§ 7460 et seq.) protect the confidentiality of certain personal information, but permit individuals to request and receive information about themselves that is maintained by government agencies.

VIII. Duty During Jury Selection

A. ABA Standard 3-6.3—Selection of Jurors

(Formerly ABA Standard 3-5.3: Selection of Jurors)

(a) The prosecutor's office should be aware of legal standards that govern the selection of jurors, and train prosecutors to comply. The prosecutor should prepare to effectively discharge the prosecution function in the selection of the jury, including exercising challenges for cause and peremptory challenges. The prosecutor's office should also be aware of the process used to select and summon the jury pool and bring legal deficiencies to the attention of the court.

(b) The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. The prosecutor should consider contesting a defense counsel's peremptory challenges that appear to be based upon such criteria.

(c) In cases in which the prosecutor conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed. If the prosecutor uses record searches that are unavailable to the defense, such as criminal record databases, the prosecutor should share the results with defense counsel or seek a judicial protective order.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. The prosecutor should not seek to commit jurors on factual issues likely to arise in the case, and should not intentionally present arguments, facts or evidence which the prosecutor reasonably should know will not be admissible at trial. Voir dire should not be used to argue the prosecutor's case to the jury, or to unduly ingratiate counsel with the jurors.

(e) During voir dire, the prosecutor should seek to minimize any undue embarrassment or invasion of privacy of potential

jurors, for example by seeking to inquire into sensitive matters outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

(f) If the court does not permit voir dire by counsel, the prosecutor should provide the court with suggested questions in advance, and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If the prosecutor has reliable information that conflicts with a potential juror's responses, or that reasonably would support a "for cause" challenge by any party, the prosecutor should inform the court and, unless the court orders otherwise, defense counsel.

B. ABA Standard 3-6.4—Relationship With Jurors

(Formerly ABA Standard 3-5.4: Relations With Jury)

(a) The prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors, before or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, the prosecutor should not communicate about or refer to the specific case.

(b) The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, a prosecutor should avoid contacts that may harass or embarrass the juror, that criticize the jury's actions or verdict, or that express views that could otherwise adversely influence the juror's future jury service. The prosecutor should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, the prosecutor may, if no statute, rule, or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate the prosecution's performance for improvement in the future. The prosecutor should consider requesting the court to instruct the jury that, if it is not prohibited by law, it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication with a juror should not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury's actions or verdict.

(e) A prosecutor who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on a judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, defense counsel.

C. The voir dire process can be used to determine if there is a basis to challenge a juror for cause, and biased jurors should be excused from service. Conversely, jurors cannot be excused merely because they are members of a particular racial, ethnic, religious, or other legally cognizable group.

D. Before Proposition 115 was passed in 1990, the scope of voir dire questioning included questions relevant to the exercise of peremptory challenges as well as challenges for cause. Proposition 115 restricts the scope of voir dire to matters relevant to a challenge for cause. (See Code Civ. Proc. § 223; *People v. Williams* (1982) 29 Cal.3d 392 [explaining the former rule].) Two important rules are unchanged:

1. A prosecutor should not intentionally use voir dire to present inadmissible facts or to argue the case to the jury. (*Williams, supra,* at 408.)

2. A prosecutor may have a duty to inform the court of any matter relevant to a challenge for cause to any juror. (See *Smith v. Phillips* (1982) 455 U.S. 209, 220; *People v. Murtishaw* (1981) 29 Cal.3d 733, 767.)

E. The court's duty to inquire about racial biases or prejudices of prospective jurors is thoroughly discussed in *People v. Wilborn* (1999) 70 Cal.App.4th 339, "where the defense by an African-American defendant rested entirely on a credibility challenge to the white police officers, the court had an obligation to make some inquiry as to racial bias of the prospective jurors." (*Id.* at 348.)

