The Framework

- *People v. Wheeler* (1978) 22 Cal. 3d 258
- *Batson v. Kentucky* (1986) 476 U.S. 79
- *Johnson v. California* (2005) 545 U.S. 162

Public Policy Underpinnings

- Allow juries to reflect diverse beliefs to avoid tyranny of the majority
- Combat governmental oppression
- Promote perception of courts as legitimate
- Encourage citizen participation in gov't
- Stem the tide of minority stigmatization

People v. Wheeler

- Article 1, Section 16 of the California Constitution contains a "right to trial by jury drawn from a representative cross-section of the community . . . ." (*Id.* at 276-77.)

- Using peremptory challenges to kick jurors based solely on "group bias" violates that right. (*Id.*)

What is "Group Bias?"

- "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" (*Id.* at 276)

Batson v. Kentucky

- 14th Amendment's Equal Protection Clause requires that jurors not be peremptorily challenged solely based on race (or protected classification)

- Promulgated Three-Part Inquiry for Trial Court to use in monitoring a *Batson*-type challenge

Three-Part Inquiry

- 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

Prong 1: *Johnson v. California* (2005) 545 U.S. 162

- Prong 1 of the original *Wheeler* test required opponent to show "strong likelihood" that jurors being kicked due to group bias
- *Johnson* held that standard too high; CA should be using mere "inference" language of *Batson* (totality of the circumstances)

Prong 1: Tips & Strategies for Making the Prima Facie Case

- Make TC put on record whether finding Prima Facie case
  - --If does not expressly so find, and you begin giving your reasons, Prong 1 will be deemed MOOT on appeal
- If TC finds no prima facie case, ask to put your classification-neutral reasons on record for purposes of appeal
  - --If says no, file them in a written declaration

Prong 2: Enunciation of Neutral Reasons

- Calmly remember and state your reasons
- Put your evidence on the record (*see infra* re: Comparative Analysis, etc.)
- And if you absolutely can't remember your reasons…see *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202

  (finding that while not forgetting is preferable, a TC can still credit as neutral a reason not stated b/c attorney can't remember the reason for the kick when other factors showed the attorney to be non-discriminatory, such as (a) remembering neutral reasons for kicking others in the class, (b) not kicking many in the class, and (c) having others in the class remain on the panel)

Prong 3: Weighing the Scales

- 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

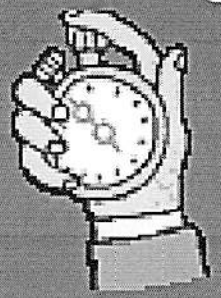
  (People v. Hall (1983) 35 Cal. 3d 161, 167)

Who Can Make the Motion?

- Either the prosecution or the defense can bring a *Batson* motion. (*Georgia v. McCollum* (1992) 505 U.S. 42.)
- Doesn't matter if D and the challenged juror share the same classification or not. (*Powers v. Ohio* (1991) 499 U.S. 400.)

Mechanics and Timing

- Best practice: make motion at bench
  - Consider limine
- Hearing: outside jury's presence
- Reasons cannot be given ex parte



- Too late to *Wheeler* if jury AND alternates sworn
- But can still *Wheeler* as to entire panel if alternates not yet sworn

What is a "Cognizable Group"?

Cognizable Groups: Per Case Law and CCP 231.5

- Race/Color/Ethnicity
- National Origin
- Religious Affiliation (note the difference of kicking someone who, due to religious views, can't sit in judgment—that's ok)
- Sex
- Sex in combination w/ Race/Ethnicity, etc.
- Sexual Orientation
- "Similar Grounds"

Non-Cognizable Groups

- Age (Young and Old)
- People newly residing in the community
- "People of Color" as a combined group

People v. Davis (2009) 46 Cal. 4th 539; *People v. Neuman* (2009) 176 Cal. App. 4th 571

What are "similar grounds"?

