

Voir Dire

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# Misdemeanor Voir Dire 101

CDA New Prosecutor School Training  
September 26, 2018  
Deputy District Attorney Christopher Puck



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## Why It Matters

- **Need 12 to win, Takes 1 juror to lose**
  - Only chance to weed out the weirdos/poison pills
  - Evidence irrelevant if VD is poorly done
- **Sets the tone for trial**
  - First impressions critical
  - Expectations set at VD can lose your case
- **First chance to educate jurors on key leg**
- **Only chance to gauge juror ability to fol principles**



"Wonderful! Just wonderful! So much for meeting them with a sense of awe."

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## Goals of Voir Dire

- **Officially:**
  - Weed out Nutjobs/Poison Pills! (Aka For Cause Challenges)
- **Unofficially:**
  - Educate jurors on basic principles important to case
  - Desensitizing jurors to issues with your case
  - Connect with jurors to begin building your credibility
- **Common Misconception: Obtain Information to aid Peremptory Challenges**
  - *People v. Williams* (1981) 29 Cal.3d 392 allowed it
  - But was overturned by CCP § 223

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## Voir Dire Basics

- **Structure**
  - Varies by Judge and Jurisdiction
- **Order of Questioning**
  - Judge voir dire
  - Defense
  - Prosecution (because we have the burden → we get last word)
- **Court has discretion to put reasonable limits on time**
  - C.C.P. § 223
- **Number of Peremptory Challenges - C.C.P. § 231**
  - Misdemeanors → 6
  - Felonies → 10
  - Life/Capital Cases → 20

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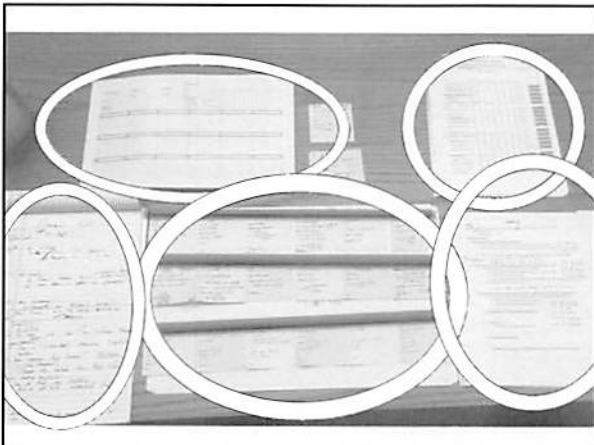
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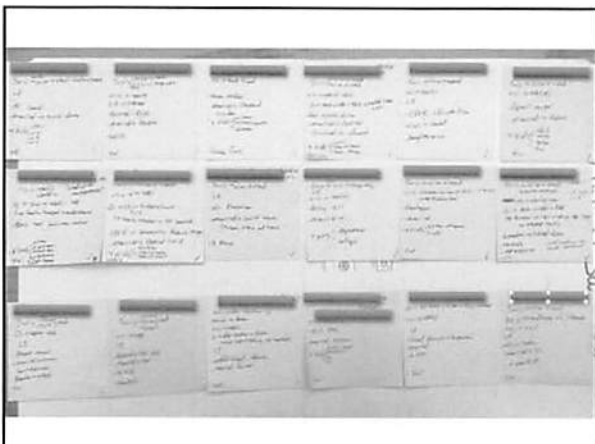
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## Voir Dire Basics

### Shorthand Suggestions

- "Married → (job)"
  - Shows juror is married and the job is what their spouse does
- "LE" for law enforcement connection
  - E.g. L.E. → brother → BPD = he has a brother in Bakersfield P.D.
- "Vic" → them or someone close was a victim of a crime
  - Usually list relation and the crime
- "Δ" → Them or someone close was a defendant/accused
- "Jury → crim/civ → Verd"
  - For prior jury experience, type of case, and where there was a verdict
  - If multiple prior juries, draw as many arrows as times they served

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Jury → crim } verd  
           → crim }  
           → crim }  
 vic → 4988  
 LE  
 - Retired → Fed. IRS  
 - married → Fed.  
 - 4 kids  
 - Rancher

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Jury → 25 yrs  
       → crim → verd.  
 vic → 28 10951  
 Δ → 513 → Embezzlement  
       3 yrs  
 L7 Family member → 197 convicted  
 COCR → Community Resource mgr  
 - married → Retired COCR  
       minister  
 - 4 kids = stay at home  
           stay at home  
 WASHO

