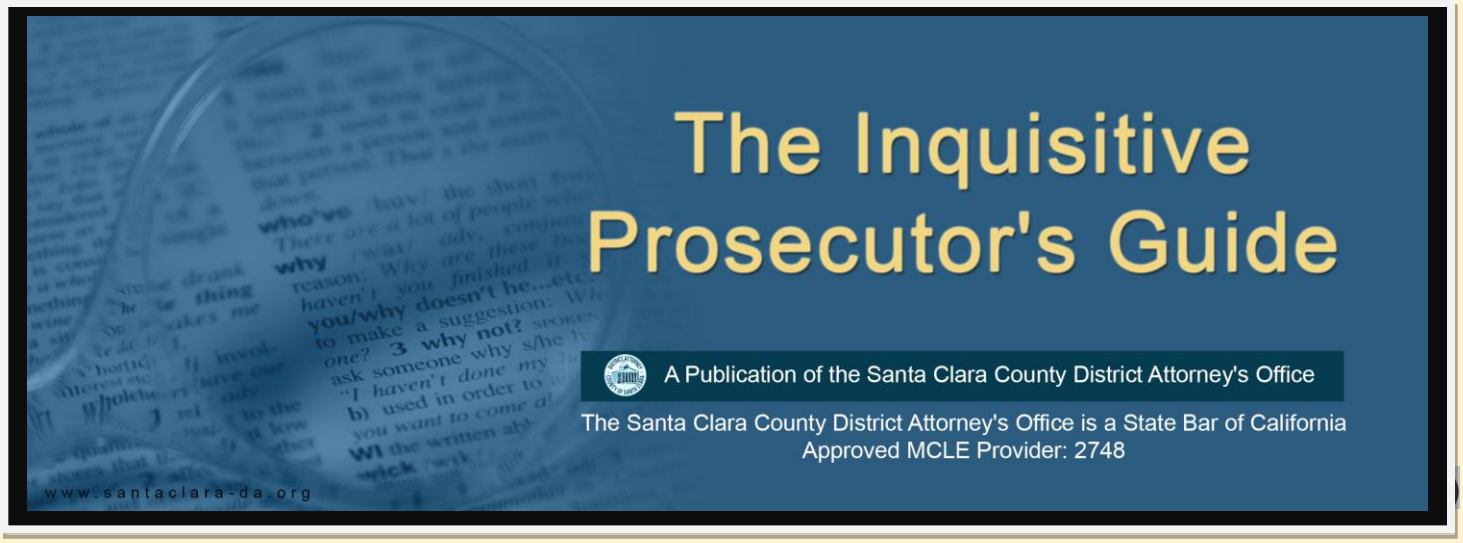

August 19, 2015

2015-IPG#8(THE ROGUE JUROR)

THE ROGUE JUROR
WHAT CAN AND CANNOT BE DONE WHEN FACED WITH A JUROR WHO IS NOT PROPERLY DELIBERATING OR WHO HAS OTHERWISE ENGAGED IN MISCONDUCT

This memo does not focus on juror discharges that occur *before* deliberations have started. However, the statutes governing removal of jurors cover *both* pre- and post- deliberation juror discharges. Thus, cases interpreting the statutes in the context of pre-deliberation discharge will often express principles applicable in all contexts of juror discharge. Accordingly, this memo will occasionally reference cases involving pre-deliberation juror discharge.

This memo also does not focus on "good cause" to remove a juror who is *requesting* a discharge. However, there is a fair amount of overlap in what provides good cause in that situation and what provides good cause to remove a juror on grounds the juror is unable to perform his or her duties (which *is* the subject of this memo). Hence, this memo may reference cases involving good cause in the former situation.

Lastly, this memo will not focus on cases involving *post-verdict* challenges on grounds of jury misconduct. However, such cases are often cited as precedent in assessing what constitutes jury misconduct that *would have* provided good cause to remove a juror pursuant had the misconduct been brought to the court's attention during deliberations.) Thus, this memo may reference cases involving new trial motions or other post-verdict challenges based on the post-verdict discovery of juror misconduct, juror failure to deliberate, juror bias, or juror failure to follow the law.

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A. What are the Statutory Grounds for Removal of a Juror?

1. Penal Code Section 1089

Penal Code section 1089, in pertinent part, states: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, ***or upon other good cause shown to the court is found to be unable to perform his or her duty,*** or if a juror requests a discharge and good cause appears therefor***,*** the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors. (Emphasis added by IPG.)

2. Code of Civil Procedure Section 233

Code of Civil Procedure section 233, in pertinent part, states: "If, before the jury has returned its verdict to the court, a juror becomes sick or, ***upon other good cause shown to the court, is found to be unable to perform his or her duty***, the court may order the juror to be discharged." (Emphasis added by IPG.)

Editor's note: Code of Civil Procedure section 233 was formerly Penal Code section 1123. (***People* v. *Green*** (1995) 31 Cal.App.4th 1001, 1009.) Thus, cases interpreting former section 1123 may be valid precedent in interpreting good cause for removal of a juror under the current law. (**See e.g.**, ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 644.) The California Supreme Court has found "no functional difference between Code of Civil Procedure section 233 and Penal Code section 1089[.]" (***People* v. *Smith*** (2005) 35 Cal.4th 334, 349.)

3. Code of Civil Procedure Section 234

Code of Civil Procedure section 234, in pertinent part, states: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, ***or upon other good cause shown to the court is found to be unable to perform his or her duty,*** or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she had been selected as one of the original jurors."

Editor's note: Code of Civil Procedure sections 233 and 234 apply to criminal as well as civil juries. (**See *People* v. *Green*** (1995) 31 Cal.App.4th 1001, 1009, fn. 7, citing to Code Civ. Proc., § 192; **see also *People* v. *Smith*** (2005) 35 Cal.4th 334, 349 [noting there does not appear to be any functional difference between Code of Civil Procedure section 233 and Penal Code section 1089].)

B. What are the Constitutional Grounds for Removal of a Juror?

The Sixth Amendment of the federal Constitution, in pertinent part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ***by an impartial jury[.]***" (***People* v. *Wong Ark*** (1892) 96 Cal. 125, 136.) "A criminal defendant has a constitutional right to trial by an impartial and unbiased jury." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95, citing to U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; **see also *Morgan* v. *Illinois*** (1992) 504 U.S. 719, 728 ["d]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment."].) "A deprivation of that right occurs even if only one juror is biased." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95, citing to ***People* v. *Nesler*** (1997) 16 Cal.4th 561, 578.)

However, if a juror is properly removed pursuant to section 1089, then there should be no deprivation of the Sixth Amendment right to an impartial jury. California courts have repeatedly held that the substitution of a juror for good cause pursuant to section 1089, even after deliberations have commenced, "does not offend constitutional proscriptions." (***People v. Lomax*** (2010) 49 Cal.4th 530, 582, 592 [rejecting defendant's claim that removal of juror violated, inter alia, the Sixth Amendment]; ***People v. Wilson*** (2008) 44 Cal.4th 758, 820-821 [same]; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1409 [same except as to mid-trial discharge]; ***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 730 ["California process for substitution of jurors under Penal Code section 1089 and Code of Civil Procedure section 233 preserves the essential features of the jury trial required by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment"]; **accord *Miller* v. *Stagner*** (9th Cir.1985) 757 F.2d 988, 995; **see also *People* v. *Martinez*** (2010) 47 Cal.4th 911, 943 [the fact there is no violation of section 1089 in retaining a juror "*necessarily* disposes of defendant's state and federal constitutional claims" since section 1089 "is consistent with state and federal constitutional proscriptions"].) The federal (but not the constitutional) rule is different than the rule in California. (**See** section N, p. 84.)

It is not as clear whether discharge of a juror when there is not good cause (as that term is defined in section 1089) for discharge will automatically result in a violation of the Sixth Amendment. The California Supreme Court generally finds that if the discharge was unwarranted under section 1089, the case must be reversed without having to decide whether there has been a Sixth Amendment violation. (**See *People* v. *Allen*** (2011) 53 Cal.4th 60, 65; ***People v. Wilson*** (2008) 44 Cal.4th 758, 814.)

C. What are the Duties of the Juror?

1. CALJICs 1.00 and 0.50; CALCRIMs 200, 101, and 104

CALJIC 1.00 broadly defines the duties of the jury. It states, in pertinent part, that the jury has "two duties to perform": First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. . . . Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict."

The instruction also informs the jurors that they "must accept and follow the law as I state it to you, regardless of whether you agree with it [,] . . . must not be influenced by pity for or prejudice against a defendant[,] . . . must not be biased against a defendant because [he] [she] has been arrested for this offense, charged with a crime, or brought to trial[,]. . .

"must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty[,]. . . [and] must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

CALJIC 0.50 is the pre-trial admonition and goes into greater depth in describing the affirmative and negative duties of the jurors. These duties include (i) basing the decisions they make "on the facts and the law"; (ii) determining "the facts from the evidence received in the trial and not from any other source"; (iii) accepting and following the law as stated by the judge;(iv) keeping an open mind on the case and on all the issues the jury must decide; (v) refraining from forming or expressing "any opinions on this case until the matter is finally submitted"; (vi) avoiding feelings of pity for or prejudice against the defendant simply because he was arrested, charged, or brought to trial; (vii) avoiding being influenced "by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" stipulation]; (viii) avoiding speculation as to why an objection was sustained; (ix) avoiding the assumption that an insinuation suggested by a question is true; (x) avoiding consideration of "any offer of evidence that is rejected, or any evidence that is stricken by the court"; (xi) avoiding independent investigation of facts or the law; (xii) avoiding discussion of "facts as to which there is no evidence"; (xiii) avoiding conducting experiments, or consulting reference works or persons for additional information; (xiv) refraining from conversing with other jurors or anyone else "on any subject connected with the trial"; (xv) refraining from conducting research or disseminating "information on any subject connected with trial"; (xvi) refraining from reading or listening to "any accounts or discussions of the case reported by newspapers or other news media, including radio, television, the internet or any other [electronic] source"; (xvii) refraining from visiting or viewing "the premises or place where the crime or crimes charged were allegedly committed, or any other premises or place mentioned or involved in the case"; (xviii) refrain from requesting, accepting, or discussing with "any person, receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial" until 90 days after the trial; and (xix) reporting "to the Court any incident within [the juror's] knowledge involving an attempt by any person either to improperly influence any member of this jury, or to tell a juror his or her view of the evidence of the case."

CALCRIM 200 similarly broadly defines the duties of the jury: It states, in pertinent part, that the jury "must decide what the facts are" and that it is up to the jurors "to decide what happened, based only on the evidence that has been presented to you in this trial."

The instruction also informs the jurors not to "let bias, sympathy, prejudice, or public opinion influence [their] decision." It also explains that the jurors "must follow the law as [the judge] explain[s] it to [them], even if [they] disagree with it." (Bracketed information added.)

CALCRIM 101 is the analogous instruction to CALJIC 0.50. It also tells jurors: (i) that their verdict must be "based only on the evidence presented during trial in this court and the law as" provided by the judge; (ii) to refrain from talking "about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists"; (iii) to refrain from sharing "information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication"; (iv) to refrain from talking about the case or about any of the people or any subject involved in the case with other jurors until deliberations begin; (v) to discuss "the case only in the jury room, and only when all jurors are present; (vi) to avoid "anything that happens outside of the courtroom to affect [their decision]" unless told otherwise; (vii) to avoid reading, listening to or watching "any news report or commentary about the case from any source"; (viii) to avoid using the Internet , a dictionary, or "other relevant source of information or means of communication" in any way in connection with the case, either on their own or as a group; (ix) to refrain from investigating the facts or the law or doing any research regarding this case; (x) to refrain from conducting "any tests or experiments"; (xi) to refrain from visiting the "the scene of any event involved in this case" or stopping and investigating the scene if you happen to pass by it; (xii) to keep any cell phone or electronic device turned off while in the courtroom or

in deliberations; (xiii) to refrain from speaking to "a defendant, witness, lawyer, or anyone associated with them"; (xiv) to refrain from listening "to anyone who tries to talk to you about the case or about any of the people or subjects involved in it"; (xv) to refrain from sharing any information about the case received from any source outside the trial and to immediately tell the bailiff if the juror receives such information or if anyone tries to influence the juror; (xvi) to "[k]eep an open mind throughout the trial" and refrain from making up their minds "about the verdict or any issue until after [the juror has] discussed the case with the other jurors during deliberations"]; (xvii) to avoid letting "bias, sympathy, prejudice, or public opinion influence [their] decision"; (xviii) "to reach [their] verdict without any consideration of punishment"; (xix) to wait at least 90 days after the trial has ended and the jurors have been released "before negotiating or agreeing to accept any payment for information about the case".

CALCRIM 104 also incorporates some of the duties described in CALJIC 0.50, including telling jurors to (i) "decide what the facts are in this case" using "only the evidence that is presented in the courtroom [or during a jury view]"; (ii) not consider "the fact that the defendant was arrested, charged with a crime, or brought to trial" as evidence of guilt; (iii) not "assume that something is true just because one of the attorneys asks a question that suggests it is true"; (iv) not to guess what a witness might have answered if a question is disallowed; (v) disregard testimony stricken from the record; (vi) "disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses."

2. Duties Described in the Case Law and Code of Civil Procedure Section 232

"A juror's duty is to weigh the evidence and credibility of witnesses and to reach a verdict with impartiality." (***People* v. *Farris*** (1977) 66 Cal.App.3d 376, 386.)

A juror has a duty to deliberate. (***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 475; ***People* v. *Thomas*** (1994) 26 Cal.App.4th 1328, 1333.)

A juror has a duty to follow the court's instructions, as "each juror must agree to render a true verdict 'according only to the evidence presented ... and *to the instructions of the court*.'" (***People* v. *Williams*** (2001) 25 Cal.4th 441, 448, citing to Code Civ. Proc., § 232(b), emphasis in original; **see also *People v. Estrada*** (2006) 141 Cal.App.4th 408, 415, fn. 4.)

See also: ***People* v. *Engelman*** (2002) 28 Cal.4th 436, 449 [discussing CALJIC instructions that describe juror duties]

3. Duties Described in Penal Code Section 1122

Penal Code section 1122 lays out "negative" duties - duties imposed on the jurors requiring them to *refrain* from doing certain things. Specifically, section 1122 provides:

"(a) After the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties, and conduct. The instructions shall include, among other matters, admonitions that the jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial; that they shall not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they shall not visit or view the premises or place where the offense or offenses charged were allegedly committed or any other

premises or place involved in the case; that prior to, and within 90 days of, discharge, they shall not request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial; and that they shall promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.

(b) The jury shall also, at each adjournment of the court before the submission of the cause to the jury, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them."

D. What is the Standard for Determining Whether There is *Good Cause* for Finding a Juror is Unable to Perform His or Her Duty in General?

"'Good cause' is not defined in the statute. The definition has evolved on a case-by-case basis since the term was added to the statute in 1933." (***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 730.) However, it is clear that a reviewing court will not find good cause for discharge of a juror unless the juror's inability to perform as a juror appears in the record as a "demonstrable reality." (***People* v. *Virgil*** (2011) 126 Cal.Rptr.3d 465, 498; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466 ***People* v. *Marshall*** (1996) 13 Cal.4th 799, 843; ***People* v. *Johnson*** (1993) 6 Cal.4th 1, 21; ***People* v. *Compton*** (1971) 6 Cal.3d 55, 60.)

In assessing whether a juror should be discharged on grounds the juror is unable to perform his or her duties, "the court must not presume the worst" of the juror. (***People* v. *Franklin*** (1976) 56 Cal.App.3d 18, 25 citing to ***People* v. *Compton*** (1971) 6 Cal.3d 55, 59; **accord *People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 729.) "[B]ias may not be presumed. (***People v. Bennett*** (2009) 45 Cal.4th 577, 621; ***People v. Beeler*** (1995) 9 Cal.4th 953, 975.)

Speculation is not sufficient to establish a demonstrable reality of a juror is unable to perform his or her duties. (***People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, 486 ["Defendant's speculation that the jurors' personal concerns could have affected the thoroughness of the jury's deliberations does not establish that the trial court erred by failing to question the jurors on the subject or to excuse any juror under section 1089."]; ***People* v. *Williams*** (1997) 16 Cal.4th 153, 229 [proper to deny defense motion to remove juror before penalty phase of capital case based on claimed observations of "body language" indicating that juror had decided case before submission since the juror's inability to perform functions was mere speculation].)

E. What Types of Circumstances Will Generally Allow a Court to Make a Finding the Juror is Unable to Perform His or Her Duties?

There are a number of different kinds of circumstances that may establish a juror is unable to perform his or her duties. However, the most common types of situations fall into one of four categories: jurors who intentionally are refusing to deliberate, jurors who are mentally and/or physically unable to deliberate, jurors who refuse to follow the law, and jurors who exhibit bias. And this outline focuses its discussion of what constitutes circumstances showing a juror is unable to perform his or her duties on these grounds: refusal to deliberate (**see** this IPG memo, section F, at pp. 11-20); mental or physical inability to deliberate (**see** this IPG memo, section G, at pp. 21-28); refusal to follow the law (**see** this IPG memo, section H, at pp. 29-45) and juror bias (**see** this IPG memo, section I, at pp. 45-58.)

Courts often speak of "misconduct" by a juror as the reason for believing that a juror will be unable to perform his or her duties. (**See *People* v. *Linton*** (2013) 56 Cal.4th 1146, 1194; ***People* v. *Daniels*** (1991) 52 Cal.3d 815, 864.) However, most forms of misconduct potentially providing good cause for discharge of a juror will fall into one of the categories listed above. For example, refusal to follow the law is a form of juror misconduct (**see *People* v. *Linton*** (2013) 56 Cal.4th 1146, 1194), refusal to deliberate constitute a form of juror misconduct (**see *People* v. *Lomax*** (2010) 49 Cal.4th 530, 589; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1411), and conduct reflecting bias is a form of juror misconduct (**see *People* v. *Farnam*** (2002) 28 Cal.4th 107, 141 fn. 13).

Editor's note: In ***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, the court cited to ***People* v. *Daniels*** (1991) 52 Cal.3d 815 for the proposition that in order for the misconduct to constitute grounds to believe the juror will be unable to fulfill his or her functions as a juror, the misconduct "***must*** be 'serious and wilful.'" (**Id**. at p. 729, emphasis added by IPG.)

Keep in mind also that while this IPG memo identifies several broad categories of circumstances potentially establishing good cause for discharge of a juror, there is often overlap between these categories. For example, a refusal to deliberate may be alternatively viewed as misconduct as a refusal to follow the law - since there is a legal obligation to deliberate. (**See *People v. Thomas*** (1994) 26 Cal.App.4th 1328, 1333.) Similarly, "[b]ias is often intertwined with a failure or refusal to deliberate." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589.) "A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge." (**Ibid**.) Finally, if a juror misrepresented or concealed material information on voir dire tending to show bias, this may alternatively be viewed as exhibiting bias as it compromises the juror's impartiality, or as refusal to follow the law – since the juror is under oath to tell the truth during voir dire. (**See *People* v. *Price*** (1991) 1 Cal.4th 324, 400).

F. What Does It Mean to Refuse to Deliberate?

1. General Rules

"One of the elements of a defendant's right to trial by jury includes the requirement that jurors deliberate before reaching a verdict." (***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 733, citing to ***People* v. *Collins*** (1976) 17 Cal.3d 687, 693.)

It is well established that a court properly may dismiss a juror based on the juror's "unwillingness to engage in the deliberative process" under the theory that the juror is unable to perform his or her duty within the meaning of Penal Code section 1089. (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 25 ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485; **see also *People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, 618 ["A refusal to deliberate is a manifestation of an inability to perform his or her duty as required by Penal Code section 1089"].) This holds true "even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations—if, after reasonable inquiry by the court, it appears 'as a "demonstrable reality" that the juror is unable or unwilling to deliberate.'" (***People* v. *Engelman*** (2002) 28 Cal.4th 436, 444, citing to ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.)

However, figuring out what it means to refuse to deliberate can be a dicey proposition. Here are some guidelines:

"A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." (***People v. Lomax*** (2010) 49 Cal.4th 530, 589; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 25; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1411; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.) A juror has a duty to deliberate with an open mind. (***People* v. *Wilson*** (2008) 43 Cal.4th 1, 26; ***People* v. *Engelman*** (2002) 28 Cal.4th 436, 449; **see also *People v. Linton*** (2013) 56 Cal.4th 1146, 1194-1195 [describing prejudging case as failing to deliberate albeit finding juror who simply expressed to her husband a lack of understanding and confusion because she thought she would react differently than the victim in the case before deliberations did not establish that she prejudged the case in a manner consistent with refusing to deliberate].)

"Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." (***People v. Lomax*** (2010) 49 Cal.4th 530, 589; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 25; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1411; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485; **accord *People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926; ***People v. Watson*** (2008) 43 Cal.4th 652, 697; **but see *People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1352 [finding that while it is "inadvisable" for jurors to express a fixed view of the case early in deliberations, it is not misconduct]; ***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 733-735 [holding to "deliberate" means "to ponder or think about with measured careful consideration and often (but not necessarily) with formal discussion before reaching a decision or conclusion" and that so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote," a juror need not engage in formal discussions with the other jurors or refrain from expressing an early opinion that is persistently maintained]; this IPG memo, section H-13 p. 44 [discussing what it means to "prejudge" a case].)

On the other hand, a juror cannot be dismissed because of juror's views on the merits of the case. The requirement of a unanimous criminal verdict "rests on the premise that each individual juror must exercise his or her own judgment in evaluating the case." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 71.) "[T]he circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge." (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 824; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485; ***People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, 618; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 71, 74 ["Jurors are supposed to share their own evaluations of the credibility of witnesses and the strength of the evidence. That a given juror may reach a different conclusion on these questions from those espoused by other jurors, or may do so forcefully, is not necessarily evidence of prejudgment or a failure to deliberate."].)

"A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1051; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485; ***People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, 621; ***People* v. *Barber*** (2002) 102 Cal.App.4th 145, 153.)

Similarly, "[t]he circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 824; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485; ***People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, 618; ***People* v. *Barber*** (2002) 102 Cal.App.4th 145, 153; ***People* v. *Diaz*** (2002) 95 Cal.App.4th 695, 703; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 74 [noting the fact a discharged juror may have

annoyed other jurors is not dispositive evidence that he had prejudged the case or declined to deliberate].)

2. Examples of Cases Where Court Found Juror Properly Removed for Refusal to Deliberate

People* v. *Lomax (2010) 49 Cal.4th 530

In ***Lomax***, the jury sent out a note stating that one of the jurors had "reevaluated his/her personal feelings regarding application of the death penalty" and the juror's objection to the death penalty "was causing the juror to be unable to continue to deliberate." (**Id**. at p. 583.) The trial court interviewed the accused juror outside the presence of the other jurors. The accused juror denied having a conscientious objection to the death penalty that would prevent him from imposing it "no matter what evidence or information" and claimed he could conceive of a situation in which he would vote for the death penalty. As to the decision in the instant case, the juror said he had tried to evaluate the evidence presented and came up with a position of LWOP. (**Id**. at p. 583.) The trial court then interviewed the foreperson who explained that the accused juror would not discuss his reasons for his decision. The foreperson said it was apparent that the accused juror had a basic underlying philosophical conscientious objection that really probably was not apparent even to him when he was filling out the interview forms based on "the lack of foundation of any kind that he would provide to us for his reasoning." Moreover, the foreperson said when the other jurors queried the accused juror, the accused juror could not up with any set of circumstances that would allow him to vote for the death penalty. The foreperson described the juror as completely uncooperative. The foreperson said the juror had a "hard and fast opinion," and despite attempts by other juror members to engage him, he would basically respond with just, "I don't know." The court cautioned the foreperson not to reveal the content of the jury's deliberations. The foreperson also brought up the fact that the juror "continually attempted to discuss facts not in evidence and was "hunting in areas that we have no understanding or knowledge of, trying to bring things in that really are not there, what-ifs, histories, potential circumstances." (**Id**. at pp. 583-584.) The foreperson also described how all the jurors (including the accused juror) were asked to approve, modify, and agree to the note alerting the judge to the problem before the note was sent out. (**Id**. at p. 584.)

The trial court proposed to question all of the jurors about the note. Defense counsel asserted the accused juror was being "browbeaten" by the majority jurors and the note should be disregarded. At defendant's request each juror was questioned outside the presence of the others. (**Id**. at p. 585.) All the jurors confirmed the accused juror had agreed to the note. All the jurors said the accused juror had a conscientious objection to imposing the death penalty, although some indicated the accused juror had stated he could apply it in a case involving a child murder – a scenario not presented to the jurors. (**Id**. at pp. 585-586.) The trial court then brought back the accused juror for questioning. The accused juror admitted stating that he would consider the death penalty if a child had been murdered, but he denied saying that was the only circumstance in which he would consider it. The juror also wavered on whether he had agreed to the wording of the note by indicating he did so under pressure from the other jurors and claimed the jurors were leaning on the fact that he was a conscientious objector even though he was not. When confronted with the discrepancy between his statement in the questionnaire that he was "moderately in favor" of the death penalty and his statement to other jurors that he would only consider the death penalty for the murder of a child, the juror did not really address the accusation but arguably implied that was not the only circumstance he might consider. The juror claimed he was discussing the evidence to the best of his ability and verbalized what he thought about the evidence. Finally the juror admitting discussing factual scenarios not based on the evidence in this case, but did so only "after the fact that they basically thought I was going to be dismissed." (**Id**. at pp. 586-587.)

The trial judge ultimately concluded (i) the accused juror was failing to deliberate – he was not using the evidence and was giving no explanation at all for his views; (ii) there was "considerable support" for the idea the juror was unqualified because he was a conscientious objector and was not impartial on the death penalty; and (iii) the juror's written statement in the questionnaire was false regarding his actual views on the death penalty. (**Id**. at pp. 586-588.)

The California Supreme Court found "ample evidence" to support each of the reasons provided: the juror was biased against capital punishment, the juror lied on his jury questionnaire, ***and the juror refused to deliberate*** in the penalty phase. (**Id**. at p. 590.) In support of its finding the juror was failing to deliberate, the ***Lomax*** court pointed to (i) the foreperson's complaint the accused juror entered the jury room with a "hard and fast decision" but refused to share any of the reasoning or feelings behind this decision with the other jurors and would not communicate with the others and (ii) the statement of another juror that the accused juror had said he was not able to consider the evidence or take part in the deliberations because of his conscientious objection to the death penalty. (**Id**. at p. 592 [and also finding there was a demonstrable reality the juror was biased- **see** this IPG memo, section I-10-c at p. 55.)

People v. Watson (2008) 43 Cal.4th 652

In ***People v. Watson*** (2008) 43 Cal.4th 652, during the penalty phase of capital trial and after a single afternoon of deliberations, the foreperson sent a note to the trial judge asking, "What do we do if we have a juror that has admitted he does not believe in the death penalty, under any circumstances?" The trial judge rejected the defense suggestion that all the jurors should simply be reinstructed that they had been qualified as capital jurors and should deliberate to the best of their ability. Instead, the trial judge then interviewed the foreperson in order to identify the juror and then interviewed the juror. The juror confirmed that, after he had consulted with his minister, he had announced to the other jurors he could not impose the death penalty and that what he said was true: he could not vote for the death penalty no matter what the evidence showed. The California Supreme Court upheld the removal of the juror under the rationale that since the juror confirmed he could not vote for the death penalty no matter what the evidence showed, the juror had "'express[ed] a fixed conclusion at the beginning of deliberations and refus[ed] to consider other points of view,'" thereby refusing to deliberate." (**Id**. at pp. 693-697.)

People* v. *Wilson (2008) 43 Cal.4th 1

In ***People* v. *Wilson*** (2008) 43 Cal.4th 1, the court held there was a sufficient showing that a juror was refusing to deliberate in the penalty phase of capital murder trial where the juror repeatedly told other jurors she had already made up her mind, she did not participate in discussions, and she admitted to court that she would go along with other jurors if she were lone holdout, even if she strongly disagreed. (**Id**. at pp. 23-27.) The ***Wilson*** court rejected the defense claim that since the accused juror told other jurors she had already made up her mind *after* the jury's first vote this meant it could be inferred she was deliberating *before* the vote. The court rejected this argument because of the juror's own repeated direct statements that she had already made up her mind at the start of penalty deliberations. (**Id**. at p. 27.)

Boeken v. Philip Morris Inc. (2005) 127 Cal.App.4th 1640

In ***Boeken v. Philip Morris Inc.*** (2005) 127 Cal.App.4th 1640, a civil case, the court upheld the discharge a juror for failure to deliberate where the accused juror separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel, the Bible, or both, throughout two days of deliberations - and *all* the other jurors reported the accused juror slept or read throughout deliberations. (**Id**. at pp. 1686-1688.)

People v. Diaz (2002) 95 Cal.App.4th 695

In ***People v. Diaz*** (2002) 95 Cal.App.4th 695, after two hours of deliberation, the foreperson sent out a note indicating a juror was refusing to deliberate and asking for further guidance. The trial court then interviewed the foreperson. The foreperson said that while the accused juror had initially participated in deliberations, she subsequently began refusing to discuss anything and was "intimidated by us needing to discuss her opinion and ours and she just feels ganged up on because she is by herself," and that "her position and her attitude is, this is how I feel, and there is nothing to discuss." (**Id**. at p. 700.) The trial court then interviewed the accused juror. The accused juror said was having difficulty in the jury room and began to cry. The juror indicated that she was discussing her opinion but the other jurors were "bombarding" her. The trial court then interviewed three of the other jurors who stated the accused juror had initially participated in deliberations but that she stopped doing so. The other jurors claimed the accused juror was refusing to discuss the evidence and erroneously claiming she was being attacked. The trial judge then reread the instructions relating to juror duties to the entire jury and excused them for the day. The next morning, the trial court continued questioning the accused juror to determine if she was either refusing to deliberate or incapable of deliberating because she felt intimidated. At this juncture, the juror claimed she was not intimidated by the other jurors and said she was "going through a lot" because her brother- in- law was very sick and died yesterday. The juror then said, "It has been kind of hard for me, but I am doing better now, your Honor." She said her brother-in-law's illness had been bothering her the day before, but when the trial court asked if she thought that was why she had been having problems in the jury room, she said: "No. There was a lot of problems in there. But, I think I can do my job, your Honor." (**Id**. at p. 701.) The trial court ultimately decided to discharge the juror based on: (i) the failure of the juror to be honest about what had been her problem the day before; (ii) concerns that the juror's emotional response to the death of her brother-in-law would continue to interfere with her ability to make decisions in this case; and (iii) the juror's failure to deliberate. (**Id**. at pp. 701-702.)

The appellate court found there was good cause to remove the juror since there was substantial evidence to support the trial court's conclusion that the accused juror was not merely viewing the evidence differently from the other jurors. Rather, she was extremely upset, her distress had caused her to stop deliberating, and questioning had revealed a troubling equivocation as to why she had been distressed. (**Id**. at pp. 704-705.)

People* v. *Thomas (1994) 26 Cal.App.4th 1328

In ***People* v. *Thomas*** (1994) 26 Cal.App.4th 1328, the court held discharge of a juror for failure to deliberate was proper where the juror "did not answer the questions posed to him by other jurors, did not sit at the table with the other jurors during deliberations, acted as if he had already made up his mind before hearing the whole case, and did not look at the two victims in the courtroom" and the juror took notes he had made during the trial home with him in his socks despite the trial court's warning not to do so. (**Id**. at p.1333 [and noting also that even if failure to answer the other juror's questions simply reflected "inattentiveness," this would also provide grounds for dismissal].)

People* v. *Warren (1986) 176 Cal.App.3d 324

In ***People* v. *Warren*** (1986) 176 Cal.App.3d 324, the court held the discharge of juror for failure to deliberate was proper where the juror asked to speak to the judge, claimed she was in disagreement with the other jurors but that she felt so intimidated that she would vote the way the group wanted her to vote, and said she could not comply with the instruction that she should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision. (**Id**. at p. 327.)

Editor's note: In ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, the court held that a juror's refusal to deliberate (i.e., by stating the defendant was guilty at the outset and there was nothing to discuss and then sitting in a corner to read his book and ignore attempts by jurors to engage) that came to light after trial was misconduct, but rejected a post-verdict challenge as harmless error since even if juror had deliberated, he and the other jurors would still have unanimously concluded defendant was guilty. (**Id**. at pp. 1411.) The ***Leonard*** court also found that even if the trial court had erred by refusing to investigate the possibility of juror misconduct after the bailiff reported that some jurors were "not participating," it was harmless error. (**Id**. at p. 1412.)