F. The line between proper use of peremptory challenges and deliberate discrimination against a particular group is thin. The prosecutor has discretion to use the peremptory challenge, which is normally not subject to inquiry. The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors selected will decide the case based on the evidence and nothing else. (See *Swain v. Alabama* (1965) 380 U.S. 202, 219.)

G. However, it is improper for a prosecutor to use peremptory challenges to remove prospective jurors on the sole ground that they are members of a "legally cognizable group." The exclusion violates the defendant's California constitutional right to a jury drawn from a representative cross-section of the community (see *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277) and the defendant's federal constitutional rights under the Sixth and Fourteenth Amendments (fair trial and equal protection). (*Batson v. Kentucky* (1986) 476 U.S. 79.) Thus, a prosecutor may not systematically exclude any member of

a cognizable group from the jury because of his or her status as a member of that group.

A "cognizable class" is defined as: "An identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*Wheeler, supra,* at 276.)

The two requirements for recognition of a "cognizable class" are: (1) Members share a common perspective arising from life experience in the group, and (2) no other members of the community are capable of adequately representing the group perspective. (See *Rubio v. Superior Court of San Joaquin County* (1979) 24 Cal.3d 93, 98.)

1. Categories of "cognizable groups" include, but are not limited to:

   a. Race/Ethnicity

      - African-Americans (*Wheeler, supra*);
      - Hispanic-Americans (*People v. Perez* (1996) 48 Cal.App.4th 1310, 1315);
      - Spanish surnamed juror (*People v. Trevino* (1985) 39 Cal.3d 667, but see, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123 [Hispanic surnamed juror not necessarily Hispanic]);
      - Asian-Americans (see *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11 [Chinese-Americans] and *People v. Williams* (1994) 26 Cal.App.4th Supp. 1 [Filipino-Americans]);
      - Italian-Americans (see *United States v. Biaggi* (2d Cir. 1988) 853 F.2d 89, 95–96);
      - Recognized ethnic groups such as Native Americans (see *United States v. Bauer* (9th Cir. 1996) 75 F.3d 1366 and 20 ALR 5th 398, section 5, citing cases from Florida, Oklahoma, Utah, and Wisconsin).

   b. Religion (see *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish jurors]; but see *People v. Martin* (1998) 64 Cal.App.4th 378 [upholding a prosecutor's challenge of a Jehovah's Witness because the challenge was not based on the juror's religion per se, but on her refusal to hold anyone accountable for judgment purposes]; see also *United States v. DeJesus* (3d Cir. 2003) 347 F.3d 500 [permissible for heightened religious involvement or beliefs vs. affiliation]).

   c. Gender appears to be a cognizable class, but most cases also involve a racial component (see *People v. Crittenden* (1994) 9 Cal.4th 83, 115 [involving an African-American woman; the court's statements concerning gender alone may be dicta]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 (cited in *Crittenden*) [involving a woman with an Hispanic surname]; *People v. Macioce* (1986) 197 Cal.App.3d 262, 280 (dicta conceding that women are a cognizable group and offering citations to federal cases; however, the holding in *Macioce* is only that "battered women" are not a cognizable group, but rather a class of victims); cf. *JEB v. Alabama* (1994) 511 U.S. 127 [plurality opinion in which five justices agree that gender is a

cognizable class and apply *Batson, supra,* to challenges based on gender in a civil paternity suit trial]; *People v. Garcia* (2011) 52 Cal.4th 706 [women].)

d. Sexual Orientation (see *People v. Garcia* (2000) 77 Cal.App.4th 1269 [gays and lesbians]). *Note*: The *Garcia* rule has been codified in Code of Civil Procedure section 231, effective January 1, 2001.

e. Disability (*United States v. Harris* (7th Cir. 1999) 193 F.3d 870 [but permissible if disability would affect or interfere with jury service].)

2. "The defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." (*Wheeler, supra,* 22 Cal.3d at 281; see also *Powers v. Ohio* (1991) 499 U.S. 400.)

