

Voir Dire

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Voir Dire Important?

- Defense needs 1 juror; you need 12 jurors.
- Best opportunity to weed out problem jurors.
- First impressions critical; sets the tone for the trial.
- First opportunity to persuade the jurors that the Prosecution Case Theory is correct.
- Principle Purpose: learn jurors' likely attitude on matters important to the case.

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Topics Covered

- General voir dire law and approaches.
- Current *Wheeler* practice.
- AB 3070 – CCP 231.7
- Challenges For Cause
- MCLE: 1 hour of ethics credit and 1 hour of general credit.
- Submit questions and we will address them at the end.

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When to Start Thinking About Voir Dire?

- While developing your Case Theory, including Theme.
 - What are the factual issues?
 - What are the legal issues?
 - What kind of person would be good/bad juror based on the case specific issues?
- Keep list of potential questions/topics & add/delete as trial approaches.

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Voir Dire

- Should focus on identifying prospective jurors who can not deliberate fairly & impartially over the prosecution case theory.
- Opportunity to explore & examine commonalities between the potential jurors and the prosecution & defense case theories – including witnesses & themes.
- Should be a springboard for important points & concepts related to the trial, such as legal principles.

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The Law

The procedures for jury selection are set out in:

- California Rules of Court §§ 4.200 et seq.
- California Code of Civil Procedure §§ 223 et seq.
 - AB 3070/CCP 231.7 – January 1, 2022 effective date.
- Case Law.

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CA Rule of Court § 4.200(a)

- The Court must conduct a conference with counsel to discuss:
- A brief outline of the case.
- Names of witnesses.
- Plaintiff's theory of culpability.
- Defense theory (though the defense can decline to reveal their theory).

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CA Rule of Court § 4.200(a)

- The procedures for deciding hardships and challenges for cause.
- Areas of inquiry during voir dire by the court and counsel and any time limits that the court is setting on voir dire.
- Number of alternates and the method of selection (traditional vs. six pack, etc.)
- Procedure for making Wheeler/Batson objections.

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**CCP § 223 and
CA Rule of Court § 4.201**

- The Court **shall** conduct an initial examination of prospective jurors.
- This examination may be conducted:
- Orally
- By written questionnaire; or
- By both methods

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Judicial Voir Dire

- Judges usually do minimum questioning
 - Charge related.
 - General background:
 - Occupations, other adults live with, number of children, prior jury service.
 - "Can you be fair and impartial?"

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Attorney Questioning

- Time limits
 - Court can control time (CCP § 223)
 - The judge **shall** permit liberal & probing examination calculated to discover bias or prejudice with regard to the case/parties.
 - The judge **shall not** establish an inflexible time limit policy.
 - The judge **shall** permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror.

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Attorney Questioning

- Who goes first?
 - CCP: silent.
 - Δ attorney should go first - Our burden.
 - Allows prosecution to react to their questions.

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Attorney Questioning

- CCP § 223 (d): Determine grounds for challenges for cause.
 - Effective date Jan. 1, 2018
- "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."
- Improper question: A question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury.
- Sometimes done by asking the prospective jurors to prejudge the evidence.

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Attorney Questioning

- Challenges for cause must be exercised before peremptory challenges.
- CCP § 226: Defense is required to use first for cause challenge.
- No limit on number of for cause challenges.

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Voir Dire Goals

1. Persuade the jury to like & trust you;
2. Persuade the jury to accept your view of the problem issues in the case; and
3. Persuade individual jurors to honestly express their views, so informed decisions can be made about which persons to excuse.

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Other Benefits of Voir Dire

- Start educating potential jurors about the preconceptions regarding crimes, such as domestic violence, stalking, sexual assault.
- Get the potential jurors reactions to the problem parts of your case, i.e. recanting/minimizing victim, large male victim with petite female defendant, minor injuries, victim permitted contact after getting a restraining order, etc.
- Get information from the jurors that you can refer to later in argument.
- Start getting them invested in the result of the case.

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First Impressions

- Watch their reaction to the introduction of the defendant.
- Watch their reaction when the charges are read for the first time.
- Watch the potential jurors' expressions and body language when they are taking the oath to tell the truth.
- Continue to watch their behavior during questioning.