- Hard to find a case law definition that's cited with regularity

  (*see People v. Garcia* (2000) 77 Cal. App. 4th 1269, 1275-76 (drawing upon a Cal. Sup. plurality opinion's definition in the absence of something with more authority)

"Similar Grounds": Federal

- Here's a pre-*Batson* definition in grand jury context: whether "the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."

  (*Castaneda v. Partida* (1977) 430 U.S. 482, 494; *see Garcia*, *supra*, at 1273 (noting that this is likely the US Supreme's standard b/c they cited this case in *Batson*)

"Similar Grounds": State

- CCP 231.5 was meant "to codify the decision in" *Garcia*.
  (CAL. CODE CIV. PROC 231.5 (2000 Note).)

- *Garcia* recites plurality language in *Rubio v. Superior Court*, (1979) 24 Cal. 3d 93, suggesting the following as the first prong of a two-prong definition:

- Groups whose members "'share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group.'"
  (*Garcia*, *supra*, at 1276 (quoting *Rubio* (lead op.), *supra*, at 98).)

"Similar Grounds": State (cont'd)

- *Garcia* notes the *Rubio* court gave a two-prong test, but only the first part seemed to have majority support

- Still, *Garcia* also used the second prong in its analysis ("that no other members of the community are capable of adequately representing the perspective of the group" in question) (*Id.* at 1278 (quoting *Rubio*, *supra*, at 98)

Religion: *People v. Jones* (2011) 51 Cal. 4th 346

- Where P excused black juror partly b/c she attended the 1st A.M.E. Church, which P called a "controversial" organization, and said he didn't want anyone "controversial". . .
- Cal Sup's said P "did not excuse her because of her religious views but because he believed she belonged to a controversial organization." (*Id.* at 368.)

Bilinguals #1: *Hernandez v. New York* (1991) 500 U.S. 352

PLURALITY OPINION

- 4-justice opinion stated the Trial Court did not commit clear error in believing DA's claim that he kicked the Spanish-speaking jurors because they gave him reason to think they would reject the interpreter's version in favor of their own, and not because he wanted Latinos off the jury
- BUT: "[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us." (*Id.* at 371-72.)

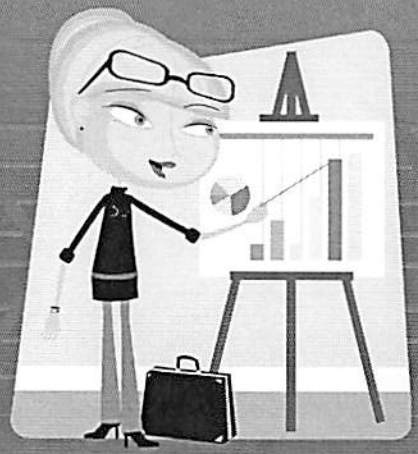
Bilinguals #2: *People v. Cardenas* (2007) 155 Cal. App. 4th 1468

- Recognized the U.S. Supreme Court's plurality in *Hernandez*

- Upheld the TC's decision that "the prosecutor had put forth a valid, race-neutral reason for excluding" the Spanish-speaking jurors on grounds DA thought they'd reject the official translation, and not as a pretext for racial kick

Bilinguals #3: *P. v. Gonzales* (2008) 165 Cal. App. 4th 620

- BUT SEE *People v. Gonzales*, where DDA stated several reasons to kick the juror, including his fear the juror would reject the official interpreter's version…
- But the record did not support that fear and also didn't support the other stated reasons, so appellate court found TC erred in accepting DDA's stated reasons
- As the appellate court said, "the stated basis is strongly suspicious of being a ruse for excusing those persons who may be perceived as more closely identifying with their national origin and/or their Hispanic ethnicity, i.e., those who still speak Spanish." (*Id.* at 631.)