3. Examples of non-cognizable groups for purposes of this rule include:

- poor persons and those who have low income (see, e.g., *Johnson, supra,* 47 Cal.3d at 1214 and *People v. Estrada* (1979) 93 Cal.App.3d 76, 91 [grand jury challenge]);
- people who are less educated (*Estrada, supra,* at 90–91);
- blue-collar workers (*Id.* at 92);
- battered women (see *Macioce, supra,* 197 Cal.App.3d at 280);
- young adults (see *People v. Ayala* (2004) 24 Cal.4th 243, 277–278); *Estrada, supra,* at 93; *People v. Marbley* (1986) 181 Cal.App.3d 45, 48);
- people over age 70 (see *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 [grand jury challenge]);
- death penalty skeptics (see *People v. Williams* (2013) 56 Cal.4th 630; *Gutierrez, supra,* 28 Cal.4th 1083; *Johnson, supra,* at 1222; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202–1203);
- ex-felons and resident aliens (see *People v. Karis* (1988) 46 Cal.3d 612, 631–633);
- naturalized citizens (see *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202 [dicta]);
- "insufficient" English-speaking citizens (*People v. Lesara* (1988) 206 Cal.App.3d 1304, 1307, 1309);
- community residents for less than one year (*Adams v. Superior Court of San Diego County* (1974) 12 Cal.3d 55, 60 [the statutory one-year residence requirement since repealed]);
- strong believers in law and order (see *Wheeler, supra,* at 276 [dicta]);
- obese people (*United States v. Santiago-Martinez* (9th Cir. 1995) 58 F.3d 422, 423 [cited in CHER Bench Book, § 4.77]);
- men who wear toupees (*People v. Motton* (1985) 39 Cal.3d 596, 606);
- retired correctional officers (*People v. England* (2000) 83 Cal.App.4th 772);
- juror who supports "jury nullification" (*Merced v. McGrath* (9th Cir. 2005) 426 F.3d 1076); and

- "people of color," as an all-inclusive group description for non-whites (*People v. Neuman* (2009) 176 Cal.App.4th 571).

H. The defense might make a *Batson/Wheeler* motion after the People use a peremptory challenge to a member of a cognizable class. (*Wheeler, supra* [peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution]; *Batson, supra,* [race-based challenges violate the Equal Protection Clause of the U.S. Constitution].) (See also *People v. Bonilla* (2007) 41 Cal.4th 313, 341). A *Batson/Wheeler* motion involves a three-step process.

1. The defendant must make a prima facie case "by showing the totality of relevant facts gave rise to an inference of discriminatory purpose." There is a presumption that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*Wheeler, supra*). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case."

   a. Prima Facie Case—The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

      (1) "A party may show that his opponent struck most or all of the members of the identified group from the venire."

      (2) "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."

      (3) "Next, the showing may be supplemented ... by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."

      (4) "Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*Wheeler, supra,* at 280–281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

   b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson, supra,* at 96–97.)

2. If the defendant shows such a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by using one of the permissible justifications for challenge, i.e., offer a permissible "cognizable" group-neutral justification. (*Johnson v. California* (2005) 545 U.S. 162) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.4th 92, 136, citing *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9.)

3. "If a race-neutral explanation is tendered, the trial court must decide ... whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson, supra,* at 168.)

   a. "It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)

   b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler, supra,* 22 Cal.3d at 282; *Johnson, supra,* at 1216; see *Purkett, supra,* at 768.)

   c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily." (*People v. Hall* (1983) 35 Cal.3d 161, 167–168; see also, *People v. Silva* (2001) 25 Cal.4th 345, 386; note in *People v. Harris* (2013) 57 Cal.4th 804, Justice Liu took trial judges, as well as his fellow justices, to task for failing to maintain appropriate vigilance in weighing *Batson/Wheeler* challenges, and cataloged every California Supreme *Court* decision between 1993 and 2013.)

I. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were not challenged to "compare" and determine whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers," the court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

Federal courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785 and *People v. Jones* (1997) 15 Cal.4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El II v. Dretke* (2005) 545 U.S. 231, using comparative analysis in the decision.

1. *Snyder v. Louisiana* (2008) 552 U.S. 472: In *Snyder*, the U.S. Supreme Court found that the prosecutor's race-neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to that of the excused juror. (*Id.* at 483–484). The Court held that a comparative analysis was

appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at 483.)

2. *People v. Lenix* (2008) 44 Cal.4th 602: Comparative analysis is alive in California. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Lenix, supra,* at 621.) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record. "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at 622.)

   The trial court has a duty to "assess the plausibility' of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at 625, quoting *Miller-El II, supra,* at 252.) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Lenix, supra.*)

   > It should be discernible from the record that (1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; (2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and (3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder, supra,* at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible.

   (*Lenix, supra,* at 625–626.)

   The court observed that comparative juror analysis is a form of circumstantial evidence and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when

reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at 627–628, quoting *People v. Bean* (1988) 46 Cal.3d 919, 922.)

3. "Positive" Comparative Analysis: This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated, non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (9th Cir. 2012) 682 F.3d 1165, 1172 [prosecutor struck at least one non-African American who indicated he would hold the prosecution to a higher standard of proof].)

J. A prosecutor may excuse a member of a cognizable class if they "have shown orally or in writing, or through conduct in court, that they personally harbor biased views." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1016.)

K. The following circumstances justify a prosecutor's challenge of a juror:

1. Negative experience with, or distrust of, law enforcement. (*Gutierrez, supra*; *People v. Turner* (1994) 8 Cal.4th 137, 171.)

2. Police contact with the juror. (*People v. Panah* (2005) 35 Cal.4th 395, 441–442.)

3. Relative in jail or prison. (*Gutierrez, supra*; *People v. Farnam* (2002) 28 Cal.4th 107; *People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

4. Refused employment by the police. (*Hayes v. Woodford* (9th Cir. 2002) 301 F.3d 1054.)

5. Juror or family/friend arrested or prosecuted. (*Arias, supra*; *Gutierrez, supra*; *People v. Dunn* (1995) 40 Cal.App.4th 1039.)

6. Relative involved in drugs. (*Id.*; *People v. Barber* (1988) 200 Cal.App.3d 378.)

7. Rely too heavily on experts or close-mindedness. (*Gutierrez, supra.*)

8. Former spouse is a police officer. (*Id.*; *Johnson, supra.*)

9. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041–1045, 1048–1051 [potential juror apparently not honest].)

10. Understanding or communication skills are lacking, inattentiveness or inconsistent answers given during voir dire. (*Id.* at 169; *People v. Mayfield* (1997) 14 Cal.4th 668; *Turner, supra*; *Barber, supra*; *United States v. Power* (9th Cir. 1989) 881 F.2d 733.)

11. Juror's appearance (unconventional)/demeanor/body language/clothing/hair style/"weird"/too eager/soft spoken or reluctant/frowning or hostile/

emotional. Peremptory challenges are properly made in response to "bare looks and gestures" by a prospective juror that may alienate one side. (*Id.* at 171, quoting *Wheeler, supra,* at 276); see also *Purkett, supra; People v. Ward* (2005) 36 Cal.4th 186; *Barber, supra; Johnson, supra; People v. Ervin* (2000) 22 Cal.4th 48; *Arias, supra; Gutierrez, supra; Dunn, supra.)*

12. Other prior jury experience or lack thereof. (*Farnam, supra; Crittenden, supra,* at 118; *Turner, supra; Perez, supra.*)

13. Limited life experience or few ties to the community. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1322–1325; *Rice, supra.*)