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Voir Dire

- Have a system to take down notes and be sure those notes anticipate any *Wheeler / Batson* or AB 3070 / CCP 231.7 challenges.

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Voir Dire

- Effective voir dire requires juror self-disclosure.
- Create a comfortable & relaxed atmosphere.
- Let the panel know that you simply want to discuss some principles of law with them & learn their views.
- Let them know that it is vital to the entire jury selection process to volunteer their feelings & attitudes.

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Voir Dire

- Explain up front that you are not looking for any particular answers & that there are no right or wrong answers.
- Let the jurors know that it's okay to disagree with you or with the law, just be truthful about it.
- You will get more responses & a higher degree of honesty, if the jurors know that you are simply looking for an accurate picture of how they feel.

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Voir Dire

- Addressing these introductory concepts should take no more than 5 minutes.
- But they may be the most important 5 minutes of the trial.
- You will be emphasizing the importance of truthful answers...that should have a positive carry over effect for the jurors chosen.
- Juror's initial impressions will likely influence their reaction to you & the People's case throughout the trial.

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Voir Dire

- Speak to each juror, if possible.
 - If not, be sure to ask the quiet prospective jurors questions.
- Use basic persuasive communication approaches, such as maintaining eye contact & addressing each juror formally.
- Important to actively listen to each juror's answers, so you can follow-up appropriately.
- How jurors answer questions is as important as what they say; so observing how jurors react to your questions is essential.
- Body language/ demeanor should be placed on the record, in part based on your questioning.

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Voir Dire

- Crucial to elicit potential jurors' views & attitudes about the primary issues affecting the prosecution case theory.
- Questions should be designed to probe juror's bias & predispositions that could affect how they will listen to witnesses and evidence.
- The goal is to find out if there is anything about the jurors that will keep them from listening to the victim with an open mind or prevent them from accepting the prosecution's case theory.

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Voir Dire

- When addressing substantive issues affecting your case theory, be organized & develop a cohesive order.
- Since prosecutors are the last party to ask questions, plan in advance which jurors will be asked to discuss particular topics.
- Forecast through your questions, the primary issues affecting the prosecution's case theory – safest approach is by referring to jury instructions.

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How to Probe Effectively

- Ask open non-leading questions.
- Open ended questions encourage jurors to talk.
- "What..", "how...", "could you..." "would you..."
- "Do you agree or disagree"?..."Why"?
- "How many of you..." rather than "Do any of you..."
- If jurors don't respond to group questions, start calling on individual jurors: What do you think about that...

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How to Probe Effectively

- Repeat the words the juror uses.
- An effective way to get jurors to talk is to use the same phrases in your question that they used in their answer.
- Example: juror says "Sometimes the police in my city don't do things right."
 - In your question, repeat the juror's words. "Could you tell me what you mean when you say that sometimes the police in my city don't do things right?"

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How to Probe Effectively

- Resist the temptation to rescue the juror by interpreting what the juror means by finishing an unfinished sentence.
- Give the juror the time and space to reveal himself/herself to you.
- Mindset: Follow your jurors rather than leading them.

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How to Probe Effectively

- Acknowledge validity & compare.
- "Thank you for your honesty and sharing your personal experience. It is understandable that you feel the way that you do. Has anyone else had violence in their home?"

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How to Probe Effectively

- Build rapport between jurors by using the answers from one juror as the starting point for dialogue with another.
- Ms. Jones said that.... How do you feel about the issue, Mr. Smith?
- Ms. Jones, how was your experience similar or dissimilar to that of Mr. Smith?

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Areas to Address

- Case issues
 - Unsympathetic victims
 - Recanting victims
 - Weak ID
 - Affirmative defenses
- Defendant related issues
 - Young, female, elderly, sympathetic
- Juror specific issues
 - Based on their previous answers
- CSI Effect / evidentiary issues: single witness; B of P; Circ Evid.

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Voir Dire Goals

- Strive to know the strength with which the jurors hold their attitudes.
 - i.e. Police Officer key witnesses:
 - Important to know how jurors feel about police and police officer testimony.
 - Makes a difference if juror has a mild distrust of police testimony because of general attitudes about the police; or
 - A strong distrust of the police based on personal experience or experience of close friend or family member.