Statistics, Comparative Analysis, and Disparate Questioning

New Forms of Evidence to Prove or Disprove Discriminatory Intent

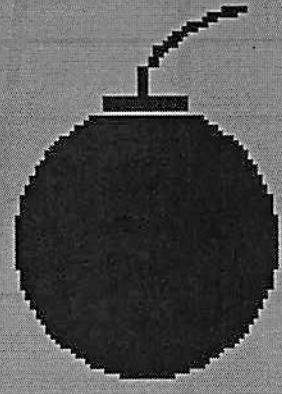
Miller-El v. Dretke (2005) 545 U.S. 231

The Majority Used the Following Methods to Find the Stated Race-Neutral Reasons to be Pretextual

Miller-El (cont'd)

Statistics

P struck 91% of black potential jurors, but only 12% of non-black potential jurors



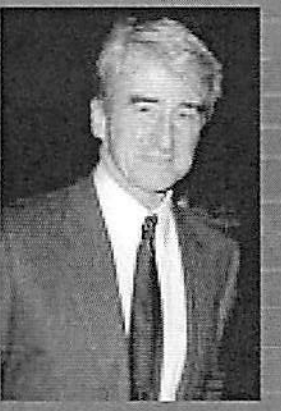
Miller-El (cont'd)

Disparate Questioning

P pressed black potential jurors harder in questioning

Also, asked trick questions of them more often

Miller-El (cont'd)



Evidence of Past DA's Office Policy of Jury Selection Discrimination

Testimony of former prosecutors of office climate of race-based voir dire

Prosecutor-written manual discussing types of people not to choose

Miller-El (cont'd)

Notation of Race on Jury Selection Cards

P annotated race on cards; but trial was before *Batson*, so Ct. not impressed with excuse of annotating to avoid *Batson* error

Miller-El (cont'd)

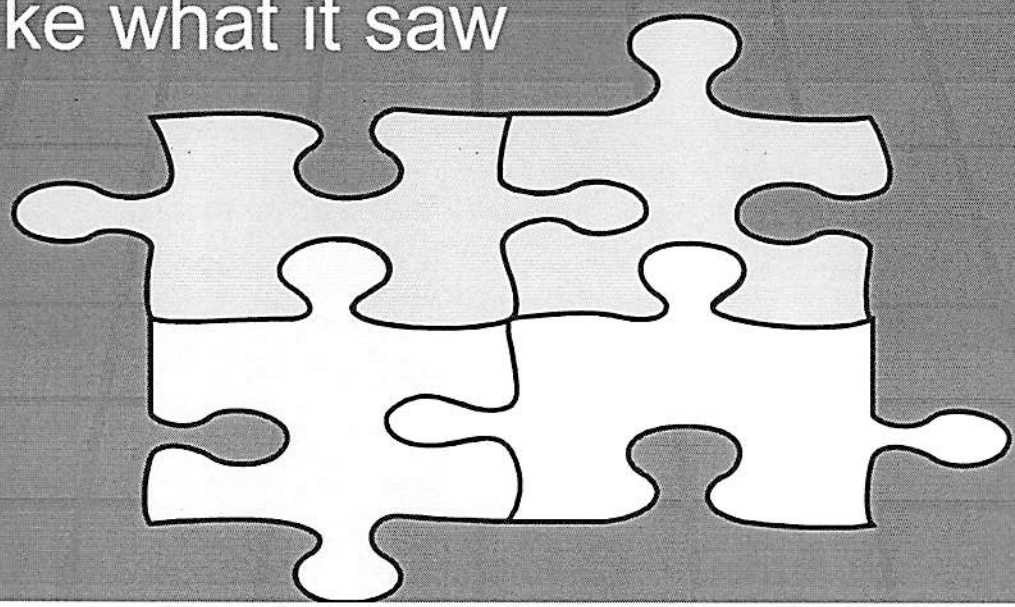
Comparative Analysis

Compared P's stated reasons for striking black potential jurors

If same quality applied to non-black potential jurors whom P didn't strike, evidence of discrimination