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Every → Crim → Verdict. → serious  
 similar charges. → 3 years  
 1982 → 460 (5) law → work  
 Δ → DUE → 1986 → 8th.  
 His Brother → 187 → 26 yrs Ago '1979  
 in treated fairly  
 - Custodian → School dir.  
 - no kids  
 - not married  
 - in  
 - Sub employee for  
 Special Investigator  
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1. Name  
 2. Address  
 a. "Describe with law"  
 b. Not all in person  
 c. Can't be a direct or indirect, personal or appearance  
 3. Documented evidence  
 a. "What does a report look like?"  
 b. "What does a report look like?"  
 c. "What if they don't see the report?"  
 d. "What if they don't want permission?"  
 e. "What if they don't test by / come to court?"  
 f. "If they don't have a test report to testify?"  
 g. "What to consider"  
 4. Documented Evidence  
 a. "How report is Example"  
 5. Confirmed with computers / digital evidence  
 a. "Data recovery?"  
 b. "Data recovery process?"  
 c. "Data recovery process?"  
 6. Any other evidence with things? How they work as a team?  
 a. Any other evidence with things? How they work as a team?  
 b. Any other evidence with things? How they work as a team?  
 c. Open to the possibility of determining outcomes

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## Voor Dire Basics

- **Proper Questioning Techniques**
  - Speak to Every Person, if Possible
  - Cold Call the Quiet Ones
    - And don't waste important questions on obviously reliable jurors!
  - Build Consensus
    - Make it easy for jurors to agree
  - Isolate Nutjobs / Damaging Opinions
    - Get your reliable jurors to voice disagreement with the extreme opinions

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## Voir Dire Basics

- **Proper Questioning Techniques**
  - Avoiding Objectionable Questions
    - Questions that ask jurors to prejudge evidence
    - Hypotheses can't use same general charges/fact patterns
    - Avoid discussing the definition of "Reasonable Doubt"
  - Use open-ended questions
    - "What do you think about that?"
    - "Do you agree or disagree? Why?"
    - "How do you think your \_\_\_\_\_ might affect you as a juror?"
  - Maintain Eye Contact!
  - Use Names (if allowed by judge)

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## Voir Dire Basics

- **For-Cause Challenges**
  - Challenges can be based on Actual or Implied Bias
    - CCP 225(b)(1)(C)
    - Includes pre-conceived ideas about criminal law principles!
  - Key Standard
    - Would a juror's views "prevent or substantially impair" the performance of the juror's duties in accordance with the court's instructions and the juror's oath?"
      - *People v. McDermott* (2002) 28 Cal.4<sup>th</sup> 946, 981
      - *People v. Eary* (1999) 20 Cal.4<sup>th</sup> 826, 853
      - *People v. Mayfield*, (1997) 14 Cal.4<sup>th</sup> 668, 727
  - Large deference to court's factual findings
  - Rulings based solely on written response → De Novo Review!

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## Voir Dire Basics

- **Setting up For-Cause Challenges**
  - **Phrasing Is Crucial to Avoid Objections**
    - Key is to pit juror's desire to nullify verdict against their obligation to follow law
  - Certain biases may impair jurors' ability to follow law
    - "Assume I've proven the case B.R.D...."
    - "Assume you believe the witness B.R.D...."
    - "Do you think you are allowed to consider ...?"

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## Voir Dire Basics

- **Setting up For-Cause Challenges**
  - **Use Hyperbolic Hypotheticals to Test Jurors' Resolve**
    - Makes it easier to expose possible impairment
      - E.g. What if the victim was a child molester?
      - E.g. What if the defendant had Stage 4 cancer?
      - E.g. What if he only stole a candy bar from Bill Gates?
      - E.g. what if his BAC was .07999999? NG, right? What about .08000000?

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## Voir Dire Basics

- **Setting up For-Cause Challenges**
  - **Exploit Any Apparent Biases That May Hurt Your Case**
    - **Law enforcement Bias**
      - E.G. – "If officer said one thing, and a civilian said something else, would you *automatically* be inclined to believe civilian because your views/your prior experience?"
    - **Their Prior Criminal History**
      - E.G. – "Knowing what its like, and how it affected your life, do you think that may affect how you vote? How?"
    - **Family Members who had a negative experience**
      - E.G. – "As you hear evidence, do you think you'll be able to put aside what happened to your son?"