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Areas to Address: Bias

- "Have you ever been in a courtroom for any reason?"
- This question uncovers the potential juror who:
 - attended her boyfriend's murder trial.
 - attended his father's molestation trial.
 - testified as a character witness for defense.
 - was prosecuted for a minor crime years ago.
 - was wrongfully arrested & arraigned for murder.
 - who fought a traffic ticket.
 - was in juvenile court with their "innocent" son.

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Areas to Address: Bias

- “Please describe any contact you have had with law enforcement?”
- This question uncovers the potential juror who:
 - was misidentified for a crime and later released.
 - was stopped and questioned at a protest.
 - had a juvenile child brought home by the police.
 - was harassed by the police.
 - went with her boyfriend to register as sex-offender.

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Areas to Address: Bias

- “Have you or anyone you know ever been in custody?”
- This question uncovers the potential juror who:
 - Is upset with police because he/she was arrested & not charged.
 - Is a woman who becomes pen pals with death row inmates, (not her, not her family, just a friend).
 - Arrested for participating in any protest, but not charged.
 - Brother doing time because he took a plea bargain, but he is not good for the crime, (i.e. juror feels he was railroaded by system).

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Areas to Address: DV cases

- Does anyone think that Domestic Violence is a personal family issue that the government should stay out of?
- Do you think Domestic Violence cases should be prosecuted even if the victim does not want it prosecuted?
- How many of you agree that the community has a responsibility through its police, prosecutors, and courts to prosecute people who commit domestic violence, even when the victim does not want to testify against the person?
- Has anyone here been *accused* of domestic violence or know someone else who has?

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Burden of Proof

- Common problem is jurors' perception and misunderstanding of the Burden of Proof.
- May influence how they respond to issues such as one-witness testimony, circumstantial evidence, & conflicts in testimony.
- Remind jurors of the B of P by reading essential elements of the reasonable doubt jury instruction – the case does not need to be proven "beyond all doubt" or "to an absolute certainty."
- After establishing the reasonable doubt law, ask the panel how many of them would require a higher level of proof.

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Burden of Proof

- "How many of you feel that before you could return a guilty verdict, you would have to be convinced of the defendant's guilt beyond all doubt?"
- After identifying and addressing the potential jurors who would require more than "reasonable doubt," go back & commit the remaining panel members to applying the "reasonable doubt" standard and not the "all doubt" standard.
- Can follow this approach with any legal principle/jury instruction.

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CSI Effect

- How many of you watch CSI, Law and Order, or other courtroom and police shows where the crime happens and is solved in an hour...
- How many of you think that a real crime lab works that way?
- Do you understand that DNA and other forensic testing is not done in every criminal case?

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CSI Effect

- How many of you would think that the People have failed to prove its case because the only evidence is the testimony from an eye-witnesses?
- Could you follow an instruction from the judge that tells you that the testimony of a single witness, if believed, can be sufficient to prove the People's case beyond a reasonable doubt?

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Fair to Both Sides

- Important to encourage jurors to think in terms of giving both the People and defense a fair trial:
- "Will you promise to give the People and its witnesses just as fair of a trial as the defendant?"
- "Can you promise me that each time you think of the defendant and think of being fair to [him or her], that you will also think of the victim and be fair to [him or her]?"
- At end of voir dire, some prosecutors like to ask questions that call for the jurors to provide a commitment to rendering a fair decision.

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Group Dynamics

- Remember a jury verdict is a product of both individual & group decision making.
- Individual juror decisions are influenced by the dynamics of group decision making.
- Group dynamics do not involve an even exchange among members of the jury.
- Some jurors will have more influence on the jury than others.

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Group Dynamics

- Can be helpful to classify prospective jurors as persuaders, participants, or non-participants.
- Persuaders: make assertive statements about the evidence; freely express their opinions; & actively build coalitions supporting their views.
- They have the most influence & dominate deliberation discussions.

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Group Dynamics

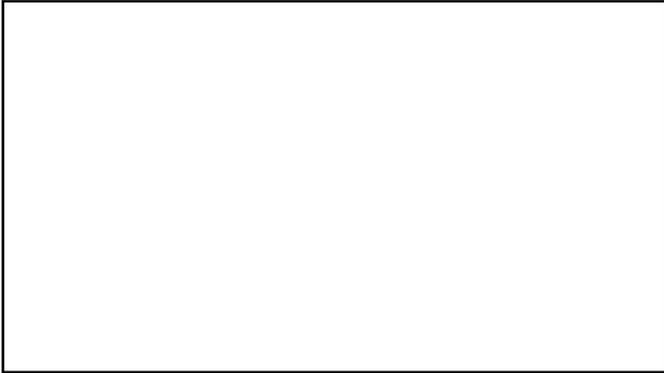
- Participants: Engage in group discussions; followers, not leaders; value social approval & acceptance by others.
- Readily join coalitions, since the coalition validates their decisions, but they do not lead them.