Miller-El (cont'd)
Cumulative Weight of All-of-the-Above

Court put all the puzzle pieces together and didn't like what it saw



Miller-El's Progeny

Fleshing Out the New Evidence Rules

Williams v. Runnels (9th Cir. 2006) 432 F.3d 1102

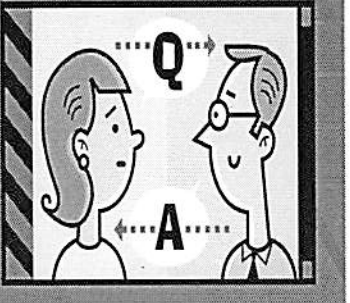
Bare Statistics OK to Establish Prong 1's Prima Facie Case

Williams v. Runnels: Make Your Record!

- TC found no Prima Facie case
- P tried to put reasons on record, just in case, for appeal
- TC said no thanks
- 9th Circuit said it was P's responsibility to make record, b/c prima facie case was shown
- Guess what? P no longer remembered why.

Snyder v. Louisiana (2008) 552 U.S. 472: Ask Follow-Up Q's

- Court suggests P should have followed up with more Q's when black potential juror's hardship request was denied after school said service ok



- P said kicked b/c thought juror would still worry; but no follow-up Q's, so Ct. disbelieved P

- Further, others whose hardships were denied were not stricken by P…and they were white

People v. Lenix (2008) 44 Cal. 4th 602

- Cal Sup's Recognize Comparative Analysis Required for First Time on Appeal

- So long as record contains enough information to so engage

Lenix: Make Your Record

- Cal Sup's prefer we make our own record and do our own Comparative Analysis at trial

- So that "defendant can make an inclusive record, [and] the prosecutor can respond to the alleged similarities"

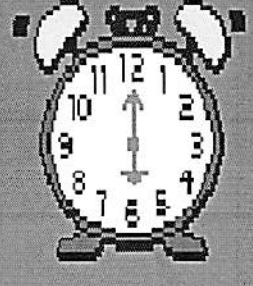
  (*Id.* at 624.)

Lenix: Don't Cut Off Voir Dire Time

Lenix recognizes TC's CCP 223 power to limit voir dire time, but said this:

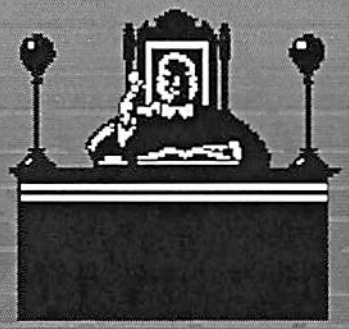
"If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask questions."

(*Id.* at 625.)



Lenix and *Green v. Lamarque*: Notations on Juror Cards

- *Lenix*: Dicta re: *Miller-El*'s disapproval of race notations on juror cards:
- "We emphasize, however, that post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id.* at 617 n.12.)
- BUT SEE *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028, 1033, finding a *Batson* violation because, inter alia, "the prosecutor had noted the race of each venire member he struck from the jury pool; when the trial judge asked him who he struck and why, the prosecutor was able to read off a list," then cited *Miller-El*'s note of that.



Rice v. Collins (2006) 546 U.S. 333

- US Supremes *unanimously* overturned 9th Circuit for going too far in second-guessing TC's 3rd prong credibility determination
- US Sup's Used Comp. Analysis as a Shield rather than a Sword
- Noted P struck similarly situated white potential juror (challenge on appeal was to strike of black potential juror)

Comparative Analysis Tips & Strategies

- Keep a list of the attributes leading you to kick
- If you saved someone with that attribute, have a list of why you kept them

