

The California District Attorneys Association

Jury Selection, Examination, and Impeachment Seminar

June 10-12, 2019



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

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CDAA's Mission

To promote justice by enhancing prosecutorial excellence

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Welcome to the Jury Selection, Examination, and Impeachment Seminar at McGeorge School of Law (Mock Courtroom)

On behalf of the California District Attorneys Association, welcome to the Jury Selection, Examination, and Impeachment Seminar.

CDAA awards Minimum Continuing Legal Education (MCLE) for prosecutors under the auspices of the California District Attorneys Association, which is designated as an authorized provider of continuing education for prosecutors in the State of California. Strict adherence to attendee hours and participation is applied. Should you have any questions regarding this information please contact Regan Steele, Training Consultant.

- **Turn off (or turn to “vibrate”) your cell phones and pagers while the seminar is in session.**
- All attorneys: You must provide CDAA with your State Bar number. If your bar number is not printed on the sign-in roster or if your number is incorrect, please add/correct it. If you attend the entire seminar, you will receive MCLE credit. Schedule and credits are subject to agenda changes.
- You are required to sign in *each day* to receive MCLE credit. Should you arrive late, leave earlier than the course schedule, or miss time during the day, please note the time on your designated sign-in space. Be aware that signing in indicates you attend the full day; the California State Bar does audit our courses.
- **CDAA relies heavily on attendee feedback. Please complete the seminar evaluation!**
- Help keep the program running on schedule. Please make sure to return from breaks and lunches on time.
- You will receive an electronic Certificate of Attendance approximately two weeks after the seminar.
- CDAA purchases only enough food/beverages for registered attendees. Because of grant restrictions, CDAA is unable to purchase food/beverages in addition to those provided each day.
- Because meeting room temperatures are sometimes unpredictable, we strongly suggest you bring a sweater or light jacket each day.
- The meeting room will remain unlocked during lunch hours and after hours. You should not leave personal items of value in the meeting room as CDAA is not responsible for them. You may leave your training materials overnight and at lunch.
- **There is no talking during the voir dire process and mock trial. Please respect this policy, or you will be asked to leave.**
- If you have any questions or concerns, please see me.

Thank you and enjoy the seminar!

Regan Steele

Training Consultant

California District Attorneys Association

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CDAА depends on attendees' seminar evaluations when designing future trainings.

**Please scan the QR code below to evaluate the
Jury Selection, Examination, and Impeachment Seminar**



OR

type this URL into your browser:

<https://www.surveygizmo.com/s3/5010622/Jury-Selection-Examination-and-Impeachment-Seminar-2019>

Please take a minute or two at the end of each day to evaluate the day's topics and instructors.



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AGENDA

Jury Selection, Examination & Impeachment Seminar

June 10-12, 2019

McGeorge School of Law – Mock Courtroom; Sacramento, CA

Monday, June 10, 2019

- 8:00 - 8:30 **Registration/Sign In**
- 8:30 - 8:45 **Welcome**
Patrick McGrath, Retired Yuba County District Attorney, Technical Advisor
- 8:45 - 11:45 **Voir Dire 101**
(includes break) Christopher Puck, Deputy District Attorney, Monterey County
- 11:45 - 1:00 **Lunch (on own)**
- 1:00 - 4:00 **Live Demonstration of Jury Selection**
(Judge) Patrick McGrath, Retired Yuba County District Attorney, Technical Advisor
Prosecution: Christopher Puck, Deputy District Attorney, Monterey County
Defense: Paris Coleman, Deputy District Attorney, Sacramento County
- 4:00 - 4:30 **Panel Debrief (Jury Dismissed)**
Patrick McGrath, Retired Yuba County District Attorney, Technical Advisor
Christopher Puck, Deputy District Attorney, Monterey County
Paris Coleman, Deputy District Attorney, Sacramento County

Tuesday, June 11, 2019

- 8:00 - 8:15 **Sign In**
- 8:15 - 9:30 **Impeachment**
Benjamin Ladinig, Senior Deputy District Attorney, Santa Barbara County
- 9:30 - 9:45 **Break**
- 9:45 - 10:45 **Prosecutors and Mental Health: Let's Talk About It**
Kibbe Day, Deputy District Attorney, San Joaquin County
- 10:45 - 11:45 **Surviving *Wheeler* – A Live Demonstration**
Cindy De Silva, Deputy District Attorney, San Joaquin County
- 11:45 - 1:00 **Lunch (on own)**

1:00 - 4:30 **Live Trial Demonstration**
(Judge) Patrick McGrath, Retired Yuba County District Attorney, Technical Advisor
Prosecution: Christopher Puck, Deputy District Attorney, Monterey County
Defense: Paris Coleman, Deputy District Attorney, Sacramento County

Wednesday, June 12, 2019

8:00 - 8:30 **Sign In**

8:30 - 10:30 **Live Trial Demonstration, cont'd**
(Judge) Patrick McGrath, Retired Yuba County District Attorney, Technical Advisor
Prosecution: Christopher Puck, Deputy District Attorney, Monterey County
Defense: Paris Coleman, Deputy District Attorney, Sacramento County

10:30 - 10:45 **Break**

10:45 - 11:45 **Closing Arguments to Jury**
Prosecution: Christopher Puck, Deputy District Attorney, Monterey County
Defense: Paris Coleman, Deputy District Attorney, Sacramento County

11:45 - 12:15 **Jury Lunch Break**
You may step out to grab lunch during this time.

12:15 - 2:00 **Watch Jury Deliberate Live**
You may step out to grab lunch during this time. We encourage you to watch.

*2:00 - 3:00 **Verdict Read/Closing Roundtable**
Patrick McGrath, Retired Yuba County District Attorney, Technical Advisor
Prosecution: Christopher Puck, Deputy District Attorney, Monterey County
Defense: Paris Coleman, Deputy District Attorney, Sacramento County

*This time is subject to change depending on when the jury comes back with a verdict.



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Case Summary

CASE SUMMARY

On 12/1/2018 at 2347 hours (11:47 p.m.), Officer Polhemus arrived at 2735 A Street in response to a 911 call that occurred at 2332 hours (11:32 p.m.). Upon arrival, Officer Polhemus made contact with Complaining Witness Victoria Valdez. Valdez was on the front porch of the residence at the time of the officer's arrival. Valdez appeared reluctant to speak with the officer and repeatedly inquired as to her safety, asking, "he can't hurt me now?" and "I can't take it anymore." Officer Polhemus noted that Valdez appeared as if she had been crying. Her clothing appeared disheveled and she had a red mark on her right cheek. Valdez complained of pain to her head and her back.

When Officer Polhemus asked Valdez what happened, she immediately stated, "he raped me." When Officer Polhemus asked who she was referring to, she stated, "David." When asked where David was now, Valdez stated he was in the house passed out in the bedroom. Officer Polhemus immediately went into the house and found a sole male occupant in the back bedroom. The male was either passed out or sleeping in the bed. The male was wearing a pair of jeans which were unbuttoned, unzipped, and pulled down slightly showing his underwear, which were twisted. The male was taken into custody and placed in the rear of Officer Polhemus' vehicle.

After securing the suspect, Officer Polhemus obtained a statement from Valdez. In summary, Valdez stated the following (for details complainant's complete statement): She and the suspect David Delaney have been living together for the last 3 months, since approximately Sept. 1st, and have been dating since approximately June. A week ago, she found out she was pregnant. When she told Delaney, he initially acted pleased and within a couple of days became moody. Today, she arrived home after working late, around 1900 hours (7:00 p.m.), as she had to work an hour overtime at the restaurant – she normally arrives home at 1730 hours (5:30 p.m.). When she got home it was evident that Delaney had been drinking. He immediately accused her of seeing someone else and then questioned Valdez as to whether or not the child was his. This made Valdez mad and she responded that he was a "prick" and of course the child was his. Delaney slapped Valdez across the face. When Valdez fell to the floor, Delaney kicked her in the back. He then pulled Valdez by the hair into the bedroom and pushed her onto the bed. Delaney then pulled his pants half way down and then pulled her panties down. Delaney tried to put his penis in the complainant's vagina but he couldn't maintain an erection. He then put his finger in her vagina. Valdez repeatedly told him "no" and pushed his hand away. She doesn't recall how many times he put his finger in her vagina. Valdez stayed on the bed until Delaney passed out and then she got up, grabbed her phone, and called her best friend, Monica Sela, and told her what happened. Monica convinced her to call the police. Valdez then called 911 and waited outside for the officer to arrive.

Officer Polhemus noticed the injury on her right cheek.

After obtaining Valdez's statement, Officer Polhemus questioned David Delaney and told him that Valdez said she was raped by Delaney. He spontaneously uttered, "how can you rape a bitch that's giving it away."

Valdez was transported by Officer Polhemus to the medical center for an examination of her facial injury and sexual assault examination by Nurse Nancy Newhall.

The case was submitted to the District Attorney's Office. The intake deputy filed the following charges: 289(c) (forcible penetration with a foreign object), 220 (assault with intent to commit rape), and 273.5 (spouse/cohabitant abuse).

Defendant Delaney is in custody unable to make bail.

Booked evidence:

- Tape of 911 call
- police report
- Complainant's damaged clothing (blouse with missing button)
- photos showing injuries to complainant
- photos of scene
- booking photo
- tape of jail call between defendant and complainant (call initiated by defendant) made on December 15th
- Cal OES 2-923 form from the SAFE examination
- Hospital discharge paperwork
- X-Ray Victoria Valdez

Witnesses:

For the prosecution:

- Victoria Valdez (now recanting statement she gave to Officer Polhemus – she claims that she and the defendant argued, he was gesturing with his hands, and she was accidentally struck by him and she bruises easily – she accused him of rape to retaliate for accusing her of infidelity and questioning the parentage of the child she's carrying)
- Monica Sela (process servers have been unable to locate)
- Officer Ed Polhemus
- Nancy Newhall (nurse practitioner who conducted 923 examination)

For the defense:

- David Delaney
- Dr. Green (expert contacted by the defense to testify re the 923 exam)

Voir Dire 101

Christopher Puck

Deputy District Attorney
Monterey County

Voir Dire 101

CDAJ Jury Selection Seminar
June 10, 2019
Deputy District Attorney Christopher Puck
Monterey County, Sex Assault Unit

Objectives of This Training

- Discuss basic principles/logistics of jury selection
- Demonstrate proper techniques
- Provide in-depth info on “For Cause” challenges
- Voir Dire objections (And how to avoid them)
- What if I only have 15 minutes...?
- Specific examples for addressing a few common issues
- Attached: Previous VD Outlines to serve as models

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

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 legal issues**
- ⊗ **Only chance to gauge juror ability to follow tough legal principles**

Goals of Voir Dire

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

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
 - ⌘ **Defense must use For Cause challenges first – CCP 226(d)**
 - ⌘ All challenges to an individual juror, except a peremptory challenge, shall be taken first by the Defendant, then by the People

