

## VOIR DIRE IN DOMESTIC VIOLENCE CASES

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### 2020

- A New World
  - Law and Procedure
  - Specific Areas of Inquiry
  - Format for Questioning
  - Intangibles

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### THE LAW

Voir Dire in California is governed by:

1. California Rules of Court
2. California Code of Civil Procedure
3. Case law

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### CALIFORNIA RULE OF COURT § 4.200(a)

Court must discuss the following with counsel:

- Brief outline of case
- Names of witnesses
- Theory of culpability
- Defense theory (may decline)
- Procedures for hardships/challenges for cause
- Areas of inquiry by court and counsel
  - Anything off-limits?
- Time limits
- Schedule of trial and predicted length
- Number of alternates and method of selection
- Procedure for *Wheeler/Batson*

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### CALIFORNIA CODE OF CIVIL PROCEDURE § 223

• Judge's discretion viewed in light of:

- Amount of time requested
- Unique/complex law or facts
- Length of trial
- Number of parties
- Number of witnesses (CCP § 223(c)(1-5))

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### CCP § 223 & RULE OF COURT § 4.201

• Examination may be conducted:

- Orally
  - Zoom
  - Different Setting
- Written questionnaire; or
- Both methods

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## PURPOSE OF VOIR DIRE

- Only in aid of the exercise of challenges for cause. (CCP § 223(d))
- Improper question:
  - A question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury. (CCP § 223(d))

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## CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge shall conduct initial questioning.
  - Attorneys may submit questions for consideration (CCP § 223(a))
- Attorneys shall have right to conduct oral questioning.
  - *"Shall permit liberal and probing examination calculated to discover bias or prejudice."*

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## CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Follow-up permitted to Judge's questions. (CCP § 223(b)(1))
- Not required to submit questions in advance. (CCP § 223(b)(1))
- No specific/unreasonable/arbitrary time limits or inflexible time policy.
  - Judge shall permit supplemental time based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. (CCP § 223(b)(2))

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## CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge shall consider use of questionnaires (CCP § 223(e))
  - COVID – Critical
  - HIPAA / Privacy
    - Sealing questionnaires
- List of jurors' random order to attorneys. (CCP § 223(f))

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## QUESTIONING A JUROR IN PRIVATE

- Preference is for non-sequestered voir dire.
  - *People v. Roldan* (2005) 35 Cal.4th 646, 691; CCP § 223(d))
- May conduct sequestered voir dire on media reports and other issues.
  - (Advisory Committee Notes, CCP § 223)
- HIPAA Laws / Privacy
- Judge should consider the charges, the nature of the evidence, and other relevant factors.

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## QUESTIONING A JUROR IN PRIVATE

- Must inform jurors of possibility of sequestered voir dire if questioning likely to elicit answers a juror may feel are sensitive in nature.
- Jurors must be advised of right to request a hearing in chambers to answer sensitive questions before writing them in questionnaire.
  - (*Copley Press Inc. v. Superior Court* (1991) 228 Cal. App. 3d 77, 78).

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## GROUNDINGS TO CHALLENGE A JUROR

- General Disqualification (CCP § 225 (b)(1)(A))
- Implied Bias (CCP § 225 (b)(1)(B) & 229(f))
- Actual Bias (CCP § 225 (b)(1)(C))

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## THE VENIRE ARRIVES.....

- Observe the jurors
  - Special needs, odd behaviors, clothing, loner, reading materials, inconsiderate behavior, masking
- Listen to the defense
  - Watch their reactions
- Notes / scoring system
  - 1,2,3....+ /-
  - Leader / Follower
  - Wheeler Challenges

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## GIVING THE JURORS A ROADMAP

- Domestic Violence / Stalking questions
- Follow-up from defense
- Questionnaire / Specific to juror questions.
- Promise to be respectful.
- Private if allowed.