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Group Dynamics

- Non-Participants: Rarely engage in group discussions; rarely become involved in deliberations other than to express agreement with a particular view or vote.
- Peremptory challenges normally should be used first to strike unfavorable persuaders.
- Note: consider striking a favorable persuader if they have an overbearing personality that may have a tendency to alienate other jury members during deliberations.

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Peremptory Challenges

- Prosecution goes first.
- "The People would like to thank and excuse juror number 6, Mrs. Jones."
- Must be exercised for a genuine, reasonably specific, protected group neutral reason related to the case.
 - See *Hernandez v. New York* (1991) 500 U.S. 352.

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Wheeler Challenges

- *People v. Wheeler* (1978) 22 Cal.3d 258
 - The use of peremptory challenges to remove prospective juror on sole basis of group bias violates Cal. Constitution Article I, § 16 (right to jury drawn from representative cross-section of the community).
- Batson: federal version of Wheeler.
 - Violation of Equal Protection.

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**Cognizable Groups
CCP § 231.5 & GC 11135 (2016)**

- Sex
- Sexual orientation
- Race
- Color
- Ancestry
- National Origin
- Ethnic Group
- Marital status
- Religion
- Age
- Mental disability
- Physical disability
- Medical condition
- Genetic information

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Wheeler: Procedure

- A timely objection outside the jury's presence.
- **Prong 1:** opponent must make a prima facie case that totality of circumstances raises an inference that peremptory challenge is exercised based on group bias.
- **Prong 2:** Burden shifts to proponent to give permissible reasons for challenge(s).
- **Prong 3:** Trial Court decides whether opponent has proven discriminatory purpose.

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Prong 1: Making a Prima Facie Case

- A defendant establishes a prima facie case of discrimination by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

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Prong 1: Making a Prima Facie Case

- Party has struck most or all of the members of a cognizable group.
 - Party has used a disproportionate number of challenges against a cognizable group.
 - Party has not engaged in significant questioning of those jurors.
 - Def. is a member of the cognizable group; although not a requirement.
 - Victim is a member of the group of the majority of the remaining jurors.
 - Comparative juror analysis: how other similarly-situated jurors were treated.
- *People v. Rhodes* (2019) 8 Cal.5th 393, 429.

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Prong 2: Burden shifts to give permissible reasons

- Successful showing shifts burden
 - Burden = to show that peremptory challenges were NOT on grounds of group bias but made on permissible group neutral reasons relevant to particular case or it's parties/witnesses.
 - Mere denials of discriminatory motive alone are insufficient to rebut a prima facie showing.
 - NOTE: that is why you should keep good notes during voir dire, so you can pull out facts or issues or observations re: excused jurors.

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Prong 3: Judge decides whether opponent has proven discriminatory purpose

- Judge makes a credibility determination.
 - It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason." (Cognizable group / class neutral reasons).
- People v. Hall* (1983) 35 Cal.3d 161, 167.

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New Wheeler Case

- *People v. Collins* F076883, filed 2/2/21.
- Def. convicted of implied malice murder based on a high-speed, PCP-fueled traffic collision that killed two.
- The DCA conditionally reversed based on a prospective juror who is the same race as the Def. being excused, concluding that raised a reasonable inference of discrimination.
- The juror was a "psych tech" for the CDCR, she was "charged with" a petty theft when she was young, and she has 2 cousins who had been committed to prison.

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New Wheeler Case

- Employing a "comparative juror analysis" DCA rejected the proffered race-neutral reasons as "defy[ing] logic or support in the record."
- "The prosecutor directly asked other jurors if they were treated fairly by law enforcement and accepted seven jurors with some connection to criminal charges including two jurors personally convicted of DUI."