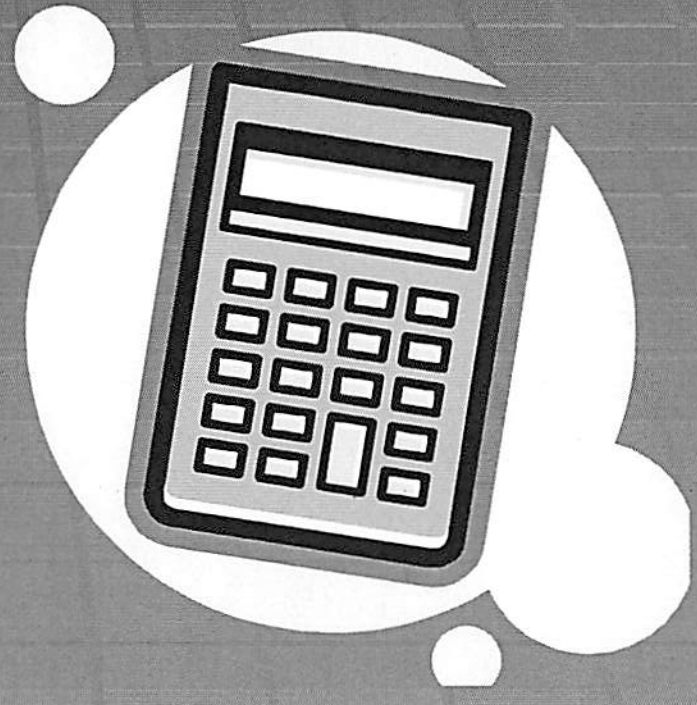
Comparative Analysis Tips & Strategies

- Don't wait for D; make your own Comp. Analysis argument, or App. Ct. will draw judgment on an artificially short record

- Shield rather than a Sword—point out when you kicked others w/same attribute

Other New Evidence Forms Tips & Strategies

- Ask follow-up Q's—or point out that Trial Court kept strict timetable and you didn't have time



- Bring a calculator to do statistics

Demeanor Strikes and the Cold Appellate Record

So what happens when you kick because of the juror's demeanor, but that demeanor is not reflected in the record?

App. Ct.'s Dislike Demeanor Strikes w/o Record Support

- *People v. Silva* (2001) 25 Cal. 4th 345

  (reversed death penalty when P's non-demeanor reasons belied by record, and demeanor reason not supported by it)

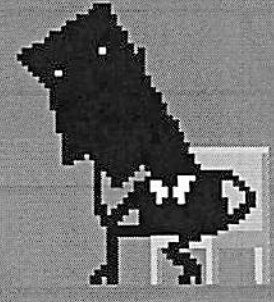
- *Snyder v. Louisiana*, *supra*

  (reversed where P gave 2 reasons, 1 of which belied by Comp. Analysis and 1 was demeanor not in record; TC didn't state which it credited)

Vague Demeanor Reasons Unsupported by Record

- *People v. Allen* (2004) 115 Cal. App. 4th 542

  (reversed where P gave demeanor reason of "her very response to your answers, and her demeanor, and . . . how she took her seat" being indicative of an independent thinker; App. Ct. had no idea what P was talking about)



A Ray of Hope… But Don't Forget *Habeas*

- *People v. Reynoso* (2003) 31 Cal. 4th 903

  (accepted TC's non-detailed credibility ruling when P's demeanor reason not in record but P's other reason not belied by it)

- NOTE: *Reynoso* can be a helpful decision, but the better practice is to make a demeanor record and have TC give a detailed ruling. Leave no stone unturned.

Another Ray of Hope—From the Supremes! *Thaler v. Haynes*

- Sup's upheld TC's crediting of P's race-neutral demeanor reason even when the TC wasn't the judge who was present for voir dire, and therefore couldn't have seen the complained-of demeanor.
- "[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." (*Id.* (2010) 130 S. Ct. 1171, 1175, __ U.S. __.

Thaler v. Haynes (cont'd)

- While "the trial judge's 'first hand observations' are of great importance," *Batson* does not "hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id.* at 1174-75, U.S. at_.
- But Note: *Haynes* involved no evidence in the record that would have undermined the prosecutor's stated reasons.

Demeanor-Based Tips & Strategies

- Weave your observations into voir dire record

-"I realized you were smiling at D. I'm curious as to why?"