3. Examples of Cases Where Court Found Juror Was Improperly Removed For Alleged Refusal to Deliberate

People* v. *Allen (2011) 53 Cal.4th 60

In the case of ***People* v. *Allen*** (2011) 53 Cal.4th 60, after several days of deliberations the foreperson and another juror (juror #4) reported their concern that one of the jurors (hereinafter the "target juror") had made up his mind before the case was submitted to the jury. (**Id**. at p. 64.) The judge interviewed the foreperson who said the target juror had (on the second day of deliberations) stated, "When the prosecution rested, she didn't have a case." However, when asked whether he had made up his mind, the target juror said he had not. The target juror had also voted "undecided" during a preliminary vote taken that morning. The court then interviewed juror #4 who recounted that the target juror had stated several times, he "was waiting for the prosecuting attorney to—to bring her case forward, and it never happened." Juror # 4 also said the target juror misconstrued the evidence to support his position. Juror #4 recounted that the target juror expressed disbelief in a prosecution eyewitness's explanation for why the witness' time card reflected the witness was at work at the time the crime occurred (i.e., because the witness' friend Jose sometimes punched his time card for him). According to juror #4, the target juror said that the explanation given by the prosecution eyewitness was a lie because "I know Hispanics, they never cheat on timecards, so this witness [Connor] was at work, end of discussion." Juror # 4 also opined the target juror was not "being completely honest" when he denied having already made up his mind. (**Id**. at p. 65-66.) Interviews with other jurors disclosed *mixed* conclusions about whether the target juror had entered into deliberations with a fixed immutable position with several of the jurors identifying *multiple* jurors who had entered deliberations with this mindset. The target juror denied making up his mind before deliberations, albeit admitted that more than once he had said, "When the prosecution rested, that they had not convinced me." The target juror (a non-Hispanic) also acknowledged he made the remark about Hispanics not falsifying timecards, and that he based his opinion on "job experience." (**Id**. at pp. 66-68.) The trial court then granted the motion to discharge the target juror because (i) the consensus of jurors was that the target juror had made up his mind before the matter had been submitted to the jury and (ii) that the timecard statement was, in fact, made by the target juror and thus the juror was inappropriately using "evidence outside of the record." (**Id**. at p. 68.) The trial court explained that it was taking into consideration the opinions of a large number of jurors and especially the foreperson's assessment of whether the target juror had made up his mind. (**Id**. at p. 68.) Although the California Supreme Court found the trial court acted properly in investigating the issue by interviewing all the jurors, it held the trial court abused its discretion in removing the juror since the target juror was not refusing to deliberate and the record did not show a demonstrable reality the target juror was unable to discharge his duty. (**Id**. at pp. 65, 70.) The ***Allen*** court found that the fact the target juror "was unimpressed by the strength of the evidence and unpersuaded by his colleagues' assertions during deliberations does not amount to prejudgment. To conclude otherwise would threaten the ability of jurors to express minority viewpoints during deliberations and undermine the principle that both parties are entitled to the independent judgment of each individual juror." (**Id.** at p. 76.) The ***Allen*** court noted the statement allegedly reflecting the juror's mind was made up did not come

until after two days of deliberation; he voted "undecided" on the fifth day of deliberations, just before the court interviewed the jurors, the juror commented "sometimes assertively, on the views of other panel members and gave his opinion of what the evidence showed." (**Id**. at p. 74.) The ***Allen*** court criticized the trial court not only for concluding the juror had prejudged the case without making a finding the juror's "undecided" vote and participation were somehow a sham or lacking in good faith, but for failing to ask the juror what he meant by his statement or attempting to resolve the matter with curative instructions. (**Id**. at p. 74.) In addition, the ***Allen*** court characterized the trial court's approach as deficient insofar as the trial court placed too much emphasis on the "opinions' of other jurors. (**Id**. at p. 75.)

Editor's note: The decision in ***Allen*** can also be viewed as an example of a juror's failure to follow the law (**see** this IPG memo, section H-13, at p. 44) or as evidence of bias (**see** this IPG memo, section I3 at p. 47).

People* v. *Cleveland (2001) 25 Cal.4th 466

In ***Cleveland***, on the second day of deliberations in a trial on charges of attempted robbery of a firearm, the jury sent a note to the trial requesting that an alternate replace one of the jurors. The note stated, "One juror does not agree with the charge and does not show a willingness to apply the law. One juror will not abide the facts and apply the law. Please provide direction in this matter." (**Id**. at p. 470.) The trial court then spoke with the foreperson who explained that one juror "could not even agree that a crime had been committed." The foreperson claimed the accused juror was not willing to consider the elements of robbery because the juror felt there was not a "valid charge." (**Id**. at p. 470.) The foreperson declined to say the juror had made up his mind before deliberations; but stated the juror only halfheartedly listened to the other jurors, and when asked by other juror to discuss his position, responded by saying, "You're not going to sway my mind, this is what I feel in conscience in looking at the big picture, no fault no foul, there's pushing and shoving on every football field[.]" (**Id**. at pp. 470-471.) The trial judge then re-instructed the entire jury on how to deliberate and asked whether any juror "feels that any other juror or jurors are not following that instruction that I just gave you, that are not deliberating, that are not considering others' opinions, that have foreclosed discussion?" (**Id**. at p. 471.) Ten of the twelve jurors raised their hand. The judge then queried all of the jurors. Questioning of each juror revealed some confusion whether the accused juror was opposed to any charge of attempted robbery or whether he simply felt that the evidence did not support the charge, although many indicated the accused juror would not answer some of the questions posed to him, went off on tangents, and/or consider the elements of the crime. (**Id**. at p. 471-473.) When the accused juror was questioned, about whether he was participating in deliberations, he acknowledged he did not want to discuss details but stated he had been participating and listening to other jurors and they to him. The accused juror indicated he had to follow his "own conscience." (**Id**. at p. 473.) When asked whether he accepted the court's instruction concerning the elements of the crime, the juror said he had "no problem with the law. I have only problems with the facts as I perceive them." (**Id**. at p. 473.) The trial court found the accused juror was not "functionally deliberating with the other jurors[.]" The trial court noted the accused juror refused to respond to specific questions as to elements and facts, and only spoke in generalities, which prevented a meaningful discussion. Accordingly, the trial judge dismissed the juror. (**Id**. at p. 473.) The propriety of that dismissal became the issue before the California Supreme Court. The ***Cleveland*** court concluded the accused juror **should not have been removed** since there was not a "demonstrable reality" the juror had refused to deliberate. (**Id**. at pp. 485-486.) The court observed that while the jury's initial note to the trial court asserted that the accused juror did not show a willingness to apply the law, "it became apparent under questioning that the juror simply viewed the evidence differently from the way the rest of the jury viewed it." (**Id**. at pp. 485-486.) The court rejected the idea that the accused juror' insistence on viewing the "grand picture" rather than analyzing the elements of the crimes, discussion of irrelevant matters, and "unreasonable interpretation" of the evidence was tantamount to refusing to deliberate. (**Id**. at p. 486.) The court acknowledged that the juror may have employed faulty

logic and reached an "incorrect" result but stated the evidence showed the accused juror "participated in deliberations, attempting to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even if less than sympathetically, to the contrary views of his fellow jurors." (**Id**. at p. 486.)

People* v. *Karapetyan (2003) 106 Cal.App.4th 609

In ***People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, a juror who "had been deliberating fully and completely for more than five days" was accused of refusing to deliberate after he refused to change his view and vote. (**Id**. at p. 621.) The other 11 jurors claimed the holdout juror was unable to understand the instructions, "fought every single thing on every single issue[,]" needed "to dissect every single word[,]" "could not make the simplest of decisions [,]" wanted to bring the instructions to a library and study them, could not decide because of his religious beliefs, made constant references to television and movies, appeared "to be in a great deal of agony[,]" "had a different view of the evidence and felt as if everyone was against him[,]" was "incapable of making a simple decision[,]" and frequently changed his mind, including on the question of guilt. (**Id**. at pp. 613-616.) The trial court removed the juror for a number of different reasons, several of which were not borne out by the record. Others were held not to provide good cause for discharge, including: (i) that the juror had said he wanted to go to the library or consult a dictionary for assistance, which the appellate court rejected as invalid since there was no evidence the juror actually engaged in the conduct; and (ii) that the juror had made "incendiary comments" after being admonished by the court not to do so, which the appellate court rejected because there was nothing in the record to indicate the accused juror made any comments other than what one would expect of a freewheeling discussion of the issue in the jury room. (**Id**. at pp. 617, 620-621.) As it turned out the juror was largely hung-up on the failure of the prosecution to prove an element of a provocative act murder that the trial court had erroneously required to the jurors to find. (**Id**. at p. 620.) The real problem, according to the appellate court "was that, after more than five days of deliberation, the jury was deadlocked at 11 to one for guilt[.]" (**Id**. at p. 621.) The court noted the accused juror had been deliberating fully and completely for more than five days and that it was only when he indicated that he was not going to change his view and was going to vote not guilty that the other jurors asked the court to intervene because of juror misconduct. Accordingly, the removal of the accused juror at that point in the proceedings was reversible error. (**Id**. at p. 621.)

People* v. *Barber (2002) 102 Cal.App.4th 145

In ***People* v. *Barber*** (2002) 102 Cal.App.4th 145, the foreperson informed the trial court that the jury was "hopelessly deadlocked" at 11 to 1, and that the jurors had deliberated in good faith. The trial court then asked the jurors whether everyone was deliberating in good faith. Seven jurors said yes, five jurors answered no. The court conducted a hearing to question only the jurors who claimed there was misconduct. This questioning revealed the identity of the lone holdout juror for acquittal. The court then allowed counsel for the prosecution and the defense to question jurors about alleged misconduct of the holdout juror. There was mixed conclusions about the extent of the accused juror's deliberations. Several of the interviewed jurors said the holdout juror was not deliberating. Others indicated the holdout juror was refusing to change his mind based on the evidence or had initially begun deliberating but stopped. There was some speculation that the accused juror was being influenced by the fact he had been falsely arrested – a fact only disclosed during deliberation, not on voir dire. The accused juror himself was interviewed. The prosecutor was allowed to question the juror about whether the evidence in the case triggered his thoughts about the old arrest, why he felt it was important to mention it in deliberations, and whether it affected the way he voted. (**Id**. at pp. 148-149.) The juror responded, "I made a promise to myself when I go in that jury room and if anyone start [sic] acting the fool and trying [sic] to corrupt everybody or confuse me, I will shut them off." (**Id**. at p. 149.) The juror said this meant, "I didn't want to listen to

nothing—if they didn't say nothing about the testimony..." (**Id**. at p. 149.) The trial judge removed the juror based on both refusal to deliberate because (i) early in the discussions the juror had decided that he was not going to participate further in the deliberations or listen to what other jurors had to say and (ii) the nondisclosure of the earlier arrest – even though the trial court thought the failure to disclose may have been an innocent mistake. (**Id**. at p. 149.) The appellate court held the juror was improperly dismissed and took the trial court to task for being both too intrusive and not being intrusive enough. The ***Barber*** court found the trial court erred by (i) allowing the prosecutor to question the jurors in a way that revealed which juror was the holdout juror and to cross-examine the holdout juror in a way that would reveal the juror's deliberative thoughts; (ii) only querying the jurors who said misconduct occurred (i.e., jurors supporting the prosecutor's position); (iii) removing a juror because the juror failed to agree with the majority about the sufficiency of the evidence; and (iv) finding the unintentional concealment by the juror was sufficient grounds to discharge the juror. (**Id**. at pp. 150-153.)

People* v. *Bowers (2001) 87 Cal.App.4th 722

In ***Bowers***, after the jury sent a note indicating they could not come to a unanimous decision, the foreperson informed the judge that he was concerned that one of the jurors was not deliberating. The judge then instructed the jury about the duties of the jury under CALJIC 1.00 and CALJIC Nos. 17.40 and 17.41 (which, among things, tells them they should decide the case "for yourself, but you should do so only after discussing the evidence and instructions with the other jurors" and informs them "[i]t is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for the certain verdict). After the judge received a second note indicating that the accused juror had stated, "I heard everything in the other room. I knew then this did not happen. I am not changing my mind and I [cannot] change your minds." The judge again met with the foreperson who again expressed a concern the juror had made up his mind about his position from the beginning, but acknowledged the juror had participated in deliberations at times. (**Id**. at pp. 726-727.)

The judge then queried the remainder of the jurors and the accused juror about whether the accused juror was refusing to deliberate. There was a split of opinion regarding the degree to which the accused juror participated in deliberations. Some jurors stated he had participated in the jury deliberations from the beginning, had advised the other jurors of his position and the reason for his position, i.e., that he did not believe the testimony of the prosecution's witnesses. Other jurors testified the accused juror had made up his mind from the beginning, refused to participate at certain times by staring out the window, and had not fully engaged in discussions nor responded to questions. In addition, one juror alleged the accused juror had fallen asleep during the deliberations. The entire panel agreed, however, the accused juror was steadfast in his decision and could not be convinced the majority's opinion was right. (**Id**. at p. 726.)

The accused juror said he listened to the other jurors and then gave his opinion he did not believe the prosecution witnesses. The accused juror stated he kept an open mind and listened to what the others said but was not convinced. After being re-instructed, the accused juror said he "heard everything already," and was going to stick with what he believed. (**Id**. at p. 726-727.)

The trial judge dismissed the juror, concluding the juror had (i) made up his mind before deliberation and had not followed the instruction to avoid stating an opinion early so that a sense of pride is not engendered which would prevent further consideration of the evidence; (ii) refused to engage in meaningful deliberations; (iii) fallen asleep; and (iv) ignored the pleas of other jurors to explain the basis for his reasoning. (**Id**. at p. 728.)

The court of appeal reversed the case, finding the record did not show a demonstrable reality that the juror was unable to perform his function nor did it show the juror engaged in serious and willful misconduct. (**Id**. at p. 730.) In so finding, the

court came up with an extraordinarily broad definition of the term "deliberate." The court concluded that to deliberate simply means "to ponder or think about with measured careful consideration and often [but not necessarily] with formal discussion before reaching a decision or conclusion.'" (**Id**. at p. 733.) According to the ***Bowers*** court, this definition of deliberate does **not** require the jurors to engage each other in the manner suggested in CALJIC 17.41, i.e., by refraining from emphatic declarations of opinion and holding their minds "in a state of abeyance" so that they might "fully and freely interchange views with each other." (**Id**. at p. 733 [and characterizing the conduct identified in the instruction as "rarely helpful" and as being suggestive rather than mandatory].) The court indicated that performing the duty to deliberate does not require "jurors to discuss issues that they have chosen to decide without discussion" nor does it require they "deliberate with each other. Instead, deliberation may be done on an individual basis." (**Id**. at p. 734.) Under this definition, "[I]t cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote[.]" (**Id**. at p. 735.) Applying this definition to the instant case, the court **rejected** that the idea that the accused juror did not "enter into meaningful deliberations[.]" (**Id**. at p. 731.) The court held the accused juror's decision was based on his belief the prosecution's witnesses did not tell the truth, i.e., a doubt about the sufficiency of the evidence. (**Id**. at pp. 732, 734.) Maintaining this position, according to the ***Bowers*** court was not tantamount to refusing to deliberate: the juror took part in discussions to some extent; he considered the evidence he believed to be crucial in determining defendant's guilt; he observed the witnesses' demeanor and listened to the testimony presented in court; he participated in the request for the readback of testimony, and listened to the reread of the victim's testimony in the jury room; he expressed the reasons for his decision; and he remained willing and able to vote concerning a verdict. (**Id**. at p. 735.)

The ***Bowers*** court also rejected the notion that the juror could be excused for inattentiveness or sleeping. As to the claim of inattentiveness, the court found noting that while there was some evidence indicating the juror occasionally was inattentive (i.e., the juror walked around and crossed his arms, refused to respond when the other jurors attempted to get him to participate, and did not participate as fully in deliberations as others), this "inattentiveness" was simply a manifestation of his disagreement with other jurors' evaluation of evidence. (**Id**. at p. 731.) As to the claim the juror was sleeping, the court held there was insufficient evidence to support a finding of misconduct or to conclude the juror was unable to perform his duty based on the juror allegedly sleeping since (i) only a single juror of all the jurors interviewed claimed the defendant had slept during deliberation; (ii) the incident occurred at an unknown time for an unknown duration; and (iii) there was no evidence of what, if anything, was occurring in the jury room at the time. (**Id**. at p. 731.)

Editor's note: ***Bowers*** has never explicitly been overruled. However, it is difficult to reconcile ***Bowers***' broad definition of what it means to deliberate with more recent California Supreme Court decisions that specifically hold that "[a] juror who expresses a fixed conclusion at the start of deliberations and rebuffs attempts to engage him or her in the discussion of other points of view raised by other jurors has refused to deliberate, and properly may be discharged." (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926; ***People v. Watson*** (2008) 43 Cal.4th 652, 695; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 25; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.) Indeed, in some ways ***Bowers*** is better understood as an attempt by the appellate court to apply the standard for discharge of a juror adopted by the federal courts. (**See** this IPG memo, section N, at p. 84.)

G. What Does It Mean to Lack the Mental or Physical Ability to Deliberate?

Good cause to remove a juror on ground the juror is unable to perform his or her duties may arise when a juror becomes physically or emotionally unable to continue to serve. (**See *People* v. *Cleveland*** (2001) 25 Cal.4th 466, 474; **cf**., ***People* v. *Thompson*** (2010) 49 Cal.4th 79, 136 [physical and mental incapacity to deliberate provides good cause to remove juror at juror's request].)

A juror who is physically or emotionally unable to continue to serve may be removed even if the juror is not requesting removal or is objecting to removal. (**See *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 350 [a juror's behavior and demeanor may supply substantial evidence of good cause for discharge from a criminal trial, even if the juror does not state his ability and willingness, or lack thereof, to continue to serve].)

1. Sleeping or Inattentiveness

A juror who sleeps or is inattentive during trial or deliberations may be deemed to lack the mental capacity or physical ability to deliberate; sleeping may also be viewed as refusing to deliberate or misconduct. (**See *People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350; ***People* v. *Ramirez*** (2006) 39 Cal.4th 398, 458; ***People* v. *Allen*** (2011) 53 Cal.4th 60, 71, fn. 9 [citing ***Ramirez*** as standing or the proposition that significant sleeping by a juror during deliberations may amount to misconduct warranting discharge"].) Indeed, a trial court's ruling excusing a juror can be sustained solely on the basis of its finding that the juror had fa llen asleep during trial. (**See *People* v. *Ramirez*** (2006) 39 Cal.4th 398; 458; ***People* v. *Johnson*** (1993) 6 Cal.4th 1, 22, 23; *People* v. *Gracia* [unpublished] 2010 WL 4653573, *3-*5; **see also *People* v. *Cleveland*** (2001) 25 Cal.4th 466, 474 [characterizing ***Johnson*** and ***Espinoza*** as cases involving removal of a juror for sleeping during trial]; **but see *People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 731 [discussed in this IPG memo, section F-3, at pp. 19-20].)

a. Cases Finding Juror Properly Removed for Sleeping or Inattentiveness

In ***People* v. *Ramirez*** (2006) 39 Cal.4th 398, the foreperson informed the trial court that a juror had fallen asleep on two occasions during deliberations. The trial court noted that it had earlier observed the accused juror, sleeping, dozing off, or catnapping in court and "doing something other than paying rapt attention to the proceedings." Based on its earlier observations that the juror was inattentive and the foreperson's note, the trial court discharged the juror. The California Supreme Court upheld the discharge. (**Id**. at pp. 456-458.)

In ***People* v. *Johnson*** (1993) 6 Cal.4th 1, a judge alerted counsel to the fact that a juror did not appear to be paying attention to what the witnesses were saying, was "doodling" in his notebook, was consistently smiling at the defendant, had been late to court three times, tended to close his eyes and possibly "nod off" during court proceedings, and (per the court's own research) had been arrested for possessing narcotics, contrary to his jury questionnaire response. Courtroom deputies confirmed the jurors was inattentive and the judge's observations. The prosecutor confirmed he also had seen the juror nod off at least once. The judge questioned the juror in chambers. The juror stated he failed to reveal his arrest because he was trying to get through with this questionnaire quickly and it did not seem important. The juror acknowledged he occasionally closed his eyes during trial and had smiled at the defendant but said it was in response to defendant smiling at him. The judge excused the juror "because of his concealment of his prior arrests, and

because of his sleeping during the course of the trial." (**Id**. at pp. 16-17.) The ***Johnson*** court held that there was ample evidence indicating defendant had fallen asleep based on the juror's exhibiting various physical indicia of sleep (including eye closures, head nodding, and slumping in his chair) as recounted by the court, deputies, and prosecutor. This ground alone justified dismissal of the juror. (**Id**. at p. 21 [albeit also finding, at p. 22, concealment of the record provided an independent ground for doing so - **see** this IPG memo, section I-10-a, at p. 54.)

In ***Boeken v. Philip Morris Inc.*** (2005) 127 Cal.App.4th 1640, a civil case, the court upheld the discharge a juror for failure to deliberate where the accused juror separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel, the Bible, or both, throughout two days of deliberations - and *all* the other jurors reported the accused juror slept or read throughout deliberations. (**Id**. at pp. 1686-1688.)

In ***People* v. *Thomas*** (1994) 26 Cal.App.4th 1328, the court indicated that to the extent a juror's failure to answer the other juror's questions during deliberations could be characterized as resulting from the juror not paying attention to the other jurors, this could constitute the type of "inattentiveness" that would provide grounds for discharge of the inattentive juror. (**Id**. at p. 1333.)

In ***Mitchell* v. *Superior Court*** (1984) 155 Cal.App.3d 624, a juror alerted the trial court that his mind kept wandering during trial and he was unable to take notes or listen to what was being said. The juror said he had missed some of the evidence and that he did not think he could continue as a juror because 'I've already started judging him and I haven't got all the facts." The trial court discharged the juror and declared a mistrial (it appeared there were no alternate jurors and defendant would not stipulate to a jury of 11). (**Id**. at p. 626-628.) The defendant then challenged the granting of a mistrial by way of writ. The appellate court held that the juror's "inability to concentrate" was good cause by itself to remove the juror and provided the legal necessity for the mistrial under former Penal Code section 1123. (**Id**. at pp. 628-629.)

In ***Miller* v. *Stagner*** (9th Cir.1985) 757 F.2d 988, the Ninth Circuit upheld the dismissal of a juror where another juror said was intoxicated, the bailiff and a third juror stated the accused juror smelled of alcohol, the judge had noticed the accused juror had fallen asleep during the rereading of testimony, and the accused juror admitted falling asleep but denied being intoxicated. (**Id**. at p. 995.)

b. Case Finding Juror Improperly Removed for Sleeping or Inattentiveness

In ***People* v. *Bowers*** (2001) 87 Cal.App.4th 722 (**see** this IPG memo, section F-3 at pp. 19-20 for a more extensive discussion of the facts) the court held there was insufficient evidence to support a finding of misconduct or to conclude the juror was unable to perform his duty based on the juror allegedly sleeping where (i) only a single juror of all the jurors interviewed claimed the defendant had slept during deliberation; (ii) the incident occurred at an unknown time for an unknown duration; and (iii) there was no evidence of what, if anything, was occurring in the jury room at the time. (**Id**. at p 731.) The ***Bowers*** court also rejected the idea that the juror could properly be excused for inattentiveness, noting that while there was some evidence indicating the juror occasionally was inattentive (i.e., the juror walked around and crossed his arms, refused to respond when the other jurors attempted to get him to participate, and did not participate as fully in deliberations as others), this "inattentiveness" was simply a manifestation of his disagreement with other jurors' evaluation of evidence. (**Id**. at p. 731.)

c. Case Finding Juror Properly Retained Notwithstanding Allegation Juror Was Sleeping

In ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, a juror advised the court that due to an extended night shift work schedule, he had "drifted off to sleep a couple of times this past week" and requested a note reprimanding him for falling asleep

during the trial, in the hope that his employer, presented with the note, would accommodate him with a more manageable night work schedule. The trial court, however, did not notice the juror asleep. During questioning of the juror, the juror indicated he had nodded off but admitted he had not really missed anything during the trial. In contrast to another juror in the same trial who *was* removed for sleeping, nobody could verify that the juror with the night work schedule had actually been sleeping. The trial court retained the juror. (**Id**. at pp. 350-352.) The California Supreme Court found the trial court did not abuse discretion in failing to discharge the accused juror. (**Id**. at p. 352.)

2. Intoxication

If a juror's ability to follow the instructions of the court, to deliberate, to render a verdict or otherwise discharge his or her duties is compromised due to the use of intoxicating substances, the juror should be excused. (***People* v. *Burgener*** (1986) 41 Cal.3d 505, 518-519; ***People* v. *Love*** (1937) 21 Cal.App.2d 623, 628-629 [finding intoxicated juror was properly discharged, pursuant to former version of section 1089, under theory that juror was too ill to perform duties]; ***People v. Groves*** (1961) 188 Cal.App.2d 785, 788 [proper to remove intoxicated juror].)

In ***People* v. *Burgener*** (1986) 41 Cal.3d 505, the foreperson brought it to the court's attention that another juror appeared to be intoxicated from drugs or marijuana during deliberations and that four jurors independently had noticed the smell of marijuana on the accused juror. The trial court did not conduct further investigation and merely admonished the jurors against the use of intoxicants. The appellate court held that the trial court had erred by failing to conduct a hearing adequate to ascertain the accused juror's condition and whether her ability to deliberate was impaired. (**Id**. at pp. 518-519.)

In ***People* v. *Love*** (1937) 21 Cal.App.2d 623, during deliberations one of the jurors became intoxicated. When this matter was called to the attention of the trial court by the bailiff, the trial court had the juror examined by a doctor who testified under oath in the presence of the defendant that in his opinion the juror was under the influence of an alcoholic beverage and that she was not able to properly perform her duties as a juror. The appellate court held this was proper even pursuant to the former version of section 1089, which required a showing the juror was dead or too ill to perform his or her duties, under theory that juror was too ill to perform duties. (**Id**. at pp. 628-629.)

In ***Miller* v. *Stagner*** (9th Cir.1985) 757 F.2d 988, the Ninth Circuit upheld the dismissal of a juror where another juror said was intoxicated, the bailiff and a third juror stated the accused juror smelled of alcohol, the judge had noticed the juror had fallen asleep during the rereading of testimony, and the juror admitted falling asleep but denied being intoxicated. (**Id**. at p. 995.)

See also *People* v. *Lynch* (2010) 50 Cal.4th 693, 738-745 [juror properly dismissed after becoming upset at being accused of being intoxicated; ***Lynch*** is discussed in this IPG memo, section G-3, at p. 24].)

3. Emotional Difficulties

A juror's emotional difficulties in sitting as a juror can provide a good cause basis for finding a juror unable to perform his or her duties. (**See e.g**., ***People v. Lynch*** (2010) 50 Cal.4th 693, 738-745; ***People* v. *Thompson*** (2010) 49 Cal.4th 79, 138.) The emotional difficulty providing good cause for discharge can stem from stress, both trial-related and non-trial-related. (***People* v. *Thompson*** (2010) 49 Cal.4th 79, 138; ***People v. Diaz*** (2002) 95 Cal.App.4th 695, 703.)

In ***People* v. *Montes*** (2014) 58 Cal.4th 809, the California Supreme Court upheld the dismissal of a juror who stated she "had been having nightmares throughout the trial," had "thought she would be strong enough to complete" the trial but did not believe she had "the mental strength to do so," was unable to "get the faces of the victim and the codefendants out of her mind," "had spent the previous week in bed feeling sick and depressed," "was having trouble sleeping," and said she could not vote for the death penalty. (**Id**. at pp. 873-874.)

In ***People v. Maciel*** (2013) 57 Cal.4th 482, the day after penalty deliberations in a special circumstances case began, a juror asked to be dismissed because the penalty deliberations were "just too heavy on" her and it was "affecting [here] emotionally and mentally." (**Id**. at p. 544.) The juror explained that she had been thinking about the decision a lot, didn't know if she could make the right decision and was having a hard time sleeping for the past couple of weeks. The juror indicated that initially she thought she could finish the whole trial but she did not think she could and wanted to be discharged before deliberations continued. The juror said that during closing arguments, she could not look at the photograph of the deceased victims. When asked to explain what she meant by "this is too heavy," the juror replied: "His life is depending on me. I don't really know how to go about that.... If the jurors and I all agree on the death penalty, ... that is too heavy on me. I don't really want that on my conscience. And if I decide to give him life in prison, I don't really know if I should do that either. I really don't know what to do. I can't really think too clearly right now." She added, "Since I can't really think too clearly, I feel like while deliberating, hearing the other jurors' opinions, it would kind of alter my opinion to go their way, not really thinking for myself, because I really don't know how to think right now. I'm young. I don't know." (**Id**. at pp. 544-555.) When the trial court pointed out there was no obligation on the part of any juror to go the way the majority goes, the juror said expressed a lot of confusion about how to go about deliberating. The trial court then asked, "Are you saying that you lack confidence in your ability to actually decide one way or the other?" The juror answered, "What's right. Exactly." (**Id**. at p. 545.) The juror twice stated she did not think she could weigh aggravation and mitigation clearheadedly, reiterated the toll it was taking on her, and said she felt "weak" and "tired," and that when she went into work after court she found herself "just wandering." (**Id**. at p. 546.) When the trial court explained that it would be inappropriate to excuse a juror just because she felt she might be in the minority and wanted to take the "easy way out." The juror replied "I feel like I'm a strong person. If I believe in one thing, I will go with it even if I have to go against everybody. But the thing is I am not going to be fair to [defendant] because I am just confused right now and I believe that my opinion will be swayed to go towards ... whoever's opinion that might strike me like maybe he seems he is right. My opinion would be to go his way because I am just confused. I can't really think right now." (**Id**. at p. 546.) The trial court eventually discharged the juror because the trial court did not believe the juror "could give either side a fair trial at this point of any meaningfulness due to her inability to follow the law and decide the case on aggravation and mitigation which is what it is about." (**Ibid**.) The California Supreme Court upheld the discharge, finding good cause to remove the juror in light of the fact she stated "she felt distressed, was losing sleep, could not focus, and was incapable of thinking or making a decision." (**Id**. at p. 547 [and rejecting defense argument the trial court should have inquired of the other jurors what was said by the juror and whether it appeared juror was participating, and could realistically continue to participate in deliberations].)

In ***People v. Lynch*** (2010) 50 Cal.4th 693, the court found the trial judge did not abuse his discretion by removing a juror who had been *accused* of smelling of alcohol during trial even though the juror denied being intoxicated and it appeared to the court the juror was truthful in this regard where the juror became embarrassed and upset about the inquiry in capital murder trial, the juror indicated (in response to extensive questioning) that he harbored a lot of resentment, the juror was concerned he would not be objective and would have difficulty focusing on his oath and duty, the juror said he felt tainted, shaken, and that his integrity had been compromised greatly, and following inquiry, the juror appeared at times to be disengaged from the proceedings. (**Id**. at pp. 738-745.)

In ***People* v. *Thompson*** (2010) 49 Cal.4th 79, the court upheld the trial court's decision to discharge an extremely agitated juror who expressed regret over her decision in guilt phase and said she felt "pressured" in the penalty phase - but who also asked to be excused, stated she could not continue to deliberate, said she would get a doctor's excuse if she had to, claimed she had not been able to sleep since the start of deliberations, and said she was ready to run out the door. (**Id**. at p. 138.)

In ***People* v. *Marshall*** (1996) 13 Cal.4th 799, the court held it was proper to discharge a juror on whose behalf the district attorney's office had refused to intercede regarding a speeding ticket, where the juror said the ticket if upheld would cost him his job, and that he would feel distracted and "wonder where justice was at" if the ticket were not dismissed. (**Id**. at pp. 845–846.)

In ***People* v. *Collins*** (1976) 17 Cal.3d 687, the court found good cause existed to dismiss a juror who steadfastly maintained that, because of her "emotional involvement" in the trial, said she could not decide the case on the evidence and the law and who denied her present state of mind resulted from duress or coercion. (**Id**. at pp. 695-696.)

In ***Perez v. Marshall*** (9th Cir.1997) 119 F.3d 1422, a juror "told the judge that she was distressed and that she did not want the responsibility of deciding whether [the defendant] was guilty," and requested to be dismissed. (**Id**. at 1424.) Over the prosecution's objection, the court denied the request and encouraged her to continue deliberating. Shortly after deliberations resumed, the foreperson reported "difficulties in the jury room," and the court suspended deliberations again. (**Id**. at p. 1424.) The juror said she was not "emotionally able to continue deliberations," **id**. at 1428, and the jury foreperson confirmed that "it started to be a very emotional thing with the jurors where basically no one could try to make an intelligent decision when you're dealing with somebody that's basically in pieces," **id**. at 1425. The next morning, the court dismissed the juror on the basis that she was "just emotionally out of control." (**Id**. at p. 1425.) The Ninth Circuit rejected the defendant's claim his Sixth Amendment rights were violated by the replacement of a holdout juror because the record showed that the court was forced to act, not because of the juror's status as a holdout juror, but because of the juror's emotional inability to continue performing the essential function of a juror- deliberation. (**Id**. at pp. 1427-1428.)

4. Language Difficulties

Code of Civil Procedure section 203 provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: [¶] ... [¶] (6) Persons who are not possessed of sufficient knowledge of the English language...."

A person with sufficient knowledge of English is one who is fully able to understand spoken and written English. (***People* v. *Moreno*** (2011) 192 Cal.App.4th 692, 705; ***People* v. *Jones*** (1972) 25 Cal.App.3d 776, 783.)

In ***People* v. *Elam*** (2001) 91 Cal.App.4th 298, the foreperson sent a complaint to the trial court about a "perception problem" or "possibly a language understanding" of one of the jurors after half a day of deliberation. (**Id**. at pp. 313.) The trial court summoned the accused juror and questioned him. The juror acknowledged having a little bit of difficulty with English. However, the juror had been in the Navy and in school in California for almost a year, earning an associate of arts degree from a community college. The juror said he had no trouble understanding the testimony and thought he could manage as a juror. (**Id**. at p. 313.) When the court asked the juror why the other jurors were concerned about his inability to communicate, he answered, "Maybe we see the case differently." (**Id**. at p. 314.) The trial court then summoned the remaining jurors and questioned them individually. The other jurors complained that the juror had problems with the English language, did not understand the process or law, frequently changed his mind, could not give

the other jurors a reason for his position and was illogical. (**Id**. at pp. 314-315.) All agreed the accused juror had a definite problem with the language. (**Id**. at p. 315.) The trial court then discharged the accused juror, commenting that "I fear that you may have overestimated your own abilities to understand all of these proceedings." (**Id**. at p. 316.)