Voir Dire Basics

⊗ **Structure**

⊗ **Number of Peremptory Challenges - C.C.P. § 231**

- ⊗ Misdemeanors → 6
- ⊗ Felonies → 10
- ⊗ Life/Capital Cases → 20

⊗ Peremptory Challenges start with People; go alternatively

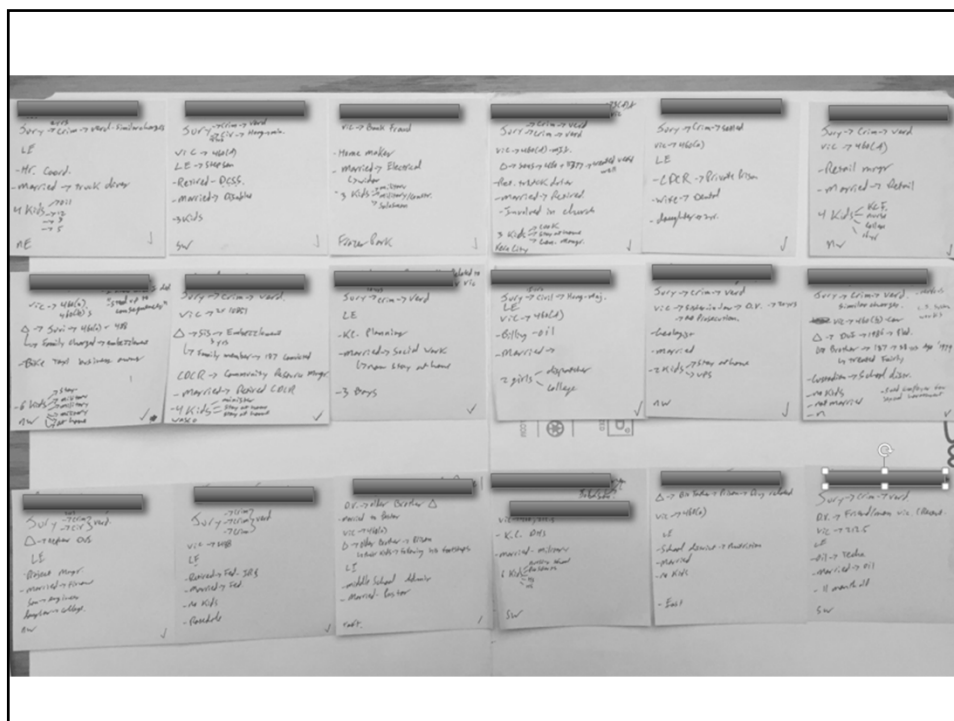
- ⊗ CCP 231(d)

⊗ Peremptory Challenges must be for genuine, reasonably specific, race(or protected group)-neutral reason related to your case

- ⊗ *Hernandez v. New York* (1991) 500 U.S. 352

⊗ **Large deference to court's factual findings, but... rulings based solely on written response → De Novo Review!**





Some Basic Techniques

✳ 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

Jury ^{-7 crim} } verd
 ^{-7 crim}
 ^{-7 crim}
 vic → 7498
 LF
 - Retired → Fed - IRS
 - married → Fed.
 - no kids
 - Roseholde

Jury ^{25 yrs} → crim → verd.
 vic → 2x 10851
 Δ → SIS → Embezzlement
 3 yrs
 ↳ Family member → 197 convicted
 COCR → Community Resource mgr
 - married → Retired COCR
 - 4 Kids = ^{minister} stay at home
 stay at home
 WASLO

Some Basic Techniques

- ⊗ **Speak to Every Person, if Possible**
- ⊗ **Use Names (if allowed by judge)**
- ⊗ **Maintain eye contact**
- ⊗ **Plan in advance which jurors will be asked to discuss particular topics**
- ⊗ **Avoid Controversial / Political jokes**
 - ⊗ **And don't make assumptions about your audience**

Some Basic Techniques

- ⊗ **Cold Call the Quiet Ones**
- ⊗ **Don't waste important questions on obviously reliable jurors!**
- ⊗ **Build Consensus**
 - ⊗ **Make it easy for jurors to agree**
 - ⊗ **Ex. Following the law when you disagree or think it's a stupid law**
- ⊗ **Isolate Nutjobs / Damaging Opinions**
 - ⊗ **Get your reliable jurors to voice disagreement with the extreme opinions**
 - ⊗ **Ex. "I think felons should be allowed to possess firearms"**

Some Basic Techniques

- ⊗ **Avoid Objectionable Questions**
 - ⊗ Stay away from or minimize time in legal grey areas
 - ⊗ Avoid discussing the definition of “Reasonable Doubt”
- ⊗ **Use open-ended questions**
 - ⊗ “Do you agree or disagree? Why?”
 - ⊗ “How do you think your __ might affect you as a juror?”
 - ⊗ “Are you allowed to consider __? Should you? Why or why not?”
- ⊗ **Stay away from wordy/abstract hypotheticals**
- ⊗ **Avoid hypos that ask jurors to prejudge reliability**
 - ⊗ This is different from asking jurors to keep an open mind
 - ⊗ Exception: rebutting defense questions on officers credibility

For-Cause Challenges

- ⊗ **Three general ways a juror can be disqualified**
 - ⊗ General disqualification – CCP § 225(b)(1)(A) & CCP § 228
 - ⊗ Actual Bias - CCP § 225(b)(1)(C)
 - ⊗ Implied Bias - CCP § 229
- ⊗ **Highly academic/technical, but important nonetheless**
 - ⊗ Most attorneys/judges aren’t aware of these specific statutory grounds and usually won’t/can’t articulate them
 - ⊗ The better the record you make; the safer your conviction is on appeal

For-Cause Challenges

- ⊗ General disqualification – CCP § 228
 - ⊗ (a) “A want of any of the qualifications prescribed by this code to render a person competent as a juror”
 - ⊗ (b) “The existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.”

For-Cause Challenges

- ⊗ General disqualification – CCP § 228
 - ⊗ **Option A – are they a want of qualifications**
 - ⊗ **Qualifications – CCP § 203(a) lists 8 possible disqualifications:**
 - 1) Non-citizens
 - 2) Anyone under the age of 18
 - 3) People who are not domiciled in CA
 - 4) Non residents of the county
 - 5) Felons who have not had their civil rights restored
 - 6) Non-English speakers
 - 7) People already serving as Grand jurors / trial jurors
 - 8) People who are the subject of a conservatorship

For-Cause Challenges

- ⊗ General disqualification – CCP § 228
 - ⊗ **Option B - Incapacity impairing juror's ability to perform duties**
 - ⊗ This an open-ended catch all
 - ⊗ No Statutory list, but generally a juror's duties include:
 - ⊗ Perceiving and considering evidence;
 - ⊗ Determining witness credibility by a uniform standard;
 - ⊗ Following a judge's instructions throughout the trial;
 - ⊗ Putting aside outside considerations / preconceived notions;
 - ⊗ Deliberating with other jurors;
 - ⊗ Rendering a lawful verdict if People meet their burden.
 - ⊗ Anything that prevents a juror from doing these with impartiality is a proper for-cause general disqualification

For-Cause Challenges

- ⊗ General disqualification – CCP § 228
 - ⊗ **Option B - Incapacity impairing juror's ability to perform duties**
 - ⊗ **Examples of common sources of incapacity:**
 - ⊗ Inability to comprehend English language
 - ⊗ *People v. Elam* (2001) 91 Cal.App.4th 298, 316
 - ⊗ Bias against legal system
 - ⊗ *People v. Thompson* (2010) 49 Cal.4th 79, 100-101
 - ⊗ Active refusal to follow certain laws (applicable to your case)
 - ⊗ *People v. Williams* (2001) 25 Cal.4th 441, 448
 - ⊗ *People v. Collins* (1976) 17 Cal. 3d 687, 690
 - ⊗ *People v. Daniels* (1991) 52 Cal. 3d 815, 865
 - ⊗ Prejudging officer/witness credibility (aka police bias)
 - ⊗ *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484

For-Cause Challenges

- ⊗ General disqualification – CCP § 228
 - ⊗ **Option B - Incapacity impairing juror's ability to perform duties**
 - ⊗ **Examples of common sources of incapacity:**
 - ⊗ Inability/Refusal to Deliberate
 - ⊗ *People v. Lomax* (2010) 49 Cal.4th 530, 589
 - ⊗ Whether due to jury nullification or youthful “anxiety”
 - ⊗ Inability to disregard outside information
 - ⊗ *In re Malone* (1996) 12 Cal.4th 935, 963
 - ⊗ Medical/Mental Health/Personal issues interfering with perception of evidence
 - ⊗ Medical conditions causing constant pain
 - ⊗ Young adults with social anxiety
 - ⊗ Family/work even that would distract juror throughout trial

For-Cause Challenges

- ⊗ **Implied Bias - CCP 229**
 - ⊗ Lists 8 exclusive statutory grounds for an implied bias challenge
 - ⊗ **Some deal with a juror having prior connection to the case**
 - ⊗ E.g. Consanguinity with Defendant or witness
 - ⊗ E.g. Financial interest in the result of case (not as taxpayer)
 - ⊗ **Relevant/possibly applicable subsections:**
 - ⊗ (e) – “having an unqualified opinion or belief on merits” of the case based on outside materials or knowledge of material facts
 - ⊗ (f) – “The existence of a state of mind in the juror evinced enmity against, or bias towards, either party.”
 - ⊗ (h) – Capital cases only – juror has such strong views on capital punishment they would never be able to vote guilty

For-Cause Challenges

- ⊗ **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.”
 - ⊗ Includes bias against:
 - ⊗ Defendants;
 - ⊗ Officers;
 - ⊗ Women;
 - ⊗ Law enforcement;
 - ⊗ Expert witnesses; etc...
 - ⊗ Like 2nd portion of General Disqual. → this is a catch-all option
 - ⊗ Any articulable bias against your interest qualifies

For-Cause Challenges

- ⊗ **A Good Overall Standard to Use:**
 - ⊗ Would the juror’s issue/preconceived notion/distracted/anxiety/bias etc... “**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.4th 946, 981
 - ⊗ *People v. Earp* (1999) 20 Cal.4th 826, 853
 - ⊗ *People v. Merced* (2001) 94 Cal.App.4th 1024,
- ⊗ **It’s a D.P. qualification standard that is consistent with and accurately summarizes spirit of For Cause challenges**
- ⊗ **An easy standard that encapsulates actual bias and general disqualification challenges**

For-Cause Challenges

⊗ Setting up For-Cause Challenges

- ⊗ Key is to expose juror's desire or potential to nullify a verdict
- ⊗ **Specific phrasing required to show an inability to follow law**
 - ⊗ Question must be structured so that wrong answer means PER SE violation of law
 - ⊗ "Assume I've proven the case B.R.D...."
 - ⊗ "Assume you believe the witness B.R.D...."
 - ⊗ "Do you think that you are allowed to consider ...?"
 - ⊗ If ____ happened, would you automatically regardless of the other evidence, do ____?
 - ⊗ Hypos/questions must not contain logical loopholes
 - ⊗ If you believe the victim, how will you vote?
 - ⊗ What if the victim has a conviction, will that affect your vote?
 - ⊗ What if there's no direct evidence, would you still vote guilty?

For-Cause Challenges

⊗ 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?

For-Cause Challenges

⊗ Setting up For-Cause Challenges

⊗ Use concrete hypotheticals to highlight juror Bias

⊗ Law enforcement Bias

- ⊗ “If officer said one thing, and a civilian said something else, would you *automatically* be inclined to believe the civilian because of your views/your prior experience?

⊗ “I need more than one witness”

- ⊗ E.G. – Battery in front of 60 witnesses

For-Cause Challenges

⊗ 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

For-Cause Challenges

⊗ Setting up For-Cause Challenges

⊗ **Exploit Other Factors That May Hurt Your Case**

⊗ Outside Stressful/Distracting Event

- ⊗ Many jurors might have stressful work event or family life drama that will consume their attention away from the trial
- ⊗ Ex - “If you are picked as a juror, will you be able to sit and listen to the evidence/witnesses, and focus on this trial, or do you think you may be distracted by _____?”
- ⊗ Ex - “Is it going to be too difficult for you to put aside ____?”
- ⊗ This is an incapacity that would prevent them from fulfilling their duties
- ⊗ Use sparingly to maintain credibility with judge.

For-Cause Challenges

⊗ Setting up For-Cause Challenges

⊗ **Once Bias is Exposed, you MUST show it will impair juror**

- ⊗ Having a bias, strong opinion or incapacity is a necessary condition, but it is not a sufficient one for a “for cause” challenge
- ⊗ The ***inability*** to put aside that bias/incapacity in accordance with a judge’s instructions and act impartially is what disqualifies the juror
- ⊗ Therefore, to make a legally valid challenge, your questions must establish:
 1. The Juror has a bias, incapacity, strong belief, etc..., affecting his ability to follow a specific law or act impartial, etc...; **AND**
 2. The Juror will not or cannot put aside that bias/incapacity/opinion even after the judge instructs him he has to.

For-Cause Challenges

⊗ Setting up For-Cause Challenges

⊗ **Once Bias is Exposed, you MUST show it will impair juror**

⊗ Examples

- ⊗ “So, are you saying that if the judge instructs you that you can’t consider ____, are you saying you won’t be able to set aside your feelings?”
- ⊗ “Even if the judge instructs you that you have to judge all witnesses by the same standard, are you saying that you won’t be able to treat the officers the same based on what happened to your brother?”
- ⊗ “If the judge instructs you that you have to put ____ aside and can’t let it affect how you view the evidence, do you think you’d have difficulty following that instruction?”