-"You seem a little upset with me. Have we met before?"

-"So I noticed you looking around during questioning. Is there something else on your mind besides these proceedings?"

Demeanor-Based Tips & Strategies

- During 2nd Prong, specifically ask TC to tell you whether she/he saw the same thing you did

  -*"Did the Court also see that Juror A kept coming in late after the breaks?"*

  -*"Does the Court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?"*

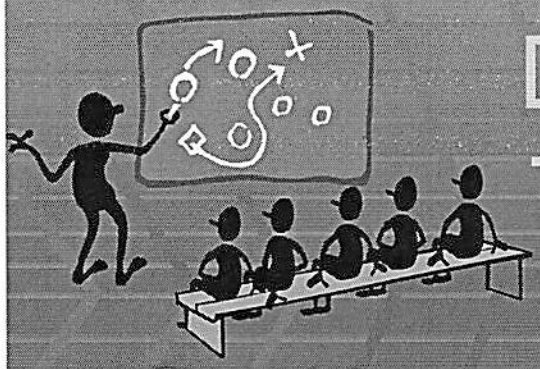
Demeanor-Based Tips & Strategies

- App. Ct.'s won't consider a reason that you didn't give (and TC can't, either)

  (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083)

- So make sure you give all your reasons

- Make TC specify its findings—which reasons accepting, and which rejecting



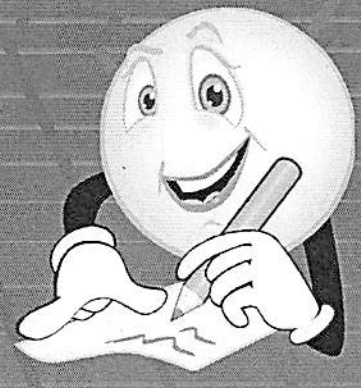
Demeanor-Based Tips & Strategies

- Consider turning chair around and watching panel from minute they walk in until the first 12 are seated in the box

  -It might look weird, but panel will think you're conscientious and care who is selected

  -You won't miss anything—who is snoozing, who won't let others squeeze past them, who didn't take hat off until admonished, etc.

Demeanor-Based Tips & Strategies



- Keep ALL your jury notes—for retained jurors as well as kicked jurors

- If remanded to do Prong 2, you can't rebut prima facie case if you can't remember your reasons

  (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692)

Remedies

(Yes, we're almost done!)

The Good, Old-Fashioned Remedies

- *Wheeler*: Dismiss entire panel and start over with new panel
- Because opponent "is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group . . . ." (*Wheeler*, *supra*, at 282.)
- *Batson*: US Supremes remanded to allow TC to engage in 3-Part Inquiry
- EXPLICITLY LEFT OPEN possible remedies of:
  - -Discharging entire panel and starting over
  - -Re-seating the offended juror

Wheeler Gone Wild: *People v. Willis* (2002) 27 Cal. 4th 811

But what if the opponent doesn't *want* to dismiss the panel?
Opponent holds all the cards…