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## COVID

- Socially Distanced Proceeding
- Masks
  - Required to Wear?
  - Amenable to that?
- Alert Court if Problem
  - You or someone close to you becomes ill.
  - You or someone close to you tests positive or is undergoing testing.

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## COVID – TRIAL LENGTH

- Current Estimate
- Flexibility
- Returning in Future

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## DOMESTIC VIOLENCE – STARTING THE DISCUSSION

- What do you think of when you hear the words “Domestic Violence?”
  - Gender(s)
    - Parties
    - Offender
  - Relationship
  - Type of abuse
  - Results

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### CONTINUE THE DISCUSSION – DV

1. Repeat their exact words. *"There was violence in my house, it was horrible."*
2. Open-ended questions. *"What kind of violence occurred? What do you think it stemmed from? What would happen?"*
  - How recent
  - Relationship
  - Reported
  - How they reacted
  - Resumed Relationship
  - Impact / Effect on life
  - Law Enforcement Involvement
  - Judicial Involvement

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### CONTINUE THE DISCUSSION – DV

3. Acknowledge validity and compare. *"Thank you for your honesty and sharing your personal experience. It is understandable that you feel the way you do. Has anyone else had violence in their home?"*
4. Compare and contrast: *"Mr. Smith, how was your experience similar or dissimilar to that of Mr. Jones?"*

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### ACCUSED OF DV

Has anyone here been *accused* of Domestic Violence or know someone else who has?

- "Mr. Smith, you said that your ex-wife accused you once."
- What happened
- How recent
- Relationship
- Reported
- Resumed Relationship
- Law Enforcement Involvement
- Judicial Involvement
- Were you treated fairly

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### ADDITIONAL QUESTIONS / ISSUES

- Does anyone think that Domestic Violence is a personal family issue that the Government should stay out of?
- Uncomfortable Nature of Topic – Getting Involved

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### SEX CRIMES

- *Crimes of Domestic Violence or Stalking may include a sexual component (rape or sexual assault), or threats to commit those crimes.*
- *Is there anyone here who as been the victim of, accused of, or know someone who has experienced or been accused of sexual assault?*
- *Same questions, maybe in private.*

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### STALKING

- When you hear the term "*Stalking*," what is the first thing that comes to your mind?
  - Celebrity / Movie
  - Personal experience (Self, Friend, Acquaintance).
- Legal vs. Layperson Definition
- What kind of conduct comes to mind?
- Do you know anyone who has sought or been the subject of a Restraining Order?

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### CONTINUE THE DISCUSSION – STALKING

1. Repeat their exact words. *“Ms. Jones, you recently read about a man who was stalking a celebrity, right?”*
2. Open-ended questions. *“What kind of conduct was involved? What did you think about it?”*
  - How would you expect a stalking victim to react/respond?
  - What if they maintained some level of communication?
  - When you hear the word “stalker,” do you make any automatic assumptions about the person’s mental health?

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### CRIMINAL THREATS – PC 422

- Freedom of Speech
  - Some limits: *“FIRE”* in crowded theater.
- Anyone who believes speech should NEVER be criminalized?
- Is a threat more or less of a threat if uttered by a family member/loved one?
- Promise to consider context and evidence

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### USING THE INFORMATION – DV AND STALKING

- Develop a profile.
  - Personal experiences
  - Susceptibility to emotion
  - Strong positions on issues
  - On the lookout for stealth jurors.
- Peremptory Challenges
- Challenges for Cause

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### INTANGIBLES

- Characteristics of Defendant
- Sympathetic defendant
- Uncooperative victim
- Unlikeable victim
- No Victim
- Cooperative / biased / motivated victim
- Different lifestyles
- Prior Domestic Violence

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### THE DEFENDANT

- *In this case the defendant is \_\_\_\_\_.*
  - *Female, Elderly, Young, Disabled*
  - *Military (Uniform)*
- *Were you surprised when you heard the charges read?*
- *Why do you think that surprised you?*
- *Do you have any automatic assumptions about the defendant?*