For-Cause Challenges

⊗ Setting up For-Cause Challenges

⊗ **Once Bias is Exposed, you MUST show it will impair juror**

⊗ “I think I can follow the law”

- ⊗ Respond with concern over “I think I can...” and provide examples
 - ⊗ Pilot landing airplane → “I *think* I can land this plane”
 - ⊗ Babysitter → “I *think* I can keep your kids alive tonight”
- ⊗ Goal is to get them to state their position more unequivocally

For-Cause Challenges

- ⊗ **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:

For-Cause Challenges

- ⊗ **Defending Against Challenges/Rehab'ing Good Jurors**
- ⊗ **Use concrete examples to test if they can be fair**
 - ⊗ 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”

For-Cause Challenges

⊗ Defending Against Challenges/Rehab'ing Good Jurors

⊗ Use concrete examples to test if they can be fair

⊗ Spell out what it means to be fair / unfair to test their resolve

- ⊗ “If you don’t believe I’ve proven he’s the driver, would you still find this man guilty just because...?”
- ⊗ “Can you listen to the evidence and make a decision as to whether you think I’ve proven that he’s done it?”
- ⊗ “Will you follow the law that the Judge gives you?”

⊗ Analogize to experiences in their lives where they do it already

- ⊗ See if juror has ever acted as a parent, manager, neutral arbiter in a friend dispute
- ⊗ Were they able to listen to both sides and make a decision?
- ⊗ “We’re asking them to do the same thing here.”

For-Cause Challenges

⊗ Defending Against Challenges/Rehab'ing Good Jurors

⊗ Use concrete examples to test if they can be fair

⊗ Distinguish this case from their own past experience

- ⊗ “Do you understand the Defendant has nothing to do what happened to your house?”
- ⊗ “Are you going to punish this person or treat him unfairly just because someone else broke into your house 10 years ago?”

VD Objections

⊗ **Statutorily Enumerated Objections – CCP § 222.5(b)(3)**

- ⊗ “For purposes of this section, an “improper question” is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law”

⊗ **Case Law Summary of Possible Objections:**

- ⊗ “...the examination of prospective jurors should not be used to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.” (*People v. Abilez* (2007) 41 Cal.4th 472, 492-493.)

VD Objections

⊗ **Types of Objections**

- ⊗ Asking jury to prejudge the evidence
- ⊗ Preconditioning/Indoctrinating the Jury
- ⊗ Pre-instructing on the law unrelated to for cause challenge
- ⊗ Argumentative
- ⊗ Improper voir dire:
 - ⊗ Unrelated to for cause challenges
 - ⊗ Ingratiating himself/herself with the jury

VD Objections

⊗ Asking Jury to Prejudge the Evidence

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Exposing facts to jury to see what they think about it
 - ⊗ Giving jurors hypo involving same facts/charges as your case.
 - ⊗ Often happens with hypos relating to self-defense or wit. credibility
 - ⊗ Other Examples:
 - ⊗ If my client has a valid excuse for violating the court order, will you vote NG?
 - ⊗ If you hear evidence that my client ____, what do you think of that?
 - ⊗ If my client had no injuries, could you still vote NG?

VD Objections

⊗ Asking Jury to Prejudge the Evidence

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Exposing facts to jury to see what they think about it
 - ⊗ Very Limited Exception to the rule: determining if a very inflammatory fact will inflame passions of jury.
 - ⊗ *People v. Williams* (1981) 29 Cal.3d 392, 408-409 [Counsel may inquire of prospective jurors on "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings"]
 - ⊗ *People v. Noguera* (1992) 4 Cal.4th 599, 646 [not improper for prosecutor to ask jurors if they would keep an open mind to death despite defendant's young age]

VD Objections

- ⊗ **Asking Jury to Prejudge the Evidence**

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Exposing facts to jury to see what they think about it
 - ⊗ Very Limited Exception to the rule: determining if a very inflammatory fact will inflame passions of jury.
 - ⊗ **Inflammatory** - *People v. Cash* (2002) 28 Cal.4th 703, 721-722 [fact that defendant had killed both his grandparents as a teenager was so inflammatory that he should have been allowed voir dire to determine whether the fact that he committed murder previously (without revealing the victims were his grandparents) would influence the jurors to vote for death without regard to mitigation]

VD Objections

- ⊗ **Asking Jury to Prejudge the Evidence**

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Exposing facts to jury to see what they think about it
 - ⊗ Very Limited Exception to the rule: determining if a very inflammatory fact will inflame passions of jury.
 - ⊗ **Inflammatory – prior felony conviction** - *People v. Chapman* (1993) 15 Cal.App.4th 136 [error to bar inquiry whether prospective jurors would be biased against defendant because he had previously been convicted of a felony]

VD Objections

- ⊗ **Asking Jury to Prejudge the Evidence**

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Exposing facts to jury to see what they think about it
 - ⊗ Very Limited Exception to the rule: determining if a very inflammatory fact will inflame passions of jury.
 - ⊗ **Not Sufficiently Inflammatory** - *People v. Zambrano* (2007) 41 Cal.4th 1082, 1122-1123 [that defendant dismembered the victim after killing him was not so inflammatory that it would cause such an invariable reaction on the part of jurors; voir dire was properly denied]
 - ⊗ **Not Sufficiently Inflammatory** - *People v. Tate* (2010) 49 Cal.4th 642, 658-660 [defendant had cut off murder victim's finger to steal her wedding rings; not proper voir dire]

VD Objections

- ⊗ **Asking Jury to Prejudge the Evidence**

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Exposing facts to jury to see what they think about it
 - ⊗ Very Limited Exception to the rule: determining if a very inflammatory fact will inflame passions of jury.
 - ⊗ Proper Question: if you find out my client is a convicted felon, will you automatically disregard his testimony?
 - ⊗ Improper: if you find out my client is a felon, will you disregard his testimony?

VD Objections

⊗ Asking Jury to Prejudge the Evidence

- ⊗ Most common error by young attorneys
- ⊗ Conduct that falls within this objection:
 - ⊗ Hypotheticals meant to determine how juror will vote / judge credibility
 - ⊗ Example: If you hear my client stabbed a person 17 times, would you be able to find he acted in self defense even if the other person had no defense wounds?
 - ⊗ Example: How do you determine if someone acts in self-defense?
 - ⊗ Example: How would you feel about hearing evidence like ___?
 - ⊗ "Will you automatically disregard my client's mom's testimony?"
 - ⊗ Any questions where its clear attorney is trying to see if juror will believe their theory of the case.

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

- ⊗ **Second most common type of error**
 - ⊗ Testing juror receptivity to attorney's theory of the case;
 - ⊗ Repetitious recitation of defense friendly legal principles;
 - ⊗ Identifying juror experiences to similar to the defense perspective.
- ⊗ **Generic examples:**
 - ⊗ "Is it possible someone may falsely confess?"
 - ⊗ Limited exception: Could an officer lie/be mistaken?
 - ⊗ "Who here's been in a fight before? What was it like?" etc...
 - ⊗ "Who's had an ugly divorce?"
 - ⊗ "Who agrees that ex-wives have a motive to lie?"

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

⊗ Case Law Examples:

⊗ IMPROPER DEFENSE QUESTION:

⊗ “In the case at bench, defense counsel stated, 'It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend.'

⊗ The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so.”

⊗ (*People v. Helton* (1984) 162 Cal.App.3d 1141, 1145.)

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

⊗ Case Law Examples:

⊗ IMPROPER DEFENSE CONDITIONING:

⊗ Def. Counsel asked whether any jurors could conceive of or had found themselves in a situation in which they had consented to have sex with someone without ever saying anything about actually wanting to have sex with them.

⊗ (PEOPLE v. HSU (July 24, 2003, A094582) ___ Cal.App.4th___ [2003 Cal. App. Unpub. LEXIS 7116, at *43].)

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

⊗ Case Law Examples:

- ⊗ IMPROPER PROSECUTION PRECONDITIONING –
- ⊗ “if a woman is unconscious, that the fact that she drank alcohol somehow equals consent for sexual intercourse?” and “if a woman drinks alcohol and later on is with a man, that she deserves what she gets or is your thinking might be [sic] she was foolish to drink and she was with a man and she deserves what she gets” followed by the prosecutor then summarizing he will provide evidence defendant had sex with a woman while she was unconscious.”
- ⊗ *PEOPLE v. HSU* (July 24, 2003, A094582) ___ Cal.App.4th ___ [2003 Cal. App. Unpub. LEXIS 7116, at *43]

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

⊗ Case Law Examples:

- ⊗ IMPROPER PROSECUTION CONDITIONING - “The prosecutor’s comments, as a whole, appear to us to be an attempt to precondition the jurors to return a guilty verdict, and improperly referred to evidence outside the record, namely, the experiences of the prosecutor and of the victims’ families in other cases on which the prosecutor had worked.” (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.)
- ⊗ Improper comments were:
 - ⊗ References to prior jury verdicts of guilty
 - ⊗ That he only does serious cases
 - ⊗ How jurors have previously told him how they deliberate
 - ⊗ Statements implying he only goes forward on guilty defendants; and believes this defendant is guilty

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

⊗ Case Law Examples:

⊗ IMPROPER DEFENSE QUESTION:

- ⊗ Defense attorney asking whether "it's possible for an eyewitness to a crime or some incident to mistakenly identify an innocent person as the person that committed that crime and say I am sure that is the person?"

- ⊗ (People v. Packard (Aug. 30, 2017, No. F070008) ___ Cal.App.5th ___ [2017 Cal. App. Unpub. LEXIS 5981, at] [found to be “obvious preconditioning”].)

VD Objections

⊗ Preconditioning/Indoctrinating the Jury

⊗ Case Law Examples:

⊗ IMPROPER PROSECUTION QUESTIONING:

- ⊗ Prosecutor improperly asked jurors what the best source of information of their own intent would be.
- ⊗ Then, “the prosecutor indicated that the question he “was trying to ask” was that “if people give opinions about what other people are thinking at a given moment and what I'm raising to you is that we should look with some caution about those kinds of opinions, and if we have available to us more direct evidence, perhaps of what a person is feeling or what a person did and why they did it, then we ought to look to that as well. So that's all I'm trying to get at.”
- ⊗ *People v. Salcido* (2008) 44 Cal.4th 93, 153

VD Objections

- ⊗ **Pre-instructing on the law unrelated to For Cause challenge**

- ⊗ Purpose of Voir Dire is not to preinstruct the jurors on the law
 - ⊗ *People v. Love* (1960) 53 Cal.2d 843, 852: "The knowledge or ignorance of prospective jurors concerning questions of law is generally not a proper subject of inquiry on voir dire, for it is presumed that jurors will be adequately informed as to the applicable law by the instructions of the court."
- ⊗ Examples:
 - ⊗ Asking jurors their understanding of specific legal principles
 - ⊗ Reading jurors jury instructions
 - ⊗ Exception – presumption of innocence / Reasonable doubt

VD Objections

- ⊗ **Pre-instructing on the law unrelated to For Cause challenge**

- ⊗ Exception: primary purpose is to determine ability to follow law
 - ⊗ *People v. Love* (1960) 53 Cal.2d 843, 852, fn. 1 - "Inquiry into a juror's understanding of a principle of law may, however, be a prerequisite to inquiry into his willingness to apply that principle of law. To preclude such inquiry might under some circumstances constitute a refusal to permit the "reasonable examination of prospective jurors" to which the parties are entitled."

VD Objections

⊗ Pre-instructing on the law unrelated to For Cause challenge

- ⊗ Exception: primary purpose is to determine ability to follow law
 - ⊗ *People v. Allen* (1969) 275 Cal.App.2d 428, 441 – “It has been held that questions concerning principles of law may be asked of prospective jurors to determine if such jurors would follow them.”
 - ⊗ *People v. Johnson* (1989) 47 Cal.3d 1194, 1224-1225 - “[T]he court must permit questioning about legal doctrines that are material to the trial and controversial in the sense that they are likely to invoke strong feelings and resistance to their application.”