The appellate court recognized that insufficient command of the English language will render a juror unable to perform a juror's duties. However, the appellate court reversed the case, concluding the complaints about the juror did "not necessarily demonstrate inadequate comprehension of the English language as opposed to legitimate disagreement over the meaning to be given certain instructions, interpretations of the law and evidence." (**Id**. at p. 317.)

The court observed that if a juror, with repeated explanations and discussions, could comprehend matters, then it is immaterial that communication with the juror is not quick and easy, that the juror has a pronounced accent, or that the juror does not speak the best English. (**Id**. at p. 316.)

5. Distraction Due to Work Concerns or Other Financial Difficulties

If a juror is subject to financial or personal hardship that would cause the juror to feel pressure to bring deliberations to a speedy close or experience distracting anxiety, the juror may be found unable to perform his or her duty and thus subject to discharge. (**See *People* v. *Montes*** (2014) 58 Cal.4th 809, 871-873 [good cause to excuse juror properly found where juror received offer of employment during trial and the start of training could only be delayed for 12 days, there was reason to believe the penalty phase of the trial could go for two weeks beyond the date training would start, and start date would create an "atmosphere of time urgency"]; ***People* v. *Earp*** (1999) 20 Cal.4th 826, 892–893 [proper to remove juror where juror's employer had stopped paying her for jury service one month earlier and juror had used 4 weeks of her own vacation time to continue to serve on the jury, and to remain on the jury would have been a financial hardship and might exert pressure to bring trial to a close]; ***People* v. *Lucas*** (1995) 12 Cal.4th 415, 488–489 [notwithstanding juror's claim the cancellation of her vacation would not affect the discharge of her duties as a juror, it was proper to dismiss her where she repeatedly brought the problem of the vacation to the court's attention and her behavior and demeanor indicated her ability to deliberate fairly would be substantially impaired if the penalty trial caused her to cancel her vacation]; ***People* v. *Fudge*** (1994) 7 Cal.4th 1075, 1098–1100 [proper to discharge juror based on belief that her anxiety over need to complete the paperwork required for her new job would affect her ability to deliberate].)

On the other hand, there must be an actual showing of hardship. Thus, in ***People* v. *Delamora*** (1996) 48 Cal.App.4th 1850, after several days of deliberations, the jury informed the court that an additional day would be needed and that two jurors wanted the court's help in obtaining an additional day of compensated time off from their employers. The trial court, without inquiry, replaced the two jurors at the end of the day. The appellate court recognized that problems relating to a juror's employment may provide a basis for a proper discharge, but held it was error to excuse the jurors without first asking if they were willing to deliberate longer even if their employers would not pay them. (**Id**. at p. 1855-1856.)

Moreover, a trial court has the discretion to retain a juror if the trial court is convinced the juror would be able to deliberate notwithstanding concerns about missing work. (***People v. Bennett*** (2009) 45 Cal.4th 577, 618-621; ***People v. Hart*** (1999) 20 Cal.4th 546, 592, 597; ***People v. Turner*** (1994) 8 Cal.4th 137, 205.)

For example, in ***People v. Bennett*** (2009) 45 Cal.4th 577, the trial judge informed the jurors that the case would go past Labor Day – even though the judge had earlier indicated the trial would be concluded by then. One of the jurors

indicated that, because she was the office manager of an elementary school, it would be difficult on the new students and the staff if she were not at school when the teachers returned on September 9. The trial judge then recessed for a period of time. When the juror called in to see when they should return and was informed jurors should return on September 3, the juror said she was not happy that she had to return on Tuesday. When the jury returned, the judge interviewed the juror outside the presence of the other jurors. The trial court extensively questioned the juror about her whether she would be distracted and told her that the case could go two or three weeks into the school year. The juror was adamant she would not be distracted, would not feel pressure to reach a decision, and would not lose focus because of her job, and juror told the court she felt strongly about remaining on the jury. The trial court allowed the juror to remain on the jury, a decision later upheld by the California Supreme Court. (**Id**. at pp. 618-621.)

In ***People v. Turner*** (1994) 8 Cal.4th 137, the court found there was no error in refusing a juror's request to be excused because his employer would not continue him on salary where the trial court satisfied itself that the juror would serve impartially and properly. (**Id**. at p. 205.)

In ***People v. Hart*** (1999) 20 Cal.4th 546, the court held a trial court could properly deny a juror's hardship request to be excused in capital case where the juror had expressed a concern that case might not conclude within trial court's estimate, but such concerns were not unusual in lengthy trials, and the record did not demonstrate that juror was unable to perform duties. (**Id**. at pp 592, 597.)

6. Distractions Due to Emergency or Death in Family of Juror

The serious illness or death of a close family member of the juror can provide good cause to excuse the juror under the theory that such circumstances would distract the juror from being able to perform his or her duties. (**See *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 347-349 [impending death of father]; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1409–1410 [death of juror's father-in-law]; ***People* v. *Smith*** (2005) 35 Cal.4th 334, 349 [juror's 82-year mother experiencing shortness of breath]; ***People* v. *Cunningham*** (2001) 25 Cal.4th 926, 1028–1030 [juror's father near death after suffering stroke]; ***People* v. *Ashmus*** (1991) 54 Cal.3d 932 986–987 [death of juror's mother]; ***In re Mendes*** (1979) 23 Cal.3d 847, 852 [death of juror's brother].)

This holds true even where the juror does not formally request to be discharged. (**See *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 347-349; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1409; ***People v. Beeler*** (1995) 9 Cal.4th 953, 989.) However, it is the better practice to personally question the juror regarding his or her state of mind or obtain some affirmative representation from the juror regarding his or her ability and willingness or lack thereof to continue to serve as a juror. (***People* v. *Zamudio*** (2008) 43 Cal.4th 327, 350; ***People v. Beeler*** (1995) 9 Cal.4th 953, 989; **see also *People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1409 [upholding discharge of juror based on phone calls to clerk from juror's wife that her father had been killed in an accident and the juror would be unavailable for the rest of week, but noting it would have been preferable for clerk to have spoken directly to juror].)

On the other hand, a trial court is not ***required*** to dismiss a juror who has a close relative who has died or is close to death, especially where the juror has not requested discharge and there is no evidence the juror would not be able to perform his or her duties. For example, in ***People* v. *Beeler*** (1995) 9 Cal.4th 953, after two days of penalty deliberations, a juror notified the court by telephone that his father had died and that he was flying out of the state that afternoon. In the absence of counsel (who were unavailable), the trial court informed the juror that the jury would continue deliberations until about noon that day, then resume deliberations the following Monday (6 days later) after the

juror's return. After counsel arrived and were informed of the situation, defense counsel requested that the juror be excused. The trial court denied the request, and the jury returned a verdict of death that morning. (**Id**. at pp. 986-988.) The California Supreme Court indicated that it would have been preferable for the juror to have been questioned regarding his state of mind or to affirmatively state on the record his ability and willingness, or lack thereof, to proceed. However, the ***Beeler*** court held the trial court was not required to excuse the juror and did not err in retaining the juror. (**Id**. at p. 989.) The court rejected the argument that it could be assumed without any evidence that the juror was so distracted by his father's death that he felt compelled to return a speedy verdict or that other jurors were aware of and affected by the situation. (**Id**. at pp. 989- 990.)

Editor's note: **See also** this IPG memo, section R at p. 87 [discussing good cause for discharge based on illness of the ***juror***]

7. Incapacity in Following Instructions Due to Mental Dysfunction

The case of ***People* v. *Harrison*** (2013) 213 Cal.App.4th 1373 reflects the fine line between a juror who is unable to perform his duties as a result of a *refusal* to follow the law and the juror who is unable to perform his duty as a result of an incapacity (due to a mental or personality defect) to follow the law. In ***Harrison***, the juror made numerous requests for accommodation of his need for additional time to prepare to deliberate but, based on numerous questions continually posed by the juror reflecting the juror's issues with principles of law and statements indicating he could not actually assess witness credibility, the court found good cause remove a juror, in effect, because the juror was simply incapable of making a decision: "The juror appear[ed] to have been overwhelmed by the task of a juror, questioning the basic principles he was instructed to accept, such as the presumption of innocence, and the meaning of many commonly used words in the court's instructions." (**Id**. at pp. 1382-1384.)

Editor's note: The facts of ***Harrison*** are explained at length in this IPG memo, section H-1 at pp. 29-31.

8. Arrest of Juror

In ***In re Devlin*** (1956) 139 Cal.App.2d 810, the court held good cause to discharge a juror existed where the juror was arrested after having been seated and the juror stated he could no longer fairly and impartially discharge his duties. (**Id**. at pp. 812–813.)

H. What Does It Mean to Refuse to Follow the Law?

"A deliberating juror's refusal to follow the law set forth in the instructions . . . constitutes a failure to perform the juror's duties, and is grounds for discharge" under Penal Code section 1089. (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926, citing to ***People* v. *Engelman*** (2002) 28 Cal.4th 436, 444; **accord *People* v. *Allen*** (2011) 53 Cal.4th 60, 69; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 834–835; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 25; ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, 738; ***People* v. *Williams*** (2001) 25 Cal.4th 441, 448, 460.)

"In appropriate circumstances a trial judge may conclude, based on a juror's willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror." (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 834; ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, 738; **accord *People* v. *Nunez*** (2013) 57 Cal.4th 1, 55; ***People* v. *Daniels*** (1991) 52 Cal.3d 815, 865; **see also *People* v. *Linton*** (2013) 56 Cal.4th 1146, 1194 ["When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties"]; ***In re Hitchings*** (1993) 6 Cal.4th 97, 120 [same]; ***People* v. *Collins*** (1976) 17 Cal.3d 687, 695-696 [discharge of juror proper where juror stated she could not follow court's instructions and could not decide the case on the law and the evidence presented]; ***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1119 [juror's intentional and persistent disregard of the court's instruction not to discuss the case with nonjurors created a "substantial likelihood that he also gave short shrift to his duty to follow the court's other instructions"].)

Although "as a practical matter, the jury in a criminal case may have the ability to disregard the court's instructions in the defendant's favor without recourse by the prosecution[, this] does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions." (***People* v. *Williams*** (2001) 25 Cal.4th 441, 448; **accord *People* v. *Engelman*** (2002) 28 Cal.4th 436, 444.) Indeed, a court may affirmatively instruct a jury that jurors have no authority to disregard the law and obtain their assurance that they will not do so if chosen to serve on the jury. (***People* v. *Estrada*** (2006) 141 Cal.App.4th 408, 411.)

"[A] court may exercise its discretion to remove a juror for serious and wilful misconduct, such as ... repeated violation of the court's instructions, even if this misconduct is 'neutral' as between the parties and does not suggest bias toward either side." (***People* v. *Daniels*** (1991) 52 Cal.3d 815, 863–864; ***People* v. *Thomas*** (1994) 26 Cal.App.4th 1328, 1333.)

However, the fact a juror disagrees with the law should not provide grounds for discharge unless such disagreement is accompanied by refusal to follow the law. (**See *People v. Wilson*** (2008) 44 Cal.4th 758, 833-834 [even if a juror makes a statement inconsistent with the instructions given, the juror should not be removed during deliberations on the grounds of failing to follow the court's instructions if the juror explains the context of the statement and a willingness to follow and apply the court's instructions]; ***People* v. *Stewart*** (2004) 33 Cal.4th 425, 449 ["disagreement with the current state of the law is not disqualifying by itself"]; **see also *United States* v. *Johnson*** (9th Cir.1993) 990 F.2d 1129, 1133 ["'The defendant's entitlement to jurors impartial on the question of whether he committed the crimes charged is entirely distinct from the question of whether the crime itself is one which arouses their moral passions'; a juror need not be 'impartial to the underlying crime itself.'"].)

1. Incapacity to Follow the Law

It is not necessary that a juror expressly refuse to follow the law if, by his conduct, it is clear that he is either incapable of applying the law or is intentionally ignoring the court's instructions. This principle was illustrated in the case of ***People* v. *Harrison*** (2013) 213 Cal.App.4th 1373.

In ***Harrison***, one of the jurors (hereinafter the "crazy juror") repeatedly had the foreperson send out notes asking for evidence that was not introduced and made excessive requests for information, including the "entire" reporter's transcript and a "timeline of case development: dates of actions taken by detectives, crime labs, searches conducted, samples taken, etc." (**Id**. at p. 1377.) The crazy juror also sent a note (previously typewritten at home) that requested either that the jury be given access to a computer and printer or that the juror be allowed to bring his own printer to the jury room (and provided a detailed explanation of why it was necessary). (**Id**. at p. 1377.) The trial court denied the request but

encouraged the jurors to discuss the evidence together and to use a board in the jury room for outlining their points. Following the court's explanation, the jury resumed deliberations for only a few minutes before presenting another note at the crazy juror's request that asked for a definition of the word "abiding" and whether it was "possible for someone to come or stay to review the evidence on their own" apart from the other jurors. (**Id**. at p. 1378.) The trial court responded that individual review of the evidence when the jury was not assembled was not possible, and declined to provide a definition of "abiding" over and above the standard instruction. (**Id**. at p. 1378.) The next morning, the foreperson asked if jurors could have extra copies of the instructions and take the instructions home and noted that one of the jurors (i.e., the crazy juror) was not comfortable with the process and was causing others to feel they cannot proceed. The foreperson asked, "[W]hat is the process of using an alternate when a juror is causing conflict with [the] group?" (**Ibid**.) The trial court provided each juror with a copy of the instructions, to be kept at court, and questioned the foreperson about the concerns expressed in the note concerning the deliberative process. The foreperson said a "particular juror" (later identified as the crazy juror) "had questions about many words in the jury instructions" and was "not open to discussion of the words or the definitions" but wanted "to have formalized questions continuously submitted to the court" for further definition rather than looking "inside the instructions for definitions" or using "the common definition" of the word. The foreperson said the crazy juror was not comfortable with the jury instructions, "the process of coming to a conclusion, of analyzing circumstantial versus direct evidence" and that, as a result, other jurors felt that deliberations were not "a working process" and were experiencing "spiked emotions." (**Id**. at pp. 1378-1379.) "The court recalled the foreperson and asked him if "the dynamics of the deliberations" might change if additional words were defined or if the jury was advised by the court that certain words could not be further defined. The foreperson said it was possible but explained that the crazy juror was rereading 'every single instruction' and struggling over many terms, including the meaning of 'intent.' The court remarked privately to counsel that it questioned if one is capable of serving on a jury if one 'can't understand and apply the term "intent."'" (**Id**. at p. 1379.) After some questioning of the crazy juror regarding whether he had everything he needed to deliberate, the juror said he was not at the stage yet where he was ready to deliberate "because he needed more time to study his notes and the jury instructions." The juror said he would "probably" be ready to deliberate if he had further review of the instructions. The juror complained that if there were any words in the instruction whose definition was disputed among the jurors, the interpretations should be provided by the court. The juror also explained that while he had a Ph.D in physical chemistry from an American University, he was born abroad and "was slow in reading English." (**Id**. at p. 379.) The juror said he had "taken a criminal law class" and had heard the terms contained in the jury instructions but found it "complicated" and wondered "for people who did not take such a class, how can they possibly understand instructions so quickly?" (**Ibid**.) As an accommodation, the trial court offered to send the rest of the jurors home early and let the crazy juror review his notes and the jury instructions that day and the following days when the jury was not scheduled to deliberate. The juror spent nine hours over several days alone in the jury room reviewing his notes and the jury instructions. (**Ibid**.) Deliberations resumed for two more days until the foreperson sent out a note indicating that the crazy juror was having challenges with the concepts of "reasonable" and continued to "discuss ideas from his personal experiences that were not presented in this case as evidence nor are they relevant to the case before us." (**Id**. at p .1380.) The note also reported rising tempers and stated, "At this time we would either require an alternate juror or move towards a hung jury verdict." (**Ibid**.) The crazy juror wrote his own reply note saying he disagreed with the foreperson's statement and thought deliberations should continue. The juror stated. "[t]he jury instruction calls for us to rely on common sense and experience. Relying in part on my experience in life, I feel that on the basis of the evidence as presented ... *I do not believe that the prosecution has sufficiently proven the allegations to allow me to form an abiding conviction about the guilt alleged*." (**Ibid,** emphasis added.) The court then interviewed both the foreperson and the crazy juror in the presence of the other jurors. The foreperson stated the vote was 11 to 1. The trial court asked the foreperson and the crazy juror if there was any legal clarification the court could provide to assist the jury in reaching a verdict. The crazy juror noted the juror questionnaire said a juror "must follow the law regardless whether you believe in it or not. And, I mean, at that time I hesitated and but then I—there is something I

don't agree with, I mean, then why does [the] Constitution require us to follow something we don't believe in? [¶] So this may be a question in everybody's mind, and it's so—so why is the standard set so high that defendant is—should be presumed innocent? And why can't we apply the lower standard of proof such as preponderance of the evidence?"" (**Id**. at p. 1380.) The court asked the crazy juror write a note with his legal questions so court and counsel could confer about a possible response, and declared a long lunch recess. The juror responded with five pages of questions, including: "Why is there a difference in the standard of proof between civil trials and criminal law?"; "Does it make sense that a defendant may be found not guilty in a criminal trial, but guilty in a civil trial (based on the same facts)?"; When I have reasonable doubt, how do I tell that my doubt has risen only to the level of preponderance of the evidence, but has not reached the level of beyond a reasonable doubt (for sure?)"; "Why must we pledge that we must follow the law even when the law is itself in dispute in court?"; "Why must a defendant be presumed innocent?"; "Why is defense not required to present *any evidence, or to call any witness?"; "Does the fact that an evidence has been admitted by the court into evidence mean that the court has determined that the evidence is reliable?"; "When a witness gives contradictory testimony, I am at a loss as to how to determine, objectively, which testimony I should believe"; "What constitutes juror misconduct requiring disqualification, mistrial, or new trial?"; "What if a juror suddenly realizes that the juror can no longer be impartial?" (**Id**. at pp. 1380-1381.) The prosecutor sought removal of the juror but defense counsel objected. Defense counsel also objected to questioning the juror on the ground that the answers would divulge the "deliberative process of the jury." (**Id**. at p. 1381.) The trial court expressed doubts that the crazy juror was following the law and decided to examine him further. The juror said some of the questions he posed referred to other jurors, not himself, including the question asking what happens if a juror "can no longer be impartial." (**Ibid**.) Ultimately, the trial court concluded that the juror was not following the law since he was "considering things that he's been told not to consider," such as why the defense is not required to present any evidence or call any witnesses, why a defendant is presumed innocent (despite clear instructions to that effect) and why there's a different standard of proof in civil versus criminal" trials. (**Ibid**.) The trial court found the juror to be "incapable of executing his obligations as a juror in a fair and impartial manner" noting that the juror was speculating on things far beyond the record and had earlier expressed an inability to judge credibility. The trial court removed him from the jury and seated an alternate juror in his place. (**Id**. at pp. 1382.)

The appellate court upheld the juror's removal finding that "[t]he trial court rightly concluded [the juror] went 'way beyond the scope' of the trial as he 'speculat[ed] on things that are far beyond the record' and was unable to follow the law applicable to the case. (**Id**. at pp. 1383-1384.) The appellate court pointed out that despite accommodations and assistance by the trial court, including hours of independent study of jury instructions and trial notes, "the juror manifestly was unable to focus on the relevant principles and to apply the court's instructions to the facts of the case before him." (**Id**. at p. 1383.) "The juror appear[ed] to have been overwhelmed by the task of a juror, questioning the basic principles he was instructed to accept, such as the presumption of innocence, and the meaning of many commonly used words in the court's instructions." (**Ibid**.) The questions posed by the juror "clearly related his own deep uncertainties and inability to follow the court's instructions" and "went far beyond issues relevant to the case." (**Id**. at p. 1383.)

Editor's note: The federal district court (in an unpublished opinion) agreed with the California court of appeal in Harrison and denied defendant's habeas petition (**see *Harrison* v. *Arnold***, 2015 WL 3991174 (N.D.Cal. Jun 30, 2015) but the defendant has filed an appeal of that denial in the Ninth Circuit.

2. Refusal to Leave Notes in Jury Room After Admonition

In ***People* v. *Thomas*** (1994) 26 Cal.App.4th 1328, the court identified several grounds for removal of a juror, including the fact that the juror took home the notes he had made during the trial despite the trial court's warning not to do so. (**Id**. at p. 1333.)

Editor's note: It appears the ***Thomas*** court treated this ground as a separate basis for removal of the juror, but the court upheld the discharge of the jury primarily on the ground the juror was refusing to deliberate. (**See** this IPG memo, section F-2, at p. 15.)

3. Refusal to "Orally Confirm" Verdict

In ***People v. Bennett*** (2009) 45 Cal.4th 577, the court held the trial court was not required to excuse a juror for being unable to perform his duty even though the juror said he would have difficulty verbally confirming his vote for the death penalty when the jury was polled in penalty phase of capital murder prosecution, where the juror's concern was related to anxiety about having to state in open court that he felt a death sentence was appropriate, the juror affirmed that he could fulfill his duty, and the juror ultimately did verbally affirm his concurrence in the penalty determination. (**Id**. at p. 618-623.)

4. Considering Evidence or Information Not Presented at Trial

Jurors have a duty to render a verdict according only to the evidence presented. (***People* v. *Williams*** (2001) 25 Cal.4th 441, 448; Code Civ. Proc., § 232(b).) "A jury's verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters." (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1414.) A juror's "receipt of information about a party or the case that was not part of the evidence received at trial" is "misconduct" that raises a presumption of prejudice and may establish juror bias. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507 citing to ***People* v. *Nesler*** (1997) 16 Cal.4th 561, 578; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829.) This holds true even if the receipt of information was passive or involuntary. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507 citing to ***In re Hamilton*** (1999) 20 Cal.4th 273, 294–295.)

Editor's note: However, it is not misconduct to consider (and courts have consistently pardoned jurors for considering) extrinsic evidence that finds its way into the jury room through party or court error. (***People* v. *Gameche*** (2010) 48 Cal.4th 347, 397-398.)

There are many ways in which this duty to render a verdict based solely on the evidence presented can be violated by jurors: (i) the jurors can engage in experimentation; (ii) the jurors can do their own investigation (e.g., visiting the scene); (iii) the jurors can consult outside sources like dictionaries or treatises; (iv) the jurors can inadvertently be exposed to (or purposefully seek out) information in the media; (v) the jurors can inadvertently or purposefully obtain information from third persons who have information about the case; or (vi) jurors can sometimes rely on facts that interjects their own expertise into deliberations. We discuss each of these variations on the failure to abide by the duty not consider evidence or information not presented at trial.

Editor's note: **See also** this IPG memo, section I-11 at p. 55 [discussing bias stemming from the receipt of extraneous information"

a. Juror Experimentation

A juror commits misconduct if the juror engages in an experiment that produces new evidence and such misconduct may justify removal of a juror on grounds the juror is unable to perform his or her duty. (**See *People* v. *Redd*** (2010) 48 Cal.4th 691, 742; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829, citing to ***Smoketree–Lake Murray, Ltd.* v. *Mills Concrete Construction Co.*** (1991) 234 Cal.App.3d 1724, 1746 [conducting an experiment regarding the pouring of concrete].) However, "[n]ot every jury experiment constitutes misconduct. Improper experiments are those that allow the jury to discover new evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the '"scope and purview of the evidence." ' [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted." (***People* v. *Cook*** (2015) 236 Cal.App.4th 341, 346 citing to ***People* v. *Collins*** (2010) 49 Cal.4th 175, 249.)

Editor's note: Keep an eye out for an upcoming IPG memo on what does or does not constitute juror experimentation.

b. Juror Conducting Independent Investigation into Facts of the Case

"A juror commits misconduct if the juror conducts an independent investigation of the facts[.]" (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829, citing to ***Lankster* v. *Alpha Beta Co***. (1993) 15 Cal.App.4th 678, 682-684 [examining and measuring turnstiles at stores similar to the store that was the scene of the accident]; **accord *People* v. *Polk*** (2010) 190 Cal.App.4th 1183, 120; **see also *People* v. *Sutter*** (1982) 134 Cal.App.3d 806, 817-820 [juror's description of his drive by the crime scene constituted misconduct].)

However, not all independent investigations into the facts will result in a finding of prejudicial juror misconduct. In ***People* v. *White*** (2015) 237 Cal.App.4th 1087, the defendant was charged with sexually assaulting a woman rendered unconscious by intoxication. *Following the verdicts* but before oral pronouncement of the verdict, one of the jurors admitted to conducting research on the bar where the victim worked and reading a flattering review online about an attractive brunette who worked at the bar which might have been the victim and that the bartender remembered the customer's names. (**Id**. at p. 1106, 1109.) The juror did not discuss her research during deliberations. (**Ibid**.) After interviewing the juror and the foreperson, who both confirmed the information did not affect deliberations, the trial court denied defendant's new trial motion. The appellate court found that misconduct had occurred, but that it was not prejudicial since the reviews had nothing to do with the issue of defendant's guilt, and whatever information the juror gleaned about the bar was effectively introduced into evidence. (**Id**. at p. 1110.) The court also rejected the idea that the juror's failure to follow the court's instructions not to conduct an independent investigation reflected actual bias since the trial court found the juror to be truthful "when she denied any improper motive in looking up the bar and told the court she did so out of curiosity, which is something she often did when she hears of a new restaurant or place" and that "her actions did not in any way influence the jury's deliberations." (**Ibid**.)

c. Juror Consultation of Outside Sources Such as Dictionaries, Online Sites, or Treatises

A juror commits misconduct by bringing in outside evidence into the jury room. (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829; citing to ***Glage* v. *Hawes Firearms Co.*** (1990) 226 Cal.App.3d 314, 323 [consulting a dictionary]; **see also**

People* v. *Karis (1988) 46 Cal.3d 612, 642-643 [juror's reference to a dictionary for the definition of a term used in an instruction constitutes misconduct].)

However, there must actually be use of outside sources. The fact a juror indicates he would *like to* consult outside sources such as a dictionary is not misconduct so long as the juror does not actually do so. (**See *People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, 620.)

Moreover, where the outside source does not relate to any issue at trial, consideration of the source will not be grounds to remove a juror or jurors. (**See e.g**., ***People* v. *Page*** (2008) 44 Cal.4th 1, 58-59 [upholding trial court's determination not to question jurors after learning that jurors were circulating a cartoon in which the character stated "Hey, I got off easy—it was the jury who had to deliberate for 36 months"].)

d. Juror Inadvertent or Purposeful Exposure to Information in the Media Relating to the Case

Obtaining information about the pending case from the media or other outside sources can constitute juror misconduct. (**See *People* v. *Gameche*** (2010) 48 Cal.4th 347, 398 citing to ***People v. Ramos*** (2004) 34 Cal.4th 494, 518–520 [consideration of outside newspaper articles during trial]; ***People* v. *Hernandez*** (1988) 47 Cal.3d 315, 338 ["misconduct for jurors to read newspaper articles relating to a trial for which they are sitting as jurors"].)

"Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (***People* v. *Thomas*** (2012) 53 Cal.4th 771, 819 citing to ***People* v. *Nesler*** (1997) 16 Cal.4th 561, 579.)

However, the presumption of prejudice may be rebutted (**see *People* v. *Thomas*** (2012) 53 Cal.4th 771, 819) and inadvertent exposure to outside material concerning a case does not require removal of a juror unless prejudice can be shown. (***People* v. *Zapien*** (1993) 4 Cal.4th 929, 994 [no prejudice from juror's inadvertent exposure to outside material concerning case].)

For example, in ***People* v. *Thomas*** (2012) 53 Cal.4th 771, jurors read news reports about the death of a witness's wife that occurred shortly before a witness testified and discussed it during guilt phase deliberations. After questioning the jurors, the judge admonished them not to read or listen to news reports about the case or to consider information that was not presented in court and told the jury that the death of the witness' wife had nothing to do with the case and not to allow it to enter into their "deliberations or decision-making in any way, any form, or fashion." (**Id**. at p. 818.) The California Supreme Court held there was no reasonable likelihood that any juror was influenced by the information that the witness's wife had been killed considering: (i) the witness' testimony was not a matter actively contested; (ii) no juror reported any speculation that the witness' wife was targeted because of her husband's testimony or that the defendant was involved; (iii) the witness had demonstrated a good relationship with defendant in front of the jury (iv) when the information came up in jury discussions, the jurors recognized it was irrelevant; and (v) the trial court instructed the jury that the death of the wife had nothing to do with the case and that it should not enter into the jury's deliberations. (**Id**. at pp. 819-820.)

e. Juror Inadvertent or Intentional Acquisition of Information from Third Persons Relating to the Case

Obtaining information about the pending case from other persons can constitute juror misconduct. (**See *People* v. *Gameche*** (2010) 48 Cal.4th 347, 398.) And this holds true even when a juror inadvertently receives information about a party or the case from a nonparty. (**See *People v. Linton*** (2013) 56 Cal.4th 1146, 1194 citing to ***People* v. *Nesler*** (1997) 16 Cal.4th 561, 579–580 [overhearing information about the case in a bar and revealing it to fellow jurors].)

> **Editor's note**: **See also** this IPG memo, section H-6 at p. 38 ["Juror Discussions About the Case With Persons Unconnected to the Case"].)

f. Reliance on Facts Based on Juror's Own Expertise or Knowledge

A juror commits misconduct if the juror "injects the juror's own expertise into the deliberations[.]" (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829, citing to ***In re Stankewitz*** (1985) 40 Cal.3d 391, 402 [former police officer claimed to know the law and misstated the law to the other jurors].) A juror "should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (***People* v. *Steele*** (2002) 27 Cal.4th 1230, 1265; ***In re Malone*** (1996) 12 Cal.4th 935, 963.)

For example, in ***People* v. *Marshall*** (1990) 50 Cal.3d 907, the court held it was misconduct (albeit nonprejudicial misconduct) for a juror claiming to have a law enforcement background to assert that "juvenile records are automatically sealed at 18 years of age," thus erroneously suggesting the defendant's apparent lack of a criminal background might be the reason for the lack of criminal history introduce in the penalty phase of a capital trial. (**Id**. at pp. 949-950.) And in ***In re Malone*** (1996) 12 Cal.4th 935, the court held it was misconduct (albeit nonprejudicial misconduct) when a juror, who was psychologist, told other jurors that she had read and discussed professional articles on polygraphs, and that while polygraph examiners claim an accuracy rate of 80 to 90 percent, as the defense expert had at trial, she reported that independent researchers had found accuracy rates of only 50 to 60 percent. (**Id**. at p. 963.)

"However, a distinction must be drawn between the introduction of new facts and a juror's reliance on his or her life experience when ***evaluating*** evidence." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 76.) "A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as misconduct." (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 830; ***People* v. *Steele*** (2002) 27 Cal.4th 1230, 1266.)

"[M]erely relying on his life experiences to interpret the evidence" does not constitute consideration of facts not in evidence. (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 825; **accord *People* v. *Linton*** (2013) 56 Cal.4th 1146, 1195; **see also *People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1414 [noting that the fact "jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience" is a weakness in the jury that must be tolerated]; ***People* v. *Marshall*** (1990) 50 Cal.3d 907, 950 [same].) "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work." (***People* v. *Steele*** (2002) 27 Cal.4th 1230, 1266.)

As explained by California Supreme Court in ***People* v. *Steele*** (2002) 27 Cal.4th 1230: "A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. 'Jurors are not automatons. They are imbued with human frailties as well as virtues.'" (**Id**. at p. 1266.)

The above principles were illustrated in the following cases:

In ***People* v. *Linton*** (2013) 56 Cal.4th 1146 [discussed in greater depth in this IPG memo, section H-6-c at p. 39], a juror told her husband "she did not understand something that was going on and that she was confused because if this had happened to her, she would not react the way this person did." When she was questioned by the judge about the statement, she explained that she never actually told her husband anything else but that when she made the statement she was thinking about the fact that she would not necessarily have reacted as the victim did (i.e., by screaming) when the defendant (who was the victim's neighbor) entered her home. (**Id**. at pp. 1191-1193.) The California Supreme Court rejected the "defendant's tacit suggestion that [the juror's] internal mental comparison of her own reaction to the reaction of [the victim] constituted the use of extraneous information outside of the evidence admitted at trial." (**Id**. at p. 1195 [and noting that a juror is entitled to apply "her everyday life experience to the evaluation of evidence" without it being considered misconduct].)

In ***People* v. *Allen*** (2011) 53 Cal.4th 60, during deliberations, a juror expressed disbelief in a prosecution eyewitness's explanation for why the witness' time card reflected the witness was at work at the time the crime occurred. The witness had claimed his Hispanic-forenamed friend sometimes punched his time card for him. The juror said the witness' explanation was a lie because "I know Hispanics, they never cheat on timecards, so this witness [Connor] was at work, end of discussion." (**Id**. at p. 65-66.) During an inquiry into allegations of misconduct which resulted in the juror being removed, the juror told the judge he based his opinion on "job experience." (**Id**. at pp. 66-68.) The California Supreme Court held the juror's remark did <u>not</u> constitute misconduct and that the juror's "positive opinion about the reliability of Hispanics in the workplace did not involve specialized information from an outside source. It was an application of his life experience, in the specific context of timecards and the workplace, that led him to conclude [the witness] was not telling the truth about the shootings." (**Id**. at p. 78.)