14. Juror's occupation. (*Turner, supra; People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245 [challenge of sole African-American juror, a social worker, as likely to have a "more forgiving attitude"]; *Barber, supra,* at 389–394 [three challenges discussed: a teacher, an assembly plant worker whose wife worked for a liberal attorney, and an "unprofessional" person; the Court of Appeal added: "Peremptory challenges are often exercised against teachers by prosecutors on the belief that they are deemed to be rather liberal."]; *Ervin, supra* [juvenile counselor; pastor]. But see *People v. Taylor* (1997) 55 Cal.App.4th 924, 934 [dicta that juror's employment is race neutral only if the employment is reasonably related to the case facts]; *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 14 [defense challenge of a Chinese computer programmer was found to be a sham].)

15. Juror had testified before in a case with related facts. (*People v. Young* (2005) 34 Cal.4th 1149, 1174.)

16. Relativity. Next venire person appears favorable. (*People v. Alvarez* (1996) 14 Cal.4th 155; *Johnson, supra,* at 1220–1221 [discussing the dynamics of jury selection].)

L. Ethical consequences of a *Wheeler* violation:

1. If a prosecutor violates *Wheeler* during a trial, a report to the State Bar may be required. Business and Professions Code section 6086.7(a)(3) requires the court to notify the State Bar of "any judicial sanctions against an attorney."

   Section 6068(o)(3) requires a sanctioned attorney to self-report the imposition of "any judicial sanctions against the attorney." (*Wheeler, supra,* at 282 and fn. 29 ["Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew. Additional **sanctions** are proposed in the literature ... but we have no present grounds to believe that the above procedure will be ineffective to deter such **abuses** of the peremptory challenge" (emphasis added).].) If there are "additional sanctions" to calling in a new venire panel, then the existing remedy is itself a sanction. Arguably, the law requires both the court and counsel to report the event to the State Bar.

2. If a *Wheeler* challenge is erroneously denied and the case is reversed, reporting to the State Bar is required. Section 6086.7(a)(2) requires the court to notify the State Bar "whenever a ... reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct ... of an attorney," and section 6068(o)(7) requires an attorney to self-report a "reversal of judgment in a proceeding based in whole or in part upon misconduct."

3. *Wheeler* error is prejudicial per se. "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (*Wheeler, supra,* at 283, quoting *People v. Rigins* (1910) 159 Cal. 113, 120; cf. *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [non-*Wheeler* case involving claim of prosecutorial misconduct: "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' (citations)."].) A reversal based on *Wheeler* error would seem to be attorney conduct rendering the trial fundamentally unfair regardless of the prosecutor's motives. At the very least, if the reversal is predicated upon an appellate court finding the attorney's reasons to be sham or pre-textual, that means counsel was deceptive in stating justifications, and misconduct was committed. The prosecutor's misconduct imposes the duty to report on both the court and the prosecutor.

4. A re-trial following a *Wheeler* reversal does not require recusal of the original prosecutor. (See Pen. Code § 1424 and *Turner, supra,* at 163.)

M. Juror Identifying Information

Code of Civil Procedure section 237(a)(2), provides:

> Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194 [of the Code of Civil Procedure], consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

Subdivision (a)(3) of section 237 provides: "For purposes of this section, 'sealed' or 'sealing' means extracting or otherwise removing the personal juror identifying information from the court record." (See Rules of Court, rule 8.332, implementing Code Civ. Proc. § 237.)

Of course, it is the prosecutor's duty to act to protect juror personal identifying information in the prosecutor's own conduct and actions and in resisting efforts of defense, appellate, or habeas counsel or others to obtain such information without lawful cause. (See Code Civ. Proc. § 206 [procedural provision implementing the requirements of Code Civ. Proc. § 237]; *People v. Duran* (1996) 50 Cal.App.4th 103, 122; *People v. Wilson* (1996) 43 Cal.App.4th 839, 850; *People v. Barton* (1995) 37 Cal.App.4th 709, 716.) In addition to resisting disclosure without lawful cause, the prosecutor can seek protective orders to further protect jurors if