VD Objections

⊗ Pre-instructing on the law unrelated to For Cause challenge

- ⊗ **Proper:**
 - ⊗ Reference legal principle (Single wit) and ask if jurors can follow
 - ⊗ Ask if jurors will keep an open mind to types of defenses/liabilities
- ⊗ **Not Proper**
 - ⊗ Reading the elements of charges and ask what they think
 - ⊗ Discussing specific defense evidence instructions
- ⊗ **Caution:** what’s good for the goose is good for the gander...
 - ⊗ Give Defense some leeway, particularly w/ R.D. & Pres. of Inn.
- ⊗ Object if Defense starts instructing on Defense instructions:
 - ⊗ Self defense, Heat of passion, Mistake of fact, etc...
 - ⊗ Especially if no follow up with asking if they can follow the law

VD Objections

- ⊗ **Pre-instructing on the law unrelated to For Cause challenge**

- ⊗ Example

- ⊗ *People v. Tilbury* (Sep. 10, 2013, No. H036579) ___ Cal.App.4th ___ [2013 Cal. App. Unpub. LEXIS 6460, at *28-29 [judge rejected Defense questionnaire suggestions on self defense instructions for being "'a little bit too pointed" in attempting to "pre-condition jurors to a particular result" or "indoctrinate the jury" on the defense theory of the case]

VD Objections

- ⊗ **Argumentative**

- ⊗ Similar to Preconditioning
- ⊗ Any time an attorney starts explaining the law in a defense friendly perspective;
- ⊗ You'll know it when you see it; sounds like closing argument
- ⊗ Relatively rare during VD but it's a possible objection

VD Objections

⊗ **Improper Voir Dire**

⊗ **Unrelated to for cause challenges**

- ⊗ Catch-all for questions that don't fall into the prior categories

⊗ Examples:

- ⊗ Asking jurors how they would determine to vote death or judge credibility of witnesses
- ⊗ Any questions meant to assess juror decision making process that don't involve misconduct
- ⊗ Irrelevant demographic questions

⊗ Word of Caution/Advice

- ⊗ Give Defense some leeway – many questions can be foundational
- ⊗ If Defense is putting jury to sleep, let him; Then use your time to distinguish yourself

VD Objections

⊗ **Improper Voir Dire**

⊗ **Ingratiating oneself with the jury**

- ⊗ This applies throughout the trial; but often seen during VD
- ⊗ Conduct whose primary/sole purpose is to get them to like you
- ⊗ Generic Examples:
 - ⊗ Talking about other cases you've prosecuted/defended
 - ⊗ Talking about family or life experiences you share with jurors
 - ⊗ Using your *unique* personal experiences to set up a hypothetical
 - ⊗ Anything where primary purpose is to charm them
- ⊗ Remember, what's good for the goose...

VD Objections

- ⊗ **Improper Voir Dire**

- ⊗ **Ingratiating oneself with the jury**

- ⊗ Case Law

- ⊗ “Defendant now contends that the public defender should have used voir dire in order to ingratiate himself with the jury. This, of course, is not an acceptable basis for voir dire.” (*People v. Huffman* (1977) Cal.App.3d 63, 74.)

- ⊗ *People v. Castillo* (2008) 168 Cal.App.4th 364, 386 – prosecutor made improper statements that were ingratiating/preconditioning

- ⊗ Informed jury he only does rape/child abuse cases
- ⊗ Informed jury he cries when talking to witnesses
- ⊗ Discussed prior case where jury voted guilty
- ⊗ Told juror “you’re on the same page as me”

VD Objections

- ⊗ **Tips for Avoiding Objections in Grey Areas:**

- ⊗ Know your judge and opposing counsel

- ⊗ Be able to articulate why your *primary purpose* is for cause

- ⊗ Broadcast the admissibility of your questions

- ⊗ E.G. “I want to see if anyone has any preconceived notions of ____ that will prevent them from being fair and impartial jurors”

- ⊗ This is how you justify exploring juror views on:

- ⊗ Consent
- ⊗ Views of DV / child molest victim behavior
- ⊗ Their roles as jurors
- ⊗ Circumstantial Evidence

- ⊗ E.G. - “Follow the law general vs speeding” allegory

Topics to Cover

⊗ What if I only have 15 minutes to Voir Dire a panel?

- ⊗ Negative Experiences with L.E. / Court system
- ⊗ Ability to follow law on stupid cases
- ⊗ Not All Evidence
- ⊗ CSI Expectations
- ⊗ The issue unique to your case

Topics to Cover

⊗ What if I only have 15 minutes to Voir Dire a panel?

- ⊗ **Negative Experiences with L.E. / Court system**
 - ⊗ Ask judge to cover; if judge doesn't, you need to
 - ⊗ Be polite, empathetic, encouraging; apologetic (if necessary)
 - ⊗ Suggested questions, "You or anyone close to you ever..." :
 - ⊗ had a negative experience with L.E.?
 - ⊗ been accused of or convicted of crime?
 - ⊗ been in a courtroom for *any* reason?
 - ⊗ been in custody/jail/prison?
 - ⊗ been contacted by L.E. For any reason?
 - ⊗ Ask them if it will affect them in this case/officer testimony?
 - ⊗ "Do you that has anything to do with this case?"
 - ⊗ Explore if it will effect views on officer credibility
 - ⊗ Consider asking juror thoughts on L.E. / Court system
 - ⊗ Consider kicking anyone with a recent experience;

Topics to Cover

- ⊗ **What if I only have 15 minutes to Voir Dire a panel?**
- ⊗ **Negative Experiences with L.E. / Court system**
- ⊗ **Ability to follow law on stupid cases**
 - ⊗ 647fs, 12500s/14601s, muni code violations, no injury 243(a)s
 - ⊗ Need to discuss following the law even if its waste of time
- ⊗ Consider analogizing to Jay Walking or trespassing

Topics to Cover

- ⊗ **What if I only have 15 minutes to Voir Dire a panel?**
- ⊗ **Negative Experiences with L.E. / Court system**
- ⊗ **Ability to follow law on stupid cases**
- ⊗ **Not All Evidence**
 - ⊗ "You may be instructed that neither side is required to produce all evidence or witnesses"
 - ⊗ Confirm jurors will base verdict only on evidence presented
 - ⊗ Will you speculate as to what else might be out there?
 - ⊗ Will you speculate as to why certain witnesses weren't called?
 - ⊗ Must confront Engineers/medical professionals with this
 - ⊗ Discuss how law is different from their fields; confirm that's ok
 - ⊗ Hypo: Battery in courtroom in front of 60 witnesses; only call 1

Topics to Cover

- ⊗ **What if I only have 15 minutes to Voir Dire a panel?**
 - ⊗ **Negative Experiences with L.E. / Court system**
 - ⊗ **Ability to follow law on stupid cases**
 - ⊗ **Not All Evidence**
 - ⊗ **CSI Expectations**
 - ⊗ 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
 - ⊗ Ask if they expect DNA / Government Enhanced Imagery / Crime scene psychics in this “misdemeanor drug possession case”
 - ⊗ I usually do this last; affords opportunity to end on a comical note

Topics to Cover

- ⊗ **What if I only have 15 minutes to Voir Dire a panel?**
 - ⊗ **Negative Experiences with L.E. / Court system**
 - ⊗ **Ability to follow law on stupid cases**
 - ⊗ **Not All Evidence**
 - ⊗ **CSI Expectations**
 - ⊗ **The issue unique to your case:**
 - ⊗ E.G. Single witness testimony
 - ⊗ E.G. Circumstantial evidence
 - ⊗ E.G. Sympathetic Defendant / unsympathetic victim
 - ⊗ Whatever is the issue that may cause jurors to nullify or screw up the verdict due to preconceived notions / unrealistic expectations

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ **Single Witness Testimony (Especially for DV/Sex cases)**

- ⊗ Summarize the principle of CALCRIM 300
- ⊗ See if jurors will keep an open mind
 - ⊗ Willing to vote guilty if they believe witness BRD?
 - ⊗ See if anyone would never vote guilty in a case with 1 witness
- ⊗ If any are resistant, ask why there may be only 1 witness in a case that occurs in privacy of a home vs a crime at walmart
 - ⊗ e.g. - Do sex assaults occur in the public square or at home?
- ⊗ For sex assault consider tying in lack of DNA questions here
 - ⊗ e.g. - Do you require DNA to convict?

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ **Circumstantial Evidence**

- ⊗ Need to make sure jurors are comfortable with it and how it works
 - ⊗ All cases rely on it for corpus or corroboration
- ⊗ Can use this to test to evaluate:
 - ⊗ Bias against Circ. Evid.; damaging preconceived notions
 - ⊗ (Secondary purpose) Jurors ability to follow you / think

⊗ **First Step: Broadcast Admissibility**

- ⊗ Declare intention of uncovering preconceived notions of Circ. Evid.
- ⊗ Ask if jurors have heard of it (50%-75% usually have)
- ⊗ Ask if they hear it in the TV context where it is portrayed as weak:
 - ⊗ “The People’s case is purely circumstantial!!!”
- ⊗ Ask for definition from a juror
- ⊗ Re-broadcast admissibility & transition to the hidden pen exercise...

Topics to Cover

⌘ Common Topics for Misdo/low level Cases

⌘ 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 ____?

Topics to Cover

⌘ Common Topics for Misdo/low level Cases

⌘ Circumstantial Evidence

⌘ Example – Pen Behind the Podium

- ⌘ Can also then be used to discuss intent:
 - ⌘ Engage in purposeful conduct (like repeatedly tapping pen or dropping it)
 - ⌘ “Am I doing this on accident?”
 - ⌘ “what if told you this was involuntary? I can’t control it. I am not intending to do this.”
 - ⌘ Ask how they know it’s not on accident.
- ⌘ Then get them to say if they are willing to do that as jurors:
 - ⌘ Use circ. Evidence to determine a person’s intent

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ 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 – Don’t want to spoil your panel
- ⊗ Suggestions for now:
 - ⊗ After discussing CSI Effect, poll jury on who follows criminal law “documentaries.”
 - ⊗ Do you think those are accurate depictions?
 - ⊗ Do those stories have any bearing on this case?
 - ⊗ Will those stories have any impact on they view evidence hear or make decisions on credibility / the case?
- ⊗ You are seeing if they have preconceived notions that impair their ability to be fair and impartial

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ **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**

- ⊗ You MUST 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 confirm that they can convict someone for a careless mistake
- ⊗ Compare to cases where consequences of the crime decide if it’s a felony or misd (e.g. DUI crash with injury vs without)

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ Domestic Violence / Uncooperative Victim

- ⊗ Always include unsympathetic questions in a DV case
- ⊗ Test pre-conceived notions
 - ⊗ How is an alleged Dv victim supposed to act? Testify?
 - ⊗ Do you expect her to act the way you did when your car was stolen?
 - ⊗ Do you have any expectations on how she is supposed to act?
 - ⊗ Does she have to cry for you to believe her?
 - ⊗ Do all women handle trauma the same way?
 - ⊗ Do you expect her to cooperate?
 - ⊗ Do you understand why a DV vic may not be cooperative?
 - ⊗ If I prove him guilty BRD, but she doesn't want him prosecuted, will that affect your vote?

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ Domestic Violence / Uncooperative Victim

- ⊗ Test willingness to listen to 1107 expert evidence
 - ⊗ If the alleged victim engages in behavior that initially doesn't make sense, are you willing to listen to expert testimony on how D.V. victim may act before you make any final judgments?
- ⊗ 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

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ Cases Lacking in Forensic Evidence

- ⊗ Must see if Jurors are “open to the possibility” of deciding guilt without forensic evidence.

⊗ No-Blow DUI's: Ever see someone drunk in public?

- ⊗ Bars / restaurants, Las Vegas, family reunions?
- ⊗ Need a BAC # to know that person was drunk?
- ⊗ Keep an open mind or will you automatically refuse to vote G?

⊗ No DNA Sex Assaults

- ⊗ Any preconceived ideas on how DNA works? When you can/can't find it?
- ⊗ "Given the nature of the charges, Do you require DNA to convict?"
- ⊗ Would you automatically vote NG, regardless of the evidence, if there's no DNA?