In ***People* v. *Wilson*** (2008) 44 Cal.4th 758, the trial court removed an African-American juror under the theory, inter alia, that the juror was considering facts not in evidence at the penalty phase of a capital trial because the accused juror said he believed the defendant must have suffered more abuse than was shown at the penalty phase and when queried as to why he so believed by the other jurors, the accused juror indicated they would not understand because they were not black and that black kids "have a different relationship with their fathers." (**Id**. at pp. 825-829.) The California Supreme Court found that, in light of the jury's function at the penalty phase under our capital sentencing scheme, it was not misconduct for the juror to interpret evidence based on his or her own life experiences. (**Id**. at p. 830.) The ***Wilson*** court characterized what occurred as simply the juror weighing the mitigating evidence more heavily than did the other jurors based on the juror's life experiences. (**Id**. at p. 831.) The ***Wilson*** court held the juror's statement that he knew more abuse occurred than was presented to the jury was not reliance on facts not in evidence, but merely a permissible "inference from the evidence presented, drawn from his own life experiences, that more abuse probably occurred than was shown." (**Id**. at p. 831.)

In ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, the court found that a juror's reliance on his personal experience with firearms to form an opinion about the accuracy of the murder weapon and the mention of his experience to the other jurors when expressing his views during deliberations were "a normal part of jury deliberations and were not misconduct." (**Id**. at p. 1414.)

In ***People* v. *Yeoman*** (2003) 31 Cal.4th 93, a case involving a post-verdict challenge, the court held it was not misconduct for jurors to discuss their own life experiences with drug abuse to evaluate trial evidence from a defense expert regarding the defendant's drug use and its alleged effect on his behavior considering that the effect of drugs. The court reasoned that while such opinion was certainly a proper subject of expert testimony, it also had become a subject of common knowledge among laypersons. (**Id**. at p. 162;

In ***People* v. *Steele*** (2002) 27 Cal.4th 1230, the jury received evidence about the defendant's military experience and training during the Vietnam War, as well as expert testimony about neurological testing performed on him. (**Id**. at pp. 1240–1241.) The defendant moved for a new trial, asserting four jurors with military experience told the other jurors it was unlikely the defendant was exposed to combat in Vietnam, and two other jurors explained, based on their experiences in the medical field, that the validity of one of the neurological tests was inadequately established. (**Id**. at pp. 1259–1260.) The ***Steele*** court held the trial court did not abuse its discretion in denying the defendant's motion for a new trial based on several jurors' assertions of expertise, noting that "it is an impossible standard to require ... [the jury] to be a laboratory, completely sterilized and freed from any external factors." (**Id**. at p. 1266.)

In ***People* v. *Fauber*** (1992) 2 Cal.4th 792, the court held a jurors' comments regarding drug use by their family members and the jurors themselves were not misconduct. (**Id**. at pp. 838–839.)

5. Discussing Case Outside of Presence of All Jurors With Other Jurors

The law prohibits jurors from discussing the case among themselves until all the evidence has been presented, the trial court has instructed the jury, and the jury has retired to deliberate. (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 838; ***People* v. *Polk*** (2010) 190 Cal.App.4th 1183, 1201; **see also** Pen. Code, § 1122; CALJIC No. 0.50 [pretrial admonition], CALCRIM No. 101 [same].) The purpose of the prohibition is to help preserve the juror's impartiality and avoid the risk the juror will gain information about the case that was not presented at trial. (***People* v. *Polk*** (2010) 190 Cal.App.4th 1183, 1201.) Moreover, "private, confidential deliberations outside of the presence of all nonjurors are an essential feature of the right to an impartial jury...." (***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1115; ***People* v. *Bradford*** (2007) 154 Cal.App.4th 1390, 1413–1414.)

However, discussions between jurors outside the presence of other jurors are less serious misconduct than discussions between jurors and third parties about the case. (**See *People v. Wilson*** (2008) 44 Cal.4th 758, 839-840.) "[I]n order to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case." (***People* v. *Majors*** (1998) 18 Cal.4th 385, 425; ***People* v. *Kramer*** (1897) 117 Cal. 647, 649.)

The law does not presume any impropriety when jurors are seen talking among themselves. (***People* v. *Majors*** (1998) 18 Cal.4th 385, 425; ***People* v. *Kramer*** (1897) 117 Cal. 647, 649.) And "trivial violations" of this rule that do not prejudice the parties do not require removal of a sitting juror. (***People v. Wilson*** (2008) 44 Cal.4th 758, 839-840; ***People* v. *Loot*** (1998) 63 Cal.App.4th 694, 697; **see also *People* v. *Majors*** (1998) 18 Cal.4th 385, 423–425 [jurors discussions

among themselves outside the presence of the other jurors did not affect outcome of the trial where discussions held not to focus on the evidence or outcome of the case but on the "process and perhaps the frustration of being a black person in what [one juror] may consider a white process"].)

6. Juror Discussions About the Case With Persons Unconnected to the Case

Jurors are instructed not to speak to anyone about the case except a fellow juror during deliberations. (CALJIC Nos. 0.50, 1.03)

"It is misconduct for a juror during the course of trial to discuss the case with a nonjuror." (***People v. Linton*** (2013) 56 Cal.4th 1146, 1194; ***People* v. *Lewis*** (2009) 46 Cal.4th 1269, 1309; ***People* v. *Danks*** (2004) 32 Cal.4th 269, 304; **accord *People* v. *Nunez*** (2013) 57 Cal.4th 1, 55; ***People* v. *San Nicolas*** (2004) 34 Cal.4th 614, 645-651; ***People* v. *Loot*** (1998) 63 Cal.App.4th 694, 697.) "Violation of this duty, in the form of discussing the case with a nonjuror, is serious misconduct." (***People v. Wilson*** (2008) 44 Cal.4th 758, 838, citing to ***In re Hitchings*** (1993) 6 Cal.4th 97,118; **accord *People v. Polk*** (2010) 190 Cal.App.4th 1183, 1201.) If such discussions take place, it creates a presumption of prejudice. (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95, 98; ***People* v. *Lewis*** (2009) 46 Cal.4th 1269, 1309.)

However, the presumption of prejudice may be rebutted (at least on appeal) if there is no substantial likelihood of any harm arising from retention of the juror. (***People* v. *Lewis*** (2009) 46 Cal.4th 1269, 1309; **see also *People* v. *Merriman*** (2014) 60 Cal.4th 1, 95 [presumption of prejudice is rebutted, and the verdict will not be disturbed, "if a reviewing court concludes after considering the entire record, including the nature of the misconduct and its surrounding circumstances, that there is no substantial likelihood that the juror in question was actually biased against the defendant"].) This holds true even if the communication is deemed "serious misconduct." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 99-101.)

A juror's simple discussion of the stress felt by being on the jury with a nonjuror is not misconduct. (**See *People* v. *Danks*** (2004) 32 Cal.4th 269, 304.)

> **Editor's note**: Compare contacts initiated by jurors with contacts initiated by third parties – discussed in this IPG memo, section I-12-at pp. 56-58.

a. Example of a Case Finding Contact Juror Improperly Kept After Contact with Unconnected Person

In ***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, the court held that a juror's daily conversations with a friend that focused on deliberative matters concerning the merits of the case, and included discussions of the defendant's decision not to testify, constituted misconduct that gave rise to serious doubts about the juror's willingness to follow the court's other instructions and should have resulted in the removal of the juror. (**Id**. at pp. 1111, 1118-1123.)

b. Example of Cases Finding Juror Properly Discharged for Contact With Unconnected Person

In ***People* v. *Nunez*** (2013) 57 Cal.4th 1, after the jurors in a penalty phase of a special circumstances trial agreed on death(but before a verdict was actually taken), one of the jurors admitted telling her close friend that the jury would return a verdict the next morning, the nature of that verdict, and her unease with the verdict. This came to light the next

day when the juror apparently switched her position and mentioned her discussions with her friend and mother to the other jurors and indicated they sided with her doubts. Under questioning the juror confirmed the contacts. The trial court find misconduct and excused the juror based upon the juror's demeanor and her comments. (**Id**. at pp. 53-55.) The California Supreme Court upheld the finding the juror engaged in misconduct and was properly removed, notwithstanding the fact that the incident came to light shortly after the jury announced it was hung 10-2. (**Id**. at pp. 53, 55.)

In ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court held it was proper to discharge a holdout juror in the penalty phase who admitted she had discussed the facts of the case with her husband and who stated that she could not be impartial and was emotionally unable to continue –even though the juror was known to the court as being the holdout juror. (**Id**. at pp. 612-619.)

In ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, the court held it was proper to discharge a juror who admitted violating the court's instructions by discussing the facts of the case with his wife and obtaining her opinion – even though the juror said his wife's opinion did not change his own opinion. (**Id**. at p. 742.)

c. Examples of Cases Finding Juror Properly Kept After Contact With Unconnected Person

In ***People* v. *Linton*** (2013) 56 Cal.4th 1146, during deliberations in the guilt phase of a special circumstances case, a juror indicated to the other jurors she had discussed the case with her husband. The foreperson brought this to the attention of the judge and the juror was questioned by the trial court. The juror explained that she had warned her husband that she might need to vent about the case, but she told him that if she did so, he was not to ask her questions or let her continue. He was just to "kind of sit there and say 'Okay. Enough.'" The juror said the only statement she made about the case to her husband was one in which she told him "she did not understand something that was going on and that she was confused because if this had happened to her, she would not react the way this person did." When she made the statement she was thinking about the fact that she would not necessarily have reacted as the victim did (i.e., by screaming) when the defendant (who was the victim's neighbor) entered her home. However, she did not convey this thought to her husband and that, consistent with her earlier request, her husband just sat there and did not respond. (**Id**. at pp. 1191-1193.) After both counsel indicated they had no questions, the court confirmed with the juror that she understood the court's admonishments, reminded her that they applied until the case was finished, told the juror her actions were on the edge of what was appropriate and should be repeated, and obtained assurances from the juror that nothing would affect her ability to be a fair and impartial juror or prevent her from deliberating rationally with the other jurors. Over defense counsel's objection that the juror should be excused, the trial court kept the juror, finding that the husband did not respond to the juror's venting and the juror had not obtained any outside information. (**Id**. at p. 1193.) The California Supreme Court upheld the trial court's decision based, noting that the trial judge believed the juror's statement that no actual back and forth conversation occurred between her and her husband. (**Id**. at p. 1195.)

In ***People v. Wilson*** (2008) 44 Cal.4th 758 (discussed in this IPG memo at length, section H-4-f, at p. 36) the court held there was no basis to discharge a juror in the penalty phase of a capital trial where the juror said one, possibly two sentences to another juror in a rhetorical fashion about how lack of an authority figure could impact defendant's criminal behavior and it was not said in an obvious attempt to persuade anyone. (**Id**. at pp. 899-840.)

In ***People* v. *Lewis*** (2009) 46 Cal.4th 1269, the court held that a juror who has spoken with her husband (a DA inspector who promptly reported the contact to the prosecutor's office and later reported the juror was angry with him for ratting her out) about her being frustrated with the fact that the jury foreperson would not immediately inform the other jurors of the results of a secret straw poll was properly retained where the juror explained she was just venting, she did not speak

substantively about the case, and she said neither the event, nor the court's inquiry, nor any anger she felt toward her husband for reporting the incident would affect her ability to be fair. (**Id**. at pp. 1306-1310.)

In ***People* v. *Avila*** (2006) 38 Cal.4th 491, the court found a trial judge properly denied a defense motion for a *post-verdict* evidentiary hearing on accusations that a juror had spoken to his employer in violation of the court's admonition not to discuss any subject connected with the trial where the juror made disparaging remarks about defense counsel, judge, and system but the statements had no bearing on defendant's guilt or innocence. (**Id**. at p. 605.)

In ***People v. Marshall*** (1996) 13 Cal.4th 799, the trial court refused to excuse a juror who asked the bailiff, in jest, whether he thought the jurors were in any danger of getting shot if the jury should decide that the defendant was guilty and later had a brief conversation with her husband about the topic, but provided assurances she had not yet formed an opinion on the case when she was questioned by the trial court. The California Supreme Court held that the question posed to the bailiff, and the juror's comment to her husband, did not constitute a violation of the admonition against speaking about the case because the statement was merely a general comment having nothing to do with the facts of the case. (**Id**. at pp. 844-845.)

In ***People v. Polk*** (2010) 190 Cal.App.4th 1183, the court upheld the denial of a post-verdict motion for a hearing on juror misconduct based on allegation that juror had spoken with a third party who told her about media rumors that the juror was romantically involved with another juror since the contact with the third party had nothing to do with defendant's guilt and bore no plausible relation to the jurors' deliberations. (**Id**. at pp. 1200-1203.)

In ***People* v. *Loot*** (1998) 63 Cal.App.4th 694 (discussed in this IPG memo at length, section H-7-c, at p. 41), the court found the trial court did not abuse its discretion in retaining a juror who had discussions with an attorney in the public defender's office (albeit not the attorney handling the case) about the "availability" of prosecuting attorney and noted that while a technical violation of Penal Code section 1122 occurred it was "certainly not as serious as questions designed to obtain extrinsic evidence regarding the case itself." (**Id**. at p. 698.)

7. Initiating Contact With Attorneys, Defendant's Family, or Witnesses

As noted above, Penal Code section 1122(a) provides that jurors should not converse with anyone on any subject connected to the trial. (Pen. Code, § 1122; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507.) And the California Supreme Court has stated: "Of course it is misconduct for a juror 'to communicate with anyone associated with the case.'" (***People* v. *Linton*** (2013) 56 Cal.4th 1146, 1194 citing to ***People* v. *Jones*** (1998) 17 Cal.4th 279, 310; ***People* v. *Loker*** (2008) 44 Cal.4th 691, 754; and ***People* v. *Stewart*** (2004) 33 Cal.4th 425, 509–510.)

a. Contact With Witnesses

"A juror's unauthorized contact with a witness is improper. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507, citing to ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 175.) Contact initiated by jurors with witnesses can be grounds for removal of a juror. (***People* v. *Ramirez*** (1990) 50 Cal.3d 1158, 1175 [juror's out-of-court comment to two witnesses regarding their testimony was "clearly misconduct"]; ***People* v. *Pierce*** (1979) 24 Cal.3d 199, 207–209 [reversal required where juror discussed state of the evidence and prosecutor's tactics with police officer witness who was neighbor of juror].)

However, contact between a juror and a witness may be nonprejudicial if the contact was "de minimis" (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507, citing to ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 175) or if there is no showing that the

contact related to the trial (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507, cf'g. ***People* v. *Cobb*** (1955) 45 Cal.2d 158, 161 [mere showing that juror had communicated with defendant's relative did not raise a presumption that juror was improperly influenced] and ***People* v. *Woods*** (1950) 35 Cal.2d 504, 512 [mere fact that juror conversed with a witness is insufficient to raise a presumption of prejudice.)

Thus, in ***People v. Cowan*** (2010) 50 Cal.4th 40 (discussed in greater depth in this IPG memo at section K-2-b, at p. 66) the court held there were no grounds for believing good cause existed to excuse a deliberating juror where the juror was seen sitting near some relatives of the defendant who were also witnesses, but it appeared that the deliberating juror was not conversing with the relatives and there was no indication any conversation that might have been overheard by the juror involved the trial. (**Id**. at pp. 504-508; **see also *People* v. *Chavez*** (1991) 231 Cal.App.3d 1471, 1479-1483 [trial court erred in failing to conduct an inquiry into potential juror misconduct, where juror was seen speaking to one of police officer witnesses, but error was not prejudicial since both counsel indicated they were satisfied officer and juror had not spoken about the case].)

b. Contact with Friends or Relatives of the Defendant

Jurors should not have contact with relatives of the defendant. (**See *People* v. *Cowan*** (2010) 50 Cal.4th 401, 507; **see also *People* v. *Abbott*** (1956) 47 Cal.2d 362, 371[upholding dismissal of a juror who worked in an office at a desk 25 feet from the defendant's brother, where trial court had dismissed the juror because of the proximity of the two men in the office and in order to save the juror from embarrassment or criticism].)

However, contact between a juror and the defendant's family may be nonprejudicial if the contact was "de minimis" or if there is no showing that the contact related to the trial or the contact inured to the benefit of the defendant. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 507; **see also *People* v. *Wilson*** (2008) 44 Cal.4th 758, 839 citing with approval ***People v. Stewart*** (2004) 33 Cal.4th 425, 509-510 [upholding denial of new trial motion made on "trifling" ground that juror contacted defendant's girlfriend during a break in the trial and told her she was a very attractive woman]; ***People* v. *Cobb*** (1955) 45 Cal.2d 158, 161 [mere showing that juror had communicated with defendant's relative did not raise a presumption that juror was improperly influenced]; ***People* v. *Barton*** (1995) 37 Cal.App.4th 709, 719 [repeated contacts between juror and defendants' uncle not prejudicial misconduct since only the People were prejudiced where nonjuror attempted to persuade the juror to vote not guilty by appealing to her sympathy, and during deliberations the juror made statements suggesting she was sympathetic to the defendants].)

For example, in ***People* v. *Cowan*** (2010) 50 Cal.4th 401 (discussed in depth in this IPG memo at section K-2-b at p. 66) the court held there were no grounds for believing good cause to excuse a deliberating juror where the juror was seen sitting near some relatives of the defendant who were also witnesses but it appeared that the deliberating juror was not conversing with the relatives and there was no indication any conversation that might have been overheard by the juror involved the trial. (**Id**. at pp. 504-508.)

c. Contact With Attorneys

In ***People* v. *Loot*** (1998) 63 Cal.App.4th 694, a sitting juror encountered a deputy public defender (not the defense counsel in the case) in an elevator during a break in the trial. The juror asked her whether she knew the prosecutor and if he was "available," that is, whether the juror could see the prosecutor socially. The appellate court agreed with the trial court that this brief conversation was a technical breach and constituted juror misconduct, but that it did not establish as a demonstrable reality that the juror was unable to perform her duty as a juror, and that any presumption of prejudice

was rebutted by the juror's statements that she had not related this conversation to any of the other jurors and she was basing her deliberations on the evidence and was not influenced by her conversation. (**Id**. at pp. 697-698; **see also *People* v. *Wilson*** (2008) 44 Cal.4th 758, 839.)

8. Holding the Prosecutor to a Higher or Lower Burden Than Reasonable Doubt

Both the prosecution and the defense are entitled to a verdict based on the standard of beyond a reasonable doubt. (**See** CALJIC 2.90; ***People v. Jackson*** [unreported] 2004 WL 119300, *12 [proper to remove juror who said she would not convict without being convinced beyond all doubt].)

However, it may be risky to delve too deeply into what standard of proof a juror is applying. In ***Williams* v. *Cavazos*** (9th Cir. 2011) 646 F.3d 626 [overruled on a different but somewhat related ground in ***Johnson* v. *Williams*** (2013) 133 S.Ct. 1088] the Ninth Circuit criticized the fact that the trial court had questioned the accused juror in a manner revealing the juror's thought processes (e.g., by asking "*In your own personal mind*, do you believe you are using a burden of proof that is based on a charge of first degree murder that is higher than one that would be used for some charge that is less serious than first degree murder?" and then following that up with a string of questions concerning jury deliberations in other, hypothetical prosecutions for other crimes. (**Id**. at p. 649, emphasis by the Ninth Circuit.) The Ninth Circuit indicated that even if the juror's statements of the law had reflected an erroneous understanding of the burden of proof (and they did not), "misstating the law during a mid-deliberation voir dire that should never have taken place cannot provide good cause to dismiss a juror[.]" (**Id**. at p. 649.) In addition, the Ninth Circuit criticized the trial court for both expecting a juror to be able to articulate the reasonable doubt standard and for relying on such an articulation as a basis for removing the juror. Specifically, the Ninth Circuit held the trial court "was wrong to derive meaning from the precise words used by the juror to define the government's burden of proof. (**Id**. at p. 650.) The Ninth Circuit also dismissed the relevance of any deviation in understanding the law in the absence of any finding by the trial court that the accused juror would not apply the correct law. (**Id**. at p. 650.)

9. Consideration of Defendant's Failure to Testify

A jury is instructed that it is not permitted to consider or discuss the fact that the defendant exercised his or her constitutional right not to testify. (***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105; 1120-1121; CALCRIM No. 355.)

A juror who violates the trial court's instruction not to discuss defendant's failure to testify commits misconduct. (***People* v. *Avila*** (2009) 46 Cal.4th 680, 726; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1425; **see also *People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1121.)

However, "[t]ransitory comments of wonderment and curiosity" about a defendant's failure to testify, although technically misconduct, "are normally innocuous, particularly when a comment stands alone without any further discussion." (***People* v. *Avila*** (2009) 46 Cal.4th 680, 726; ***People* v. *Hord*** (1993) 15 Cal.App.4th 711, 727–728; **accord *People* v. *Loker*** (2008) 44 Cal.4th 691, 749; **see also *People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1424-1425 [jurors' expression that they would have liked to hear from defendant to better understand him was error but was not the equivalent to drawing adverse inference from defendant's silence and thus not prejudicial error].)

Cases involving situations where such juror misconduct has come to light post-verdict have considered the following in deciding whether the misconduct was prejudicial: (i) whether discussion of the defendant's failure to testify was of great

length or significance and (ii) whether other jurors admonished the offending juror that consideration of such failure to testify was improper. (**See e.g**., ***People* v. *Avila*** (2009) 46 Cal.4th 680, 727; ***People* v. *Loker*** (2008) 44 Cal.4th 691, 749; ***People* v. *Hord*** (1993) 15 Cal.App.4th 711, 727–728.) Presumably, similar considerations would be taken into account in deciding to discharge a juror if misconduct came to light during deliberations.

10. Consideration of Penalty or Punishment

A juror's refusal to follow the court's instruction not to consider penalty constitutes misconduct. (***People* v. *Engelman*** (2002) 28 Cal.4th 436, 445.) A juror's consideration or discussion of penalty or punishment in cases in which they have no sentencing power may provide good cause to remove the juror. (***Williams* v. *Cavazos*** (9th Cir. 2011) 646 F.3d 626, 651[overruled on a different ground in ***Johnson* v. *Williams*** (2013) 133 S.Ct. 1088].)

It is also misconduct for a juror to consider the costs of punishment (i.e., the cost of imposing death versus life imprisonment). (***People* v. *Loker*** (2008) 44 Cal.4th 691, 750.) However, where the discussion is brief and met with an admonition from other jurors it will not be deemed prejudicial misconduct. (**Ibid**.)

11. Refusal to Consider Death Penalty

A juror's expression of an absolute refusal to refusal to consider the death penalty under any circumstances provides ample reason to investigate a juror. (***People v. Watson*** (2008) 43 Cal.4th 652, 694-697; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 533; **see also *People v. Samuels*** (2005) 36 Cal.4th 96, 131 [trial judge did not abuse discretion in dismissing juror *who requested to be heard* in capital case, and said she could not follow oath and instructions to consider imposition of death penalty, that she lacked "courage" to impose that penalty even under appropriate circumstances, and that while she believed in the death penalty she could not "act on it"]; ***People* v. *Homick*** (2012) 55 Cal.4th 816, 899-900 [removal of juror whose views on the death penalty revealed during deliberations were inconsistent with her statements during voir dire – discussed in this memo, section I-4 at p. 48].)

However, in ***People* v. *Wilson*** (2008) 44 Cal.4th 758, it was held error for the trial judge to dismiss a juror on the basis the juror refused to follow instructions that the death penalty was worse than life imprisonment, where, inter alia, the trial court did not find that juror was prevaricating when he explained context of his statement and affirmed that he understood death was worse than life and was applying that rule, the juror initially voted for death penalty before changing his mind, and the juror suggested that he could consider death as a possible penalty had defendant been raised in a supportive, intact family. (**Id**. at pp. 833-835.)

12. Willingness to Reach Verdict Based on Something Other Than Law or Evidence

In ***People* v. *Wilson*** (2008) 43 Cal.4th 1, the court upheld the exclusion of a juror on grounds of refusal to deliberate (**see** this IPG memo, section H-4-f, at p. 36), but also found the juror was subject to discharge because the juror stated that "she would go along with the other 11 jurors if they all agreed on a position, even if she strongly disagreed with them. The court characterized this statement as essentially proposing to reach a verdict without respect to the law or the evidence. (**Id**. at pp. 26-27.)

In ***People* v. *Collins*** (1976) 17 Cal.3d 687, the court found good cause existed to dismiss a juror who steadfastly maintained that she could not decide the case on the evidence and the law since she was involved emotionally more than intellectually. (**Id**. at pp. 695-696.)

However, the fact a juror posed a question that indicates a desire for information that was not introduced into evidence would not be a basis for removal of the juror. (**See *People* v. *White*** (2015) 237 Cal.App.4th 1087, 1108 [finding no misconduct in juror posing question about the "clearance time of a date rape drug" even though there had been a stipulation that the drug test on the victim had been negative].)

13. Prejudging Case Before Deliberations Begins

"Inasmuch as [Penal] section 1122, subdivision (b) requires the court to admonish the jurors not 'to form or express any opinion about the case until the cause is finally submitted to them,' a juror who prejudges a case and so fails to deliberate is also guilty of misconduct." (***People* v. *Linton*** (2013) 56 Cal.4th 1146, 1194 citing to ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 840–841 and ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1410–1411; **accord *People* v. *Allen*** (2011) 53 Cal.4th 60, 70, 73.)

Nevertheless, "it would be entirely unrealistic to expect jurors not to think about the case during the trial...." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 73 citing to ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, 729.) "The reality that a juror may hold an opinion at the outset of deliberations is . . . reflective of human nature. It is certainly not unheard of that a foreperson may actually take a vote as deliberations begin to acquire an early sense of how jurors are leaning. We cannot reasonably expect a juror to enter deliberations as a tabula rasa, only allowed to form ideas as conversations continue." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 75; **see also *People v. Linton*** (2013) 56 Cal.4th 1146, 1195 ["Jurors are allowed to reflect about the case during the trial and at home"].) A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 73.)

What the California Supreme Court can and does "require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (**Id**. at p. 75.)

Editor's note: In the case of ***People* v. *Allen*** (2011) 53 Cal.4th 60 [discussed in this memo at length in this IPG memo, section F-3 at pp. 16-17]**,** the court found there was insufficient evidence that a juror had engaged in this type of misconduct and noted the absence of any cases finding a juror was properly discharged for prejudgment based solely on comments made during deliberations. (**Id**. at p. 73.) Nevertheless, the court indicated that a sufficient showing might be met if the juror had made statements such as "I made up my mind already. I'm not going to listen to the rest of the stupid argument." (**Id**. at p. 71, citing to ***Grobeson* v. *City of Los Angeles*** (2010) 190 Cal.App.4th 778, 784 [upholding dismissal of juror for making that statement *before* deliberations began].)

Editor's note: **See also** this IPG memo at sections F-1 at p. 12 [discussing prejudging case as refusal to deliberate] and section I-3 at p. 47 [discussing prejudging case as bias].

14. Basing Determination on Prejudice or Stereotyping

Both CALJIC 1.00 and CALCRIM 200 inform the jury that they must not be influenced by prejudice. "Although jurors are entrusted to evaluate the credibility of witnesses, they may not do so based on prejudice or stereotype. Nor may they apply differing standards to the consideration of different witnesses." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 78.)

Basing on a decision on prejudice or stereotyping not only be viewed as a refusal for follow the law or court instructions but as reflecting bias. This type of juror misconduct is discussed more fully in this IPG memo at section I-9 at p. 51.

15. Refusal to Deliberate as Refusal to Follow the Law

A refusal to deliberate may also be viewed as a refusal to follow the law since the juror has a legal obligation to deliberate. However, refusal to deliberate is discussed in a separate section of this IPG memo, section F at pp.11-20.)

I. What Does It Mean for a Juror to Have a Bias Requiring Removal?

1. In General

"A defendant has a constitutional right to trial by an impartial jury." (***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1115; **accord *People* v. *Loot*** (1998) 63 Cal.App.4th 694, 697, citing to U.S. Const., Amend. VI; ***Williams* v. *Florida*** (1970) 399 U.S. 78, 102–103.) "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (***People* v. *Galloway*** (1927) 202 Cal. 81, 92.) An impartial jury is one in which no member has been improperly influenced and every member is "capable and willing to decide the case solely on the evidence before it." (***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1303; ***In re Hamilton*** (1999) 20 Cal.4th 273, 294; ***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1115.) The Ninth Circuit has repeatedly stated that "[t]he bias or prejudice of even a single juror would violate [a defendant's] right to a fair trial." (***Dyer* v. *Calderon*** (9th Cir. 1998) 151 F.3d 970, 973 [and noting, accordingly, the presence of biased juror is structural error requiring reversal without a showing of prejudice]; **accord *United States v. Gonzalez*** (9th Cir. 2000) 214 F.3d 1109, 1111.)

The Ninth Circuit "recognizes three forms of juror bias: (1) 'actual bias, which stems from a pre-set disposition not to decide an issue impartially'; (2) 'implied (or presumptive) bias, which may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, or has repeatedly lied about a material fact to get on the jury'; and 3) 'so-called ***McDonough***-style bias, which turns on the truthfulness of a juror's responses on voir dire' where a truthful response 'would have provided a valid basis for a challenge for cause.'" (***United States* v. *Olsen*** (9th 2013) 704 F.3d 1172, 1189.)

a. Do Not Confuse Refusal to Deliberate With Juror Bias

"Bias is often intertwined with a failure or refusal to deliberate." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589.) "A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge." (***People* v.**

Lomax (2010) 49 Cal.4th 530, 589; ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1051.) However, having a bias is not necessarily synonymous with refusal or failure to deliberate. A juror's ability to perform her duties may be prevented or substantially impaired based on the juror's bias regardless of whether the juror is outwardly willing to engage in deliberations. (**See *People* v. *Homick*** (2012) 55 Cal.4th 816, 899 [discussed in this IPG memo, section I-4 at p. 48].)

b. Not All Juror Misconduct Establishes Bias Requiring Removal of the Juror

However, not all juror misconduct establishes a juror is biased. "A juror's misconduct . . . generally raises a **rebuttable** presumption that the defendant was prejudiced and ***may*** establish juror bias. (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95 citing to ***In re Hamilton*** (1999) 20 Cal.4th 273, 295–296.) Moreover, in evaluating whether a juror should be removed for bias, it must be kept in mind that "[t]he safeguards of juror impartiality ... are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." (***Smith* v. *Phillips*** (1982) 455 U.S. 209, 217; ***People* v. *Loker*** (2008) 44 Cal.4th 691, 747.)

c. Bias Supporting a Challenge for Cause Renders Juror Unable to Perform Duties

Under Code of Civil Procedure section 225, a challenge for cause may be based on, inter alia, implied bias or actual bias. The code defines "actual bias" as "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." (Code Civ. Proc. § 225(b)(1)(C).) The code defines "implied bias" as "when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc. § 225(b)(1)(B).)

"A sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution...." (***People* v. *Homick*** (2012) 55 Cal.4th 816, 898; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 533; **see also *People* v. *Nesler*** (1997) 16 Cal.4th 561, 582–583 [describing a juror as actually biased where the juror "was unable to put aside her impressions or opinions based upon the extrajudicial information she received and to render a verdict based solely upon the evidence received at trial"].)

Implied bias also appears to provide grounds for discharge of a juror. (**See *People v. Wilson*** (2008) 44 Cal.4th 758, 823 ["intentional concealment of material information by a potential juror may constitute ***implied bias*** justifying his or her disqualification or *removal*" –emphasis added by IPG]; **see also *Sanders* v. *Lamarque*** (9th Cir. 2004) 357 F.3d 943, 947 ["Unlike the inquiry for actual bias, in which we examine the juror's answers on voir dire for evidence that she was in fact partial, the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced"]; ***United States* v. *Gonzalez*** (9th Cir.2000) 214 F.3d 1109, 1112 [same].)

d. Does the Fact the Misconduct Does Not Reflect a Bias Toward One Party or the Other Prevent a Juror From Being Discharged as a Result of That Misconduct?

Juror bias can be against the defense. (**See e.g.**, ***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1304-1305 [possible bias against defense because of threats made to juror].) But "[j]uror bias does not require that a juror bear animosity towards the defendant." (***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1116.)

The bias can be against the prosecution. (**See e.g.**, ***People* v. *Loot*** (1998) 63 Cal.App.4th 694, 697 [right to fair trial "would be denied if a juror engaged in deliberations with a bias in favor of the prosecution"]; ***People* v. *Marshall*** (1996)

13 Cal.4th 799, 845–846 [no abuse of discretion in discharging a juror on whose behalf the district attorney's office had refused to intercede regarding a speeding ticket, when the juror said the ticket if upheld would cost him his job, and that he would feel distracted and "'wonder where justice was at'" if the ticket were not dismissed].)

The bias can be against certain types of witnesses. (**See e.g.**, ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1051 [trial court properly removed juror who was biased against police officers for failure to deliberate where evidence supported trial court's conclusion that juror, rather than simply disbelieving particular officers, judged their testimony by different standard because they were police officers].)

Indeed, it is not necessary that bias be "for" or "against" anyone. Rather, juror bias exists if there is a substantial likelihood that a juror's verdict will be based on an improper outside influence, rather than on the evidence and instructions presented at trial. (***People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1116 [albeit noting to reverse for juror bias requires that the nature of the influence was detrimental to the juror].)

The fact the misconduct does not suggest a bias toward one party or the other does not prevent a trial court from finding good cause to believe the juror is unable to perform his or her duties. A trial court, in its discretion, may "remove a juror for serious and wilful misconduct … even if this misconduct is 'neutral' as between the parties and does not suggest bias toward either side." (***People* v. *Daniels*** (1991) 52 C.3d 815, 864.)

2. Can a Trial Court Find Juror Bias Even if the Juror Denies the Bias?

"[A] juror need not admit a bias for the court to find that it exists." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 590 [finding juror properly dismissed for bias against death penalty notwithstanding juror's denial]; **see also *People* v. *Marshall*** (1996) 13 Cal.4th 799, 846 [juror properly discharged, in part, because of perceived hostility toward the district attorney's office, notwithstanding his protest to the contrary]; ***People* v. *Price*** (1991) 1 Cal.4th 324, 400 [finding juror properly discharged notwithstanding denial of bias against the prosecution]; ***People* v. *Feagin*** (1995) 34 Cal.App.4th 1427, 1434-1437 [juror found to have bias against police in general notwithstanding juror's claims otherwise]; ***People* v. *Farris*** (1977) 66 Cal.App.3d 376, 386 [juror who had not disclosed pending misdemeanor charges and missed court session because he had been arrested on a felony charge was properly dismissed despite his insistence that he could remain fair and impartial].)