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New Wheeler Case

- By comparison: "[T]he prosecutor did not directly ask [the juror] a single meaningful question."
 - She was never asked how her petty theft was resolved.
 - She was never asked if she was treated fairly.
 - She was never asked if her experience was negative or positive.
 - She was never asked any questions about her cousins' experiences.
- The DCA noted: Certainly, her experiences did not prevent her from pursuing a career at CDCR.

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New Wheeler Case

- The DCA noted: The fact that the prosecutor accepted another juror who is the same race as the Def. and excused juror was probative, but not dispositive.
- On remand the trial court must accept that a prima facie case was established (Batson/Wheeler prong 1), allow the prosecutor to explain further (prong 2), and substantively rule (prong 3).

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New Wheeler Case

- [Note: AB 3070 was not a basis for the *Collins* ruling, but the court discussed this new legislation and its “presumptively invalid justifications” in footnote 6.]
- FN 14 referenced *People v. Miles* (2020) 9 Cal.5th 513, 543

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New Wheeler Case (Miles)

- *People v. Miles* (2020) 9 Cal.5th 513, 541-544
- Comparative analysis is a form of circumstantial evidence that is relevant on the issue of purposeful discrimination.
- A party legitimately may challenge one prospective juror but not another to whom the same particular concern applies [because] the risk posed by one panelist might be offset by other answers, behaviors, attitudes, or experiences that make one juror, on balance, more or less desirable.

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New Wheeler Case (Miles)

- Bec the ultimate question concerns the prosecutor’s motivations in exercising the challenge in question, we must ask whether there were any material differences among the jurors – differences other than race, [cognizable group] that we can reasonably infer motivated the prosecutor’s pattern of challenges.
- In determining whether there were any material differences among the jurors, we note the differences among the jurors generally will be more probative if they closely relate to reasons the prosecutor has stated for a peremptory challenge.

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Result of Wheeler Challenge

- The objecting party may waive the right to dismissal of the panel & consent to less severe alternatives:
 - Re-seating offended juror (Willis);
 - Give extra peremptory challenges.

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Result of Wheeler Challenge

- Monetary sanctions for violation of lawful court order pursuant to CCP 177.5.
 - After an “admonition”; see *People v. Muhammad* (2003) 108 Cal.App.4th, 313, 324-326.
 - BP § 6068 (o) (3) judicial sanctions \$1000 or more triggers a self-reporting requirement to state bar.

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AB 3070: Legislative Findings

- Peremptory challenges frequently used to exclude jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation or perceived membership in any of those groups.
- This has disproportionately harmed African Americans, Latinos, and other people of color.

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AB 3070: Legislative Findings

- Existing procedure for determining if challenge done due to impermissible reason(s) has failed to eliminate discrimination.
- Requiring proof of intentional bias ineffective.
- Many routine reasons for challenges are associated with "stereotypes" or based on "unlawful discrimination".

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AB 3070: Legislative Findings

- Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both "conscious" and "unconscious" bias in the use of peremptory challenges.
- It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias in the use of peremptory challenges.

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CCP § 231.7 / AB 3070

- CCP 231.7 (a):
- Adds cognizable groups / classes to those referenced in CCP 231.5 and GC 11135:
 - Gender Identity
 - Or the perceived membership of the prospective juror in any such group.

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CCP § 231.7 / AB 3070

- CCP 231.7 (b):
- A party or the trial court on its own motion, may object to the improper use of peremptory challenges.
- After objection is made, further discussion shall be conducted outside of the jury panel's presence.
- Timing: The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

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CCP § 231.7 / AB 3070

- Eliminates **Wheeler** prong one of establishing a prima facie case.
- Prong 1: opponent must make a prima facie case that totality of circumstances raises an inference that peremptory challenge is motivated by group bias.
- CCP 231.7 (c): Upon objection to the exercise of a peremptory challenge...the party exercising the peremptory challenge shall state the reasons the challenge has been exercised.

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CCP § 231.7 / AB 3070

- Also institutes a new court standard to evaluate peremptory reasons.
- CCP 231.7 (d) (1): The court shall consider only reasons given & may not speculate on other possible justifications.
- If substantial likelihood that an objectively reasonable person would view race, [cognizable group/class] as a factor in the challenge, then the objection shall be sustained.
- The court need not find purposeful discrimination to sustain an objection.