Topics to Cover

⊗ Common Topics for Misdo/low level Cases

⊗ "I need Evidence" aka testimony isn't evidence

- ⊗ Can inquire if jurors are comfortable with law that sworn testimony is evidence
- ⊗ Can ask if willing to convict if the only evidence is testimony

⊗ Views on Witnesses with Drugs/Disabilities

- ⊗ Obtain jurors view on drug use / mental disabilities
 - ⊗ For drugs – see if any family members have been negatively affected by drug abusing relatives – possibly kick them
 - ⊗ "Can a person with a disability still be reliable?"
- ⊗ Will jurors automatically disregard a person's testimony just because of drug use or disability?

Final Words of “Wisdom”

- ⊗ **Don't go overboard in trying to make jury care**
 - ⊗ Never lose perspective because credibility is your # 1 Asset
- ⊗ **Misdos & common felonies 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!**

Final Words of “Wisdom”

- ⊗ **Practice new topics out loud**
- ⊗ **Always prep your VD/identify issues in advance**
 - ⊗ But be ready to adapt based on the "flow" of V.D.
- ⊗ **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**

Contact Info

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[illegible]

Impeachment

Benjamin Ladinig

Senior Deputy District Attorney
Santa Barbara County



IMPEACHMENT

BENJAMIN LADINIG
SENIOR DEPUTY DISTRICT ATTORNEY
SANTA BARBARA COUNTY
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1

IT STARTS IN VOIR DIRE

- **ASK ABOUT FACTORS THEY CONSIDER (CALCRIM 226)**
 - **DISCUSS PAID EXPERTS**
- **PREP THEM FOR RECALCITRANT WITNESS**
 - **DISCUSS BIAS**

2

WHO WILL YOU IMPEACH FIRST?

THE DIFFICULT WITNESS

EC 1235

EC 1236

EC 1237

EC 770

3

EVIDENCE CODE § 1235

EVIDENCE OF A STATEMENT MADE
BY A WITNESS IS NOT MADE
INADMISSIBLE BY THE HEARSAY
RULE IF THE STATEMENT IS
INCONSISTENT WITH HIS
TESTIMONY AT THE HEARING AND IS
**OFFERED IN COMPLIANCE WITH
EVIDENCE CODE § 770.**

4

EVIDENCE CODE § 1235

A PRIOR STATEMENT OF A WITNESS CAN BE INTRODUCED TO IMPEACH A WITNESS AND CAN BE OFFERED NOT ONLY FOR IMPEACHMENT, BUT ALSO FOR THE TRUTH OF THE MATTER ASSERTED UNDER EVIDENCE CODE § 1235.

***PEOPLE V. MONTIEL* (1993) 5 CAL.4TH 877
[ADMISSIBLE FOR THE TRUTH].**

5

EC 1235 PRIOR INCONSISTENT

- 1. MUST LOCK IN TO CURRENT VERSION**
- 2. THEN CONFIRM PRIOR STATEMENT MADE**
- 3. CONTRONT WITH ACTUAL PRIOR STATEMENT.....PRECISE!!!**
- 4. ASK WITNESS TO ADMIT TO MAKING STATEMENT**
- 5. DO NOT REFRESH RECOLLECTION TOO EARLY**

6

EVIDENCE CODE § 770

UNLESS THE INTEREST OF JUSTICE OTHERWISE REQUIRE, EXTRINSIC EVIDENCE OF A STATEMENT MADE BY A WITNESS THAT IS INCONSISTENT WITH ANY PART OF HIS TESTIMONY AT THE HEARING SHALL BE EXCLUDED UNLESS:

- (A) THE WITNESS WAS SO EXAMINED WHILE TESTIFYING AS TO GIVE HIM AN OPPORTUNITY TO EXPLAIN OR TO DENY THE STATEMENT; OR
- (B) ***THE WITNESS HAS NOT BEEN EXCUSED FROM GIVING FURTHER TESTIMONY IN THE ACTION.***

7

EVIDENCE CODE § 770 REQUIRES EXCLUSION OF THE STATEMENT UNLESS EITHER THE WITNESS WAS GIVEN THE OPPORTUNITY WHILE TESTIFYING TO EXPLAIN OR DENY THE STATEMENT OR THE WITNESS HAS NOT BEEN EXCUSED FROM GIVING FURTHER TESTIMONY IN THE ACTION.

PEOPLE V. BUTTES
(1990) 223 CAL.APP.3D 1631

8

REMEMBER THE THREE “C”s

- 1. COMMIT:** GET WITNESS TO COMMIT TO CURRENT VERSION AND THAT IS THE TESTIMONY TODAY
- 2. CONFIRM:** GET WITNESS TO ACKNOWLEDGE HE/SHE MADE PRIOR STATEMENT, CLOSER IN TIME, NOT LYING THEN
- 3. CONFRONT:** DIRECTLY QUOTE THE PRIOR INCONSISTENT STATEMENT AND GIVE THEM CHANCE TO EXPLAIN/DENY

9

WRONG QUESTIONS

- DO YOU RECALL WHAT YOU TOLD OFFICER SMITH?
- DO YOU RECALL TELLING SMITH THE DEFENDANT HAD A GUN?

I DON'T RECALL IS NOT INCONSISTENT WITH PRIOR STATEMENT...IT AIN'T COMING IN

10

RECANTING WITNESS

PEOPLE V. GREEN (1971) 3 CAL.3D 981.

- THE COURT HELD IN GREEN, IT WOULD BE *UNWILLING TO PERMIT A WITNESS TO BECOME A TURNCOAT WITNESS AND DELIBERATELY OBSTRUCT JUSTICE* IN A CASE BY GIVING EVASIVE ANSWERS AND “I DON’T REMEMBER ANSWERS.”

11

- WHEN A WITNESS’S CLAIM OF LACK OF MEMORY AMOUNTS TO DELIBERATE EVASION, INCONSISTENCY IS IMPLIED.” *GREEN, SUPRA* AT 988-989. “AS LONG AS THERE IS A REASONABLE BASIS IN THE RECORD FOR CONCLUDING THAT THE WITNESS’S ‘I DON’T REMEMBER’ STATEMENTS ARE EVASIVE AND UNTRUTHFUL, ADMISSION OF HIS OR HER PRIOR STATEMENTS IS PROPER.” **PEOPLE V. O’QUINN (1980) 109 CAL.APP.3D 219, 225; PEOPLE V. JOHNSON (1992) 3 CAL.4TH 1183, 1219-1220**

12

“GREENING” YOUR WITNESS

(“I DON’T RECALL”)

- GET THEM TALKING, EVEN A SMALL BIT
- LOCK THEM INTO CURRENT VERSION
- GET THEM TO ADMIT BEING INTERVIEWED SHORTLY AFTER CRIME
- GET TO ADMIT THEY DON’T WANT TO TESTIFY
- DISCUSS FEAR/RELUCTANCE/ETC.
- **DON’T SAY DO YOU RECALL TELLING....**
- CONFRONT W/ PRIOR STATEMENT + OPPORTUNITY TO EXPLAIN OR DENY

DO NOT EXCUSE WITNESS!!

13

I DON’T REMEMBER

- HAVE THEM ADMIT TO MAKING SOME PRIOR STATEMENT
- ASK SPECIFICS, THEN REFRESH
- ESTABLISH BIAS (RELATIONSHIP TO DEF.)
- ASK COURT TO ADMONISH
- ASK COURT TO MAKE FINDING FEIGNED LACK OF MEMORY

14

IMPLIED DENIAL (GREEN)

IF WITNESS IS EVASIVE/CLAIMED LACK OF MEMORY.....

- A)RELATIONSHIP WITH DEFENDANT**
- B)FEAR**
- C)RELUCTANCE**
- D)LOSS OF MEMORY IS IMPLAUSIBLE**
- E)GET WITNESS TO TALK ABOUT THINGS THAT ARE HELPFUL TO DEFENDANT**

15

EMPHASIZE THE FOLLOWING

- (1) THE IMPORTANCE OF GIVING POLICE OFFICERS ACCURATE INFORMATION;**
- (2) THE WITNESS'S DESIRE TO GIVE THE POLICE ACCURATE INFORMATION TO MAKE SURE THE RIGHT PERSON IS ARRESTED; AND**
- (3) THAT THE WITNESS DID IN FACT GIVE THE POLICE ACCURATE INFORMATION**

16

PAST RECOLLECTION RECORDED (EC § 1237)

- **USE WHEN REFRESHING DOESN'T WORK**
- **MUST ESTABLISH PRIOR STATEMENT MADE WHILE FRESH IN WITNESS'S MIND NEAR TIME OF EVENT**
- **WITNESS MADE A STATEMENT AND PRIOR STATEMENT WAS TRUTHFUL AND ACCURATE.**
- **IF WITNESS STILL CANNOT REMEMBER, STATEMENT IS READ INTO RECORD....NOT WRITING ITSELF UNLESS OFFERED BY ADVERSE PARTY**

17

IMPEACHING DEFENSE WITNESSES

18

DO YOU EVEN CROSS?

***“NEVER CROSS-EXAMINE ANY MORE THAN
IS ABSOLUTELY NECESSARY. IF YOU DON’T
BREAK THE WITNESS, HE BREAKS YOU.”***

RUFUS CHOATE, 19TH CENTURY TRIAL LAWYER

19

APPLICABLE STATUTES

- | | |
|-----------------|--|
| 1. EC 720: | QUALIFICATION OF EXPERT WITNESS |
| 2. EC 721: | CROSS-EXAMINATION OF EXPERT |
| 3. EC 722: | CREDIBILITY OF EXPERT |
| 4. EC 761: | CROSS-EXAMINATION |
| 5. EC 765: | COURT TO CONTROL MODE OF
INTERROGATION |
| 6. EC 767: | LEADING QUESTIONS |
| 7. EC 770: | EVIDENCE OF INCONSISTENT STATEMENT
OF WITNESS; EXCLUSION; EXCEPTIONS |
| 8. EC 771: | PRODUCTION OF WRITING USED TO
REFRESH MEMORY |
| 9. EC 800: | LAY WITNESS; OPINION TESTIMONY |
| 10. EC 801-805: | EXPERT WITNESS; OPINION TESTIMONY;
ULTIMATE ISSUE, PROPER AND IMPROPER
BASIS |

20

NO WITNESS, INCLUDING A
DEFENDANT WHO ELECTS
TO TESTIFY ON HIS OR HER
OWN BEHALF, IS ENTITLED
TO A FALSE AURA OF
CREDIBILITY.