Bias may be established by the testimony of other jurors (**see e.g**., ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1051) or the trial judge's own observations regarding the juror's demeanor (**see *People* v. *Marshall*** (1996) 13 Cal.4th 799, 846).

3. Prejudging Case as Bias

If the juror finds it difficult to keep an open mind due the nature of the case, this "constitutes a basis for his disqualification before trial, and may amount to good cause upon such an assertion made during trial, provided it actually renders him 'unable to perform his duty." (***People* v. *Franklin*** (1976) 56 Cal.App.3d 18, 25, citing to ***People* v. *Compton*** (1971) 6 Cal.3d 55, 59; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 70 ([discussed in this memo, section F-3 at p 16-17 ["For a juror to decide a case before it is submitted is misconduct."].)

However, the existence of a closed mind must be more than speculation. Thus, in ***People* v. *Williams*** (1997) 16 Cal.4th 153, the court there was no error in denial of a defense motion to remove a juror before the penalty phase of capital case on ground of misconduct during guilt phase, where the claim was based on alleged observations of "body language" indicating that juror had decided case before submission and nothing much else. (**Id**. at p. 229.)

Care should be taken before removing a juror based solely on statements reflecting prejudgment made during deliberations. (**See *People* v. *Allen*** (2011) 53 Cal.4th 60, 73 ["The Attorney General has cited no case, and we have found none, in which a juror was discharged for prejudgment based solely on comments made during deliberations."].)

In ***People* v. *Wilson*** (2008) 44 Cal.4th 758, the court held it was error to discharge a juror where, before deliberations had begun, the dismissed juror said to another juror, "The whole thing is a problem with authority, and this is what happens when you have no authority figure" and later made comments during deliberations consistent with this view. In finding the "mere utterance of one or two short sentences [did not] establish[] to a *demonstrable reality* that [the juror] had prejudged the question of penalty," the ***Wilson*** court pointed to the fact that the juror had convicted the defendant a special circumstance murder, indicating that he could hold the defendant accountable for his actions and had initially voted for the death penalty. (**Id**. at p. 840, emphasis in original.)

And in ***People* v. *Linton*** (2013) 56 Cal.4th 1146 [discussed in greater depth in this IPG memo, section H-6-c at p. 39], the court held that a juror's statement to her husband before deliberations began that she would have reacted to a particular circumstance in a different manner than the victim showed only that the juror was thinking about the case before deliberations and did "not suggest [the juror] would not or did not listen to the evidence introduced at trial and the arguments of counsel" not did it indicate a refusal to consider other opinions or to deliberate. (Id. at pp. 1195-1196.)

4. Bias Against the Death Penalty

In People* v. *Homick (2012) 55 Cal.4th 816, the jury in the penalty phase of a capital case informed the judge they were deadlocked 11 to one. The judge ordered them to resume deliberations. The jury then sent out a note from the "holdout" juror in which the juror stated: "When I was questioned about the Death Penalty at the very beginning of this trial I stated that I believed that I could vote for the Death Penalty under special circumstances. I believe that the Death Penalty should be imposed if: (1) a child is involved [¶] (2) torture of an adult [¶] rape of an adult. [¶] Since none of these factors were involved I cannot vote for the Death Penalty for Steven Homick. That is the reason for the deadlock." (**Id**. at p. 896.) This statement was inconsistent with the juror's responses during voir dire – where the juror had said she could find the death penalty appropriate even in cases not involving children and made no mention of any other limitations. (**Id**. at p. 896.) The trial judge questioned the juror about her earlier inconsistent statements and the juror tried to reconcile them with her current stance. The juror explained she could still find the death penalty if an adult was tortured or raped (neither of which occurred in ***Homick***) but that there were several other factors involved." (**Id**. at p. 897.) Ultimately, the trial judge refused a defense request to explore what the juror meant in her reference to other factors and focused on the language of her note – which appeared to the judge "to expressly state that she cannot fairly deliberate on the issue of penalty in this case, because she has a specific agenda." (**Ibid**.) The trial judge then removed the juror since "that agenda, had she expressed it to the court and the attorneys during the initial voir dire, would have disqualified her from service in this trial." (**Id**. at p. 897.) After the juror was excused, the trial court instructed the jurors that the juror was removed because "she could not follow the court's instruction with respect to considering both possible penalties in this case" and not "because of her refusal to vote for the death penalty[.]" (**Id**. at p. 898.) The California Supreme Court upheld the discharge of the juror, noting that the views she expressed in her note that she could not impose the death

penalty if a child was not killed were patently inconsistent with those she gave in response to voir dire. (**Id**. at pp. 899-900 [and also finding the trial court did not err refusing to delve into the juror's "other reasons" for her refusal to apply the death penalty].)

Editor's note: This case could also be considered an example of a juror concealing a bias against the death penalty. (**See** this IPG memo, section I-4 at p. 48.)

In ***People* v. *Lomax*** (2010) 49 Cal.4th 530 (**see** this IPG memo, section F-2, at p. 13 [discussing the facts of ***Lomax*** in greater depth]), the California Supreme Court found an accused juror's disqualifying bias against the death penalty was shown to a "demonstrable reality" by (i) the foreperson's note that a juror's objection to the death penalty was causing the juror to be unable to continue to deliberate; (ii) the testimony of all of the other jurors that the accused juror had made statements indicating he was conscientiously opposed to voting for the death penalty, that the accused juror (subject to a single exception of a child murder) could not think of a factual situation in which he would vote for death, and that the juror would not agree that death would be the appropriate punishment when extreme situations were suggested by other jurors; (iii) the accused juror's admission he had agreed to the wording of the foreperson's note, which explained he had reevaluated his feelings about the death penalty and now had a conscientious objection that prevented him from deliberating further; and (iv) the juror's misrepresentation during voir dire that he was "moderately in favor" of the death penalty. (**Id**. at pp. 590-591 [and noting that the testimony made it clear that the accused juror's objection to the death penalty was not based on the specific evidence presented in the case, but was rather an objection to imposition of the penalty in *any* case not involving a child].)

On the other hand in ***People v. Wilson*** (2008) 44 Cal.4th 758, the court held it error *to discharge* a juror on the ground the juror was failing to follow trial court's instruction that death was a more severe penalty than life imprisonment, even assuming that juror stated that life was a more severe penalty than death, where, inter alia, the trial court did not find that juror was prevaricating when he explained the context of his statement, the juror affirmed that he understood death was worse than life and that he was applying that principle, the juror initially voted for the death penalty before changing his mind, and the juror suggested that he could consider death as a possible penalty for the defendant had defendant been raised in a supportive, intact family. (**Id**. at pp. 833-835.)

5. Bias Against Law Enforcement Officers

"[A] bias against law enforcement officers that renders a juror unable to fairly weigh police testimony is grounds for the juror's replacement." (***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1051; **accord *People* v. *Feagin*** (1995) 34 Cal.App.4th 1427, 1437.)

In ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, the trial court received multiple notes from the jury indicating that one of the jurors was not deliberating based on a bias against police officers. The trial court examined all 12 jurors to investigate the allegation. The allegedly biased juror stated he was not biased against all law enforcement officers, but simply disbelieved the officers in this case. However, nine of the jurors indicated that the discharged juror had exhibited bias against police officers. The trial court discharged the accused juror, concluding that the accused juror was violating his oath of impartiality by judging the testimony of the witnesses by a different standard because the witnesses were police officers. The California Supreme Court upheld the discharge, finding the record demonstrated that the juror exhibited a general bias against police officers that prevented him from fairly weighing police testimony in this case. (**Id**. at pp. 1048-1054.)

In ***People* v. *Feagin*** (1995) 34 Cal.App.4th 1427, after two days of deliberations, the trial court received two competing notes, one from the foreperson and one from a holdout juror. The trial court interviewed the all the jurors and a majority confirmed that the holdout juror was refusing to deliberate or explain her thoughts and had brought up issues of police bias against Blacks, specifically referring to the Rodney King incident. The trial court made findings that the holdout juror (i) was unwilling and unable to participate in meaningful deliberations with the other jurors; (ii) was evaluating the evidence based on her emotions and not on a rational analysis of the evidence; (iii) came in with a bias against police officers, would not believe any member of the Los Angeles Police Department if it pertained to a statement or situation having to do with a Black person, and was prejudiced against officers. The trial court made its ruling, which was upheld by the appellate court, notwithstanding the juror's denial of the allegations and the juror's claims that she was concerned with the honesty of all the witnesses. (**Id**. at pp. 1434-1337.)

In ***People* v. *Thomas*** (1990) 218 Cal.App.3d 1477, the court held it was proper to discharge a juror who had stated that police officers in Los Angeles generally lie and that she could not accept the testimony of the officers who testified at trial. (**Id**. at pp. 1482-1485.)

6. Bias Against Defense Counsel

In ***People* v. *Kaurish*** (1990) 52 Cal.3d 648, at the end of defendant's case, an unidentified juror was heard to make a derogatory remark ("Oh, you son-of-a-.") apparently directed at defense counsel. Nothing was done about it. Defendant later contended that once the court was put on notice that a juror might be biased against his counsel, it had a sua sponte duty to inquire into the state of mind of the juror making the remark to determine if he could still be impartial. Defendant also contends the court should have inquired into the state of mind of the other jurors as well, to discover if they had been influenced by the derogatory comment. The California Supreme Court observed that since the juror's derogatory remark appeared to simply reflect a momentary exasperation with the proceedings and not an indication of serious bias, it was not error for the trial court to fail to inquire sua sponte into the juror's state of mind. (**Id**. at p. 694.)

In ***People* v. *Avila*** (2006) 38 Cal.4th 491, 605, the court found a trial judge properly denied a defense motion for post-verdict evidentiary hearing on accusations that a juror had made disparaging remarks about defense counsel to his employer in violation of the court's admonition not to discuss any subject connected with the trial since statements had no bearing on the matter pending before the jury, that is, defendant's guilt or innocence. (**Id**. at p. 605.)

7. Bias Against the Defendant as a Result of Fear of Defendant

Although, presumably, a juror's fear of a defendant could potentially create a bias against the defendant, a juror's fear of a defendant has been held insufficient to justify a discharge of the juror – at least in situations when there was other evidence in the record supporting an inference that the juror could nevertheless perform his or her duties.

For example, in ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, during deliberations, the foreperson gave the trial court a letter stating a few days earlier "a person whom I know personally walked into the courtroom to observe the trial. As you may expect, this came as a shock to me. However, I dismissed the incident as a coincidence. However, this weekend I became aware of this person as a close friend of both the defendant and his family. Additionally, I became aware of the fact that my name has already been revealed to the members of his family. [¶] As you may understand, this does not make me feel comfortable to continue as a juror in this case. My safety and the safety of my family may be in jeopardy

because of this incident. Please accept my request to step down as a juror on this case." (**Id**. at p. 52.) Nevertheless, upon further inquiry, the foreperson said the information would not affect verdict or impact her ability to be impartial or to consider the evidence objectively; that she did not want the court to excuse her from the jury; that she was not concerned about the possibility of retribution for her jury service, and became less concerned the more she thought about it; that she had given the letter to the court just so it would be aware of the situation; and that she had not discussed the details of the case with anyone or received any information from the person about defendant or his family. (**Id**. at p. 52.) The trial court rejected defendants' request to replace the juror. Later, the trial court received a note indicating that the foreperson wanted a different person to read and sign the verdict. The defendant asked the judge to engage in further inquiry and claimed the later note showed the juror was afraid to serve on the jury and had disclosed her concern to other jurors. The trial court denied the request. (**Id**. at p. 52.) The California Supreme Court rejected defendant's argument that the trial court abused its discretion in declining to inquire further into the matter. (**Id**. at p. 54.)

And in ***People* v. *Navarette*** (2003) 30 Cal.4th 458, before deliberations, a juror gave the trial court a note that read: "Your Honor, I would like the response to my question not to be answered in court, but done privately, or in the jury room. [¶] Has [defendant] seen or have access to the questionnaires? [¶] My concern is for property and family." (**Id**. at pp. 499-500.) After the defense counsel then raised the issue of the juror's ability to remain impartial, the court clerk said that the juror had indicated that other jurors shared his concerns. The trial court responded to the note in front of the entire jury, without privately discussing the note with the juror. The trial court assured the jury that no one other than the court, the clerk, and counsel had seen the questionnaires, that they would be placed under seal, and that the identities of specific jurors would not be public information. The court also encouraged the jurors that, if any of them felt unable to be "fair" and "unbiased," to let the court know in writing and reminded the jury not to prejudge the case. (**Id**. at p. 500.) The defense argued that the question reflected the juror's implied bias and the trial court validated the jurors' fears about defendant, thereby causing the jury to conclude that defendant was guilty before it had even heard the defense case. (**Ibid**.) However, the California Supreme Court approved of the trial court's response, noting that the trial court addressed the "jurors' concerns about confidentiality without unnecessarily implicating defendant or calling the attention of the entire jury to the specifics of [the juror]'s fears and thereby possibly spreading those fears. (**Ibid**.)

8. Bias Against the Prosecution

In ***People* v. *Marshall*** (1996) 13 Cal.4th 799, the court held it was proper to discharge a juror on whose behalf the district attorney's office had refused to intercede regarding a speeding ticket where (i) the juror said the ticket, if upheld, would cost him his job, and that he would feel distracted and "wonder where justice was at" if the ticket were not dismissed, and (ii) the juror "clearly felt some animosity toward the district attorney's office" notwithstanding his protest to the contrary. (**Id**. at pp. 845–846.)

9. Racial or Ethnic Bias

Jurors should not base their decision on racial or ethnic bias. (**See *People* v. *Wilson*** (2008) 44 Cal.4th 758, 831.) "Although jurors are entrusted to evaluate the credibility of witnesses, they may not do so based on prejudice or stereotype. Nor may they apply differing standards to the consideration of different witnesses." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 78.)

For example, for a juror to decide to impose the death penalty on a defendant because of the defendant's race or hold a position that members of a particular group should never or always be sentenced to death would be misconduct. (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 831; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 78, fn. 13 [citing to ***United States* v. *Heller*** (11th Cir.1986) 785 F.2d 1524, 1527 ["A racially or religiously biased individual harbors certain negative stereotypes which, despite ... protestations to the contrary, may well prevent him or her from making decisions solely on the facts and law that our jury system requires."].)

However, in the penalty phase of a trial, it is not misconduct for a juror to, based on personal experience, to consider the effects of certain social environments and family dynamics on a young person growing up, when this understanding illuminates the significance or weight an individual juror would accord to related evidence in a particular case. (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 831.)

Moreover, not every statement of juror reflecting a racial or ethnic stereotype will establish bias. (**See *People* v. *Allen*** (2011) 53 Cal.4th 60, 78 [juror's expression of disbelief in a prosecution witness' claim that he and his friend (Jose) signed each other's time cards to cover the other's absence based, in part, on the juror's positive opinion about the reliability of Hispanics in the workplace (i.e., That's a lie. I know Hispanics, they never cheat on timecards") "did not involve the kind of racial bias that may reflect misconduct"].)

10. Misrepresentations or Concealment of Information During Voir Dire as Bias

Removing jurors on grounds they misrepresented or concealed information during voir dire that would render them unable to perform their duties can be viewed as discharge based on misconduct (**see e.g**., ***In re Hitchings*** (1993) 6 Cal.4th 97, 110–111; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 823) or as discharge based on failure to follow the law since jurors "are obligated to respond truthfully to the voir dire examination" (***People v. Blackwell*** (1987) 191 Cal.App.3d 925, 929). More commonly though, if a juror conceals or misrepresents information during voir dire it is treated as "misconduct" reflecting a form of bias that would render a juror unable to perform his or her duties. (**See e.g**., ***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95; ***People* v. *Homick*** (2012) 55 Cal.4th 816, 898-899 [discussed in this IPG memo, section I-4 at p.48]; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 823-824; ***People* v. *Price*** (1991) 1 Cal.4th 324, 400.)

"[I]ntentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal[.]" (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 823; ***People* v. *McPeters*** (1992) 2 Cal.4th 1148, 1175; ***People* v. *Tuggles*** (2009) 179 Cal.App.4th 339, 371.) "When the trial court discovers during trial that a juror misrepresented or concealed material information on voir dire tending to show bias, the trial court may discharge the juror if, after examination of the juror, the record discloses reasonable grounds for inferring bias as a 'demonstrable reality,' even though the juror continues to deny bias. [Citations.]" (***People* v. *Price*** (1991) 1 Cal.4th 324, 400.) "[I]t is misconduct, and therefore presumptively prejudicial, for a juror to conceal relevant facts during the jury selection process." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95.) However, the presumption of prejudice is rebuttable. (**Ibid**.)

Mere inadvertent or unintentional failures to disclose are not accorded the same effect as intentional concealment. (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 96-97; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 823; ***People* v. *McPeters*** (1992) 2 Cal.4th 1148, 1175; **see also *People* v. *Barber*** (2002) 102 Cal.App.4th 145, 153 ["To find misconduct on the basis of concealment which is unintentional and the result of misunderstanding or forgetfulness would be excessive"]; ***People* v. *Jackson*** (1985) 168 Cal.App.3d 700, 705 [same].) The California Supreme Court has identified the proper test to be applied to "unintentional concealment" as simply "whether the juror is sufficiently biased to constitute good

cause for the court to find under Penal Code sections 1089 and [former] 1123 that he [or she] is unable to perform his [or her] duty.'" (***People* v. *Wilson*** (2008) 44 Cal.4th 758, 823; ***People* v. *McPeters*** (1992) 2 Cal.4th 1148, 1175; ***People* v. *Tuggles*** (2009) 179 Cal.App.4th 339, 371.)

Editor's note: There is a split of opinion among appellate courts as to whether a juror's concealment must be intentional to officially constitute "misconduct" but the California Supreme Court has declined to resolve the issue. (***People* v. *Carter*** (2005) 36 Cal.4th 1114, 1208, fn. 47.)

Trial courts removing jurors on grounds the accused juror concealed information on voir dire must be very careful in assessing whether the juror actually made a misrepresentation. Appellate courts are often unwilling to accept the argument that a juror concealed or misrepresented something when the juror was not asked a question that specifically called for the information the juror allegedly failed to provide or allegedly misrepresented. (**See e.g., *People* v. *Tuggles*** (2009) 179 Cal.App.4th 339, 373 [juror did not improperly conceal during voir dire her acquaintance with a man under investigation for rape whom she barely knew by not mentioning him in response to the court's question whether a "close friend" had been accused of any offense]; ***People* v. *Duran*** (1996) 50 Cal.App.4th 103, 107, 114–115 [juror's failure during jury selection to identify a certain individual as a person "close" to her who had been the victim of a violent crime did not amount to misconduct because there was no evidence establishing her relationship with him was anything more than casual];***People v. Blackwell*** (1987) 191 Cal.App.3d 925, 929 [there must be "questioning" that "is sufficiently specific to elicit the information which is not disclosed, or as to which a false answer is later shown to have been given"]; ***People* v. *Jackson*** (1985) 168 Cal.App.3d 700, 705 [finding no intentional concealment where juror self-disclosed to court that his nephew died of a drug overdose after deliberations had begun even though he did not reveal this fact when asked by defense counsel a catch-all question whether there was "anybody in the jury who up to this point has had anything in their background come to mind who's wondering if I asked you a question where you would have to tell me about it? This is what's known as the skeleton in the closet question."]; ***People* v. *Resendez*** (1968) 260 Cal.App.2d 1, [upholding conviction where juror in child molestation case denied on voir dire that any event of a similar nature had happened to her but informed jury during its deliberations that when she was 15 her stepfather had caressed her sexually where witness did intentionally conceal the incident but had forgotten it and remarks did not disclose bias or prejudice]; ***Sanders* v. *Lamarque*** (9th Cir. 2004) 357 F.3d 943, 947, 949 [juror who had *previously* lived in areas where there was open gang activity held not to have concealed this information where question on voir dire was phrased in the present tense: "Do you live or work in an area where there is open gang activity?"; nor was juror held to have concealed information about contacts her son had long ago with gangs where questions expressly asked about discrete and particular contacts with gangs, i.e., whether the jurors had expertise in the area of gangs, and were not open-ended queries into all possible contacts with gangs or gang members.]; **but see *People* v. *Diaz*** (1984) 152 Cal.App.3d 926, 938-939 [juror who failed to disclose she had been raped when asked on voir dire in an assault with a deadly weapon case if she had ever been "a complaining witness or a victim in a case of this kind?" should have been removed even though the juror said it never occurred to her that her rape was an assault with a deadly weapon, and that she would not be biased in her determination and regardless of "whether nondisclosure was unintentional and based upon a good-faith misunderstanding of the meaning of the question" as the juror's statement was self-serving and "the prior experience may cause unconscious bias"].)

Moreover, in assessing whether a defendant has been deprived of a fair trial based on juror concealment of information on voir dire, courts "must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment. The Supreme Court has held that an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality." (**See *Dyer* v. *Calderon*** (9th Cir. 1998) 151 F.3d 970, 973,

citing to ***McDonough Power Equip.* v. *Greenwood*** (1984) 464 U.S. 548, 555-556; **see also *People* v. *Merriman*** (2014) 60 Cal.4th 1, 97 ["an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias"]; ***In re Boyette*** (2013) 56 Cal.4th 866, 890 [referee's findings that juror's failure to disclose his own criminal history and drug use and that of his friends and relatives was neither intentional nor deliberate supports the conclusion that the juror was not biased against the defendant].)

Appellate courts will give deference to the determination by trial courts whether the "failure to disclose is intentional or unintentional and whether a juror is biased in this regard . . . [because] the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination." (***People* v. *San Nicolas*** (2004) 34 Cal.4th 614, 644 [so finding in context of new trial motion based on juror misconduct]; **see also *People* v. *Merriman*** (2014) 60 Cal.4th 1, 96-97.)

Ultimately, "good faith when answering voir dire questions is the most significant indicator that there was no bias." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 97, citing to ***In re Hamilton*** (1999) 20 Cal.4th 273, 300 and ***In re Boyette*** (2013) 56 Cal.4th 866, 890.)

a. Concealment of Juror's Criminal Record

"Concealment of prior criminal charges constitutes good cause for discharge of a juror under section 1089." (***People* v. *Johnson*** (1993) 6 Cal.4th 1, 22, citing to ***People* v. *Price*** (1991) 1 Cal.4th 324, 399–401 [concealment of prior conviction and dismissed assault charge]; ***People* v. *Farris*** (1977) 66 Cal.App.3d 376, 386–387 [concealment of misdemeanor prosecution and arrest record].)

In ***People* v. *Johnson*** (1993) 6 Cal.4th 1, a judge the learned that a juror had been arrested for possessing narcotics, contrary to the juror's questionnaire response. The judge questioned the juror in chambers. The juror stated he failed to reveal his arrest because he was trying to get through with this questionnaire quickly and it did not seem important. (**Id**. at pp. 16-17.) The judge dismissed the juror (before deliberations) on this ground, as well as because the juror was sleeping in court. The ***Johnson*** court upheld the discharge, rejecting defendant's argument that no fabrication occurred since the juror had not really been arrested, i.e., the defendant purportedly viewed the prior "arrests" as mere detentions, because no accusatory pleadings were ever filed. (**Id**. at p. 22 [and noting that defendant was also asked if he had ever been accused of a crime].)

In ***People* v. *Barber*** (2002) 102 Cal.App.4th 145, the trial court asked the jurors whether any of them had been criminally charged or arrested. One of the jurors failed to mention an incident years earlier in which he was fingerprinted and falsely identified as a crime suspect. This fact came out during deliberations. After the trial court conducted what the appellate court viewed as an improper probing of the jurors, the trial court discharged the juror even though the trial court speculated that the concealment might have been an innocent mistake. The appellate court held this alleged concealment was not misconduct since it was not found to have been intentional. (**Id**. at pp. 153-154.)

In ***People* v. *Farris*** (1977) 66 Cal.App.3d 376, a juror missed a court session because he was in custody on a felony charge. An investigation revealed that he was also being prosecuted on two misdemeanor charges and had an extensive arrest record. Despite the juror's insistence that he could remain fair and impartial, the trial judge excused him and substituted an alternate. The court upheld that discharge on the basis of the juror's deliberate concealment of his past and present scrapes with the law, knowing that he would otherwise be subject to dismissal from the jury panel. (**Id**. at p. 386.)

b. Concealment of Racial Bias

Concealment of a racial bias may provide grounds for discharge of a juror. (**See e.g**., ***Weathers* v. *Kaiser Foundation Hospitals*** (1971) 5 Cal.3d 98, 111 [finding juror concealed bias against blacks]; *People v. Salazar* [unreported] 2007 WL 2122015, *4-*5 [concealment of bias against Vietnamese shopkeepers provided grounds for removal of juror].)

However, the fact a juror "brings a perspective" based on his or her own ethnicity or race does not equate to racial bias. For example, in ***People* v. *Wilson*** (2008) 44 Cal.4th 758, a juror was removed during the penalty phase of a capital murder trial. He was the sole juror voting for life imprisonment, and made a number of comments concerning race during penalty phase deliberations, including: "I don't expect you to understand; you're not black.", "Black people don't admit being abused.", and "Black kids have a different relationship with their fathers." (**Id**. at p. 818.) Although the trial court found that the juror had "concealed his racial biases and fundamental belief in racial stereotypes on voir dire (**id**. at p. 819), the California Supreme Court disagreed: "The record fails to demonstrate that [the juror] concealed anything. He was never asked whether he would interpret evidence of any abuse defendant may have suffered as a child through the prism of his own experiences; indeed, we expect jurors to use their own life experiences when evaluating the evidence." (**Id**. at p. 823.) The ***Wilson*** court noted that while the juror affirmed during voir dire that "he would not consider defendant's race to benefit or disadvantage him and that he would treat him like he would anyone else," he explained during the penalty phase that "he viewed the mitigating evidence favorably because defendant came from a broken, disadvantaged family, not simply because he was African–American." (**Ibid**.) Moreover, while the trial court "apparently concluded that [the juror] had concealed certain race-based assumptions regarding the nature of family dynamics in African–American families, especially with regard to young men who grow up without strong positive male role models," the ***Wilson*** court observed the juror was not asked about that subject during voir dire, and the "failure to express his views about African–American family dynamics is not the kind of concealment that would justify [his] removal from the jury under section 1089[.]'" (**Id**. at pp. 823–824.)

c. Concealment of Bias Against Death Penalty

Concealment of the juror's actual views about the death penalty may constitute good cause for discharge of a juror if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (**See *People* v. *Homick*** (2012) 55 Cal.4th 816, 898; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 532-553.)

Thus, in ***People* v. *Lomax*** (2010) 49 Cal.4th 530, the court held a juror was properly excused because, inter alia, the juror misrepresented that he was "moderately in favor" of the death penalty when, in fact (as later revealed during deliberations), he was conscientiously opposed to voting for the death penalty in any case not involving a child. (**Id**. at pp. 590-591.)

11. Bias Stemming From the Receipt of Extraneous Information

A juror may be deemed biased based on the juror's receipt of extraneous information. As noted by the California Supreme Court in ***People* v. *Thomas*** (2012) 53 Cal.4th 771, when "juror misconduct involves the receipt of information from extraneous sources, a substantial likelihood of juror bias 'can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant.'" (**Id**. at p. 819, citing to ***In re Carpenter*** (1995) 9 Cal.4th 634, 653.)

"A juror's . . . involuntary exposure to certain events or materials other than what is presented at trial generally raises a ***rebuttable*** presumption that the defendant was prejudiced and may establish juror bias." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95 citing to ***In re Hamilton*** (1999) 20 Cal.4th 273, 295–296, emphasis added.)

However, not all receipt of extraneous information will necessarily result in a finding of bias. (**See e.g.**, ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 819 [discussed in this IPG memo, H-4-d at p. 34; ***People* v. *White*** (2015) 237 Cal.App.4th 1087, 1110 [discussed in this IPG memo, H-4-b at p. 33].)

Editor's note: **See also** this IPG memo, section H-4 at pp. 32-36 [discussing juror consideration of evidence or information not presented at trial as being good cause based on failure to follow the law]

12. Bias Stemming From Improper Contacts

Sometimes jurors may be purposefully or inadvertently contacted by parties to the criminal proceeding, persons affiliated with parties to the proceeding, or even persons not associated with the proceedings. "Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation." (***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1303; ***In re Hamilton*** (1999) 20 Cal.4th 273, 294-295.) Depending on the nature of the contact and the impact it had on the juror or other jurors, discharge of the juror may be required. (**See *People* v. *Foster*** (2010) 50 Cal.4th 1301, 1342 ["A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require ... examination for probable prejudice"]; ***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1303 [same]; ***In re Hamilton*** (1999) 20 Cal.4th 273, 294-295 [same].)

'In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." (***People* v. *Foster*** (2010) 50 Cal.4th 1301, 1342 citing to ***Remmer* v. *United States*** (1954) 347 U.S. 227, 229; ***People* v. *Lewis*** (2009) 46 Cal.4th 1269, 1309 [same]; ***In re Price*** (2011) 51 Cal.4th 547, 560 [same]; **see also *People* v. *Merriman*** (2014) 60 Cal.4th 1, 95.) However, the presumption of prejudice is rebuttable. (**See *In re Hamilton*** (1999) 20 Cal.4th 273, 295, 305–306; ***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1303.)

A prompt hearing "to explore the circumstances of the threat and the possibility of bias is the ***required*** procedure for handling a presumptively prejudicial incident of juror tampering." (***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1304, citing to ***Smith* v. *Phillips*** (1982) 455 U.S. 209, 215–216 and ***In re Carpenter*** (1995) 9 Cal.4th 634, 647–648, emphasis added by IPG.)

In deciding whether to remove a juror who has been improperly contacted, it is permissible for the court to taken into consideration the concern that misconduct on the part of the defendant or others related to the defendant to intimidate or threaten a juror would be rewarded by the granting of a mistrial. (***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1304.)

a. Cases Involving Contacts With Jurors Initiated By Others

In ***People* v. *Martinez*** (2010) 47 Cal.4th 911, a juror who later served as the foreperson of the jury was the lead clerk in the county probation department at juvenile hall and had worked there for 20 years. During voir dire the juror said she recognized defendant's name because "he had been at" juvenile hall. The defense made several challenges to the juror for bias (i.e., based on the juror's statements about leaning toward the death penalty and again after she said it would be

difficult for her to serve on the jury because she knew the defendant and because of the severity of the charges). However, the challenges were denied after further questioning of the juror clarified she did not have any memorable contact with the defendant and could follow the law. (**Id**. at pp. 939-940.) The juror was sworn and the case was put a week. During that week a district attorney investigator called the juvenile department in an attempt to locate defendant's juvenile disciplinary reports and inadvertently spoke with the juror. The juror informed the investigator that he needed a court order to access those reports. The investigator then consulted with a deputy district attorney, and, less than 30 minutes after their first conversation, he again called and spoke with the juror. At that time, the juror told the investigator that she was a juror on defendant's case. The juror somewhat jokingly asked the investigator "[i]f I could get her off the jury[.]" The investigator said he could not, and ended the call. The investigator later called back the juror and said she should not be involved in the matter further and asked to speak with her supervisor. The investigator had no further contact with the juror. The details of this contact were brought to the attention of the judge by way of the investigator's memo. Defense counsel asked the judge to inquire whether the juror was "willing and able and fit for further duty in light of the comment about wanting to get off the jury. The judge declined to do so, reasoning that the juror's comment merely reflected "a normal desire not to be a juror" and did not relate to her qualifications as a juror. (**Id**. at p. 941.) The defendant later claimed this failure to inquire was error and that a hearing was necessary to determine whether the juror wanted to get off the jury due to her knowledge that defendant had a juvenile record, her belief that he had made poor choices, or the severity of the charges. The defense also speculated some of this information may have resulted in the juror questioning whether she could remain an impartial juror, and thus caused her to ask the investigator for assistance in being removed from the case. The California Supreme Court upheld the trial court's determination to retain the juror, finding the defendant had failed to show that the juror was unable to fulfill her functions as a juror. The ***Martinez*** court also rejected defendant's claim that the trial court was under a duty to inquire any further than it did, noting that the mere fact the investigator contacted the juror did not "constitute 'good cause' that cast doubt on her ability to serve as a juror, the contact by the investigator was inadvertent, the investigator did not provide the juror any additional information about defendant's case, or cause the juror to obtain additional information about defendant's juvenile record. (**Id**. at p. 943.)

In ***People* v. *Foster*** (2010) 50 Cal.4th 1301, there were two incidents of external contact with jurors. In the first, some notes containing personal details about a juror were placed on juror's windshield during capital murder trial. Another juror saw the notes as well. As it turned out, a friend of the juror's had placed the notes on the windshield as a joke. The trial court did not determine the details of any and all conversations between jurors concerning the notes but did determine that neither of the jurors who saw the notes believed the incident would affect them in any way. In the second incident, a juror overheard some people in the parking lot commenting to each other that the juror was a juror in the pending case and one person said he would not want to be a juror in the case. The trial court interviewed the juror about the incident. The juror indicated it would not bother her or affect her deliberations in any way. The trial court then admonished the juror to disregard what had occurred and not to mention it to the other jurors. (**Id**. at pp. 1339-1340.) The California Supreme Court **rejected** defendant's claim that the trial court did not do an adequate job questioning the juror who received the note on his windshield since the juror identified the content of the notes to the extent he could recall their content, and sufficiently explained that they caused him concern until his friend revealed they were a joke. The California Supreme Court also **rejected** defendant's claim that after the trial court learned the juror had overheard others identify the juror, the trial court had a duty to question the jurors about whether other jurors overheard the same comments, whether the same juror had overheard other similar comments, or whether other jurors had been involved in similar incidents. (**Id**. at p. 1342.) The court observed that any presumption of prejudice stemming from the incident in which two people outside the courtroom identified the juror was rebutted in light of the juror's statements that the comments did not bother him in any way, and would not affect his service as a juror. (**Id**. at p. 1343.)

