CHALLENGES FOR CAUSE"

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

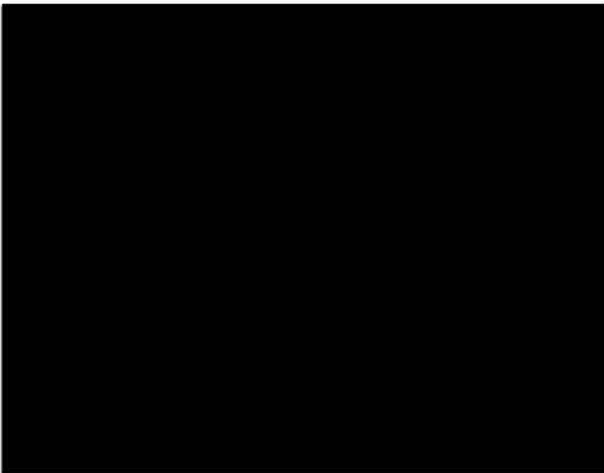
WHAT CONSTITUTES A "CAUSE" CHALLENGE

CODE OF CIVIL PROCEDURE § 225

- 1. GENERAL DISQUALIFICATION**
- 2. ACTUAL BIAS**
- 3. IMPLIED BIAS**







**CAN QUESTIONS BE ASKED
THAT DISCUSS ISSUES IN THE
CASE**

**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.
PEOPLE V. WILLIAMS, (1981) 29 CAL. 3D 392**

**CAN QUESTIONS BE ASKED
THAT DISCUSS ISSUES IN THE
CASE**

**"COUNSEL 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." PEOPLE V. WELLS (1983) 149
CAL. APP. 3D 721**

**CAN QUESTIONS BE ASKED
THAT DISCUSS ISSUES IN THE
CASE**

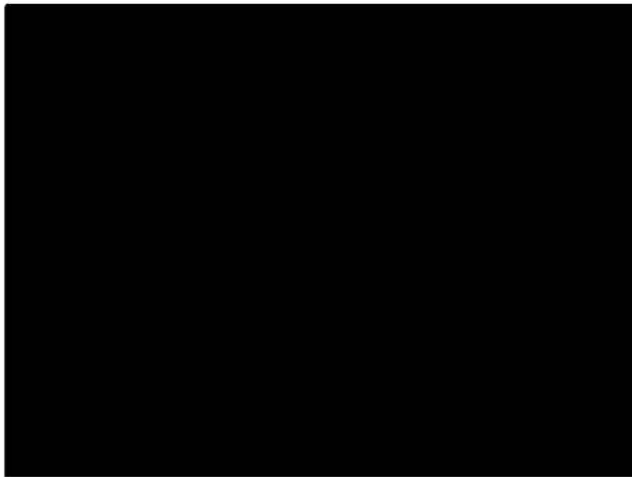
**"IT IS NOT A FUNCTION OF THE EXAMINATION OF
PROSPECTIVE JURORS TO EDUCATE THE JURY PANEL TO
THE PARTICULAR FACTS OF THE CASE, TO COMPEL THE
JURORS TO COMMIT THEMSELVES TO VOTE A PARTICULAR
WAY... ON THE OTHER HAND, A QUESTION FAIRLY PHRASED
AND LEGITIMATELY DIRECTED AT OBTAINING KNOWLEDGE
FOR THE INTELLIGENT EXERCISE OF PEREMPTORY
CHALLENGES MAY NOT BE EXCLUDED MERELY BECAUSE OF
ITS ADDITIONAL TENDENCY TO INDOCTRINATE OR EDUCATE
THE JURY." PEOPLE V. WILLIAMS, (1981) 29 CAL. 3D
392**