PEOPLE V. MULDROW
(1988) 202 CAL.APP.3D 636

21

AREAS OF IMPEACHMENT

- **VERACITY**: EXPOSE AS UNTRUTHFUL
COMPARE WITH OTHER EVIDENCE,
CHALLENGE, DEMEANOR,
CHARACTER FOR TRUTH OR MORAL
TURP
- **BIAS**: KNOWS DEFENDANT, STAKE IN
GAME, INTIMATE, BFF, CO-WORKER
- **PERCEPTION**: TOO FAR AWAY,
DISTRACTIONS, UI BOOZE OR DRUGS,
CAN'T BE CREDIBLE
- **MEMORY**: CAN'T REMEMBER SQUAT

CALCRIM 226

- **HOW WELL COULD WITNESS SEE, HEAR, OR PERCEIVE?**
- **HOW WELL WAS THE WITNESS ABLE TO REMEMBER AND DESCRIBE WHAT HAPPENED?**
- **WHAT WAS THE WITNESS'S BEHAVIOR WHILE TESTIFYING OR UNDERSTAND QUESTIONS + ANSWER DIRECTLY?**
- **WITNESS'S TESTIMONY INFLUENCED BY BIAS OR PREJUDICE, PERSONAL RELATIONSHIP WITH SOMEONE IN CASE OR INTEREST IN HOW CASE IS DECIDED?**

23

- **WITNESS'S ATTITUDE ABOUT CASE OR ABOUT TESTIFYING?**
- **DID THE WITNESS MAKE A STATEMENT IN THE PAST THAT IS CONSISTENT OR INCONSISTENT?**
- **DID THE WITNESS ADMIT TO BEING UNTRUTHFUL?**
- **WHAT IS THE WITNESS'S CHARACTER FOR TRUTHFULNESS?**
- **HAS THE WITNESS BEEN CONVICTED OF A FELONY?**
- **WITNESS ENGAGED OTHER CONDUCT THAT REFLECTS ON BELIEVABILITY?**

24

PEOPLE V. CASTRO

(1985) 38 CAL.3RD 301

- **FELONIES AND MISD. THAT INVOLVE MORAL TURPITUDE CAN BE USED TO IMPEACH.**
- **EC 788 (FELONIES) + EC 352.5 (MISDEMEANORS)**
- **IMPEACH WITH CERTIFIED PRIORS/RAPS/ETC.**
- **SOMETIMES CAN IMPEACH WITH CONDUCT (WHEELER (1992) CAL.4TH 284).**
- **CAREFUL ON JUVI PRIORS, VERY LIMITED. WIC 827**
- **MAKE COURT DO 352 ANALYSIS + BEAGLE FACTORS 6 CAL.3D 441 (SANITIZE?)**
- **CAL. CRIM LAW PROCEDURE & PRACTICE (BIBLE) HAS LIST OF MORAL TURPITUDE CRIMES**

**IMPEACHING OFFENSE MAY
POST DATE CURRENT
CHARGES**

**PEOPLE V. HINTON
(2006) 37 CAL.4TH 839**

**EXPUNGEMENT PC 1203.4
MAY NOT BE USED FOR
IMPEACHMENT******

**PEOPLE V. FIELD
(1995) 31 CAL.APP.4TH 1778**

27

TYPE OF WITNESS DICTATES

1. HONEST CITIZEN
2. **SYMPATHETIC WITNESS**
3. HESITANT WITNESS
4. **CHILD WITNESS**
5. EVASIVE WITNESS
6. **BELLIGERENT/HOSTILE WITNESS**
7. CHARACTER WITNESS [MIL + #351]
8. **ALIBI WITNESS**

..... AND

THE MERCENARY

28

CHARACTER WITNESS

- 402 AS TO BASIS FOR KNOWLEDGE
- 402 AS TO SCOPE AND CHARACTER TRAIT
- EC 1102 ALLOWS REPUTATION OR OPINION ON DEFENDANT, NOT S.I.
- ASK “HAVE YOU HEARD QUESTIONS” PER CALCRIM 351
- IF TRUE, WOULD THAT CHANGE YOUR OPINION?
- ESTABLISH BIAS
- DON’T BEAT UP IF UNNECESSARY

29

THE MERCENARY

- STARTS WITH PREP (FILE DISC. REQUEST!)
- ASK COURT TO SET EXPERT DATE.
- ASK COURT TO ASK COUNSEL IF THEY HAVE CONTACTED ANY EXPERTS PRIOR TO JURY SELECTION (DUH! WITNESS LIST)
- TRY (GOOD LUCK WITH THIS!) TO GET PRE-TRIAL EXPERT COMPLIANCE.
- CDAA ONLINE COMMUNITY REQUEST!! TX, CV.....GOOGLE!!
- VOIR DIRE ON THE DB + 402 HEARING
- RESEARCH TOPIC OF EXPERTISE

30

WOODS V. SUPERIOR COURT

(1994) 25 CAL.APP.4TH 178

**ENTITLED VIA DISCOVERY TO
ALL REPORTS, TESTS, TEST
RESULTS, NOTES, ANYTHING
THE DEFENSE EXPERT
RELIED UPON.**

31

**WHEN DO YOU FIND
OUT ABOUT EXPERT?**

**IF YOU BRIEFED IT, JUDGE WILL
BE PREPARED.**

32

THE MERCENARY II

- **MAKE OUTLINE OF POINTS FROM EXPERT**
- **HAVE I.O. TAKE NOTES ON DIRECT**
- **DON'T ASK OPEN-ENDED QUESTIONS >>>??**
- **SET GROUND RULES EARLY (POLITELY!)**
- **ESTABLISH DEFENSE BIAS (\$\$\$\$\$\$)**
- **WHAT WAS PROVIDED TO THEM + WHAT DID THEY RELY ON?**
- **BIG PICTURE, DON'T GET BOGGED DOWN IN MINUTIAE.....GET IN AND GET OUT**
- **CAN TURN INTO YOUR EXPERT**

33

THE MERCENARY III

- **KEEP QUESTIONS TIGHT + CONTROL EXPERT OR HAVE COURT DO IT!**
- **BIAS, WEAK QUALIFICATIONS, POOR PREP OR LIMITED THINGS CONSIDERED**
- **GARBAGE IN GARBAGE OUT/JUNK SCIENCE**
- **IF NON-RESPONSIVE, INTERRUPT + MOVE TO STRIKE**
- **REMINDE HIM OF EARLY AGREEMENT**
- **MAKE HIM LOOK LIKE A FOOL AND A WHORE**

34

WHAT IF DEFENDANT TESTIFIES?

**DO NORMAL RULES STILL
APPLY?**

**YES AND NO
GLOVES COME OFF!!**

35

RULES TO LIVE BY**

- | | |
|--|--|
| 1. YOU DON'T NEED
TO CROSS | 7. DEFENSE FINAL
POINT ON DIRECT,
GOOD PLACE TO
START |
| 2. GET IN + GET OUT! | 8. CONTROL THE
COURTROOM |
| 3. KEEP FOCUSED | 9. ASK TO
APPROACH ON
DICEY AREAS |
| 4. DON'T ASK
QUESTION YOU
DON'T KNOW
ANSWER | 10. AVOID DO YOU
RECALL |
| 5. CONTROL YOUR
WITNESS | 11. LISTEN!!! |
| 6. DON'T SHY AWAY
FROM SILENCE | *** ALWAYS EXCEPTIONS |

36

RULES TO DIE BY

- | | |
|--------------------------------------|---------------------------------------|
| 1. FORGET TO
LISTEN TO
ANSWERS | 5. FAIL TO ASK
OTHERS FOR
INPUT |
| 2. USE "ISN'T IT
TRUE" | 6. FAIL TO
PREPARE |
| 3. END ON
SUSTAINED
OBJECTION | 7. FAIL TO SEND
EMAIL TO CDAA |
| 4. NEGLECT TO
WATCH OTHERS | |

37

MARC TAYLOR

**DNA TRANSFER THEORIST
CASE STUDY**

38

[illegible]

Prosecutors and Mental Health: *Let's Talk About It*

Kibbe Day
Deputy District Attorney
San Joaquin County

Prosecutors and Mental Health: *Let's talk about it*

Kibbe Day
Deputy District Attorney
San Joaquin County District Attorney's Office

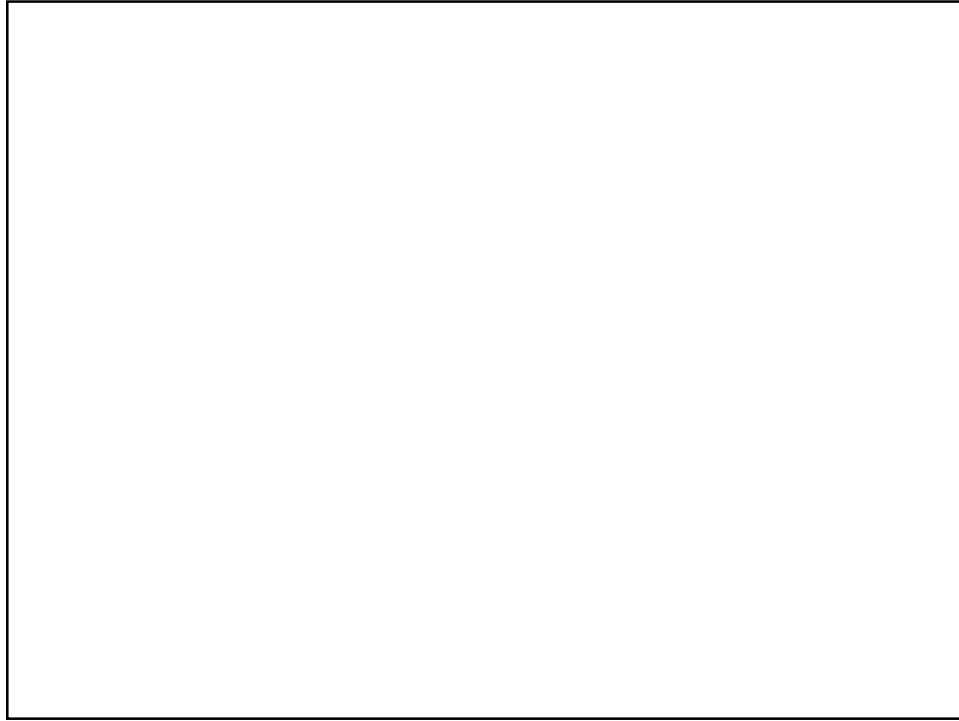
May 2019 Presentation



WHAT ARE YOU EXPECTING?

- Learn about Depression?
- Learn about Compassion Fatigue?
- Competency credit
- Facts.....facts.....facts.....and statistics 

WHAT DID YOU GET OUT OF THIS HOUR?



What contributes to our
professional quality of
life?

Complex Relationships

PERSONAL
EXPERIENCE

VICTIM
EXPERIENCE

WORK
ENVIRONMENT

Compassion
Satisfaction

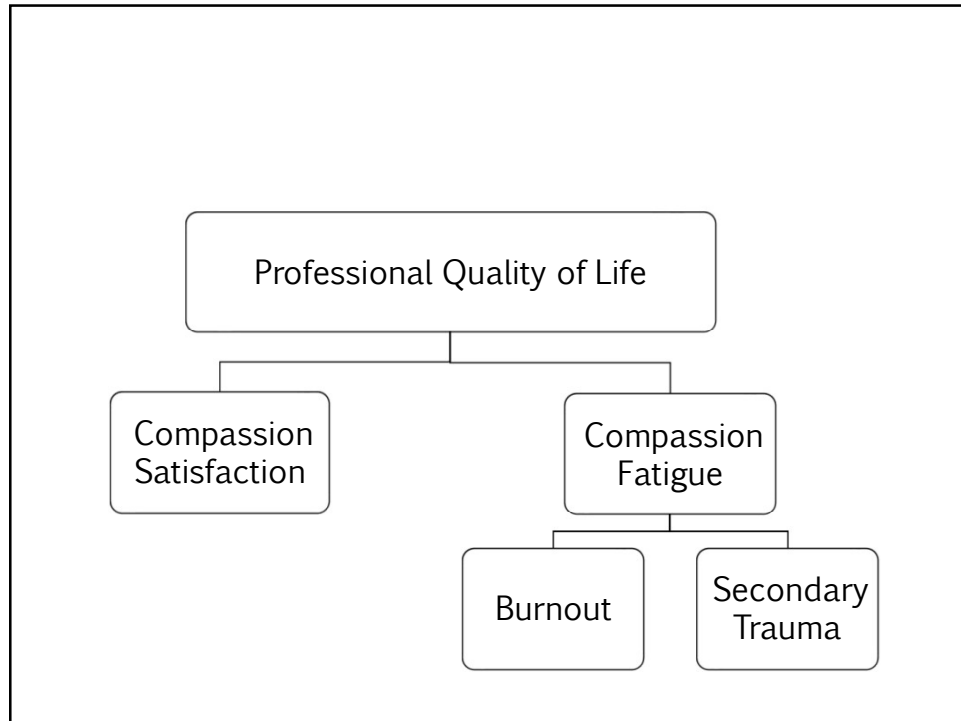
- The positive aspects of helping
- “The good stuff.”

Compassion
Fatigue

- The negative aspects of helping
- “The bad stuff.”