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CCP § 231.7 / AB 3070

- CCP 231.7 (d) (2) (B): "Substantial likelihood" means more than a mere possibility but less than a standard of more likely than not."
- CCP 231.7 (d) (2) (A): An "objectively reasonable person" is aware that unconscious bias has resulted in unfair exclusion of jurors.
- CCP 231.7 (d) (2) (C): "Unconscious bias" includes implicit & institutional bias.

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CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (A) (i): Is objecting party member of same cognizable group as challenged juror.
- CCP 231.7 (d) (3) (A) (ii): Is "alleged victim" **NOT** a member of that group.
- CCP 231.7 (d) (3) (A) (iii): Are witnesses **NOT** members of that group.
- CCP 231.7 (d) (3) (B): Does cognizable class/group or perceived membership of a cognizable class/group bear on case facts – i.e. cross racial identification.

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CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (C) Number & Types of questions posed to challenged juror:
 - (i) No questioning.
 - (ii) Cursory questioning.
 - (iii) Differential questioning of cognizable class jurors (*Miller-EI*).
- CCP 231.7 (d) (3) (D) Comparative analysis.

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CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (E): Is a reason for challenge "disproportionately associated" with a cognizable group or perceived membership of a cognizable class/group.
 - New & Vague.
- CCP 231.7 (d) (3) (F): Is reason for the challenge contrary to or unsupported by the trial record?

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CCP § 231.7 / AB 3070

- CCP 231.7 (d) (3) Circumstances for court to consider:
- CCP 231.7 (d) (3) (G): Has counsel/that office used peremptory challenges disproportionately in past against a given cognizable group or perceived membership of a cognizable class/group.
 - Including whether Counsel or Counsel's office who made the challenge has a history of prior violations under *Batson* or *Wheeler*, or this section.

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CCP § 231.7 / AB 3070

- CCP 231.7 (e) Peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to the prospective juror's membership or perceived membership in a cognizable class and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

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CCP § 231.7 / AB 3070

- CCP 231.7 (f): "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias.
- To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

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CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
- (2) Expressing a belief that LE officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
- (3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
- (4) A prospective juror's neighborhood.

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CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (5) Having a child outside of marriage.
- (6) Receiving state benefits.
- (7) Not being a native speaker.
- (8) The ability to speak another language.
- (9) Dress, attire, or personal appearance.

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CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members or a group or groups listed in subdivision (a). (New & Vague)
- CDAA video clip

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CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.
- (12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

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CCP § 231.7 / AB 3070

- CCP 231.7 (e) Presumptively invalid reasons:
- (13) Any justification that is similarly applicable to a questioned prospective juror or jurors who are not members of the same cognizable group as the challenged prospective juror but were not the subject of a peremptory challenge by that party.
 - The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be presumptively invalid.
 - Comparative analysis.

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CCP § 231.7 / AB 3070

- CCP 231.7 (f): "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias.

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CCP § 231.7 / AB 3070

- CCP 231.7 (f) continued:
- To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.
- This is the standard to determine that a presumption of invalidity has been overcome.
- Juror specific and case specific reasons.

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CCP § 231.7 / AB 3070

- CCP 231.7 (g) (1):
- The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:
- (A) The prospective juror was inattentive, staring, or failing to make eye contact.
- (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
- (C) The prospective juror provided unintelligent or confused answers.
- Additional findings required...

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CCP § 231.7 / AB 3070

- CCP 231.7 (g) (2):
- The reasons set forth in paragraph (g) (1) are presumptively invalid unless:
- the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or;
- the observations of counsel for the objecting party.
- Even with that observation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner matters to the case.

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CCP § 231.7 / AB 3070

- Next juror looks better. *People v. Cisneros* 234 CA 4th 111.
- Must state on the record the reason(s) the person was excused.
- Limited life experience – keep in mind that age is a protected class/group pursuant to CCP 231.5.

88

CCP § 231.7 / AB 3070

- Past hung jury. *People v. Farnam* (2002) 28 Cal 4th 107,138.
- Remember distrust or negative experience with the criminal legal system presumptively invalid reasons.