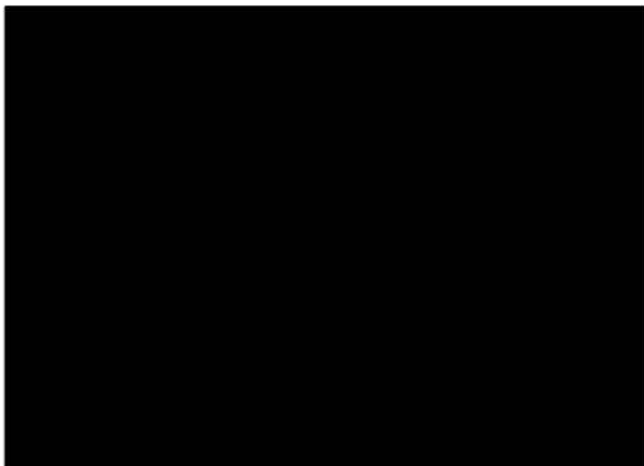
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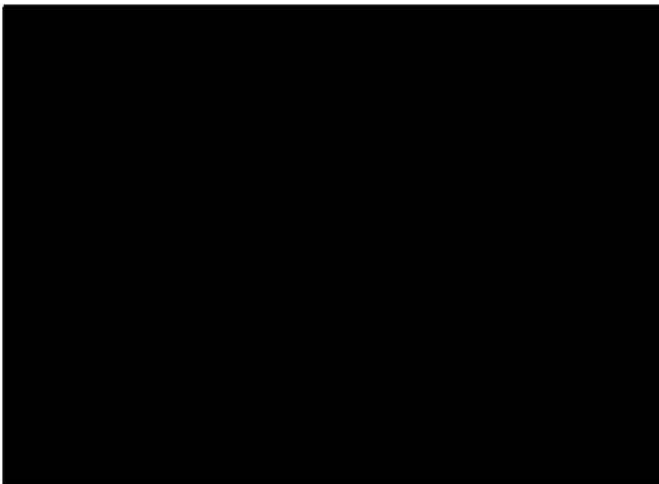
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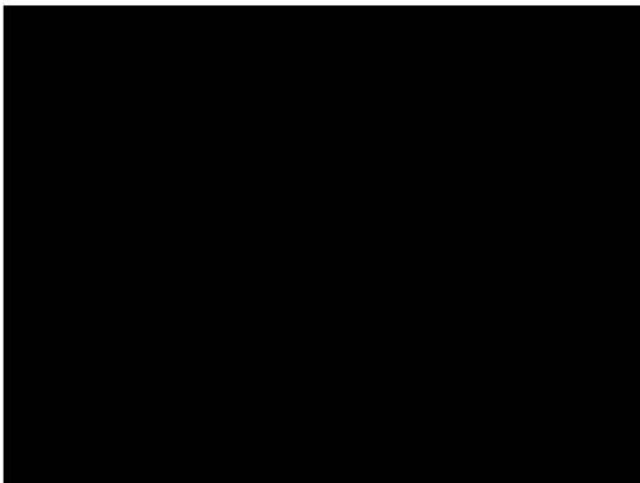
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Seven horizontal lines for writing, positioned to the right of the first redaction box.



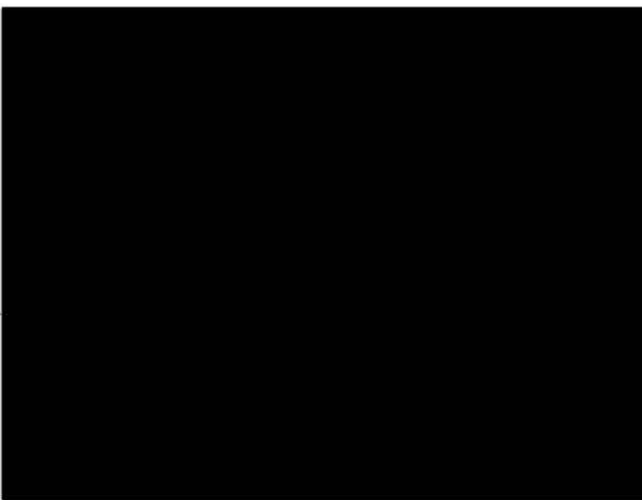
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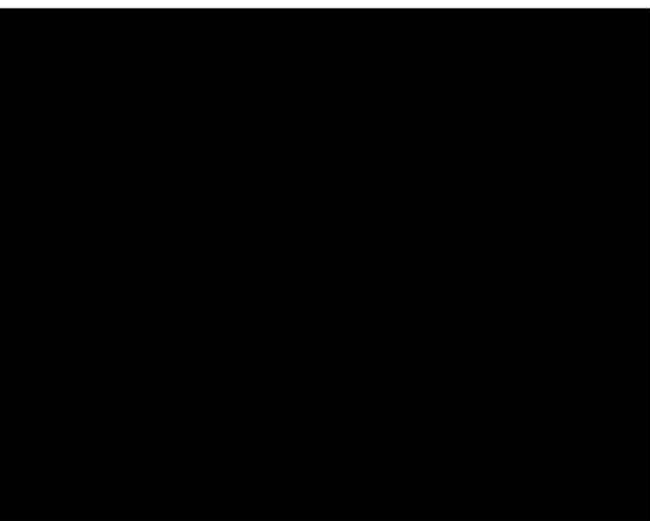
Seven horizontal lines for writing, positioned to the right of the third redaction box.



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Handwritten notes on lined paper, corresponding to the second redacted section.



Handwritten notes on lined paper, corresponding to the third redacted section.





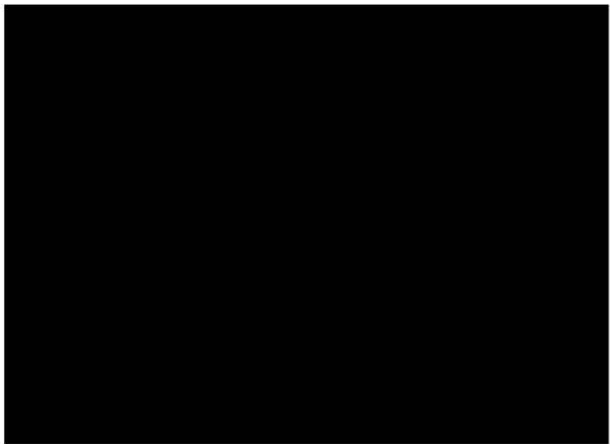




Handwriting practice lines consisting of seven horizontal lines.



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Handwriting practice lines consisting of seven horizontal lines.