Burnout

- Inefficient
- Overwhelmed



Secondary Traumatic Stress

AKA:
Vicarious Trauma

SECONDARY TRAUMA

"Vicarious Trauma"

- Unique to professionals repeatedly exposed to the trauma of others
 - Law enforcement, firefighters, nurses, social workers, judges, criminal lawyers.....
- Symptoms mimic PTSD
- Cumulative effect of repeated exposure to trauma
- Erode sense of self, damage our outlook on life, harm our overall well-being

"Trauma for the tough-minded prosecutor." *The Texas Prosecutor*, July-August 2016, Volume 46, No. 4

SECONDARY TRAUMA

"Vicarious Trauma"

- "I would feel really bad right now if I had any feelings left."
- "I used to be so happy go lucky- I wish I could be like that again."
- "When I drive around town, I see crime scenes everywhere. Over there is where that child was raped. This is the field where that woman's body was found."
- "This is a terrible thing to say but....."
- "Watching the news is NOTHING compared to what we see daily."

NOT RELEVANT TO YOU?



RESEARCH ON STS AND ATTORNEYS

- STS for family and criminal court attorneys were higher than for mental health professionals (Levin & Greisberg, 2003)
- Study of public defenders found that 34% met criteria for STS and 75% met criteria for functional impairment (i.e., disruption in personal life, family life, etc.) (Levin et al, 2011)

Complex Relationships

PERSONAL
EXPERIENCE

VICTIM
EXPERIENCE

WORK
ENVIRONMENT

A diagram titled "Complex Relationships" showing three concepts: "PERSONAL EXPERIENCE" at the top, "VICTIM EXPERIENCE" on the left, and "WORK ENVIRONMENT" on the right. The "WORK ENVIRONMENT" text is enclosed in a hand-drawn oval, while the other two are not.

Prosecutors are being
increasingly criticized

NOT RELEVANT TO YOU?



ProQOL 5 Score

- Compassion Satisfaction Scale (“The good stuff”)
- Burnout Scale (“Inefficient and overwhelmed”)
- Secondary Traumatic Stress Scale (“The bad stuff”)

Complex Relationships



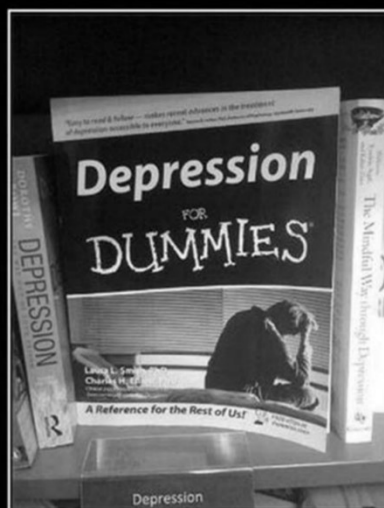
VICTIM
EXPERIENCE

WORK
ENVIRONMENT

We bring our life
experience into each
case.

FACTS ABOUT DEPRESSION

JKD



I'M PRETTY SURE
calling them dummies isn't going to help

What is Depression?

- **National Institute of Mental Health**

1. Difficulty concentrating, remembering details, and making decisions;
2. Fatigue and decreased energy;
3. Feelings of guilt, worthlessness, and/or helplessness;
4. Insomnia, early-morning wakefulness, or excessive sleeping;
5. Irritability, restlessness
6. Loss of interest in activities or hobbies that were once pleasurable;
7. Loss of pleasure in life
8. Overeating or appetite loss;
9. Persistent sad, anxious or “empty” feelings; and
10. Thoughts of suicide or suicide attempts

“Lawyer Depression: What is it, What Causes it, and What You Can Do About It.”
-www.lawyerswithdepression.com

Clinical Depression= at least 5 symptoms for 2 weeks.

1. Difficulty concentrating, remembering details, and making decisions;
2. Fatigue and decreased energy;
3. Feelings of guilt, worthlessness, and/or helplessness;
4. Insomnia, early-morning wakefulness, or excessive sleeping;
5. Irritability, restlessness
6. Loss of interest in activities or hobbies that were once pleasurable;
7. Loss of pleasure in life
8. Overeating or appetite loss;
9. Persistent sad, anxious or “empty” feelings; and
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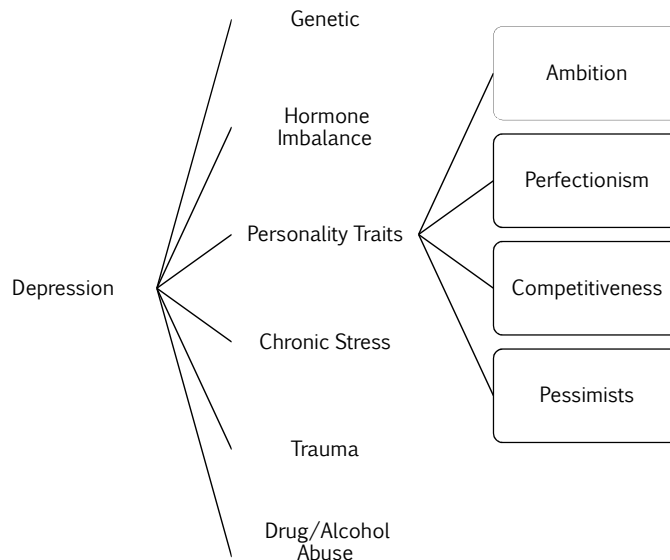
“Lawyer Depression: What is it, What Causes it, and What You Can Do About It.”
-www.lawyerswithdepression.com

DEPRESSION CAN ONLY BE DETERMINED BY A MENTAL HEALTH PROFESSIONAL

- “It’s just a slump.”
- “I’m just sad.”
- “A vacation will fix it.”
- “I’m just burned out.”
- “Snap out of it.”

“Lawyer Depression: What is it, What Causes it, and What You Can Do About It.”
-www.lawyerswithdepression.com

What causes depression?



NOT RELEVANT TO YOU?



Why do WE need to talk about it?

- ABA, Hazelden Betty Ford Foundation
- First national study on licensed and employed attorney substance abuse and mental health concerns. (February 2016)
- Compared with other professionals (ie; doctors.)
- Highest Risk
 - First 10 years of practice
- Attorneys experience mental health distress at a *higher rate* than other professional populations
 - 28% struggle with depression
 - 46% reported concerns with depression at some point in legal careers
- Most common barriers for attorneys to seek help
 - Fear of others finding out
 - Confidentiality

Expectations of prosecutors prevent disclosure

“Emotional vulnerability is viewed as a weakness and a problem.”

“Perfection is expected, as any mistake or oversight can dramatically change the outcome of a case or a trial.”

“This expectation leaves little room for the very normal human experience and error.”

“Trauma for the tough-minded prosecutor.” The Texas Prosecutor, July-August 2016, Volume 46, No. 4

POLITICS

The Untold Story of Susan Hawk

She had always dreamed about being Dallas County district attorney. But as her career took off, her personal life was falling apart—divorce, pain pills, thoughts of suicide. After two months of treatment, she says she’s ready once again to serve. Is she up to the job?

BY JAMIE THOMPSON | PUBLISHED IN D MAGAZINE NOVEMBER 2015

- 1995-2002: Prosecutor. Deputy Chief of Child Abuse Division
- 2003-2013: Judge
 - "Her personal life [was] in tumult while her career took off."
 - Started taking pain pills for a running injury
- 2013: Resigned as judge to run for district attorney
 - "She says she started taking more and more pain pills, spiraling into a deep depression. She had suffered bouts of sadness her whole life, as far back as seventh grade. But for the first time, she began to wonder whether she wanted to live."
- 2013: Wandering and incoherent at Whole Foods
- 2013: Hawk secretly went to rehab for prescription drug abuse during campaign for DA
- January 2015: Sworn in district attorney
- June 2015: Hawk fired two members of management. Described Hawk as "wild-eyed, paranoid and delusional."
 - Discussions behind closed doors haunted her.
- July 2015: Hawk on "summer break" (aka: psychiatric hospitalization for severe depression)
- October 2015: Hawk returns to work followed by calls for resignation

The thing that jumped out at me, with little or no mention, is that while the hospitalization, addiction, and all-around erratic behavior was taking place:

SHE WAS THE DISTRICT ATTORNEY RESPONSIBLE FOR CHARGING AND ULTIMATELY PUTTING PEOPLE IN JAIL!

Do ya think those people in jail, or otherwise, have a reasonable case to make that, oh, they might not have been handled properly?

I have sympathy for those that have issues of this type, but there are many more people than her and the DA office staff negatively impacted.

I get what you're saying but on a day-to-day basis I'd be much more worried about this from a line ADA or especially a bureau chief/executive ADA who is probably going to have much more of an effect on any given defendant.

Susan Hawk Talks about Depression

- January 2016: Petition for Removal Dismissed
 - Mental Illness v. Poor Performance
 - Hawk’s attorneys called it a, “stigmatizing and improper at based on the notion hat individuals suffering from depress disorder cannot meaningfully contribute to our society.”
 - “If suffering from depression is enough to qualify a license attorney from being a district attorney, then roughly a qua of the State Bar is disqualified.”
- May 2016: Hawk hospitalized for second time for severe depression. Hawk did not return to work after.
- June 2016: Hawk sought treatment for a third time.
- August 2016: Hawk returned to work.
- September 2016: Hawk resigned



SUSAN HAWK
CRIMINAL DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

September 6, 2016

Governor Greg Abbott
Office of the Governor
P.O. Box 12428
Austin, Texas 78711-2428

Dear Governor Abbott,

It is with a heavy heart that I must tender my resignation as Dallas County District Attorney. It's been an honor and a privilege to serve this office and the citizens of Dallas County, but my health needs my undivided attention.

More than my words could express, I appreciate the grace I've been shown as I've tried to balance my health and my duties. This has been a very difficult process for me as I've dedicated my life to serving our criminal justice system. I believe our office is making a difference and I want to continue that good work. But last fall upon returning from treatment, I made a commitment to step away from the office if I felt I could no longer do my job, and unfortunately I've reached that point as my health needs my full attention in the coming months.

While my personal health issues have received much attention over the past months, it's my hope that those issues do not overshadow the great work of our office over the past 20 months, so I would like to give you some of our highlights:

“Dallas DA Susan Hawk’s legacy may be better awareness about depression.”

-Jennifer Emily. *Dallas News*

Why Me?



The Opinion Pages

Should I Tell My Students I Have Depression?

Abby L. Wilkerson

DISABILITY DEC. 14, 2016

“Disclose, and face stigma, and perhaps material repercussions. Don’t disclose, and your suffering may remain invisible, you may face judgments about your character when your depression alters your affect and behavior, and you remain isolated.”

“At times when one’s depression is not acute, it’s easy to feel there’s no need to disclose; when it is, it can seem unthinkable.”

“My depression has given me unasked-for gifts, including a sensitivity to others’ suffering.”

The Opinion Pages

Should I Tell My Students I Have Depression?

Abby L. Wilkerson

DISABILITY DEC. 14, 2016

How do we loosen the double bind and remove the fear of risking careers and relationships?

Sometimes vulnerability loves-and needs-company.

A TALE OF...
NO INTERVENTION
LATE INTERVENTION
EARLY INTERVENTION



The New York Times | <http://nyti.ms/2hMnt4Y>

The Opinion Pages

Should I Tell My Students I Have Depression?

Abby L. Wilkerson

DISABILITY DEC. 14, 2016

Though I have suffered severe depression in the past, these days, my episodes tend to be milder and less frequent. Some days, I feel fine. But I might soon begin feeling melancholy — yet still able to laugh, think clearly, sleep at night and enjoy my life. Then one morning, for no discernible reason, I wake up mired in mud, my body now freight to be pushed through daily routines. The rhythm of life is suddenly ground down almost to nothing. I feel somehow both numb and raw, skin thin, laid open. Everything that matters is now far-off in the distance. Other people seem remote, existing in some parallel universe.