89

CCP § 231.7 / AB 3070

- CCP 231.7 (h):
- Remedies if objection is granted, one or more of the following options:
 - (1) Quash the venire and start jury selection anew. This remedy shall be provided if requested by the objecting party. (*Wheeler*)
 - (2) if motion granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant; (*new*).
 - Double Jeopardy? Did prosecutor intentionally commit misconduct to trigger a mistrial?
 - (3) Seat the challenged juror. (*Willis*)

90

CCP § 231.7 / AB 3070

- CCP 231.7 (h): Remedies cont.
- (4) Provide the objecting party additional challenges.
- (5) Provide another remedy as the court deems appropriate; (new).
 - Fines?

91

CCP § 231.7 / AB 3070

- CCP 231.7 (j):
- A denial of an objection shall be reviewed by the appellate court de novo, with the trial courts express factual findings reviewed for substantial evidence.
- The appellate court:
- Shall not impute findings that trial court did not expressly state on the record, including demeanor.
- May only consider reasons for challenge given on the record and not speculate on other unstated reasons.

92

CCP § 231.7 / AB 3070

- CCP 231.7 (j):
- If appellate court determines that the objection was erroneously denied, the error will be prejudicial, the judgement shall be reversed, and the case remanded for a new trial.

93

CCP § 231.7 / AB 3070 Recap

- Defense will no longer need to make a prima facie case to advance their objection; the mere making of an objection will trigger our justifications.
- Justifications will no longer be presumed constitutional; instead, no purposeful discrimination will be required and if an "objectively reasonable person" would view the challenge in part based on a cognizable group (by a showing less than a preponderance) the objection prevails.

94

CCP § 231.7 / AB 3070 Recap

- Most case-based categories of valid justifications will become presumptively invalid.
- Prosecutors will have to show by "clear & convincing" evidence, (i.e. highly probable) that a "reasonable person" would view the justification unrelated to a cognizable group; and
- Such justification bears on juror's ability to be fair.
- CCP 231.7 (d) (3) (E): No definition or guidelines regarding "disproportionately" associated with a cognizable class.

95

CCP § 231.7 / AB 3070 Recap

- CCP 231.7 (l) (small L):
 - It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

96



97

Attorney Questioning

- Determine grounds for challenges for cause CCP § 223 (d).
- "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."
- Effective date: January 1, 2018.

98

Grounds to Challenge a Juror for Cause

- General Disqualification, CCP §§ 228 & 225 (b)(1)(A)
- Actual Bias, CCP § 225(b)(1)(C)
- Implied Bias, CCP § 225(b)(1)(B)
- CCP § 225 (a) allows a challenge against the entire panel.

99

General Disqualification

- Code of Civ Pro § 228; (see CCP 203):
 - Non- U.S. citizen
 - Under 18
 - Not domiciled in California
 - Non-resident of County
 - Convicted of malfeasance in office & civil rights not restored.
 - Convicted felon
 - Non-English speaker
 - Already serving on as a Grand / trial juror.
 - Subject of a Conservatorship.

100

Felons Can Now Serve as Jurors

- Code of Civ Pro § 203 (a) (9-11) eff. 1/1/20.
- Unless: still incarcerated, still on post-conviction supervision or registered sex offender based on a felony conviction...
 - What was the felony or felonies you were convicted of?
 - How long were you incarcerated?
 - When?
 - Did you successfully complete parole or probation without a violation?
 - Did you plead guilty or have a jury trial?
 - Were you guilty?
 - How did the police, prosecutor, court system, treat you?

101

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
 - 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. i.e.)
 - Perceiving & considering evidence;
 - Determining witness credibility by a uniform standard;
 - Following the judge's instructions;
 - Putting aside outside considerations;
 - Deliberating with other jurors.

102

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
- 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
- Refusal to follow the courts instructions and the law.
 - *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

103

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
- Prejudging officer / witness credibility (anti-LE bias).
 - *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484
- Inability / Refusal to deliberate.
 - *People v. Lomax* (2010) 49 Cal.4th 530, 589
- Inability to disregard outside information.
 - *In Re Malone* (1996) 12 Cal.4th 935, 963

104

General Disqualification

- Code of Civ Pro § 228 (b), catch-all reason:
- Medical / Mental Health / Personal issues interfering with perception of evidence:
 - Medical condition causing pain.
 - Family or work commitments that would distract the prospective juror.

105

Actual Bias

- Code of Civ Pro § 225(b)(1)(C)
- Defined as "the existence of the 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."
- In other words, they can't be fair on the type of case you are prosecuting, or they can't be fair to the District Attorney's Office.