In ***People* v. *Harris*** (2008) 43 Cal.4th 1269, one juror reported on the first day of the penalty trial that his father had received death threats by telephone from an unknown party. When questioned, the juror asked that some type of protection be given to his family but stated that he was not distracted and had not discussed the matters with other jurors. The trial court asked the prosecutor to look into the matter and consider providing protection to the juror, but did not remove the juror. The trial judge admonished the juror that he could not consider the threat against the defendant. After an investigation into the threat, it appeared the threat stemmed from an unrelated case involving his father as a witness. The juror was again interviewed and reiterated he could be fair. (**Id**. at pp.1300-1303.) The California Supreme Court held that since there was no likelihood that the juror was actually biased against defendant, it was proper to retain the juror. (**Id**. at p. 1306.) In finding the trial court acted properly, the ***Harris*** court found it was proper for the trial court to take into consideration that the caller might have been attempting to force a mistrial. (**Id**. at p. 1304.) The ***Harris*** court rejected the claim that the trial judge prejudiced the juror in favor of the prosecution by telling him the district attorney would investigate and take steps to protect his family, although the court stated it would have been preferable for the trial court to avoid informing the juror that the prosecutor would take the lead on this matter. (**Id**. at p. 1305.)

In ***People v. Huff*** (1967) 255 Cal.App.2d 443 the defendant, during a recess, went to the water cooler, where several jurors were gathered. A police officer saw defendant strike up a conversation with a juror, bring her a glass of water, and asked if the other jurors wanted water. Based on the officer's recounting of his observations at a hearing, the trial court immediately declared a mistrial, ordered the jury discharged, and sentenced defendant to 5 days in jail for contempt of court. The trial court then allowed counsel to call defendant, who testified that he had not talked to any juror, but had merely filled a cup of water for one because he was there first, and as a further courtesy asked if any others wanted water. (**Id**. at pp. 444-446.) On appeal, the court held that the trial court abused its discretion in declaring a mistrial without calling for a hearing on the matter and affording defendant and his counsel a reasonable opportunity to present defendant's version of the incident. (**Id**. at p. 447-448.)

Editor's note: Bias may also be reflected by a juror's *intentional* receipt of extraneous information or intentional contacts by jurors. This intentional gathering of extraneous information by jurors (as a form of refusal to follow the lawis discussed in this IPG memo, sections H-6 at pp. 38-39 ["Juror Discussions About the Case With Persons Unconnected to the Case"] and H-7 at pp. 40-41 [Initiating Contact with Attorney's Defendant's Family, or Other Witnesses].

13. Bias Stemming from Having Been a Victim of the Crime With Which the Defendant is Charged

In ***People* v. *Diaz*** (1984) 152 Cal.App.3d 926, the court reversed a case because the trial court failed to remove a juror who, intentional or not, failed to disclose she had been a victim of the same crime with which defendant was charged, despite being asked in voir dire if she had every been a victim in a case "of this kind" or if there was anything in her background or mind which might cause the attorneys to choose another juror in her place after hearing questions to another juror about her kind of personal experience. (**Id**. at pp. 930–931, 935.)

14. Bias Stemming from a Relationship or Connection With the Defendant

In ***People* v. *Debose*** (2014) 59 Cal.4th 177, the court upheld the removal of a juror on grounds of bias where the juror was dating the father of a spectator (who claimed to be working on school project but was the aunt of the girlfriend of one of the defendants), the juror did not mention the spectator was related to her and avoided eye-contact with the spectator

until the relationship came to light, and the trial court found the juror's demeanor and the manner in which these connections were brought to the court's attention suggested that the juror was not being truthful and forthcoming even though juror stated that she did not know the spectator well and could fulfill her duties as juror. (**Id**. at pp. 200-202.)

J. Is Intemperate, Rude, or Hostile Behavior During Deliberations Good Cause for Removal of a Juror?

Intemperate, rude, or hostile behavior on the part of jurors usually does not provide grounds for discharge of a juror. Although such behavior can give rise to a claim that the juror against whom the hostility is directed is being "coerced," more often than not reviewing courts are disinclined to criticize or reverse trial judges for failure to conduct intensive investigations into allegations of overly heated argument. The general philosophy is that to permit inquiry into such claims would tend to "deprive the jury room of its inherent quality of free expression." (***People* v. *Johnson*** (1992) 3 Cal.4th 183, 1255; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 540.)

As noted in ***People* v. *Engelman*** (2002) 28 Cal.4th 436, "jurors, without committing misconduct, may disagree during deliberations and may express themselves vigorously and even harshly." (**Id**. at p. 446.) "[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means." (***People* v. *Engelman*** (2002) 28 Cal.4th 436, 446; ***People* v. *Johnson*** (1992) 3 Cal.4th 1183, 1255.) This tolerance is illustrated in the following three cases:

In ***People* v. *Bradford*** (1997) 15 Cal.4th 1229, on the third day of deliberations in the guilt phase of a capital case, the trial court received a note from the jury foreperson stating that the jury had "big problems" and could not continue deliberations. The trial court questioned the foreperson, who explained that the presence of "a few hostile jurors" caused others jurors to feel they could not continue deliberations. (**Id**. at p. 1350.) The trial court discovered that the disagreement arose because of comments made by two strongly opinionated jurors that had caused several other jurors to conclude they could not deliberate further with those jurors-and not because of any deadlock with regard to the substantive issue of defendant's guilt. A claim was made that the "hostile jurors" had expressed a fixed view of the case before all of the evidence had been reviewed. Although when asked, three jurors indicated they could not continue deliberations, the trial court reread several jury instructions concerning the jury's duty to deliberate and advised the jury to put aside any hard feelings and resume deliberations. The California Supreme Court held the trial court acted properly and stated that while it was "inadvisable" for the "hostile jurors" to express a fixed view of the case early in deliberations, their action did not constitute misconduct. (**Id**. at pp. 1351-1352.)

In ***People* v. *Keenan*** (1988) 46 Cal.3d 478, it was alleged in support of a motion for new trial that, during deliberations, a juror had confronted the lone holdout juror, an elderly woman, stating: "If you make this all for nothing, if you say we sat here for nothing, I'll kill you and there'll be another defendant out there—it'll be me." (**Id**. at p. 540.) The California Supreme Court concluded, as a matter of law, that this incident did not amount to prejudicial misconduct impeaching the verdict, stating that, although the "outburst ... was particularly harsh and inappropriate, ... no reasonable juror could have taken it literally." (**Id**. at p. 541.) Recognizing that "[j]urors may be expected to disagree during deliberations, even at times in heated fashion," the ***Keenan*** court viewed the alleged 'death threat' as "but an expression of frustration, temper, and strong conviction against the contrary views of another panelist." (**Ibid**.) The court observed "[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression." (**Ibid**; **see also *People* v. *Cleveland*** (2001) 25 Cal.4th 466, 475-476.)

In ***People* v. *Karapetyan*** (2003) 106 Cal.App.4th 609, the court held that a juror's statement during deliberations that he did not want to be part of lynch mob did not justify removing the juror and noted "[t]here is nothing in the law that requires jurors to adhere to Chesterfieldian manners in the jury room." (**Id**. at pp. 620-621.)

K. What Steps Should or May a Judge Take When the Issue of a Juror Being Unable to Perform His or Her Duties is Brought to the Judge's Attention?

A good summary of the dilemma facing a trial court when possible juror misconduct is brought to the court's attention was provided by the California Supreme Court in ***People v. Fuiava*** (2012) 53 Cal.4th 622:

"A trial court made aware of the possibility of a juror's misconduct, and particularly possible misconduct occurring during the jury's deliberations, is placed on a course that is fraught with the risk of reversible error at each fork in the road. [Citations.] The court must first decide whether the information before the court warrants any investigation into the matter. [Citation.] If some inquiry is called for, the trial court must take care not to conduct an investigation that is too cursory [citation], but the court also must not intrude too deeply into the jury's deliberative process in order to avoid invading the sanctity of the deliberations or creating a coercive effect on those deliberations [citation]. After having completed an adequate (but not overly invasive) inquiry into the misconduct issue, the trial court must then decide whether, under section 1089, there is 'good cause' to excuse the juror at issue. The court at this final fork might err in declining to dismiss a juror who should have been excused [citation] or excusing a juror who should have been retained [citation]. In making these decisions, a trial court might at times be placed between a rock and a hard place." (***Fuiava*** at pp. 710–711, fn. omitted; ***People* v. *Harrison*** (2013) 213 Cal.App.4th 1373, 1384.)

However, [t]he ultimate decision to retain or to discharge a juror rests within the court's sound discretion." (***People* v. *Debose*** (2014) 59 Cal.4th 177, 200; ***People* v. *Burgener*** (2003) 29 Cal.4th 833, 878.)

1. When Does the Court Have a Duty to Inquire About the Possibility of a Juror Being Unable to Perform His or Her Duties?

a. In General

"[N]ot every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court." (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 506; ***People* v. *Martinez*** (2010) 47 Cal.4th 911, 943; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 478, quoting ***People* v. *Ray*** (1996) 13 Cal.4th 313, 343; **accord *People* v. *Virgil*** (2011) 126 Cal.Rptr.3d 465, 532; ***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 729, citing to ***People* v. *Castorena*** (1996) 47 Cal.App.4th 1051, 1065 and ***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1348; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 69 ["Whether *and how* to investigate an allegation of juror misconduct falls within the court's discretion"]; **but see** this IPG memo, section L at pp. 82-83 [discussing duty to investigate pursuant to Penal Code section 1120].)

"A court's intervention may upset the delicate balance of deliberations. The requirement of a unanimous criminal verdict is an important safeguard, long recognized in American jurisprudence. This safeguard rests on the premise that each individual juror must exercise his or her own judgment in evaluating the case. The fact that other jurors may disagree with a panel member's conclusions, or find disagreement frustrating, does not necessarily establish misconduct." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 71; **see also *Tracey* v. *Palmateer*** (9 th Cir. 2003) 341 F.3d 1037 ["An evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source"].)

Thus, a court should first decide if the conduct allegedly engaged in by the juror even falls into the category of conduct potentially allowing discharge of a juror. "The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial." (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 53; ***People* v. *Virgil*** (2011) 126 Cal.Rptr.3d 465, 532; ***People* v. *Martinez*** (2010) 47 Cal.4th 911, 942; ***People* v. *Ray*** (1996) 13 Cal.4th 313, 343.)

Editor's note: A fairly comprehensive list of the type of conduct that potentially provides for removal of a juror may be found in this IPG memo, sections G and H at pp. 21-45.

"[I]t often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations before making further inquiries that could intrude upon the sanctity of deliberations." (***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 480.)

However, while it might sometimes be appropriate for a trial court to take this approach, the California Supreme Court has never mandated such an approach. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 696.)

Moreover, **"[w]hen a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*"** (***People* v. *Debose*** (2014) 59 Cal.4th 177, 200; ***People* v. *Homick*** (2012) 55 Cal.4th 816, 898; ***People v. Lomax*** (2010) 49 Cal.4th 530, 588, emphasis in original) and "it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (***People v. Cowan*** (2010) 50 Cal.4th 401, 505-506; ***People* v. *Martinez*** (2010) 47 Cal.4th 911, 942; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1409 quoting ***People* v. *Espinoza*** (1992) 3 Cal.4th 806, 821; **accord *People* v. *Virgil*** (2011) 51 Cal.4th 1210, 1284; ***People* v. *Hayes*** (1999) 21 Cal.4th 1211, 1255; **see also *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251 ["when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud. The law is clear, for example, that the court ***must*** investigate reports of juror misconduct to determine whether cause exists to replace an offending juror with a substitute", emphasis added]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 696 [where trial court is informed juror is refusing to deliberate, court is required to inquire and not simply instruct]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350 ["When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate"]; ***People* v. *Kaurish*** (1990) 52 Cal.3d 648, 694 ["Such an inquiry is central to maintaining the integrity of the jury system, and therefore is central to the criminal defendant's right to a fair trial."].)

The California Supreme Court has stated both that "a hearing is required '"where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case'" (***People* v. *Watson*** (2008) 43 Cal.4th 652, 695; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 69) and that such is hearing is required ***only*** in that circumstance (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 53;

People* v. *Cowan (2010) 50 Cal.4th 401, 506; ***People* v. *Martinez*** (2010) 47 Cal.4th 911, 942; ***People* v. *Ramirez*** (2006) 39 Cal.4th 398, 461; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 478; ***People* v. *Ray*** (1996) 13 Cal.4th 313, 343).

In making inquiry, "[c]ourts must exercise care when intruding into the deliberative process to ensure that the secrecy, as well as the sanctity, of the deliberative process is maintained." (***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251; **accord *People* v. *Bennett*** (2009) 45 Cal.4th 577, 624; ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 829; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 475; **see also *People* v. *Allen*** (2011) 53 Cal.4th 60, 71 ["Great caution is required in deciding to excuse a sitting juror."].) This is especially true where the juror who may potentially be excused is a "lone holdout juror." (***People* v. *Harrison*** (2013) 213 Cal.App.4th 1373, 1382.)

"The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 695; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 476; **accord *People* v. *Wilson*** (2008) 44 Cal.4th 758, 829.) "The trial court's authority to discharge a juror includes the authority to conduct an appropriate investigation concerning whether there is good cause to do so, and the authority to take 'less drastic steps [than discharge] where appropriate to deter any misconduct or misunderstanding it has reason to suspect.'" (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 926; **accord *People* v. *Keenan*** (1988) 46 Cal.3d 478, 533.)

"Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 588; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 478; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 532.)

b. Does the Court's Duty to Make a Reasonable Inquiry Exist Even if the Defendant Objects to Such an Inquiry?

"The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry." (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 506 [and see cases cited therein].)

c. Can a Judge Initiate the Inquiry Without Input From Counsel?

Although it is not uncommon for trial judges to solicit advice from counsel on how to proceed (**see e.g.**, ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 504; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 585; ***People* v. *Lewis*** (2009) 46 Cal.4th 1269, 1307), it is not required that judges do so. Nor are trial judges required to follow counsel's advice if it is sought. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 694-697.)

One benefit of soliciting advice from defense counsel on how to proceed is that if the court adopts the approach of defense counsel, it will be much more difficult for the defense to later claim error. (**See *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1250 [the doctrine of invited error applies when a defendant, for tactical reasons, makes a request acceded to by the trial court and claims on appeal that the court erred in granting the request]; ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 932 [noting defense counsel's statement in trial court indicating jurors should not be queried in support of later rejection of contrary argument by defense on appeal]; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 583 [noting defense counsel agreed to having individuals jurors questioned in support of finding trial judge did not excessively intrude into jury deliberations]; ***People* v. *Lewis*** (2009) 46 Cal.4th 1269, 1307 [finding defendant forfeited ability to challenge retention of juror on appeal because defense counsel "agreed with the court's intended inquiry, and stated at

the conclusion of the inquiry that he had no questions"]; ***People* v. *Johnson*** (1992) 3 Cal.4th 1183, 1255 [noting that defense counsel did not request further inquiry in support of conclusion there was no duty to make further inquiry in response to note]; ***People* v. *Burgener*** (1986) 41 Cal.3d 505, 521 [defendant cannot be permitted to prevent an inquiry into the condition of a possibly intoxicated juror on the basis that such an inquiry would "destroy the jury" and subsequently challenge the verdict of that very jury on grounds that the court's failure to conduct an inquiry prejudiced his interest"].)

In ***People* v. *Johnson*** (1993) 6 Cal.4th 1, the judge initiated an inquiry into removal of a juror who the judge had noticed did not appear to be paying attention to what the witnesses were saying. The judge alerted counsel and told them the juror was "doodling" in his notebook, was consistently smiling at the defendant, had been late to court three times, tended to close his eyes and possibly "nod off" during court proceedings, and (per the court's own research) had been arrested for possessing narcotics, contrary to his jury questionnaire response. After obtaining confirmation of these observations, in whole or part, from the courtroom deputies and prosecutor, the judge questioned the juror in chambers. Eventually, the judge found good cause to discharge the juror. (**Id**. at pp. 16-17, 21.) One of the claims made on appeal was that defendant was denied due process by the trial court's "ex parte" manner of investigating the juror's suitability as a juror. The defendant claimed the lower court "abandoned its role as a neutral arbiter" by secretly observing the juror, recording his conduct, and examining his questionnaire responses and arrest record, before announcing to the parties the court's doubts as to his suitability. (**Id**. at p. 22.) However, the ***Johnson*** court rejected defendant's claim, noting that, in the course of investigating whether good cause exists to replace a juror suspected of misconduct or inattentiveness, a trial court need not reveal its concerns to the defendant or his counsel before conducting further investigation. (**Id**. at p. 22.)

> **Editor's note**: The approval in ***Johnson*** of a judge making independent observations relating to juror misconduct should not be taken as approval of ex parte contacts with jurors by the judge outside the presence of counsel. "It is well settled that the trial court should not entertain, let alone initiate, communications with individual jurors except in open court with prior notification to counsel." (***People* v. *Wright*** (1990) 52 Cal.3d 367, 402.)

d. Does the Duty to Make Reasonable Inquiry Differ Depending on the Nature of the Allegation Made Against the Juror?

California courts have not explicitly held that the nature of the allegation made against the juror (i.e., failure to deliberate versus violations of the court's instructions versus introduction of extraneous influences) determines how imperative it is for a court to make further inquiry. Penal Code section 1120, however, dictates the nature of the inquiry when a juror has personal knowledge regarding the facts of a case and requires the juror to be sworn as a witness. (**See** this IPG memo, section L at pp. 82-83.)

2. How Expansive Does the "Inquiry" Have to Be?

a. In General

While "courts should promptly investigate allegations of juror misconduct 'to nip the problem in the bud' (***People* v. *Keenan*** (1988) 46 Cal.3d 478, 532 [alternate citation omitted by IPG]), they have considerable discretion in determining ***how*** to conduct the investigation." (***People* v. *Virgil*** (2011) 51 Cal.4th 1210, 1284 citing to ***People* v. *Prieto*** (2003) 30 Cal.4th 226, 274; **see also** ***People* v. *Engelman*** (2002) 28 Cal.4th 436, 442 ["the decision whether (and how) to

investigate rests within the sound discretion of the court"]; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 533 [court has "broad discretion as to the mode of investigation"].) "The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (***People* v. *Beeler*** (1995) 9 Cal.4th 953, 989.)

However, when the inquiry will involve questioning of the jurors, it is important to keep in mind that "[t]he secrecy of deliberations is the cornerstone of the modern Anglo–American jury system." (***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251.) "Courts must exercise care when intruding into the deliberative process to ensure that the secrecy, as well as the sanctity, of the deliberative process is maintained." (***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251.) "The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (***People* v. *Ramirez*** (2006) 39 Cal.4th 398, 461; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 476.) "[T]o avoid a chilling effect on the jury's deliberations, a trial court may decline to require jurors to testify when the testimony will relate primarily to the content of the jury deliberations." (***People* v. *Barber*** (2002) 102 Cal.App.4th 145, 150, citing ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 476.)

Even when "a trial court tries to circumscribe its investigation, the process of examining jurors to determine whether someone is refusing to deliberate often inadvertently and inappropriately reveals the jurors' thought process." (***People* v. *Bowers*** (2001) 87 Cal.App.4th 722, 733.) As pointed out in ***People* v. *Engelman*** (2002) 28 Cal.4th 436, jurors "do not always know what constitutes misconduct. They may be tempted to relinquish the secrecy of deliberations unnecessarily, simply because of fierce disagreement among the jurors." (**Id**. at p. 446.) ‘‘The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 53 citing to ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 476.) Thus, "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251; ***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 927; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.)

"Nonetheless, the need to protect sanctity of the deliberations does not mean that any inquiry into the deliberation process violates the defendant's constitutional or statutory rights: 'secrecy may give way to reasonable inquiry by the court when it receives an allegation that a deliberating juror has committed misconduct.'" (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 927 quoting ***People* v. *Engelman*** (2002) 28 Cal.4th 436, 444 citing to ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.)

It is a good idea for the trial court, before questioning the foreperson or juror, to advise the juror that the court is not seeking to intrude upon deliberations and that the court is not interested in the individual jurors' positions on guilt or innocence. (**See *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248, 1251.) This helps reduce the magnitude of the intrusion into the jury process and will help avoid claims that the court has removed a juror due to the juror's belief there is insufficient evidence or that the court attempted to "coerce" a verdict. (**See *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248, 1251, 1253 [discussed in greater detail in this IPG memo, sections K-2-b at pp. 65-66 and K-7-b at p. 74.)

Questioning "should cease once the court is satisfied that the juror in question "is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 53 citing to ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.)

b. Examples of Cases Where No Duty of Further Inquiry Found

People* v. *Maciel (2013) 57 Cal.4th 482

In ***Maciel***, the court upheld the discharge of a juror based primarily on the juror's own answers that she was distressed, losing sleep, and incapable of making a decision. The ***Maciel*** court rejected the defense argument the trial court should have inquired of the other jurors about what was said by the juror and whether it appeared the juror was participating, and could realistically continue to participate in deliberations. (**Id**. at p. 547.) **See** this IPG memo, section G-3 at p. 24 [for a fuller discussion of ***Maciel***].

People* v. *Virgil (2011) 51 Cal.4th 1210

In ***Virgil***, the defense counsel saw the foreperson of the jury (a first-year law student) studying a law book and speculated to the judge that a question from the jurors regarding unanimity was "curiously framed" in a way that suggested the foreperson had read about the 1977 death penalty law - although counsel acknowledged he did not know if it was a criminal law book, and he had no independent knowledge that the juror was researching criminal issues or communicating any legal knowledge to his fellow jurors. (**Id**. at pp. 1283-1284.) When the judge questioned the foreperson about defense counsel's accusations, the foreperson said he had not studied or researched anything relating to criminal law or procedure, the book he was reading during breaks was a property law textbook, and he had not talked to other jurors about criminal law. The trial judge then declined to do any further inquiry. (**Id**. at p. 1284.) The California Supreme Court held the trial court did not abuse its "considerable discretion" in declining to hold a further evidentiary hearing since, aside from counsel's speculation, there was nothing to indicate the foreperson had violated the court's instructions or committed misconduct of any kind. (**Id**. at pp. 1284-1285.)

People* v. *Russell (2010) 50 Cal.4th 1228

In ***Russell***, the trial court received a note from Juror No. 2 expressing concern about Juror No. 8's ability to deliberate objectively. The note explained that Juror No. 2 was concerned that Juror No. 8 was "unable to set aside her empathy for the defendant," "unable to set aside her own personal experience relating to mental illness," and that "she seems to be suffering personal angst during the process stating 'pick on somebody else, I can't do this anymore.' 'I've had it!' 'Can I abstain?'" (**Id**. at p. 1248.) The judge then interviewed the foreperson outside the presence of the other jurors. The foreperson explained that Juror No. 8 was not refusing to deliberate (i.e., because she was actively discussing the case with the jurors) but was expressing sympathy for the defendant and was identifying with defendant's emotional state. The foreperson said Juror No. 8 seemed particularly emotionally drained by the deliberations to the point that she became so exhausted by the process that she refused to participate at one point, saying, " 'I wasn't going to talk today. I just wasn't going to say anything.' " (**Id**. at p. 1249.) After the foreperson was interviewed, the judge conducted a direct inquiry of the juror No. 8. The court explained to Juror No. 8 that the law required jurors must not allow pity or sympathy for a defendant to interfere with the deliberation process or influence his or her vote in the jury process. The trial court asked if Juror No. 8 believed her feelings of sympathy for defendant interfered with her deliberative process, to which she responded in the negative. Juror No. 8 explained that she understood both that it would be unfair and against the law to allow her sympathy for defendant to interfere with the deliberative process, and that she understood that she could not allow a particular personal event in her background to interfere with or influence her objectivity. The trial court then directed Juror No. 8 not to allow events in her past to "interfere with [her] objectivity in this case" and "direct[ed her] to further deliberate with the jurors. That means to discuss the evidence. Objectively." Juror No. 8 explained that the jury had "gone over and over" the evidence, and the court directed her to return to the deliberation room and continue to deliberate. (**Id**. at p. 1249.) Before questioning both the foreperson and Juror No. 8, the trial court advised them that it

did not wish to know individual votes, that it wished to limit its impact on the deliberative process, and that it sought only to ascertain the extent of any potential misconduct. (**Id**. at p. 1251.)

The trial court declined to question any other jurors in the absence of any further problems. Although defense counsel did not object to Juror No. 8's continued service on the jury, the defendant contended on appeal that the trial court erred by questioning Juror No. 8, that the court's questions of Juror No. 8 were intrusive, that the court's instructions to Juror No. 8 were coercive, and that the court made an unnecessary comment to the foreperson. (**Id**. at p. 1251.) The ***Russell*** court rejected all of defendant's claims, finding the trial court "did nothing more than follow established law by investigating, to as limited an extent as possible, allegations that a juror was unable to perform her duties." (**Id**. at p.1251.)

People* v. *Cowan (2010) 50 Cal.4th 401

In ***Cowan***, one juror claimed another juror, during penalty phase deliberations, was expressing second thoughts about the jury's verdict on guilt. The reporting juror also claimed he saw the other juror sitting next to two of the defendant's relatives who had been witnesses in the case. The reporting juror saw the relatives talking but could not tell if the accused juror was conversing with the relatives. Shortly thereafter, the accused juror and yet another juror asked to speak with the trial judge. The accused juror stated the reporting juror had told *her* that he had reported she was talking to defendant's relatives. The trial court cut off the accused juror, telling her he wasn't going to take any further action because there was not anything indicated by the reporting juror that would have suggested any impropriety on the part of the accused juror. The judge then asked the accused juror if there was there anything else she wished to talk about, to which the accused juror responded, "No." When the third juror was brought out into court, the third juror said she was "fine" and had no problem. The trial judge said he was available if there was a problem. The judge sent both jurors back to the jury room without taking further action. (**Id**. at pp. 504-505, 508.)

The ***Cowan*** court held trial court acted within its discretion in declining to inquire further because, at best, the trial court possessed ambiguous information suggesting the accused juror was talking to defendant's relatives who also were witnesses at the penalty phase, it appeared as if the reporting juror did not believe the accused juror actually spoke to the witnesses and the accused juror's own comments suggested she was about to deny speaking with the witnesses. Moreover, there was no suggestion, other than the reporting juror's speculation, that anything that the accused juror had said or heard had anything to do with the trial. (**Id**. at pp. 507-508.)

People* v. *Alexander (2010) 49 Cal.4th 846

In ***Alexander***, during the penalty phase, the jury sent the trial court a note asking for the court to recess early in order allow "feelings to cool down." The next day, the jury sent a second note read, "We have a split eleven to one + the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children." (**Id**. at p. 929.) The trial judge and prosecutor thought this reflected that one juror was improperly considering sympathy for defendant's children as a mitigating factor, and/or might be basing a decision on sympathy evidence in isolation, rather than weighing it in conjunction with all the other evidence. *Without further questioning of the jurors*, the trial court gave an instruction (that incorporated two changes proposed by defense counsel) explaining the proper role of sympathy in the jury's deliberations. Among other things, the instruction informed the jury the focus of its inquiry at the penalty phase must be on defendant's character and background and not the effect the verdict might have on others. (**Id**. at pp. 929-930.) The defendant later argued that the jurors should have been queried. However, the California Supreme Court held otherwise, noting the deliberations were at a crucial point and had become so contentious that the jury felt compelled to cut deliberations short on the previous day and thus the trial court "reasonably could have believed that inquiring of the

jury regarding the note could have led to statements that might further exacerbate the conflict or give an inaccurate impression of what was occurring." (**Id**. at p. 932 [and also pointing out both that defendant provided no suggestion as to how the court could have explored the issue with the jurors in a way that would have illuminated the difficulty without making matters worse and, in fact, had objected to any such inquiry in the trial court].)

People* v. *Martinez (2010) 47 Cal.4th 911

In ***Martinez*** (a *pre-deliberation* removal of a juror case), a juror who later served as the foreperson of the jury was the lead clerk in the county probation department at juvenile hall and had worked there for 20 years. During voir dire the juror said she recognized defendant's name because "he had been at" juvenile hall. The defense made several challenges to the juror for bias (i.e., based on the juror's statements about leaning toward the death penalty and again after she said it would be difficult for her to serve on the jury because she knew the defendant and because of the severity of the charges). However, the challenges were denied after further questioning of the juror clarified she did not have any memorable contact with the defendant and could follow the law. (**Id**. at pp. 939-940.) The juror was sworn and the case was put over a week. During that week a district attorney investigator called the juvenile department in an attempt to locate defendant's juvenile disciplinary reports and inadvertently spoke with the juror. The juror informed the investigator that he needed a court order to access those reports. The investigator then consulted with a deputy district attorney, and, less than 30 minutes after their first conversation, he again called and spoke with the juror. At that time, the juror told the investigator that she was a juror on defendant's case. The juror somewhat jokingly asked the investigator "[i]f I could get her off the jury[.]" The investigator said he could not, and ended the call. The investigator later called back the juror and said she should not be involved in the matter further and asked to speak with her supervisor. The investigator had no further contact with the juror. The details of this contact were brought to the attention of the judge by way of the investigator's memo. Defense counsel asked the judge to inquire whether the juror was "willing and able and fit for further duty in light of the comment about wanting to get off the jury. The judge declined to do so, reasoning that the juror's comment merely reflected "a normal desire not to be a juror" and did not relate to her qualifications as a juror. (**Id**. at p. 941.) The defendant later claimed this failure to inquire was error and that a hearing was necessary to determine whether the juror wanted to get off the jury due to her knowledge that defendant had a juvenile record, her belief that he had made poor choices, or the severity of the charges, as well as because factors also may have caused her to question whether she could remain an impartial juror, and thus caused her to ask the investigator for assistance in being removed from the case. The California Supreme Court upheld the trial court's determination to retain the juror, finding the defendant had failed to show that the juror was unable to fulfill her functions as a juror. The ***Martinez*** court also rejected defendant's claim that the trial court was under a duty to inquire any further than it did, noting that the mere fact the investigator contacted the juror did not "constitute 'good cause' that cast doubt on her ability to serve as a juror, the contact by the investigator was inadvertent, the investigator did not provide the juror any additional information about defendant's case, or cause the juror to obtain additional information about defendant's juvenile record. (**Id**. at p. 943.)

Editor's note: In contrast to the trial court's response to the juror who was contacted by the investigator, the trial court in ***Martinez*** *did* conduct a follow-up investigation in response to the claim of another juror that she had received a harassing phone call and believed it may have been connected to defendant's case as an attempt to intimidate her. In that instance, the ***Martinez*** court stated that circumstance "was clearly the kind of matter that would affect a juror's impartiality" and that "once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated." (***Martinez***, at p. 942, fn. 5, citing to ***People v. Sanders*** (1995) 11 Cal.4th 475, 540.)

People* v. *Foster (2010) 50 Cal.4th 1301

In ***Foster*** (discussed in greater detail in this IPG memo, section I-12-a, at p. 57), the court held that it was not necessary for the trial court to do a more detailed inquiry than brief questioning of the affected jurors where one juror had received notes on his windshield providing biographical information about him but it turned out to be a friend's joke and another juror had overheard persons in the parking lot identifying the juror as a juror in the pending case. (**Id**. at pp. 1338-1343.

People v. Bennett (2009) 45 Cal.4th 577

In ***Bennett***, a juror made vague statement to bailiff regarding a concern as to what was taking place in the jury room. The California Supreme Court held, however, that the trial court was not required to inquire of juror as to what his concerns were where the juror did not write a note detailing any concerns when instructed to do so by bailiff, and the juror did not mention any concerns about jury deliberations when given the opportunity to do so by the trial court. (**Id**. at pp. 623-624.)

People* v. *Page (2008) 44 Cal.4th 1

In ***Page***, the California Supreme court upheld the trial court's determination not to question jurors after learning that jurors were circulating a cartoon in which the character stated "Hey, I got off easy—it was the jury who had to deliberate for 36 months." (**Id**. at pp. 58-59.)

People* v. *Bradford (1997) 15 Cal.4th 122

See this IPG memo, section J at p. 59 [for an extended discussion of ***Bradford***.

People* v. *Marshall (1996) 13 Cal.4th 799

In ***Marshall***, the defendant claimed that the trial court erred in refusing to voir dire jurors on whether they had read a newspaper article that appeared between the guilt and penalty phases of the trial. But the court had admonished the jurors not to read such articles, and in the absence of evidence to the contrary it is presumed that the jurors followed the admonition. Nothing but defense counsel's supposition indicated that any juror had read the article, and the trial court thus had no duty of inquiry. (**Id**. at p. 864.)