Coming out is HARD

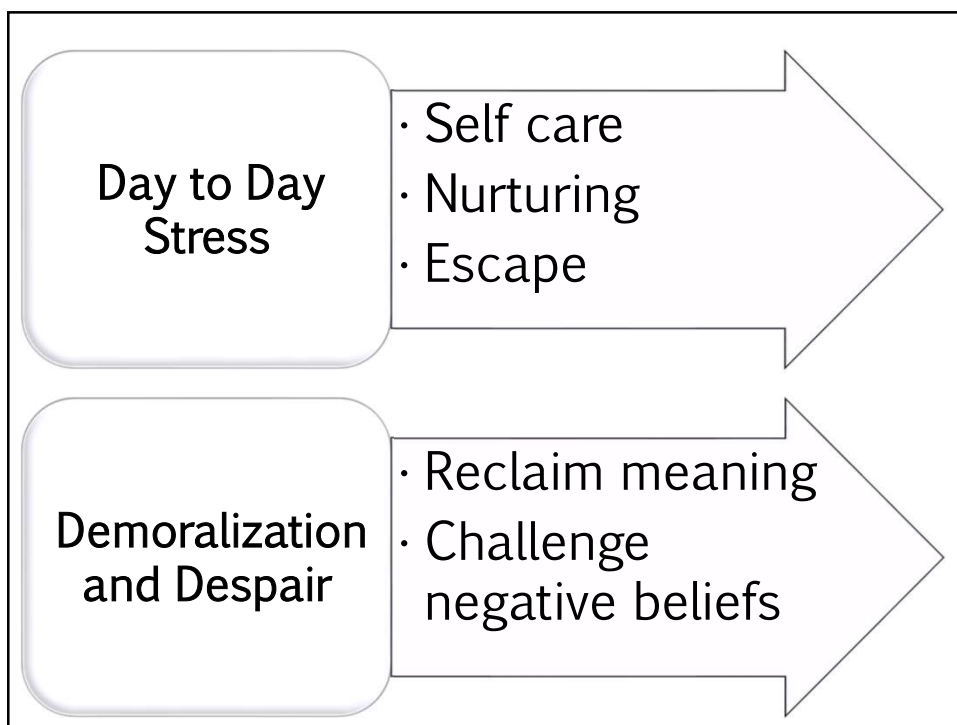
My Limitations

Should I ask for help?



ew, people.

“This work will change us, but by recognizing its impact and employing strategies to address the secondary trauma, we can hope to avoid or transform the damage it does.”



Is a therapist the only answer?



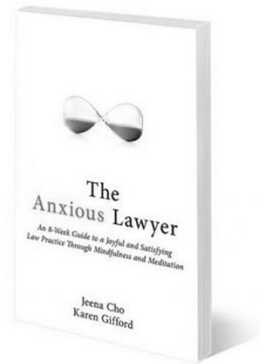
Mindfulness:
Condition of “being”
rather than “doing”
- Jon Kabat-Zin



The Anxious Lawyer

*An 8-Week Guide to a Joyful and Satisfying
Law Practice Through Mindfulness and Meditation*

Jeena Cho
Karen Gifford



SILENCE IS GOLDEN

Mindfulness



JKD

THIS ISN'T ALL ABOUT YOU
Reach out to help someone else



Helping someone else

- Talk to them.
- Do not try to diagnose depression yourself.
- Be empathetic and not judgmental.
- Give information about County Employee Assistance Program.
- Give information about the State Bar Lawyer Assistance Program.
- Contact Human Resources to understand policies and confidentiality.
- TAKE ANY SUICIDE THREAT SERIOUSLY

STATE BAR RESOURCES

**The State Bar of California
Lawyer Assistance Program (LAP)
877-LAP 4 HELP (877-527-4435)**

DEPRESSION Self-Assessment Test

One out of five Americans will experience a major depressive episode at least once during his/her lifetime. The rate for lawyers is 3-4 times that rate.

If you are experiencing any of the following, please consult the LAP for confidential help.

Has there been at least a 2-week period of time in which you experienced either depressed mood, or loss of interest or pleasure?
Are you:

- ☐ feeling sad, empty and/or irritable?
- ☐ feeling a loss of interest or pleasure in activities or work you once enjoyed?
- ☐ experiencing changes in weight and/or appetite?
- ☐ having increased difficulty sleeping, or sleeping more than usual?
- ☐ experiencing increased restlessness?
- ☐ experiencing a decrease in level of activity noticeable to others?
- ☐ feeling more fatigued or less energetic?
- ☐ having difficulty concentrating, remembering or making decisions?
- ☐ feeling overwhelming guilt, hopelessness or worthlessness?
- ☐ thinking of suicide or death?

If you answered YES to the last item, you should seek help IMMEDIATELY (regardless of your answer to any other questions).

If you answered YES to even a few of these questions, you may suffer from depression. You should get a professional assessment.
The LAP will help.

THE STATE BAR OF CALIFORNIA
Protecting the Public and Enhancing the Administration of Justice

January 12, 2017

HOME ATTORNEYS PUBLIC FUTURE LAWYERS ABOUT US

LAP Services
Counseling LAP
Resources
FAQ
Rules
Oversight

Home > Attorneys > Member Services > Lawyer Assistance Program > FAQ

FREQUENTLY ASKED QUESTIONS

Category: Lawyer Assistance Program Expand All

What is the Lawyer Assistance Program?

The Lawyer Assistance Program (LAP) is a confidential program that provides a supportive structure for building a personal program of recovery from chemical dependency and/or mental health disorders. The Program also monitors a participant's progress, not only for the public safety, but also as documentation of recovery for the professional participant.

More information about the Lawyer Assistance Program (LAP) can be found here.

What guarantees do I have that my participation in the LAP will be kept confidential?

Business & Professions Code §6232 (d) states that "...An attorney who is not the subject of a current investigation may voluntarily enter, whether by self-referral or referral by a third party, the diversion and assistance program on a confidential basis. Confidentiality pursuant to this subdivision shall be absolute unless waived by the attorney (emphasis added)."

ONLINE RESOURCES

- Lawyers with Depression- www.lawyerswithdepression.com
- American Bar Association-
http://www.americanbar.org/groups/lawyer_assistance/resources/depression.html
- California State Bar Lawyer Assistance Program-
<http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx>
- Depression and Bipolar Support Alliance –
<http://www.dbsalliance.org/site/PageServer?pagename=home>
- Lawyer Assistance Programs in U.S. –
http://www.americanbar.org/groups/lawyer_assistance.html
- Dave Nee Foundation – <http://www.daveneefoundation.com/>
- Undoing Depression – <http://www.undoingdepression.com/>
- Depression1on1 –
<http://www.1on1health.com/web/info/depression/english/home/Topic-Home>
- Men Get Depression – <http://mengetdepression.com/>
- MedicineNet – <http://www.medicinenet.com/depression/article.htm>
- Mental Health America – <http://www.mentalhealthamerica.net/>
- National Institute of Mental Health – <http://www.nimh.nih.gov/index.shtml>
- National Alliance on Mental Illness – <http://www.nami.org/>
- American Foundation for Suicide Prevention – <http://www.afsp.org/>
- Families for Depression Awareness – <http://www.familyaware.org/>
- Partnership for Workplace Mental Health –
<http://www.workplacementalhealth.org/>
- PsyWeb.com – <http://www.psyweb.com/>

“You are here for a reason, whether you believe you were called to this work or just find it exciting and interesting. We aren’t going to change the nature of it, but we do have control over who we are in the midst of it. Don’t run from your feelings. Pushing them underground doesn’t eliminate them, it just buries them. Much healthier is to recognize in the moment that you’re sad, horrified or overwhelmed by whatever is going on around you, and you can then focus on breathing and staying present. Find one or two safe people at work to debrief with, and be available for them when they need to talk as well. Using the suggestions above, create a plan for yourself to manage stress, take care of yourself, and cultivate hope and meaning.”

Trauma for the tough-minded prosecutor.” The Texas Prosecutor, July-August 2016, Volume 46, No. 4

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Surviving *Wheeler* – A Live Demonstration

Cindy De Silva
Deputy District Attorney
San Joaquin County

WHEELER/BATSON: A SUMMARY

By Cindy De Silva
Deputy District Attorney
County of San Joaquin
June 2019

1

What Is a “*Wheeler/Batson*” Objection Based On?

- **“Group Bias”:** The presumption “that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]”
 - (*People v. Wheeler* (1978) 22 Cal.3d 258, 276.)

2

The Tripod and the Three-Part Inquiry

- *People v. Wheeler* (1978) 22 Cal.3d 258
- *Batson v. Kentucky* (1986) 476 U.S. 79
- *Johnson v. California* (2005) 545 U.S. 162
- *Prong 1*: Opponent must make prima facie case that totality of circumstances raises an inference of discriminatory kick
- *Prong 2*: Burden shifts to proponent to give permissible reasons
- *Prong 3*: Trial Court decides whether opponent has proven discriminatory purpose

3

Prong 1: What Makes a Good “Prima Facie Case”?

- *People v. Scott* (2015) 61 Cal. 4th 363, 384, lists the following “particularly relevant” evidence:
- That the “party has struck most or all of the members of the identified group”;
- The “party has used a disproportionate number of strikes against the group”;
- The party has not engaged in significant questioning of those jurors;
- D is a member of the identified group; and
- V is a member of the group of the majority of the remaining jurors

4

Prong 1: Cognizable Groups

- CCP 231.5/GC 11135: Race, color, ancestry, national origin, ethnic group identification, religion, sex, sexual orientation, medical condition, age, marital status, mental disability, physical disability, genetic information (GC 12926)
- People Newly Residing in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- Not “People of Color” as a combined group (*People v. Davis* (2009) 46 Cal.4th 539, *People v. Neuman* (2009) 176 Cal.App.4th 571)

5

Prong 2: Reasons, Comparative Analysis, Statistics, Etc.

- *Miller-El v. Dretke* (2005) 545 U.S. 231:
 - Statistics
 - Disparate Questioning
 - Comparative Analysis
 - Notations on Post-Its
 - Past DA’s Office Practice
 - Cumulative Weight of All-of-the-Above

6

Prong 3: “Sincere and Reasoned Attempt”

- *People v. Hall* (1983) 35 Cal.3d 161, 167
- Third Prong is a credibility determination
- It “demands of the trial judge a sincere and reasoned attempt to evaluate” the truthfulness of the proffered race-neutral reason (*id.* at 167)

7

Prong 3: “Demeanor” Reasons and How They Figure Into Credibility

- When otherwise belied by the record and demeanor not in record, we tend to lose. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345; *Snyder v. Louisiana* (2008) 552 U.S. 472)
- When demeanor reason vague & non-sensical, we lose. (See, e.g., *People v. Allen* (2004) 115 Cal.App.4th 542, 546)
- When demeanor not in record or not seen by judge but nothing belies us, we can win. (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903; *Thaler v. Haynes* (2010) 559 U.S. 43)

8

Mechanics of the Motion

- Consider Limine/Trial Brief (see materials)
- Best Practice: “Objection, may we approach?”
- Hearing: outside jury’s presence
- Either P or D can make motion (*Georgia v. McCollum* (1992) 505 U.S. 42)
- D need not share same classification as kicked juror(s) (*Powers v. Ohio* (1991) 499 U.S. 400)
- Reasons: NEVER ex parte! (See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; *Davis v. Ayala* (2015) 576 U.S. ___, 135 S.Ct. 2187)

9

Remedies at Voir Dire Level

- Traditional Wheeler: dismiss entire panel and start over fresh
- Batson: simply remanded for TC to conduct 3-Part inquiry, but specifically left open the possibility of:
 - Traditional *Wheeler*
 - Re-seating offended juror
- *People v. Willis* (2002) 27 Cal.4th 811: If opponent agrees...
 - Monetary sanctions
 - Re-seat offended juror (dicta)
 - Give opponent extra peremptories (dicta)

10

Potential State Bar Reporting

At Trial

- If monetarily sanctioned \$1000 or more:
- BP 6086.7(a)(3): TC must report you
- BP 6068(o)(3): You must report yourself within 30 days

After Losing on Appeal

- If judgment reversed “in whole or in part” b/c of attorney misconduct:
- BP 6086.7(a)(2): TC must report you
- BP 6068(o)(7): You must report yourself within 30 days

11

But...is *Wheeler/Batson* violation “attorney misconduct”???

- Retired SFDDA Jerry Coleman thinks so!
- But...did a recent case in a different *Wheeler* context foreshadow something?
- “We use the term ‘prosecutorial error’ rather than the at times misleading term ‘prosecutorial misconduct,’ because we are not concerned with the prosecutor’s culpable mental state, but with the lawfulness of the reasons given for exercising the peremptory challenges.” (*People v. Douglas* (2018) 22 Cal.App.5th 1162, n.6 at 1176)
- Be on the safe side: report self until we know for sure.

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Thank you!

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