106

Actual Bias

- Examples:
 - Opinion as to Δ's guilt (Police only arrest guilty people).
 - Under no circumstances would believe a police officer.
 - Bias based on nature of the charge, i.e. child molestation.
 - Bias based on attending the same church as Δ.
 - Prior jury service causing a bias against D.A.'s office.

107

Implied Bias

- Code of Civ Pro § 225(b)(1)(B)
 - Eight exclusive grounds, examples (see CCP 229):
 - Relationship/affinity to party, witness, or victim.
 - Having unqualified opinion of case merits based on outside knowledge of material facts.
 - Having a particular interest in party or outcome.
 - State of mind evincing enmity (actively opposed or hostile) against or bias towards either party.
 - Death Penalty case: entertaining conscious opinions that would preclude a finding of guilty.

108

For Cause Challenges

- “Would the juror’s issue/perceived notion/bias/ distraction/anxiety prevent or substantially impair the performance of the juror’s duties in accordance with the court’s instructions & the juror’s oath?”
- This approach taken from the death penalty qualification standard captures the elements needed for an actual bias and general disqualification for cause catchall challenge.
- Having a bias, strong opinion, or incapacity is a necessary condition, but insufficient by itself.
- Inability to put aside bias, strong opinion, or incapacity is what disqualifies a juror.

109

For Cause Challenges

- Setting up For-Cause challenges:
- Key is to expose the juror’s desire or potential to nullify a verdict.
- Specific phrasing is required to show an inability to follow the law.
- Questions must be structured so that a wrong answer means a PER SE violation of the law.
 - i.e) Assume each element of the charged crimes are proven beyond a reasonable doubt, what would be your vote, guilty or not guilty?

110

For Cause Challenges

- For example:
- “If the judge instructs you that you have to evaluate 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?”
- “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?”

111

For Cause Challenges

- For example:
- "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 that you may be distracted by your family/work situation?"
- "Would your illness prevent you from being able to listen to the evidence / witnesses, and focus on this trial?" ... "Do you think that it may distract you from fulfilling your duties?"

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For Cause Challenges

- For example: Concrete hypotheticals.
- "If an officer testified one way on a point, and a civilian testified differently on the same point, would you **automatically** be inclined to believe the civilian because of your views and prior experience?"

113

For Cause Challenges

- Using hyperbolic hypotheticals to test potential jurors' resolve.
- Makes it easier to expose possible impairment, i.e)
 - What if the defendant had stage 4 cancer?
 - What if the defendant only stole a candy bar from Bill Gates?

114

For Cause Challenges

- Once the bias/impairment is exposed, you must show it will disqualify the juror:
- "I think I can follow the law."
- Respond with concern over "I think I can..." and provide examples of important situations: i.e)
 - Babysitter – "I think I can keep your kids safe tonight."
 - Pilot landing airplane – "I think I can land this plane."
- The goal is to get them to state their position more unequivocally, leaving no doubt.

115

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Distinguish this case from their own past experiences:
 - "Do you understand the Def. has nothing to do with what happened to your house?"
 - "Are you going to treat the Def. unfairly because someone else broke into your house 5 years ago?"

116

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Use concrete examples to test if they can be fair:
 - "If you don't believe the People proved BRD the def is the shooter, would you still find him guilty because the victim suffered serious injuries?"
 - "Can you listen to the evidence and make a decision as to whether you think the case has proven BRD that the def committed the crime?"

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For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Analogize to experiences in their lives where they essential carry out a juror's role.
- Ask if juror has acted as a parent, manager, neutral arbitrator in a friend dispute.
 - Were they able to listen to both sides and make a decision?
 - That's what we are asking them to do as jurors here.

118

For Cause Challenges

- Defending/Rehabilitating against a challenge:
- Remind jurors they do not decide punishment, only guilt.
 - "Do you understand, your job is to just to decide if the evidence shows BRD that the Def. did it? You do not have to decide the punishment if he is found guilty."
 - E.G. "No one likes robbery."
 - E.G. "No one like kidnapping."
- Morality variation: Remind jurors their job is not to decide whether the defendant is a good or bad person.

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CDAAs Resources

Joe Chavez, CDAAs Resource Attorney



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