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## Voir Dire Basics

- **Setting up For-Cause Challenges**
  - **Exploit Any Apparent Biases That May Hurt Your Case**
    - **"I need more than one witness"**
      - Assume I only call one witness, and will you be able to vote Guilty if you believe that witness B.R.D.? Are you saying you could never vote guilty with just one witness?
    - **Race issues**
      - Avoid if possible. Never bring it up unless the case *absolutely* requires it or juror first brings it up.
      - E.G. - Do you think the fact that he is \_\_\_\_ will affect how you view the evidence or how you vote?

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## Voir Dire Basics

- Setting up For-Cause Challenges
- Exploit Other Factors That May Hurt Your Case
  - Lack of Maturity/Confidence (College students)
    - Many young jurors can't think concretely enough about your case/burden of proof
    - If you see one that is sheepish/nervous/can't talk coherently:
      - Ask if they feel comfortable deciding this "important" case?
      - Would he/she be able to focus on evidence and deliberate?
      - Are they able to understand everything that is being said?
    - Encourage him/her to express his/her lack of confidence/comfort with the juror role
      - Let them know it is common for people their age
      - And thank them for being honest

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## Voir Dire Basics

- Setting up For-Cause Challenges
- Make Them Comfortable with Stating Opinions/Inability to Follow Law
  - Use positive, encouraging tone
  - "There are no wrong answers if they tell the truth"
  - But always maintain your pokerface when they say something crazy/unexpected! Don't look like this:



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## Voir Dire Basics

- Defending Against Challenges/Rehab'ing Good Jurors
- Remind jurors they don't decide punishment, just guilt
  - Explain the difference between judge's role and juror's
    - "Do you understand, your job is just to decide if the evidence shows B.R.D. that he did it? You don't have to decide the punishment if he is in fact guilty."
    - Usually add the disclaimer that they can't consider punishment in any way, just to be safe
  - E.G. "No one likes drunk driving"
  - E.G. "No one likes theft"
  - E.G. "No one thinks violence is a good thing"

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## Voir Dire Basics

- **Defending Against Challenges/Rehab'ing Good Jurors**
  - Use concrete examples to test if they can be fair
    - Defense often use vague questions that don't really test anything
    - E.G. - "If you don't believe I've proven he's the driver, would you still find this man guilty just because...?"
  - Distinguish this case from their past experience
    - This case is different from whatever happened in their past
    - Defendant had nothing to do with...

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## Making Them Care

- **Must Always Voir Dire on for Misdo Cases:**
  - Ability to follow law on things that barely qualify as criminal
    - Or that jurors do themselves...
  - Discuss Importance of Enforcing law, regardless of how petty
    - Punishment /deterrence just as important as restitution
  - Not All Evidence Required

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## Making Them Care

- **Frequent Issue to Voir Dire on:**
  - Circumstantial Evidence
    - Need to make sure jurors are comfortable with it and how it works
      - Because most of your cases rely on it
    - First must ask if jurors have heard of it (50%-75% usually have)
    - Then ask what they think it is (to determine preconceived notions)
    - Ask if they hear it in the TV context where it is portrayed as weak:
      - "The People's case is purely circumstantial!!!"

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## Making Them Care

- **Frequent Issue to Voir Dire on:**
  - **Circumstantial Evidence**
    - **Example – Pen Behind the Podium**
      - Direct evidence → “I see the pen. It’s in the Court room”
      - Drop the pen behind your podium, or the desk
        - Ask a juror if its in the courtroom
        - How do they know? They no longer have direct evidence.
      - Provide suggestions:
        - Did you hear a sound? Sound like the pen hit the ground?
        - Did you see a hole there? Is that even reasonable?
        - What if I testify the pen is not in the courtroom anymore? Does that change your mind? (If they waffle → KICK!)
      - End with: Are you comfortable with doing that in this case? Using circumstantial evidence to decide whether \_\_\_\_?

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## Making Them Care

- **Common Misdemeanor Issues**
  - Battery involving minimal/no injuries
    - Voir Dire on importance of following law and **WHY**
      - Have the jurors say why its important to enforce law, however slight the violation is
    - Compare to .03 DUI's or 1-step trespassing/Jaywalking
  - Low-Blow DUI
    - Same voir dire tactic → focus on highly technical crimes
    - “If I prove B.R.D. he crossed that line, how will you vote?”