People* v. *Johnson (1992) 3 Cal.4th 1183

In ***Johnson***, a juror sent a note to the judge that read: "Judge, I feel 11 of us have come to a decision, and one has not. It is not only myself but others feel this one person does not believe or ever did in the death penalty. Can she be disqualified?" (**Id**. at p. 1253.) After conferring with counsel, the trial court sent back a note that declined to discuss this allegation and instructed the juror to keep her communications with the court to herself. The jury resumed deliberations and determined that the penalty should be death. The ***Johnson*** court rejected the argument that the judge had a duty to inquire into whether some jurors were coercing the dissenting juror. The court noted that "[t]o probe as defendant suggests, in the absence of considerably more cogent evidence of coercion, would '"deprive the jury room of its inherent quality of free expression."' [Citations.] Consequently, the trial court was not required to make the inquiry for which defendant now argues. Moreover, any such inquiry could in itself have risked pressuring the dissenting juror to conform her vote to that of the majority." (**Id**. at p. 1255.)

People* v. *Harrison (2013) 213 Cal.App.4th 1373

In ***Harrison*** (discussed in depth is this IPG memo, section H-1 at pp. 29-31), a juror who himself was the target of judicial inquiry into his alleged inability to deliberate, provided the judge a list of legal questions he wanted answered in order to help him deliberate. One of the questions (in five pages of questions) asked by the juror was "[w]hat if a juror suddenly realizes that the juror can no longer be impartial?" which the juror said referred to "other persons." (**Id**. at pp. 1380-1381.) In addition, there was some hint that "evidentiary issues like the reliability of admitted evidence and the burden of proof were "raised" during discussions among the jurors." (**Id**. at p. 1384.) On appeal, the defendant argued this question triggered a duty of inquiry into the potential misconduct of the 11 other jurors. However, the appellate court held the trial court acted properly here in limiting the scope of its inquiry and not delving into the content of the jury's deliberations based on the juror's questions." (**Id**. at p. 1384.) In support of its conclusion, the court stated that the juror's "general question about juror impartiality indicated, at most, that he believed other jurors were not impartial[,]" that "[s]uch feelings are not uncommon during heated deliberations[,] and that "the juror provided no reason to believe other jurors were not impartial." (**Ibid**.) The court rejected the notion that "[t]he expression of such a sentiment without any evidence of juror bias" compelled further investigation. (**Ibid**.) Finally, the court rejected the notion that discussion of matters like the reliability of admitted evidence and the burden of proof were not proper subjects of jury deliberation or that there was any evidence that the other jurors were not following the law on these subjects. (**Ibid**.)

c. Examples of Cases Where Duty of Further Inquiry Found

In ***People* v. *Burgener*** (1986) 41 Cal.3d 505, the foreperson brought it to the court's attention that another juror appeared to be intoxicated from drugs or marijuana during deliberations and that four jurors independently had noticed the smell of marijuana on the accused juror. The trial court did not conduct further investigation and merely admonished the jurors against the use of intoxicants. The appellate court held that the trial court had erred by failing to conduct a hearing adequate to ascertain the accused juror's condition and whether her ability to deliberate was impaired. (**Id**. at pp. 518-519.)

In ***People* v. *McNeal*** (1979) 90 Cal.App.3d 830, the trial court received a note from the foreperson on the first day of deliberations indicating that one of the jurors possessed personal knowledge concerning the testimony of a defense witness. Defense counsel requested a formal hearing pursuant to Penal Code section 1120 (**see** this IPG memo, section L at pp. 82-83), but the trial judge declared that he was "not going into the facts." (**Id**. at p. 836.) The judge questioned the juror outside the presence of the other jurors, but was instructed not "to go into factual matters." (**Id**. at p. 836.) When asked whether she could deliberate fairly and impartially, the juror stated cryptically that she "still can't find that I can say 'guilty' when I can't believe it." (I**bid**.) Upon further questioning, the juror indicated she could disregard any information that was "outside the evidence," and she was permitted to rejoin the jury and resume deliberations. (**Ibid**.) The Court of Appeal reversed the conviction, holding that the trial court erred in failing to conduct a more extensive hearing, noting: "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality. [Citation.] ... Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the ***factual*** explanation for that possibility." (**Id**. at p. 838.)

Editor's note: ***McNeal*** was quoted with approval in ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 476-477.)

3. Should the Foreperson Be Questioned?

When judges are informed by way of a note from the jury that one of the jurors is refusing to deliberate, refusing to follow the law, or engaging in other misconduct, it is common for the judge to begin the inquiry by simply questioning the jury foreperson regarding the allegation. (**See e.g.**, ***People* v. *Nunez*** (2013) 57 Cal.4th 1, 53; ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248; ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 923; ***People v. Watson*** (2008) 43 Cal.4th 652, 694; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 23; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 470; ***People* v. *Diaz*** (2002) 95 Cal.App.4th 695, 700.)

Such questioning may take place outside the presence of the other jurors. (***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1253 [noting that conducting "an inquiry before the entire panel, rather than discreetly questioning the foreperson regarding alleged misconduct before taking further action, arguably would be more intrusive and less reasonable than" questioning the foreperson followed by questioning the accused juror outside the other juror's presence].)

It may be appropriate to ask the foreperson to keep the colloquy between the judge and foreperson confidential, but whether failure to do so has any significance will depend on the case. (**See *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1253; ***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 924.)

However, questioning *only* the foreperson potentially risks obtaining a skewed picture of what occurred and often will not satisfactorily resolve the issue. If questioning of the foreperson does not resolve the issue or indicates further questioning is necessary, judges will query other jurors. (**See e.g., *People* v. *Watson*** (2008) 43 Cal.4th 652, 694.)

4. Should Other Jurors Be Questioned?

So long as the type of questioning is proper, it is within the discretion of the trial court to question other jurors in deciding whether there is good cause to find one of the jurors is unable to perform his or her duty. (**See e.g**., ***People* v. *Allen*** (2011) 53 Cal.4th 60, 70; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 592.) On the other hand, it is not always necessary to question all of the other jurors after receiving additional information from the foreperson and/or the juror in question. (**See e.g.*, People* v. *Foster*** (2010) 50 Cal.4th 1301, 1342 [discussed in this IPG memo, section I-12-a at p. 57]; ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, 928 [the trial court was not required to privately question each juror (though individual questioning might have been preferable) where the trial court admonished two jurors who had read a newspaper article praising the trial tactics of the prosecution to disregard the article, and instructed the remaining jurors who had not read the article not to do so].)

Courts are especially deferential to a trial court's determination not to interview other jurors when it appears likely such questioning might tend to reveal the contents of the deliberations. (**See e.g**., ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 932; **see also *People* v. *Thompson*** (2010) 49 Cal.4th 79, 137 [trial court acted within its discretion in not examining the other jurors about jurors' request for discharge where source of juror's request for discharge was tension arising from deliberations itself and doing so "would have threatened to intrude on the deliberation process"].)

However, questioning of the jurors must be done in an equitable manner. Although not every juror needs to be interviewed, it is improper to limit inquiry only those jurors claiming misconduct has occurred and not those jurors who are claiming no misconduct has occurred. (**See *People* v. *Barber*** (2002) 102 Cal.App.4th 145, 151-152.)

Editor's note: The question of *whether* the juror should be removed is not a question that should be posed to the jurors. In ***People* v. *Roberts*** (1992) 2 Cal.4th 271, a juror telephoned the court to say that she was ill and could not come to court for 3 days. The trial court acted within its discretion in excusing her and substituting an alternate juror. However, the California Supreme Court stated the judge should not have solicited views of other jurors on whether to substitute the alternate or wait for the sick juror to return. (**Id**. at p. 323.) The Supreme Court admonished that trial courts "must not permit jurors to exercise any control over the composition of the jury. That function is reserved exclusively for the trial court." (**Id**. at p. 325.)

5. Should the Juror Alleged to Be Unable to Perform His or Her Duties Be Interviewed?

Trial courts are not prevented from interviewing the juror who has been accused of failure to deliberate, failure to follow the law, or other misconduct and often do so. (**See e.g.**, ***People* v. *Nunez*** (2013) 57 Cal.4th 1, 53; ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248-1253; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 504-505; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 592; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 696; ***People* v. *White*** (2015) 237 Cal.App.4th 1087, 1106; ***Boeken* v. *Philip Morris Inc.*** (2005) 127 Cal.App.4th 1640, 1686.) This is often done outside the presence of the other jurors. (**See e.g.**, ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 504-505; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 592; ***People* v. *Foster*** (2010) 50 Cal.4th 1301, 1339-1341; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 694; ***People* v. *White*** (2015) 237 Cal.App.4th 1087, 1106; ***Boeken* v. *Philip Morris Inc.*** (2005) 127 Cal.App.4th 1640, 1686; ***People* v. *Diaz*** (2002) 95 Cal.App.4th 695, 700.)

6. Should the Attorneys Be Allowed to Question the Jurors?

The California Supreme Court has held that "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted." (***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485; ***People* v. *Barber*** (2002) 102 Cal.App.4th 145, 150 [error to allow attorneys to interview jurors].) However, the California Supreme Court has also stated that trial courts "may allow counsel to suggest areas of inquiry or specific questions to be posed by the court." (***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.) And trial courts often do. (**See e.g.**, ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248; ***People* v. *Foster*** (2010) 50 Cal.4th 1301, 1340-1341; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 504; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 585; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 694.)

It is also a different story if the inquiry involves questioning of persons who are not on the jury. (**See e.g**., ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350-352 [in case involving question of whether juror was sleeping during trial, the trial court allowed each side to submit testimony and cross-examine non-juror witnesses].)

7. Should the Court Avoid Questions Inquiring Into the Juror's Mental Processes?

As noted earlier, caution must be exercised in determining whether a juror has refused to deliberate, especially when the alleged misconduct consists of statements made during deliberations. (***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 475, 484; **see also *People* v. *McIntyre*** (1990) 222 Cal.App.3d 229.) Questions that call for answers that reflect a juror's mental processes are not necessarily barred when investigating allegations that a juror is unable to deliberate - as they

are, under Evidence Code section 1150, when there is a post-verdict challenge to the validity of the verdict. (**See *People* v. *Allen*** (2011) 53 Cal.4th 60, 72, fn. 10; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 484-485.) However, the interest in protecting the sanctity of jury deliberations dictates that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations" and demands "[t]he inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 484-485; **accord *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251; ***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 927.)

Editor's note: Evidence Code section 1150 provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Trial courts can advise the juror(s) not to disclose anything relating to the deliberative process in response to the trial court's questions. (**See e.g.**, ***People* v. *Nunez*** (2013) 57 Cal.4th 1, 53; ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251.)

If jurors begin disclosing information that is not the topic of the inquiry or unnecessarily reveals the content of the deliberations, the trial judge should intervene to prevent the answers from going too far afield. (**See *People* v. *Lomax*** (2010) 49 Cal.4th 530, 592.)

Of course where the very making of a comment establishes the misconduct, the fact that it also reflect a juror's mental processes does not preclude it from being considered. (**See e.g., *People* v. *Lomax*** (2010) 49 Cal.4th 530, 591; ***People* v. *Avila*** (2009) 46 Cal.4th 680, 726.) Indeed, even in a post-verdict context (when Evidence Code section 1150 would otherwise bar the admission of evidence "to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined"), statements made by jurors during deliberations are admissible when "the very making of the statement sought to be admitted would itself constitute misconduct[.]" (***People* v. *Danks*** (2004) 32 Cal.4th 269, 308, fn. 12; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 484.) And in such circumstances it is not improper to query jurors about whether such statements were made or whether they reflect a state of mind that would render the juror unable to perform his or her duty. (**See e.g., *People* v. *Watson*** (2008) 43 Cal.4th 652, 694-697 [proper to ask juror whether he said he could not impose the death penalty under any circumstances and to inquire whether statement reflected juror's actual position].)

a. Examples of Cases Where Questioning Was Found Intrusive

People* v. *Barber (2002) 102 Cal.App.4th 145 [discussed in this IPG memo, section F-3, at p. 18].

In ***Williams* v. *Cavazos*** (9th Cir. 2011) 646 F.3d 626 [***overruled*** on a different but somewhat related ground in ***Johnson v. Williams*** (2013) 133 S.Ct. 1088], the jury foreperson delivered a note to the trial court stating that, during deliberations, one juror had expressed an intention to disregard the law regarding and had expressed concern relative to the severity of the charge (1st degree murder). The judge queried the foreperson outside the presence of the other jurors. The foreperson confirmed that no juror was discussing punishment but that one juror was repeatedly expressing concern that there was not sufficient evidence. At that point, the trial court interrupted the foreman and informed him that

he could not speak to "how jurors view the evidence" but could only express concern with whether there was "misconduct." (**Id**. at pp. 631-632.) The trial court held a second interview with the foreperson (upon the People's motion and over defendant's objection). According to the foreperson, on the first day of deliberations, the accused juror had brought up historical instances of jurors refusing to follow the law. The foreperson stated that when he asked the accused juror if he felt there was a responsibility to be disobedient in the case they were deciding, the accused juror answered "no." (**Id**. at p. 632.) The foreperson testified that the accused juror had expressed his view that first degree murder was a severe charge which affected the "way he interprets the evidence and the standard he uses for doubt" and connected the severity of the charge (first degree murder) with his need for a higher standard." However, the foreperson conceded that the accused juror had not explicitly expressed an unwillingness to follow the law or the jury instructions on the standard of proof. He also agreed that the juror had attempted to explain "the basis for his reasonable doubt" to the other jurors many times and had actively engaged in "intellectual conversation with them, listening to their questions, trying to answer them." (**Id**. at pp. 632-633.) The trial court then called in the accused juror for questioning. The accused juror testified that no juror had indicated being motivated by the issue of possible punishment in the case and denied using a higher burden of proof based on the severity of the first-degree murder charge. The accused juror said he believed the same burden of proof should be used for any criminal offense. The accused juror also expressed an understanding of the burden of proof of beyond a reasonable doubt. The accused juror did, however, recall stating that it was an important case and the jury should be "very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. When asked what that meant, the accused juror said that he did not think there was a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt. The accused juror also expressed his view that "jurors should not use juror nullification," stating jurors should "base their decisions on the evidence that was presented at a particular trial and only on that evidence." The accused juror explained he shared his knowledge of historical cases regarding jury nullification in response to another juror who had "raised the question whether juries always convict according to the law[.]" (**Id**. at pp. 633-634.) The trial judge, prosecutor, and defense counsel then questioned each of the remaining jurors, one by one. Several jurors indicated the accused juror was not following the law but most of those jurors acknowledged he had never said as much. Other believed he was following the law but there was just a difference in opinion as to how the law applied to the facts of the case. Five of the jurors mentioned jury nullification, but only one thought the accused juror might actually be engaging in the practice. Two jurors commented that the accused juror disapproved of the theory of accomplice liability. Six jurors explained the accused juror did not believe that the evidence was sufficient to prove guilt of murder beyond a reasonable doubt. (**Id**. at p. 634.) Ultimately, the trial court discharged the accused juror under section 1089, not because the juror was failing to deliberate or follow the law, but because of bias. Specifically, the trial court provided five overlapping reasons for concluding the juror was biased, including that (1) during questioning, the juror "added his own words to the court's instructions as to what the law is," which "indicates where his mind is bent towards and that is biased against the prosecution in the matter"; (2) the juror repeatedly mentioned "the severity of the charge in conjunction with his bringing up the subject of juror nullification," which "establishes his state of mind that he's bent in that regard, that he's concerned about the severity of the charge, which means the severity of the punishment"; (3) when asked what burden of proof he was relying on, the juror "said it was a [sic] very, very convinced beyond a reasonable doubt," which the judge interpreted as meaning a standard "higher than beyond a reasonable doubt because the charge is murder"; (4) the juror "disagrees with the felony murder rule"; and (5) the juror was dishonest in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification. (**Id**. at pp. 634, 648.)

The Ninth Circuit found fault with these findings on several grounds. As pertinent here, the Ninth Circuit took issue with the fact that the trial court had, in coming to its conclusion the juror should be removed, relied on the juror's statement that "I can remember saying [during the jury deliberations] this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." (**Id**. at p. 649.) The Ninth Circuit criticized the

fact that the trial court had even questioned the accused juror in a manner revealing the juror's thought processes (e.g., by asking "In your own personal mind, do you believe you are using a burden of proof that is based on a charge of first degree murder that is higher than one that would be used for some charge that is less serious than first degree murder?" and then following that up with a string of questions concerning jury deliberations in other, hypothetical prosecutions for other crimes. (Id. at p. 649, emphasis by the Ninth Circuit.)

b. Examples of Cases Where the Court's Inquiry Was *Not* Found Intrusive

In ***People* v. *Russell*** (2010) 50 Cal.4th 1228 (discussed in greater depth in this IPG memo, sections K-2-b at pp. 65-66 and K-7-b at p. 74), the court found that the trial judge did not engage in excessive questioning where, inter alia, the judge prefaced his questions of the foreperson and the accused juror by noting (i) he did not wish to know individual votes, that he wished to limit its impact on the deliberative process, and that he sought only to ascertain the extent of any potential misconduct; and (ii) the judge essentially asked a single question as to whether the juror believed her feelings of sympathy for defendant interfered with her deliberative process, sandwiched between the judge's admonitions that the juror not consider pity or sympathy for the defendant and not to allow events in the juror's past affect her objectivity. (**Id**. at pp. 1249-1252.)

In ***People* v. *Alexander*** (2010) 49 Cal.4th 846 (discussed in greater depth in this IPG memo, sections K-2-b at p. 66), the trial court received a note from the foreperson indicating that one juror was refusing to deliberate and/or was refusing to follow the court's instructions on the law of circumstantial evidence. The trial court asked more detailed questions about what was occurring than simply whether the juror at issue was deliberating because it was concerned the juror may have been refusing to follow its instructions concerning circumstantial evidence. The California Supreme Court held the trial court's questioning was reasonable under the circumstances and did not needlessly invade the secrecy of the jury's deliberations. (**Id**. at p. 927.) Later, during the penalty phase in the same trial the jury sent the trial court a note asking for the court to recess early in order allow "feelings to cool down." The next day, the jury sent a second note read, "We have a split eleven to one + the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children." (**Id**. at p 929.) The trial judge and prosecutor thought this reflected that one juror was improperly considering sympathy for defendant's children as a mitigating factor, and/or might be basing a decision on sympathy evidence in isolation, rather than weighing it in conjunction with all the other evidence. Without further questioning of the jurors, the trial court gave an instruction (that incorporated two changes proposed by defense counsel) explaining the proper role of sympathy in the jury's deliberations. Among other things, the instruction informed the jury the focus of its inquiry at the penalty phase must be on defendant's character and background and not the effect the verdict might have on others. As it had done in its response to the jury's guilt phase, the trial court emphasized that it was not suggesting any particular result would be proper, and that its supplemental instruction was directed at all of the jurors, not those favoring one verdict or the other. (**Id**. at pp. 929-930.) The California Supreme Court upheld the trial court's conduct, rejecting defendant's argument that the trial court should not have provided instruction to the issue mentioned in the note because doing so invaded the secrecy of the jury's deliberations. (**Id**. at p. 932 [and noting that the claim of juror misconduct required judicial action even though it might have implicated the content of deliberations].)

In ***People v. Lomax*** (2010) 49 Cal.4th 530 (discussed in greater depth in this IPG memo, section F-2 at p. 13), the jury sent out a note stating that one of the jurors had "reevaluated his/her personal feelings regarding application of the death penalty" and the juror's objection to the death penalty "was causing the juror to be unable to continue to deliberate." (**Id**. at p. 583.) The trial court interviewed the foreperson and the accused juror outside the presence of the other jurors. (**Id**. at p. 583.) Defense counsel asserted the accused juror was being "browbeaten" by the majority jurors and the note should be disregarded. At defendant's request each juror was questioned outside the presence of the others. (**Id**. at p.

585.) The trial court then brought back the accused juror for questioning before ultimately excusing the juror on grounds the juror was biased against capital punishment, the juror lied on his jury questionnaire, and the juror refused to deliberate in the penalty phase. (**Id**. at pp. 586-590.) The defendant later challenged this ruling, claiming the trial court "improperly delved into the jury's deliberative process" when it questioned the accused juror and the other jurors. The defendant argued that, since the note said the juror's opposition to the death penalty made him "unable to *continue* to deliberate," the trial court should have made no inquiries but simply ordered the jury to continue deliberating. (**Id**. at p. 592.) The California Supreme Court disagreed, concluding the once the "trial court was notified that a juror had a disqualifying bias, it had a duty to investigate the allegation." (**Id**. at p. 592.) Moreover, the court found the inquiry here was sufficiently restrained, noting (i) that the judge questioned the juror and the foreperson separately about the statements in the note; (ii) the judge separately asked each of the jurors simply whether everyone had agreed to the wording of the note; (iii) defense counsel supported this proposal; (iv) the judge reminded the jurors repeatedly not to divulge the substance of their deliberations; (v) the judge admonished jurors to avoid inappropriate topics and intervened if their answers threatened to go too far afield; and (vi) the judge did not permit the attorneys to question the jurors. (**Id**. at p. 592.)

In ***People* v. *Watson*** (2008) 43 Cal.4th 652 (discussed in greater detail in this IPG memo, section F-2 at p. 14), the court held it was not only proper, but required, that a trial judge question the foreperson and the accused juror after receiving a note from the foreperson asking, "What do we do if we have a juror that has admitted he does not believe in the death penalty, under any circumstances?" (**Id**. at p. 696.)

8. Should the Trial Judge Admonish the Jurors in Any Way Before Questioning Them?

Prior to questioning jurors, it is a good idea for the trial judge to explain to the jurors:

(i) the court is not interested in ascertaining the numerical breakdown, i.e., how many jurors are voting guilty versus not guilty (**see *People* v. *Russell*** (2010) 50 Cal.4th 1228, 1252; ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 927

(ii) the court does not wish jurors to divulge the substance of their deliberations other than statements that themselves reflect misconduct or bias (**see *People v. Lomax*** (2010) 49 Cal.4th 530, 592.)

9. Should the Court take into Account the "Opinions" of Jurors Regarding Whether Someone is Refusing to Deliberate or Follow the Law?

In ***People* v. *Allen*** (2011) 53 Cal.4th 60 [discussed in depth in this IPG memo at section F-3 at pp. 16-17], the trial court had to assess, among other things, whether a juror had prejudged the case. As part of its investigation, the trial court not only asked the other jurors what the targeted juror had said but solicited (and relied upon) the jurors' opinion as to whether the juror had prejudged the case, i.e., how the statement should be interpreted. In finding the trial court erred in removing the juror, the California Supreme Court specifically noted that "a trial court should be wary of relying on the opinions of jurors, rather than on its own consideration of objective facts. Under Evidence Code section 1150, for example, a court cannot consider evidence of a juror's subjective reasoning process in deciding whether to grant a new trial based on purported juror misconduct. ([Citation omitted.]) Although this case is not governed by Evidence Code

section 1150, its underlying policy provides guidance: In deciding whether to discharge a juror for misconduct, a court should focus on its own consideration of a juror's conduct. The court cannot substitute the opinions of jurors for its own findings of fact." (**Id**. at p. 75.) The ***Allen*** court recognized that it is appropriate to rely on a jurors' recitation of what was said and that a reviewing court should defer to the factual determinations the trial court makes when assessing the credibility of the jurors, who may offer conflicting accounts. However, where, as in ***Allen***, neither the comments nor the attitude of the juror in question are disputed, the jurors' "opinions" about the comment should not play a role in the court's ruling. (**Ibid**.)

10. Are there Special Concerns If the Court Becomes Aware the Numerical Breakdown of the Jurors is 11 to 1 and the Alleged Juror Engaging in Misconduct is the Holdout Juror?

In general, trial courts are told to avoid asking the jurors for information as to how the many jurors are voting for guilt versus acquittal or the direction of the split, and refrain from commenting upon the vote. (**See *People* v. *Russell*** 2010) 50 Cal.4th 1228, 1252 [discussed in this IPG memo in greater depth, sections K-2-b at p. 65-66 and K-7-b at p. 74; ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 927 [discussed in this IPG memo in greater depth, sections K-2-b at p. 66 and K-7-b at p. 74; ***People* v. *Pride*** (1992) 3 Cal.4th 195, 265-266; ***People* v. *Haskett*** (1990) 52 Cal.3d 210, 238; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 533-534; **see also *Sanders* v. *Lamarque*** (9th Cir. 2004) 357 F.3d 943, 944 [noting the United States Supreme Court has held "it is improper for a trial judge to inquire as to the numerical division of a deadlocked jury"]; **but see *People* v. *Howard*** (2008) 42 Cal.4th 1000, 1030 [noting the California Supreme Court has repeatedly approved inquiry into the numerical breakdown of the jury where the trial court is careful to explain it is not interested which side is favored but that this is contrary to federal procedural rule].)

Moreover, in ascertaining whether a juror has engaged in misconduct, the numerical breakdown of the jurors is not likely to be relevant. Nevertheless, the numerical breakdown of a jury may nevertheless come to light as well as the fact the juror accused of misconduct is the holdout juror. (**See e.g**., ***People* v. *Harrison*** (2013) 213 Cal.App.4th 1373, 1383)

Where a court is aware the vote is 11 to 1, and the focus is on the defense holdout juror, "the most extreme care and caution" is "necessary in order that the legal rights of the defendant should be preserved." (***People* v. *Barber*** (2002) 102 Cal.App.4th 145, 152, citing to ***Burton* v. *United States*** (1905) 196 U.S. 283, 307.) There is undoubtedly an increased "potential for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror[.]" (***People* v. *Bell*** (2007) 40 Cal.4th 582, 616; ***People* v. *Sheldon*** (1989) 48 Cal.3d 935, 959.) And there is a risk that any inquiry into asserted misconduct of a member of a deliberating jury will pressure a dissenting juror to conform her vote to the majority. (***People* v. *Engelman*** (2002) 28 Cal.4th 436, 446; ***People* v. *Johnson*** (1992) 3 Cal.4th 1183, 1255.)

However, the fact a trial judge knows that a juror is the lone holdout does not, by itself render the trial court's refusal to declare a mistrial "inherently coercive. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 616; ***People* v. *Sheldon*** (1989) 48 Cal.3d 935, 959; **see also *People v. Homick*** (2012) 55 Cal.4th 816, 901 [discussed in this IPG memo, section I-4 at p. 48].) Nor does it invalidate the trial judge's decision to excuse the juror for cause. (***Sanders* v. *Lamarque*** (9th Cir. 2004) 357 F.3d 943, 945; ***Perez* v. *Marshall*** (9th Cir.1997) 119 F.3d 1422, 1427.)

That being said, "removal of a holdout juror is proper where the facts demonstrate the juror is unable to follow the law."

(***People* v. *Harrison*** (2013) 213 Cal.App.4th 1373, 1382 citing to ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 928.) "A "trial court's attempt to ensure the jurors understood the law,' and removal of a holdout juror who would not or could not follow the law, 'cannot be viewed as an improper attempt to overcome a deadlock in the jury's deliberations.'" (**Ibid**.)

Moreover, the fear of coercing a juror or jurors should not prevent a judge from taking steps to address a juror's misconduct, refusal to deliberate or refusal to follow the law. (**See *People* v. *Haskett*** (1990) 52 Cal.3d 210, 238; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 532.) To that end, judges should be aware that:

a. It is Not Coercive to Instruct the Jurors to Follow the Law or to Instruct Jurors to Report Other Jurors Who Are Refusing to Follow the Law Once the Refusal is Brought to the Court's Attention

A judge may certainly instruct the juror or jurors to follow the law and it is not coercive to do so. (**See e.g.**, ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1252 [discussed in this IPG memo in greater depth, section K-2-b at pp. 65-66 and section K-7-b at p. 74]; ***People v. Alexander*** (2010) 49 Cal. 4th 846, 928 [discussed in this IPG memo in greater depth, sections K-2-b at p. 66 and K-7-b at p. 74]; ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 536.) Nor is it coercive to clarify the law for the jurors. (***People v. Alexander*** (2010) 49 Cal.4th 846, 931 [discussed in this IPG memo in greater depth sections K-2-b at p. 66 and K-7-b at p. 74].)

In ***People v. Alexander*** (2010) 49 Cal. 4th 846, the trial court got word that one of the jurors may be been improperly considering the effects that a sentence of death could have on defendant's children, and might have been basing a decision on the assessment of a single factor in isolation, rather than weighing the significance of that evidence against all other evidence. In response the judge gave instructions properly explaining how jurors should weigh aggravating versus mitigating evidence and that the factor relating to sympathy referred to sympathy for the defendant not solely for other persons. This was followed by an instruction that, inter alia, told the jurors to notify the court if a juror or jurors refused or failed to follow the law, the court should be notified of that fact. (**Id**. at pp. 930-931 and fn. 41.) The ***Alexander*** court recognized that ***People* v. *Engelman*** (2002) 28 Cal.4th 436, it had disapproved the giving of an instruction at the *beginning of* deliberations that jurors should notify the court if a juror is refusing to follow the court's instructions. However, the ***Alexander*** court held the instructions were not coercive because, "in the context of the present case, the jurors could not have interpreted the legally correct admonition that they had a duty to notify the court if any juror was not following the law as an improper invitation for the majority of the jurors to "browbeat" a single juror into giving up what the court had just explained could be a ***legally proper*** assessment of sympathy evidence and the balance of the mitigating and aggravating factors." (***Alexander***, at p. 932.)

b. It is Not Coercive to Inform Jurors Inquiry May Need to Be Made After Court is Informed a Juror is Not Following the Law

In ***People* v. *Keenan*** (1988) 46 Cal.3d 478, the court received a note from the foreperson that a there was a juror who could not "morally vote for the death penalty." (**Id**. at p. 529.) The court indicated to counsel that it would have to investigate whether a juror had misled us on the voir dire. However, since it was Friday afternoon, the court opted to excuse the jury for the weekend, telling the jury that it appeared they had a problem that the court was required to investigate. (**Id**. at p. 529.) The juror was never examined because on Monday, the foreperson was examined and stated that the problem apparently had been resolved, explaining that an unidentified juror had apologized and said "I needed the weekend." (Id. at p. 531.) The California Supreme Court rejected the defendant's argument that the trial court's "threat" to "investigate" the jury's "problem" unfairly coerced the dissenting juror. (**Id**. at p. 532.)

c. It is Not Coercive to Instruct a Juror to Disregard Pity and Sympathy

In ***People* v. *Russell*** (2010) 50 Cal.4th 1228 (discussed in this IPG memo in greater depth, sections K-2-b at pp. 65-66 and K-7-b at p. 74), the court held the trial judge did not improperly coerce a verdict where the trial judge instructed the juror accused of failure to follow the law to disregard pity and sympathy in deliberation but prefaced his questioning of the juror by noting he was not interested in how any of the jurors were voting and indicating he was indifferent to the vote, and never suggested he favored any particular verdict. (**Id**. at p. 1253.)

d. It is Not Coercive to Instruct a Jury That Eyewitness Identification is Not Required in Order to Find a Defendant Guilty

In ***People* v. *Alexander*** (2010) 49 Cal.4th 846, the foreperson indicated that a juror was refusing to deliberate and to follow the law regarding permissible use of circumstantial evidence by insisting that there must be eyewitness identification before conviction. The trial court responded, inter alia, by instructing the jury on circumstantial evidence, stressing that evidence comes in different forms and that there is no requirement the evidence be fingerprints or a confession or that there be someone who comes into court and identifies a defendant as the perpetrator of the crime. The ***Alexander*** court held no coercion was involved because it was proper to advise jurors to follow the law, the trial judge had stressed that the instructions applied to the jury as a whole, not any particular juror or group of jurors, and the trial judge made it clear he was not encouraging any position on "whether the matter should be resolved and if so in what way." (**Id**. at pp. 923-928.) The ***Alexander*** court also rejected the defense argument that the trial court's actions and instructions were equivalent to an improper ***Allen*** charge, i.e., an instruction that encourages a seemingly deadlocked jury to continue deliberations in order to try to reach a verdict. (**Id**. at p. 928.) Later, during the penalty phase in the same trial the jury sent the trial court a note asking for the court to recess early in order allow "feelings to cool down." The next day, the jury sent a second note read, "We have a split eleven to one + the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children." (**Id**. at p 929.) The trial judge thought this reflected that one juror was improperly considering sympathy for defendant's children as a mitigating factor, and/or might be basing a decision on sympathy evidence in isolation, rather than weighing it in conjunction with all the other evidence. Without further questioning of the jurors, the trial court gave an instruction (that incorporated two changes proposed by defense counsel) explaining the proper role of sympathy in the jury's deliberations. Among other things, the instruction informed the jury the focus of its inquiry at the penalty phase must be on defendant's character and background and not the effect the verdict might have on others. As it had done in its response to the jury's guilt phase, the trial court emphasized that it was not suggesting any particular result would be proper, and that its supplemental instruction was directed at all of the jurors, not those favoring one verdict or the other. (**Id**. at pp. 929-930.) The California Supreme Court found the trial's court conduct did not coerce the verdict. (**Id**. at p. 932.)

e. It is Not Coercive to Have the Jury Take a Break in Deliberations

In ***People* v. *Keenan*** (1988) 46 Cal.3d 478, after the trial court received a pair of notes from the jury indicating that a juror or jurors may have not been honest on voir dire regarding their ability to impose the death penalty. However, rather than rushing right into an investigation, the trial court decided to postpone any further action until after a weekend recess. The California Supreme Court rejected the argument that any coercion arose from the trial court's decision to postpone any further action as "[t]he express purpose of the recess was to relieve the jurors of excessive stress. (**Id**. at pp. 528-529-536.)

11. Do the Rules of Evidence Apply at the Hearing?

It does not appear that there must be strict adherence to the rules of evidence during an inquiry into potential jury misconduct. Courts discourage examination of the jurors by the attorneys (**see** this IPG memo, section K-6 at p. 71) and jurors routinely recount hearsay statements that were made during deliberations (**see e.g**., ***People v. Wilson*** (2008) 44 Cal.4th 758, 819-820; ***People v. Watson*** (2008) 43 Cal.4th 652, 694) albeit many of the statements might fall under the well-established exception (or departure) from the hearsay rule that applies when the very fact in controversy is whether certain things were said and not whether these things were true or false (**see *Weathers v. Kaiser Foundation Hospitals*** (1971) 5 Cal.3d 98, 109; ***People* v. *Henry*** (1948) 86 Cal.App.2d 785, 789.)