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### UNCOOPERATIVE VICTIM

- *Not all crime victims are happy about coming to court. In fact, some want nothing to do with it.*
- *Do you think Domestic Violence cases should be prosecuted even if the victim does not want it prosecuted?*
- *Can you think of reasons why a victim might not want the case prosecuted?*

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### UNCOOPERATIVE VICTIM

- *Do you think that a person could get on the stand and lie?*
- *How do you determine if someone is lying?*
- *The court will give you instructions as to how to evaluate testimony, will you use those as you reflect back on the testimony of witnesses?*
- *Listen to all of the evidence*

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### UNLIKEABLE VICTIM

- Jury instruction
- *Some witnesses in cases are not very likeable for a whole host of reasons.*
- *Can you set that aside as you look at the evidence in the case?*

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### NO VICTIM

- In some cases, victims never testify. In this case, I do not expect that we will hear from the victim during the trial.
- Do you think it is fair that a trial can proceed without the victim?
- Can you look at the evidence that is presented and render a verdict?

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### COOPERATIVE / BIASED / MOTIVATED VICTIM

- Preview the issue
- You may hear that there is an ongoing custody issue in this case.
- Would it influence you in a manner such that you would give less weight to the testimony based on that alone?

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### INTANGIBLES

- Socioeconomic differences
- Status in Community
- Same sex relationship
- Drug use
- Bad choices

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### INTANGIBLES

- Presence / lack of injury
- Inconsistent statements
- Involvement of children
- CSI

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### INTANGIBLES– HOW TO ADDRESS THEM

- Jury instructions
- Preview of what to expect
- Immediate / Strong feelings
- What do you think?
- How would it affect you?
- Can you set aside?

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### PRIOR DV- EVIDENCE CODE 1109

- By Defendant (and/or Victim)
- Pre-trial ruling
- *You may receive evidence that you can consider in your deliberation, but only for specific or limited purposes. You will get instructions from the judge on how to do that.*
- *Will you agree to consider all of the evidence you are allowed to?*
- *Will you follow the judge's instructions?*

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### CHILDREN AS WITNESSES / VICTIMS

- A child may be called as a witness in this case.
- Do you think it is fair to ask a child to testify?
- What if it is about something that involves their parents?
- Would you hold it against the party who called the child?

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### INTANGIBLES

- #MeToo
- BLM / Law Enforcement
- Social Unrest
- Strong Opinions
- Social Media / Comments

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### GENERAL QUESTIONS

- Reasonable doubt
- One Witness Rule
- Direct vs. Circumstantial Evidence
- Reasonable vs. Unreasonable
- Commitment - wait to decide until case complete!

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### JUROR-SPECIFIC QUESTIONS

- Specific to questionnaire
- Prior questions by defense
- Any unanswered questions

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## SECOND WAVE OF JURORS

- Do not simply ask if anyone has different answers!
- Don't shortchange yourself on time!
- Still ask direct questions and general questions

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## DON'TS

- Abbreviate your voir dire as selection goes on (and on).
- Argue with a juror.
- Discuss information subject to privacy request.
- Use legalese.

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## JURORS TO AVOID

- Batterers
- Former Victims
  - Can be very critical
    - I got out, why can't she?
    - My situation was worse.
    - Still caught in cycle.
    - Emotional Response
- Jurors who won't get along
  - Overbearing, obnoxious, etc.

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### JURORS - CAREFUL

- Lived in abusive homes
- Cynical about DV / Stalking
- Messy Divorces / Custody
- Law Enforcement / Relatives
- Participants in court system
- Teachers, Social Workers, Therapists
- Lawyers
- Engineers??

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### JURORS YOU WANT

- No DV history
- Life Experience
- Personable
- Reasonable
- Leaders and Followers

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### FINAL ADVICE

- Take a Deep Breath
  - Neighbors
- Let the jury do most of the talking
- Be yourself
- Sense of community
- Go with your gut!

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