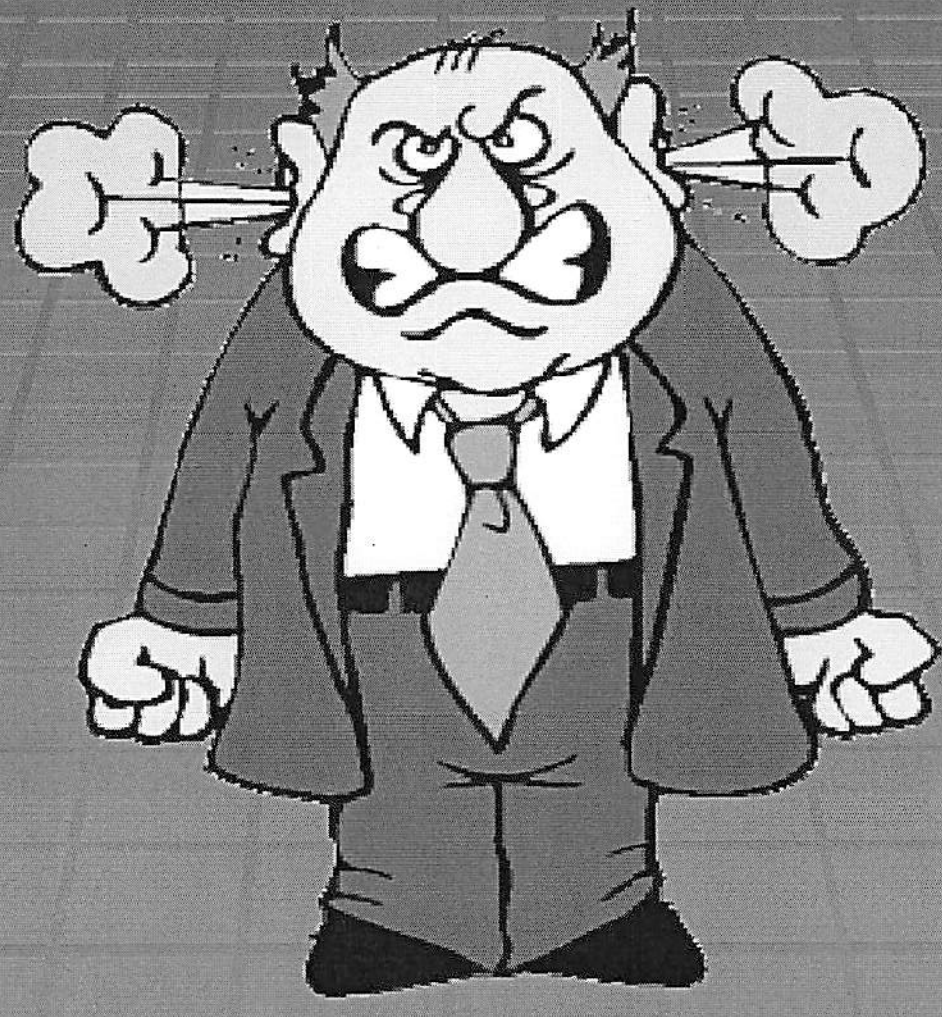
Willis: *Wheeler* Gone Wild

- Defense attorney purposely violated *Wheeler* b/c didn't like mostly white panel
- Rather than reward defense w/ new panel, TC fined defense attorney $1500 as an alternate remedy
- (To the chagrin of the higher courts, TC later vacated the sanction order)

Willis: Cal Sup's Expand *Wheeler*'s Remedies

- Cal Sup's affirmed use of $$ sanctions
- Gave nod to re-seating offended juror
- Hinted ok to give opponent extra peremptories instead of re-seating, if offended juror already gone (dicta)
- THE CATCH: the opponent has to AGREE to the alternative remedy. OPPONENT HOLDS THE CARDS.

Potential State Bar Reporting Requirements



State Bar Reporting: At Trial

- BP 6086.7(a)(3): TC must report if monetarily sanctions you for $1000 or more

- BP 6068(o)(3): You must report self w/in 30 days if TC monetarily sanctions you for $1000 or more

State Bar Reporting: On Appeal

- BP 6086.7(a)(2): TC must report if judgment reversed "in whole or in part" b/c of attorney misconduct
- BP 6068(o)(7): You must report self w/in 30 days if judgment reversed "in whole or in part" b/c of misconduct

State Bar Reporting: On Appeal
cont'd

- Coleman thinks *Wheeler* error means attorney made Jury Trial unfair--and if pretext finding, deceptive; thinks reporting duty.

  (JERRY P. COLEMAN, MR. *WHEELER* GOES TO WASHINGTON--THE FULL FEDERALIZATION OF JURY CHALLENGE PRACTICE IN CALIFORNIA 43 (2006))