In ***People* v. *Tinnin*** (1934) 136 Cal.App. 301, the court dismissed a defendant's claim that conducting a hearing on whether a juror should be discharged violated certain rules of evidence. The court stated that section 1089 "doubtless contemplates a summary hearing, it being held in this regard that in order to determine whether a juror, by reason of some illness, is unable to further discharge his duties as such, it is not necessary to take testimony in the manner required judicially to establish a controverted proposition; that the juror's appearance before the court, without the aid of such testimony, may itself be sufficient proof thereof. (**Id**. at pp. 318-319.)

In ***People v. Abbott*** (1956) 47 Cal.2d 362, a judge questioned a juror in chambers regarding whether the juror had worked in an office with defendant's brother. This was done over defendant's objection. Nevertheless, the California Supreme Court held "[t]here is no statutory provision regarding the procedure to be followed in applying section 1089, but it seems clear that the taking of sworn testimony under the usual rules of evidence is not necessary where the facts upon which action is taken are uncontroverted." (**Id**. at p. 371.)

No case has held that a juror must be sworn or provide an oath to tell the truth before being answering questions delving into allegations that a juror is unable to perform his or her duties during deliberations. (**Cf**., Penal Code section 1120 [discussed in this IPG memo, at section L at pp. 82-83.) However, jurors do take an oath to tell the truth before they are questioned during voir dire. (**See** Code Civ. Proc. § 232(a) [requiring jurors to agree they "will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court"].)

12. Can the Hearing Take Place In Camera?

Occasionally, a juror or jurors will be interviewed by the trial court in chambers. (**See e.g**., ***People* v. *Debose*** (2014) 59 Cal.4th 177, 198-199; ***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1309-1310.) In ***People* v. *Johnson*** (1993) 6 Cal.4th 1, the court indicated that a defendant might have a statutory, albeit not a constitutional, right to be present during the questioning of a juror in chambers. (**Id**. at pp. 19-21.) However, in ***People* v. *Harris*** (2008) 43 Cal.4th 1269, the court indicated that a defendant simply did not have a right to be present during an in chambers hearing relating to juror misconduct. (**Id**. at pp. 1309-1310 [""the removal of a juror is not a matter for which a defendant is entitled to be present"].)

13. When Should the Inquiry Cease?

A court's "inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 53; ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1251; ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 927; ***People* v. *Cleveland*** (2001) 25 Cal.4th 466, 485.)

14. Must the Court Assess Juror Credibility?

"[T]rial courts are frequently confronted with conflicting evidence on the question whether a deliberating juror has exhibited a disqualifying bias." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 590, citing to ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1053.) "Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 590; ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1053.) "In such circumstances, the trial court must weigh the credibility of those testifying and draw upon its own observations of the jurors throughout the proceedings. We defer to factual determinations based on these assessments." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 590; ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1053.)

Courts may properly rely on the statements of jurors that they can remain impartial, including those made after an incident raising a suspicion of prejudice. (***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1304 [and cases cited therein].)

However, in making the credibility assessment, the trial court is not **bound** by the statements of the accused juror. It may choose to rely on contradictory statements of other jurors or even the juror's own inconsistent demeanor and behavior. (**See *People* v. *Debose*** (2014) 59 Cal.4th 177, 201-202 [noting juror's evasiveness and lack of candor in answering questions]; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 590; ***People* v. *Price*** (1991) 1 Cal.4th 324, 400; ***People v. Diaz*** (2002) 95 Cal.App.4th 695, 704; ***People* v. *Lucas*** (1995) 12 Cal.4th 415, 489 [court properly relied on juror's demeanor in deciding juror could not deliberate fairly]; ***People* v. *Beeler*** (1995) 9 Cal.4th 953, 989 [recognizing importance of trial court's observation of juror's demeanor in reviewing decision to discharge]; ***People* v. *Halsey*** (1993) 12 Cal.App.4th 885, 892 [trial court properly removed juror because his evasions under questioning led court to conclude he had violated order not to discuss case and lacked ability to follow instructions, keep open mind, and be objective].)

15. Should Any Instructions Be Given to the Juror or Jurors After Questioning is Completed?

If the trial court does not believe there is a good cause to remove a juror accused of failure to deliberate, bias, failure to follow the law, or other misconduct, section 1089 provides authority to take steps less drastic than removing the juror, such as clarifying the applicable law by giving additional instructions. (***People* v. *Alexander*** (2010) 49 Cal. 4th 846, 931.)

If a trial court is concerned that discussions of events potentially impacting the impartiality of a juror might cause consternation among the other jurors, the trial court may admonish the juror not to discuss what occurred with the other jurors. (**See e.g.**, ***People* v. *Foster*** (2010) 50 Cal.4th 1301, 1340-1341.)

If a juror accused of failure to deliberate, failure to follow the law, or other misconduct is retained, a judge must be careful not to instruct the accused juror, or the other jurors in a manner that "coerces" the juror or jurors to reach a verdict. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 616; ***People* v. *Haskett*** (1990) 52 Cal.3d 210, 238.)

A trial court should inform the jury that any follow-up instructions are not directed at any one juror. (**See *People* v. *Alexander*** (2010) 49 Cal. 4th 846, 927, 932.)

"[I]f there is an indication the jury is deadlocked "it is error for a trial court to give an *instruction* which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them[.]" (***People* v. *Gainer*** (1977) 19 Cal.3d 835, 852 [disapproving the so-called ***Allen*** instruction].) (Emphasis added by IPG.)

16. Should the Trial Judge State the Reasons in Support of Discharging or Retaining a Juror?

A trial court **should** state the reasons for discharging or retaining a juror as appellate court reviewing the decision will "consider not just the evidence itself, but also the record of reasons the court provided." (***People* v. *Wilson*** (2008) 43 Cal.4th 1, 26; ***People v. Barnwell*** (2007) 41 Cal.4th 1038, 1053.)

17. Can the Parties Stipulate to the Removal of a Juror?

The parties may stipulate to the removal of a juror. (**See *People* v. *Love*** (1937) 21 Cal.App.2d 623, 628,)

If the removal of the juror would result in a jury of less than twelve, the defendant must personally waive/stipulate to continuing with fewer than twelve jurors. (***People* v. *Maes*** (1965) 236 Cal.App.2d 147, 148-149.)

18. What Should a Judge Do After Removing a Juror and Substituting an Alternate?

If deliberations have begun and it is determined that a juror should be removed and replaced with an alternate juror, the jury should be instructed that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had. (***People* v. *Collins*** (1976) 17 Cal.3d 687, 694; accord ***People* v. *Nunez*** (2013) 57 Cal.4th 1, 58-59; CALJIC No. 17.51; CALCRIM No. 3575.)

However, the newly constituted jury is not required to deliberate for the same length of time as the original jury, nor to review the same evidence. (***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1413.) Nor is it required that the jurors be examined on ability to set aside prior deliberations. (***People* v. *Anderson*** (1990) 52 Cal.3d 453, 483.)

If a juror is excused during the penalty phase, the jury should be instructed pursuant to CALJIC 17.51.1, which, among other things, instructs the jury that for "purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial." (**See *People* v. *Nunez*** (2013) 57 Cal.4th 1, 58 [albeit finding failure to do so can be harmless error].) The comparable CALCRIM instruction is number 3576.

Editor's note: As to whether the case may proceed with eleven jurors, **see** this IPG memo, section O at p. 85-86.)

19. Post-Discharge Disclosure of Lack of Good Cause

The determination to remove a juror, if made on a proper showing, must be final. The subsequent discovery that good cause did not exist is not a basis for discharging the alternate and reseating the original juror. (***People* v. *Von Badenthal*** (1935) 8 Cal.App.2d 404, 412.)

L. What Should a Court Do if a Juror Has "Personal Knowledge Respecting a Fact in Controversy" (Penal Code Section 1120)?

1. Statutory Language of Penal Code Section 1120

Penal Code section 1120 states: "If a juror has any personal knowledge respecting a fact in controversy in a cause, he or she must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact that could be evidence in the cause, as of his or her own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his or her discharge as a juror."

2. Must a Hearing Be Held if the Court is Alerted that a Juror Has Personal Knowledge of a Fact in Controversy?

In contrast to the discretion provided to a trial court when faced with an allegation that could lead to a finding that a juror is able to perform his or her duty, it appears that once a trial court is alerted that a juror has personal knowledge of a fact in controversy, the trial judge **must** hold a hearing.

The Law Revision Comment to Penal Code section 1120, in pertinent part, states: "Section 1120 requires a juror who discovers that he has personal knowledge of a fact in controversy in the case to disclose the same in open court. If he reveals such personal knowledge during the jury's retirement, the jury must return into court. The section then ***requires*** that the juror be sworn as a witness and examined in the presence of the parties." (Emphasis added by IPG.) (**See also *People v. McNeal*** (1979) 90 Cal.App.3d 830, 838 [finding trial court's decision to only question one juror and to question

the juror "without going into the facts" was insufficient to meet the demands of section 1120 once trial court received note from foreperson that one of the jurors possessed personal knowledge concerning the testimony of a defense witness].)

Editor's note: It is likely that this section does *not* apply when the juror has information that only indirectly relates to the case. That is, when the juror has specialized expertise in an area where such expertise might be useful in analyzing the evidence (as opposed to actual knowledge of facts in dispute in the case), section 1120 is probably not applicable. No published case has directly addressed this issue, though.

3. What Happens if the Juror Becomes a Witness?

Before the enactment of the current version of Penal Code section 1120, it was not clear whether the section applied to the examination of a juror solely for the purpose of determining if "good cause" existed for the juror's discharge in accordance with the statutes governing removal of a juror on grounds of being unable to perform his or her duties or whether the examination was for the purpose of obtaining the juror's knowledge as evidence in the case. However, the current version of section 1120 now makes it clear that the section is "to be used solely to determine whether 'good cause' exists for his discharge." (7 Cal.L.Rev.Comm.Reports 1 (1965).) When a juror is called to testify on the merits in a criminal case, Evidence Code Section 704 covers examination of the juror. (**See** 7 Cal.L.Rev.Comm.Reports 1 (1965).

Editor's note: As to the scope of Evidence Code section 704, **see** this memo, section M at pp. 83-84.)

M. What Should Happen If the Contacts With a Juror Become Relevant Evidence in the Case the Juror is Sitting On? (Evidence Code Section 704)

Although relatively rare, jurors are occasionally placed in circumstances rendering them potential witnesses in the very case in which they are serving on the jury. (**See e.g.**, ***People* v. *Knox*** (1979) 95 Cal.App.3d 420, 432-434 [juror overheard a conversation between an officer and a prosecution witness allegedly relevant to the case]; *People v. Haney* 2009 WL 1396249, *2-*4 [juror saw defendant handing wad of cash to defense witness].) In such circumstances, Evidence Code section 704 governs whether the juror can testify in the pending case.

Evidence Code section 704 provides:

"(a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness."

"Evidence Code section 704, by its plain language, only applies in the situation of testimony by a sitting trial juror who is called as a witness in the same trial, and does not apply when a juror who has already been excused is involved." (***People v. Morris*** 2015 WL 4652867, *4 citing to ***People* v. *Knox*** (1979) 95 Cal.App.3d 420, 432-435

However, even when the juror has been excused, the juror should not be allowed to testify in the case where the juror has previously sat on the jury. "[A]llowing an excused juror to testify in a case in which he or she had once been a juror creates a constitutionally unacceptable probability that the other jurors who ultimately decide the case may look with favorable bias on the excused juror's testimony due to their shared jury experience." (***People v. Morris*** 2015 WL 4652867, *6 citing to ***People* v. *Sanders*** (1988) 203 Cal.App.3d 1510.)

The excused juror should not be permitted to testify in the case in which the juror sat regardless of whether the excused juror will only be testifying as a rebuttal witness to impeach the defendant. (***People v. Morris*** 2015 WL 4652867, *6.) The juror may, however, testify in a *subsequent* proceeding if the trial court declares a mistrial. (***People v. Morris*** 2015 WL 4652867, *6.)

Because the constitutional due process right to a fair trial is implicated by allowing a juror to testify in a case in which he or she had once been a juror, the standard for assessing whether the error was prejudicial is the "harmless beyond a reasonable doubt" standard of review used in ***Chapman* v. *California*** (1967) 386 U.S. 18. (***People v. Morris*** 2015 WL 4652867, *7.)

Editor's note: See also this IPG memo, section L at pp. 82-83 ["What Should a Court Do if a Juror Has "Personal Knowledge Respecting a Fact in Controversy" (Penal Code Section 1120)?]

N. Do Not Confuse the Federal Court's Interpretation With the California Supreme Court's Interpretation of When Removal of a Juror Violates the Sixth Amendment Interpretation

When removal of a juror pursuant to section 1089 will violate the Sixth Amendment is discussed in this IPG memo, section B at p. 7. However, that section just discusses how that question will be answered in *California* courts.

In some federal courts, including the Ninth Circuit, it is considered a violation of the Sixth Amendment to inquire into whether a juror is unable or unwilling to deliberate and precludes dismissal of such a juror whenever there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." (**See *Johnson* v. *Williams*** (2013) 133 S.Ct. 1088, 1098.) The California Supreme Court has specifically **declined** to adopt the standard used in these federal courts for assessing whether removal of a juror violates the federal or state constitution. As noted in ***People* v. *Lomax*** (2010) 49 Cal.4th 530: "In supplemental briefing, defendant urges us to abandon the 'demonstrable reality' standard in favor of the test applied in federal courts and courts of other states, which prohibits dismissal of a juror if there is any "reasonable possibility" the dismissal is based on the juror's views of the merits of the case. (**E.g**., ***U.S.* v. *Brown*** (D.C.Cir.1987) 823 F.2d 591, 596*;* ***U.S.* v. *Thomas*** (2d Cir.1997) 116 F.3d 606, 622; ***U.S.* v. *Symington*** (9th Cir.1999) 195 F.3d 1080, 1088.) We considered and rejected these arguments in ***People***

v. *Cleveland*, supra, 25 Cal.4th at pages 480–484 [alternate citation omitted]. Defendant offers no persuasive reason for us to alter our settled view." (**Id**. at p. 590, fn. 17; **accord *People* v. *Thompson*** (2010) 49 Cal.4th 79, 137-138.)

In ***Johnson v. Williams*** (2013) 133 S.Ct. 1088, the United States Supreme Court recognized there were divergent views on whether the Sixth Amendment is satisfied by California's "demonstrable reality" standard. The Court was not called upon to actually decide the question (so it remains open) but the High Court did note that "the views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question[.]" (**Id**. at p. 1098.)

Editor's note: "The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricts the circumstances under which a federal habeas court may grant relief to a state prisoner whose claim has already been 'adjudicated on the merits in State court[.]'"(***Johnson v. Williams*** (2013) 133 S.Ct. 1088, 1091 [citing to 28 U.S.C. § 2254(d)]. "Specifically, if a claim has been 'adjudicated on the merits in State court,' a federal habeas court may not grant relief unless "the adjudication of the claim— '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (**Ibid.)** The High Court in the ***Williams*** case rejected the assumption of the Ninth Circuit that a state court decision relying on the California Supreme Court's interpretation of the standard to be applied in assessing whether removal of a juror has violated the Sixth Amendment was "contrary to . . . clearly established Federal Law as determined" by the United States Supreme Court. Rather, the holding of the state court was merely contrary to decisions of the federal court of appeals – which is not enough to meet the requirements for review under the AEDPA. (***Williams*** at p. 1098.) The Ninth Circuit decision that was vacated by the High Court was the decision in ***Williams* v. *Cavazos*** (9th Cir. 2011) 646 F.3d 626 [discussed in this IPG memo in part in section K-7-a at p. 72].)

O. Can a Judge Finding a Juror is Unable to Perform His or Her Duties Declare a Mistrial and Dismiss the Jury or Must an Alternate Juror Be Selected?

Ordinarily, if a juror is discharged pursuant to section 1089, an alternate juror must be selected. In ***Larios* v. *Superior Court*** (1979) 24 Cal.3d 324, the California Supreme Court held where an alternate juror could replace the discharged juror, there is no legal necessity for a mistrial and dismissal of the jury without the defendant's consent would bar a retrial. (**Id**. at pp. 332-333; **see also *People v. Daniels*** (1991) 52 Cal.3d 815, 866 [disapproving dictum in ***People* v. *Hamilton*** (1963) 60 Cal.2d 105 that remedy for jury misconduct is mistrial, not replacement of the offending juror].)

However, if there are no alternate jurors, a mistrial may be granted and retrial would not be barred. (**See *Larios* v. *Superior Court*** (1979) 24 Cal.3d 324, 332 [if a juror is excused for good cause and there is no alternate juror, then legal necessity for a mistrial would exist, the jury could be dismissed, and double jeopardy would not bar a retrial]; ***People* v. *Diaz*** (1984) 152 Cal.App.3d 926, 932, 936 [juror's required discharge, when no available alternate, mandated discharge of jury]; ***Mitchell* v. *Superior Court*** (1984) 155 Cal.App.3d 624, 626-629 [granting of mistrial where only 11 jurors left after juror was discharged and defendant refused to stipulate to a jury of 11 was proper under former Penal Code section 1123]; Code Civ. Proc., § 233 ["If, after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court," the jury must be discharged. After a new jury is "then or afterwards impaneled," the cause "may again be tried."].)

As an alternative to declaring a mistrial, "with the consent of all parties, the trial court may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew." (Code Civ. Proc., § 233; **see also *People* v.**

Evans (1970) 8 Cal.App.3d 152, 156; ***People* v. *Patterson*** (1959) 169 Cal.App.2d 179, 187 [defendant, on discharge of juror, could waive 12-juror requirement]; ***People* v. *Ragsdale*** (1960) 177 Cal.App.2d 676, 678 [same].)

Warning!!! The stipulation to proceed with eleven jurors implicates a defendant's state constitutional right to a jury and thus, there must be a waiver of the right to a jury of twelve jurors by the defendant – a stipulation by counsel alone is insufficient. (***People v. Maes*** (1965) 236 Cal.App.2d 147, 148-149.)

In some circumstances, it is possible that even if there are alternate jurors, the granting of a mistrial might be appropriate. If, for example, several or all jurors had been irreparably tainted by the misconduct of the challenged juror then seating an alternate would not solve the problem and there would still likely be legal necessity for declaration of a mistrial. (**See *Rufo v. Simpson*** (2001) 86 Cal.App.4th 573, 613 [the remedy of mistrial (as opposed to replacement of the offending juror with an alternate) "is for those rare cases where the trial court in its discretion concludes the misconduct of the juror has already caused such irreparable harm that only a new trial can secure for the complaining party a fair trial"]; ***People* v. *Guzman*** (1977) 66 Cal.App.3d 549, 559 [pre-***Larios*** case noting whether mistrial should be declared depends on whether the misconduct of the discharged juror has destroyed the integrity of the remaining jurors].)

P. Error in *Failing* to Remove Juror

It is not always the prosecution that wishes to see a juror discharged. Sometimes, the defense may believe the juror is one unfavorable to the defense. Indeed, even with an allegedly rogue juror, the defense may believe the juror is holding out for guilt against all the other jurors. On other occasions, defense gamesmanship may enter the equation. For example, a juror who initially appears to the prosecution to be a rogue juror may be rehabilitated during questioning in a manner such that the prosecution and judge no longer feel there are grounds for removal. In that situation, the defense might object that the juror *should* be removed so that the defense can later argue it was error *to fail to remove* the juror. In any event, regardless of the defendant's unspoken tactics, if a judge does not remove a juror, the defense may, on appeal, challenge the trial judge's decision to allow the juror to remain on the panel. (**See e.g.**, ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248-1253; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350-352.)

More often than not, appellate courts defer to the trial court's exercise of discretion in deciding to keep a juror. (**See e.g.**, ***People* v. *Russell*** (2010) 50 Cal.4th 1228, 1248-1253 [proper to retain juror who another juror had suggested was violating the court's instructions not to take into account sympathy for the defendant where the juror said she could follow the law]; ***People* v. *Bennett*** (2009) 45 Cal.4th 577, 618-624 [trial judge properly found two jurors in capital case were able to fulfill their duties where both affirmed their ability to do so, even though, near end of trial, one expressed her concern about opening of school she managed and other stated possible inability to state his vote on penalty verdict when polled]; ***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1300-1306 [trial court properly retained juror who reported his father had received death threats by telephone from an unknown party where the investigation into the threats later revealed the threat was unrelated to the trial and the juror indicated he could remain impartial]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350-352 [trial court did not err in retaining juror who complained he had been falling asleep and asked the court for a note reprimanding him for falling asleep during the trial, in the hope that his employer, presented with the note, would accommodate him with a more manageable night work schedule]; ***People* v. *Williams*** (1997) 16 Cal.4th 153, 229 [no error in denial of defense motion to remove juror before penalty phase of capital case on ground of misconduct during guilt phase, based on claimed observations of "body language" indicating that juror had decided case before submission].)

However, some challenges to the retention of a juror may be successful (**see e.g., *People* v. *Cissna*** (2010) 182 Cal.App.4th 1105, 1111, 1118-1123 [error not to excuse a juror who had daily conversations with a friend that focused on deliberative matters concerning the merits of the case, and included discussions of the defendant's decision not to testify]) and **trial courts must be careful to make as good a record for retaining a juror as they do in discharging a juror**.

Q. What Constitutes Good Cause to Dismiss a Juror at the Jurors' Request?

Penal Code section 1089 allows a juror to be discharged "if a juror ***requests a discharge*** and good cause appears therefore[.]" (Emphasis added by IPG.) This memo does not focus on good cause to dismiss a juror at the juror's request. The good cause to dismiss a juror at the juror's own request covers a broader range of circumstances than does good cause to dismiss a juror on grounds the juror is unable to perform his or her duty. There is a fair amount of overlap, however, between the types of "good cause." Certainly, if there is good cause to dismiss a juror on grounds the juror is unable to perform his or her duty, there would be good cause if the juror were also asking for dismissal. However, the reverse is not necessarily true. A review of the case law suggests dismissal of a juror is more likely to be upheld if the juror has requested a discharged.

R. Removal of Juror for Illness or Death

Penal Code section 1089 allows for the discharge of a juror and substitution of an alternate when the juror is either ill or has died. (**See *People* v. *Roberts*** (1992) 2 Cal.4th 271, 324.) This IPG memo does not focus on removal or jurors for illness or death. It is usually fairly easy to establish a juror is too ill to deliberate and when the basis for discharge is illness or death of a juror, a court may discharge the juror even without holding a hearing - so long as there is a sufficient basis in the record for a reviewing court to determine whether the discharge constituted an abuse of discretion. (**See *People* v. *Nunez*** (2013) 57 Cal.4th 1, 556-57 [proper to discharge juror with high-risk pregnancy who said she was experiencing stress from the jury deliberations, whose previous pregnancy had ended in a miscarriage that occurred when she was under stress, and who, earlier in deliberations, experienced pain and hemorrhaging that caused her doctor to order her to go on bed rest and suspend her jury service for three days]; ***People* v. *Dell*** (1991) 232 Cal.App.3d 248, 253-256 [two jurors properly dismissed, one on the basis of a phone call from juror to court clerk indicating "he had an attack of phlebitis and he wished to be excused because he was feeling very ill" and the other based on a call from the juror's cousin that the juror was in an accident and was being taken to the hospital"].)

"The demonstrable reality test does not demand of trial judges confronted with sick jurors that they elicit conclusive proof of the length of future incapacitation; judges are lawyers, not doctors. Nor does it demand that incapacitation exceed some preset length; in the right circumstances, an absence of a day or less may warrant excusal." (***People* v. *Duff*** (2014) 58 Cal.4th 527, 560-561 citing to ***People* v. *Bell*** (1998) 61 Cal.App.4th 282, 286–289 and ***People* v. *Hall*** (1979) 95 Cal.App.3d 299, 305–307.) "Whether a juror's illness can best be accommodated by a continuance or replacement with an alternate is a matter committed to the trial court's discretion." (***People* v. *Duff*** (2014) 58 Cal.4th 527, 561.)

S. Can a Juror Be Removed After Some But Not All Verdicts Have Been Rendered or After the Guilt Phase of a Trial?

Substitution of an alternate is permissible after a verdict has been reached on fewer than all of the charged counts, provided that the jury is instructed that as to the remaining counts it must disregard past deliberations and begin anew. (**See *People* v. *Aikens*** (1988) 207 C.A.3d 209, 211]; **see also *People* v. *Fudge*** (1994) 7 Cal.4th 1075, 1100, [cases allowing substitution following partial verdict discussed, but issue waived in this case].)

However, this does not mean that a court could not choose to discard verdicts reached before an alternate was seated and ask the jury to begin anew. In ***People* v. *Sanborn*** (2005) 133 Cal.App.4th 1462, after the jury reached verdicts on some of the counts against defendant, a juror was excused and replaced by an alternate. These verdicts were discarded, and the jury was asked to begin deliberations anew. Defendant contended on appeal that this procedure denied him his rights to due process and a jury trial and subjected him to double jeopardy. However, the court rejected the argument finding the defendant was entitled to a unanimous verdict reached through the deliberations of all 12 jurors, and this is what he received. (**Id**. at p. 1466.)

Substitution of an alternate juror may also occur after the conclusion of the guilt phase of a capital case. In ***People* v. *Cain*** (1995) 10 Cal.4th 1, a juror was discharged and an alternate substituted at the beginning of the penalty phase in a capital trial. The trial court instructed that the alternate must accept that the defendant's guilt of the murders and the truth of the special circumstances had been proved beyond a reasonable doubt, but that the jury could consider any lingering doubt as to those matters. The trial court explained that for the purpose of assessing lingering doubt, the jury must begin its deliberations from the beginning with respect to evidence presented at the guilt phase, and that the original jurors must set aside any earlier deliberations as to lingering doubt. (**Id**. at pp. 64-65.) The California Supreme Court upheld the trial court's ruling and instructions. (**Id**. at pp. 66-68; **see also *People* v. *Cunningham*** (2001) 25 Cal.4th 926, 990, 1030 [instruction to commence deliberations anew when substitution is made in midst of deliberations is not required when alternate juror joins panel after guilty verdict in capital case and before start of deliberations at penalty phase] ***People* v. *Brown*** (1988) 46 Cal.3d 432, 461 [same]; ***People v. Wright*** (1990) 52 Cal.3d 367, 4201 [similar]; CALJIC No. 17.51.1; CALCRIM, No. 3576.)

T. What is the Standard of Review When a Juror Has Allegedly Been Improperly Removed?

"[D]ecisions to investigate juror misconduct and to discharge a juror are matters within the trial court's discretion[.]" (***People v. Lomax*** (2010) 49 Cal.4th 530, 589.) However, when a juror is removed "'a somewhat stronger showing' than is typical for abuse of discretion review must be made to support such decisions on appeal." (***People v. Lomax*** (2010) 49 Cal.4th 530, 589, citing to ***People* v. *Wilson*** (2008) 44 Cal.4th 758, 821.) "This heightened standard is used by reviewing courts to protect a defendant's fundamental rights to due process and a fair trial, based on the individual votes of an unbiased jury . . . which are also hallmarks in American jurisprudence." (***People* v. *Allen*** (2011) 53 Cal.4th 60, 71.)

"[T]he basis for a juror's disqualification must appear on the record as a 'demonstrable reality.' This standard involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence in the record supports the trial court's decision." (***People v. Lomax*** (2010) 49 Cal.4th 530, 589, citing to ***People v. Barnwell*** (2007) 41 Cal.4th 1038, 1052; **accord *People* v. *Debose*** (2014) 59 Cal.4th 177, 200-201; ***People* v. *Homick*** (2012) 55 Cal.4th

816, 899; ***People* v. *Wilson*** (2008) 44 Cal.4th 758,821; **see also *People* v. *Martinez*** (2010) 47 Cal.4th 911, 943 [appellate court will not presume bias on the part of the discharged juror]; **but see *People* v. *Virgil*** (2011) 51 Cal.4th 1210, 1243 [reiterating demonstrable reality standard but noting "we generally uphold a trial court's decision regarding discharge if there is any substantial evidence to support it"].)

"It must appear 'that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established.'" (***People* v. *Homick*** (2012) 55 Cal.4th 816, 899; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589, citing to ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1052-1053; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 26.) "The inquiry is whether 'the trial court's conclusion is manifestly supported by evidence on which the court actually relied.'" (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589, citing to ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1053.)

However, in applying the demonstrable reality test, the court does not reweigh the evidence. (***People* v. *Homick*** (2012) 55 Cal.4th 816, 899; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 589, citing to ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, 1053; ***People* v. *Wilson*** (2008) 43 Cal.4th 1, 26.) And the trial "court's credibility determinations and findings on questions of historical fact" are accepted on review if "supported by substantial evidence." (***People* v. *Merriman*** (2014) 60 Cal.4th 1, 95 [and observing, at p. 101, that "a trial judge who observes and speaks with a ... juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record."].)

Moreover, even though the heightened standard of demonstrable reality is applied to the overall question of whether good cause exists for discharge, "[t]he *manner* in which the trial court conducted its inquiry is subject to review for abuse of discretion under the typical standard. (***People* v. *Fuiava*** (2012) 53 Cal.4th 622, 712 citing to ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 927.)

U. If a Case is Reversed on Appeal for the Improper Discharge of a Juror, May the Case be Retried?

The improper discharge of seated juror during criminal trial warrants reversal of judgment, but does not operate as a double jeopardy bar to retrial. (***People* v. *Hernandez*** (2003) 30 Cal.4th 1, 6.)

SEE NEXT PAGE FOR A QUICK CHECKLIST OF GUIDELINES ON HOW TO PROCEED WHEN CONFRONTED WITH A CLAIM A JUROR IS NOT DELIBERATING, IS NOT FOLLOWING THE LAW, IS BIASED, OR IS ENGAGED IN OTHER MISCONDUCT

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Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.

QUICK CHECKLIST WHEN CONFRONTED WITH A CLAIM A JUROR IS NOT DELIBERATING OR FOLLOWING THE LAW, IS BIASED, OR IS ENGAGED IN OTHER MISCONDUCT

1. Determine the end goal: is it best if the juror is removed or retained? But keep in mind that what is best is not always whether the juror is in favor of conviction and that the initial goal may change depending on the discovery of new information.

2. Assuming the conduct turns out to be true, determine whether it is a lawful basis for removal of the juror under Penal Code section 1089, which permits discharge of a juror if the juror "becomes ill, or upon other good cause shown to the court is found to be unable to perform *his or her duty*[.]" (See IPG#8, sections F-I at pp. 11-58.)

3. Figure out what duty (e.g., the duty to deliberate, follow the court's instructions, base the decision only on the evidence presented, be impartial, etc.,) the juror is allegedly unable to perform. (See IPG#8, section C at pp. 7-10.)

4. If conduct is such that, if true, it would provide a lawful basis for removal of the juror, cite the law requiring a court to conduct an inquiry (See IPG #8, section K at p. 61).

5. Generally, ask the court to interview the foreperson outside the presence of the other jurors to help identify exactly what the target juror is doing. If the court is not going to interview the foreperson, ask the court to inquire of defense counsel whether defense counsel wants further inquiry. (See IPG #8, section K-3 at p. 70.)

6. Request the court admonish the foreperson that the court is not seeking to intrude into the deliberative process, that it is not interested in the numerical breakdown or who is voting for guilt or innocence, and that the questions will focus on the alleged misconduct. (See IPG #8, section K-8 at p. 75.)

7. Submit questions you would like the trial court to ask, if any, of the foreperson. If questioning reveals no basis for removal, it is *usually* best to end the inquiry without further intrusion and keep the target juror on the jury.

8. If questioning of the foreperson reveals misconduct, ask the court to interview the target juror outside the presence of the other jurors. The same admonition given to the foreperson (as stated in #6) should be given to the target juror. (See IPG #8,

section K-5 at p. 71) Submit questions you would like the trial court to ask, if any, of the target juror.

9. If there is no dispute regarding the conduct and it does *not* constitute good cause for removing the juror, ask the juror be left on the jury.

10. If there is no dispute regarding the conduct and it *does* constitute good cause for removing the juror, determine whether leaving the juror on the jury is likely to (i) prevent a verdict or (ii) provide the defendant a basis for appeal. If the answer is yes to either question, request removal of the juror and replacement with an alternate. If the answer is no to both questions, then consider asking the court to leave the juror on the jury with instructions to the target jurors or other jurors regarding their duties and the proper manner in which to deliberate. (See IPG#8, sections F-I at pp. 11-58.)

11. If there *is* a dispute regarding what has occurred, ask the judge to interview the other jurors. Request that the court give the same admonition given to the foreperson (as stated in #6) to the each juror before the juror is interviewed. Submit questions you would like the trial court to ask, if any, of the target juror. Request that the court resolve the dispute. If the court finds there is good cause for removing the juror, follow the suggestions provided in #10. If the court find there is *not* good cause for removing the juror, ask for defense counsel to be queried on whether the juror should be retained. Ask the court for any helpful non-coercive follow-up instructions and request the court inform the jury that any follow-up instructions are not directed at any one juror. (See IPG#8, sections K-6 at p. 71 and K-10 at pp. 76-78.)

12. Regardless of whether the court decides to retain or remove the juror, ask the court to state the reasons for its decision. (See IPG #8, section K-16 at p. 81.)

13. If a juror is removed and replaced with an alternate juror, the jury should be instructed that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had. (See IPG#8, section K-18 at p. 81.)