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## Making Them Care

- **Common Misdemeanor Issues**
  - Refusals with no PAS or Forced Draws
    - Compare DRE/FST's to doctor visits that last 5 minutes
      - Trust opinion of medical professional or lawyer?
    - See if they are “open to the possibility” of deciding issue of intoxication based on circumstantial evidence / no breathalyzer.
  - Suggest times they made opinions on other peoples' intoxication
    - Concerts
    - Bars / restaurants
    - Las Vegas
    - Obligatory family reunions (there's always one... ☹)
  - Places where they have seen individuals intoxicated, falling over themselves, holding beverage, etc...
    - Need a BAC # to know that person had too much to drink?

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## Making Them Care

- **Common Misdemeanor Issues**
  - **Unsympathetic Victim**
    - Desensitize jury using hyperbolic hypotheticals
    - What if you hate her? Should that matter as to whether he is guilty?
    - Victim unlikability doesn't mean he gets a pass
  - **Sympathetic/young defendant who just made a mistake**
    - Confront the fact head on
      - "Do you think you would consider the fact that he's only 18?"
      - "Do you understand you can't do that? Can you follow that law?"
      - "Judge decides punishment and will take it into account"
  - **Misd. Vehicular Manslaughters**
    - Must voir dire on the fact that making a mistake or being careless can be a crime
    - Compare to cases where consequences of the crime decide if it's a felony or misd (e.g. DUI crash with injury vs without)

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## Making Them Care

- **Common Misdemeanor Issues**
  - **Victimless Crimes / No Loss Thefts**
    - Get jurors to discuss importance of following law
    - Punishment/Deterrence just as important as restitution
    - E.G. - Petty theft from Bill Gates
  - **CSI Effect**
    - Ask them if they think these shows accurately portray court
    - Call on jurors with prior experience as jurors or in L.E. to bolster your points
  - **The "Making a Murder Effect"**
    - Need to start addressing the "availability heuristic" of media coverage on the exoneration cases involving L.E. misconduct
    - DO THIS CAREFULLY

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## Making Them Care

- **Common Misdemeanor Issues**
  - **Bare Minimum Investigations**
    - Use the "Not All Evidence" instruction to set the right perspective
    - If you prove it B.R.D., doesn't matter what else is out there
    - E.G. - Battery with 60 witnesses, but we call 1 and they believe him
    - Get them to acknowledge why it might be reasonable to not invest same amount of resources into a 647(f) as we would a 187(a)...
  - **Everyone Is Doing It**
    - The fact that other people do it, is that an excuse to vote N.G.?
    - See if they can vote guilty even though they do it
    - Have them reiterate why it's important to do so

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## Making Them Care

- **Common Misdemeanor Issues**
- **Domestic Violence – Uncooperative Victim**
  - Test pre-conceived notions
  - Ask jurors what they expect with DV Victims
  - If they expect them to be cooperative
  - Do they understand why DV victim may not be cooperative?
    - Defendant is sole income earner...
    - Father of her children and still wants him in the kids' life...
  - How is she supposed to testify? Expect her to cry? Why?
    - Does everyone handle trauma the same way? (Hint → no)
  - Make sure jurors don't use unique experiences to judge your victim
  - "Do you understand you can't judge the alleged victim's credibility based on how you/your friend handle your prior abusive situation?"
  - A juror's prior D.V. history isn't a common/lay experience

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## Making Them Care

- **Common Misdemeanor Issues**
- **Don't go overboard in trying to make them care**
  - Never lose perspective because credibility is your # 1 Asset
- **Misdemeanors aren't crimes of the century**
  - Some of your jurors have misdemeanors on their record
  - Many defendants are normal people who made poor decisions
    - Acting like he's Charles Manson will alienate your jurors!
- **Do not overstate or overdramatize your case!**

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## Final Words of "Wisdom"

- Practice new topics out loud
- Always prep your VD/Identify issues in advance
- Be yourself and do what works for your personality
- Have fun with it
- Learn from your mistakes
  - Identify what types of jurors hung your case and why
- # 1 Rule → When in doubt, go with your gut

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## Contact Info

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